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puerto rico Business Law Developments

Dramatic changes to the closing law effective immediately!!

LUIS F. ANTONETTI
LABOR & EMPLOYMENT LAW DEPARTMENT

On November 16, 2009, Governor Luis Fortuño signed into Law H.R. 1233, which introduced key amendments to the Closing Law in order to adjust it to the challenges and demands of Puerto Rico's society in the twenty-first century.

What is gone?

- All restrictions in the operation of retail businesses between Midnight and 5:00 a.m. from Monday to Saturday are repealed.
- Early closing provisions for Christmas Eve and the evening before Epiphany (Three Kings Day) are no longer required.
- The clauses on lease contracts demanding that a business open on Sunday as part of a lease agreement are no longer null and void.
- All restrictions related to the hours of service of employees on Sundays are eliminated.

What was changed?

- No more double time the regular hourly wage for Sunday work. The base salary is set at $11.50 per hour.
- Retail businesses will be able to determine their Sunday closing time. They will no longer be bound by the 5:00 p.m. limit.
- Infractions are no longer handled by the Department of Justice, but rather as an administrative matter by the Department of Consumer Affairs (DACO).

What remains the same?

- The Sunday opening time of 11:00 a.m.
- The nine (9) days of compulsory closing, namely:

1. New Year's
2. Epiphany
3. Good Friday
4. Easter Sunday
5. Mother's Day
6. Father's Day
7. Election Day
8. Thanksgiving
9. Christmas

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in this issue

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MARÍA P. LAKE
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Amendments to DACO Regulations relating to the sale of residential units

Speculation is fairly common in our local real estate market. Many investors option or purchase a residential unit not for their personal use, but in order to resell the unit at a profit. The Puerto Rico Legislature understands that these activities contributed, to some extent, to the real estate bubble here in Puerto Rico, since there were people signing options and purchase contracts who really were not home buyers but rather investors looking to immediately resell the units. So, these activities in a way created a false sense of demand for housing units in Puerto Rico...until the bubble burst!

In order to discourage this kind of activity, the Legislature enacted various amendments to the Department of Consumer Affairs' (DACO) Regulation known as the *Regulation to regulate the different activities that are carried out in the business of construction of residential units in Puerto Rico*. The Regulation regulates the different activities carried out in connection with the development and sale of residential projects having 20 or more units. The amendments impose harsher consequences on purchasers who fail to comply with their obligations under an option or purchase contract in order to attract only those who seriously intend to purchase the unit for their own use and those who are financially capable of qualifying for a purchase loan.

The pre-amendment language provided broad excuses for a purchaser to withdraw from its obligation to purchase under an option contract without incurring in any significant loss. The amendment provides several changes which address these loopholes.

One of the most important changes is that under the amendment for a buyer to terminate an option based on the excuse of failing to qualify for the loan, the buyer must have requested a pre-qualification before signing the option agreement or within 15 days of the signing thereof if the developer so requests. If the developer requested such pre-qualification and buyer failed to obtain it, then buyer would be precluded from using non-qualification as an excuse for performing his obligations. On the other hand, when the developer does not request the pre-qualification, the developer will be precluded from retaining the deposit in the event that buyer fails to qualify.

Other changes for option contracts are as follows:

Pre-amendment	***Now***
The buyer could resolve the contract if the seller changed to different quality materials.	Only allows the resolution of the option if there is a "significant change" to "inferior" material.
The buyer could resolve if the seller failed to sign a purchase contract within a year from the signing of the option.	This is no longer an excuse to resolve if failure to sign the purchase contract within the established period is due to "causes attributed to the buyer, force majeure, or to a third party."

The buyer could resolve if the buyer observed defects (as defined in the corresponding Regulation) in the unit and the developer refused to correct them.	Any defect observed must be noted in writing in the Inspection Report and the developer is not required to make the correction if he can demonstrate that they are not "defects" as defined in the Regulation, but rather usual variations acceptable in the construction industry.
The buyer could resolve if the buyer failed to qualify for the loan or if they qualified for a lesser amount.	The buyer will not be able to resolve the option and get its full deposit back unless it is based on causes not attributable to the buyer. The amendment clearly states that acts attributable to the buyer shall include acts or omissions in violation of the requirements or process of the financial institution for the granting of the loan.
The maximum amount of the deposit which the developer could keep in the event that the purchaser failed to exercise its option to purchase was $50.00.	Increased to the lesser of: (a) 2% of the purchase price; or (b) 50% of the option deposit amount.
Limited rights for developer to terminate the contract.	The developer will be able to resolve the option if buyer fails to perform or does not exercise the option, or if the buyer fails to inform the seller of its failure to qualify for the loan within the period of 15 days. There are also similar provisions applicable to the purchase contract.

In the case of purchase contracts, the amendment substantially increases the amount of deposit that can be forfeited in the event that the buyer resolves the purchase contract without having an excuse for performance, as defined in the contract. Pre-amendment, the maximum amount which could be retained by the developer was 2% of the purchase price. The specific amount that can now be retained under the amendment will depend upon the amount of the purchase price of the unit. The new parameters established by the amendment are as follows:

- If the purchase price of the unit is equal to or less than $217,500, a maximum of 2% of the purchase price can be retained.
- If the purchase price is more than $217,500 but less than $362,500, the maximum is 4% of the purchase price.
- If the purchase price is more than $362,500 but less than $507,500, the maximum is 8% of the purchase price.
- When the price exceeds $507,500, the amount shall be that specified in the purchase contract.

The amendment also establishes that the mentioned amounts are also the maximum amount which a developer

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can require as a down payment, but the developer is free to require a lesser amount.

In summary, the substantial deposit amounts required under the amendment coupled with the more stringent requirements for resolving an option or purchase contract (while still getting back the deposit), should serve as a disincentive to persons contemplating speculating in real estate at the developers' cost.

Important to note also is that the forms of option and purchase contract used by the developers (which must be approved by DACO) must be updated to conform to the amendments enacted. The amendments were effective on **November 29, 2009**. ✦

PAUL A. FERRER
CORPORATE & BANKING LAW DEPARTMENT

Let the games begin!!!

DACO has lessened its requirements for holding contests and sweepstakes in Puerto Rico

On October 27, 2009, DACO amended its *Contests and Sweepstakes Regulation* in order to lessen some of the burdens on the promoters of contests and sweepstakes held in or extended to Puerto Rico. By the amendment, (i) the rules of a contests or sweepstakes no longer have to be certified by the promoter before a notary public; (ii) a notary public does not have to be present during the drawing of the winners; and (iii) a public document ("Acta Notarial") is no longer required to be prepared by a notary to certify the contest's procedures. These changes alone signify substantial savings to the promoter of a contest in notarial fees.

The Regulation has finally authorized the advertising of a contest/sweepstake and the publication of its rules on a "freely accessible website." For years many promoters, especially foreign promoters, had been advertising their contests and sweepstakes via special websites even though the Regulation didn't specifically authorize said method of advertising and publication of contest rules. This practice probably began back in 2000 when the then new Sweepstakes Regulation stated that the contest rules could be published by digital or electronic means. Later versions of the Regulation eliminated said provision and the legality of contests held and advertised solely on the internet was left up in the air.

The Secretary of DACO has stated that in the promulgation and approval of the new Regulation the agency took into account that "[even though] we have to be concerned that [consumers] are not abused or deceived... [we have to make sure that] we don't become overprotective in the sense that the barriers to do promotions, in this case, actually result in the undesirable cost of just having our market opt out."

It certainly seems as though the new Sweepstakes Regulation is an attempt from the current government administration to get foreign businesses and promoters interested in holding or extending their promotional contests and sweepstakes to Puerto Rico. Only time will tell if the new Regulation has successfully met its goal and what side effects will result, if any, from the less burdensome rules and regulations.

The new Regulation took effect on **November 26, 2009**. The amendments are available at DACO's website at: www.gobierno.pr/daco/inicio/. The Regulation is already available in the English language. ✦

PAUL A. FERRER
CORPORATE & BANKING LAW DEPARTMENT

DACO's Advertising and Deceitful Practices Regulation has been amended

On September 24, 2009, DACO amended its Advertising and Deceitful Practices Regulation. In order to avoid the hefty fines and penalties that the Secretary of DACO is authorized to impose per violation of its regulations, retailers and businesses under the jurisdiction of DACO would be wise to become familiarized with the aforesaid amendment as soon as possible.

As is often the case with changes, some of the amendments to the Advertising Regulation have caused confusion amongst retailers and the consuming public as to their extent and interpretation. Pursuant to such doubts and confusion, the Secretary of DACO issued an interpretive letter on November 3, 2009, with respect to some of the amendments that have caused the most confusion.

Rule 5 (CC) regarding special sales

One of the new rules which has been subject to debate is Rule 5 (CC) regarding special sales. In Puerto Rico, special sales are subject to specific rules regarding the availability of goods announced as part of a special sale, substitute goods in the event that the goods on special sale are not available, and the famous rain checks provisions. Rule 5 (CC) provides a specific definition of what constitutes a special sale which was not available in the previous version of the Advertising Regulation. In his interpretive letter, the Secretary clarifies that **a special sale applies only to sales which advertise products or goods at a price which is inferior to the regular price**. Articles or services promoted for sale at regular price do not constitute special sales for purposes of the Advertising Regulation. Thus, when a retailer reaches an agreement with a supplier for certain promotional goods or limited quantity goods, but does not advertise them at a discounted price, such goods do not fall under the scope of the special sales rules of the Advertising Regulation.

Rule 11 (I)

New Rule 11 (I) states that a product need not be individually marked and priced if said product is dispatched by an employee or representative of the business establishment and if there is adequate signage which lists the price of the product in the area where it is sold. The Secretary states that the purpose of the rule is to make sure that all products are individually marked and sold, but that specific products may be exempted from this requirement if said products are handled and dispatched by an employee of the business and a list price of all product handled by said individual is clearly displayed nearby. This allows retailers to display a number of products in a display or counter by simply providing a list price for all items in the display, instead of individually marking each product.

Rule 13 regarding the availability of products on special sales

Generally speaking, Rule 13 has for years mandated that a business must have a sufficient quantity of product to satisfy the reasonable demand for that product during a special sales event. What was a "sufficient quantity" or how to determine the "reasonable demand" was not clear. The amendment to Rule 13 clarifies that the reasonable amount of products or goods to meet the demands of the consumers may be located at the store itself or at the retailer's warehouse. If the retailer wants to limit the amount of products available during a special sales event, Rule 13 provides that he has to comply with the following:

1. The special sales advertising must indicate the amount of products or goods on sale available per store; and

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2. the retailer must state that the sale will end on a determined date; or
3. until supplies last.

Under the previous version of Rule 13, the retailer could not limit a special sale to less than 50 articles or goods per store. Obviously, this Rule made it difficult for retailer to advertise special sales events for very high end goods and products, since the retailer would be obligated to have a minimum of say fifty (50) $350,000 diamond studded watches on special sale. This fifty (50) article minimum requirement was eliminated under new Rule 13.

Rule 14 – Rain checks

New Rule 14 has been softened somewhat in favor of the retailer. Previously, the rule stated that when an advertised product in a special sale was not available, the seller would have to provide the consumer with a substitute product of equal or greater quality. New Rule 14 no longer makes reference to a substitute product of greater quality. Also, this rule previously established a presumption against the retailer that it did not have a reasonable supply of products to meet the consumer demand if a consumer requested a Rain Check. Moreover, Rule 14 provided that compliance with the Rain Check provisions of the Advertising Regulation would not exonerate the Retailer from the payment of a fine resulting from its failure to meet the consumers' reasonable demand for a product on sale in accordance with Rule 13.

New Rule 14 eliminates the presumption against the retailer but further provides that compliance with the Rain Checks provisions does exonerate the retailer from any fine resulting from its failure to comply with Rule 13. In his interpretive letter, the Secretary states that in DACO's opinion, the refund of money is only available to the consumer after he/she has requested a Rain Check and after the retailer has failed to obtain the product within the required 30- day period.

Rule 15 – Information regarding special sales events

New Rule 15 mandates that the following information be included in all advertisements of a special sales event:

1. Identification of the product(s) on sale;
2. the location of the store where the products will be available;
3. the commencement and termination date of the sales event;
4. the sales event should last at least eight (8) hours or while supplies last in accordance with Rule 13;
5. the amount of products available per store (this requirement is only necessary if the retailer wants to be exempted from the application of Rule 14 – Rain Checks.); and
6. that the advertisement of special sales of products not available in Puerto Rico is prohibited.

Rule 22 – Warranties

Prior Rule 22 mandated that a retailer or commercial establishment could not charge a restocking fee as part of its product return policy. According to the Secretary's interpretation, New Rule 22 provides that the restocking fee is only prohibited when the product is returned under warranty and not when the product is simply returned under a store return policy.

Rule 28 – Product return policy

This rule was previously denominated as "Signs." **The language that was required to be exhibited in a DACO Sign at all commercial establishments has changed.** The DACO Sign must now include the business's product return policy followed by the following warning in Spanish:

"Publicar Anuncios engañosos es ilegal. Incurrir en tal práctica conlleva pena de multa de hasta un máximo de $10,000. El consumidor podrá someter una querella ante el Departamento de Asuntos del Consumidor (DACO). Ley Núm. 5 de abril de 1973, según enmendada."

The foregoing warning basically states that publishing deceitful advertisements is illegal and may be subject to a fine of up to $10,000. The warning also advises the consumers of their rights to file claims with DACO.

Professional service providers and restaurants, fast food chains, and other food establishments as provided by the amended Advertising Regulation have been exempted from having to provide a product return policy. However, they must continue to exhibit the above cited warning. ✦

GIOVANNI DÁVILA
CORPORATE & BANKING LAW DEPARTMENT

New corporation's law approved

During the past few years Puerto Rico has experienced a local recession, followed by one of the worst global recessions since the 1930's Great Depression. This has undoubtedly affected every aspect of our already fragile economy. Among the many reasons local economist have acknowledged is our lack of effectiveness *vis a vis* other jurisdictions in offering the business sector the tools they need to succeed and take their companies into the 21st century.

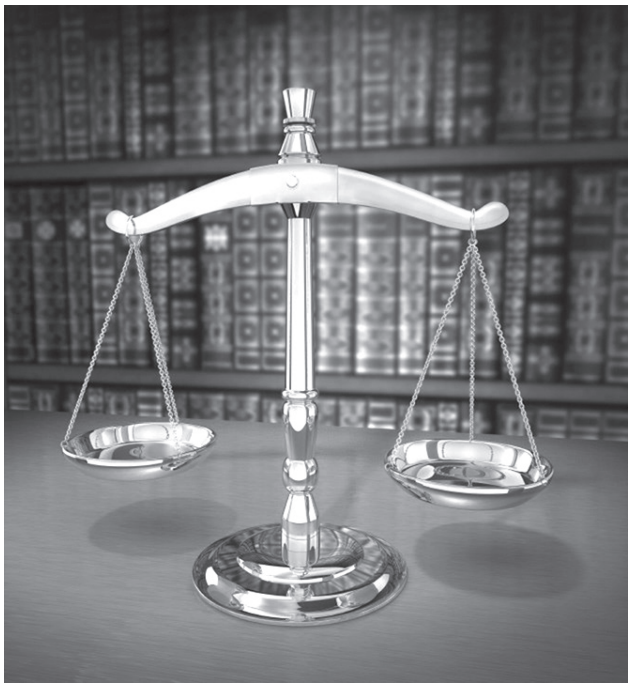
Corporate laws constitute one of the many instruments governments have to promote the economic development in their country. Therefore, during the last day of legislative session the House and the Senate approved Senate Bill 124, a new *General Corporations Law*, which was signed by the Governor and became Law No.164 of December 16, 2009. Law will place Puerto Rico in the forefront of corporate law by harmonizing and tempering our statute to the new global business realities, which includes, among others, advances in technology, information and communications.

Any person starting or managing a business must have a clear understanding of all the changes and opportunities the Law will provide his or her business. For example, one of the mayor changes is in the use of electronic communication for:

- Holding shareholders and director meetings using video conference;
- Granting immediate consent to any corporate action such as the voting in the election of directors or officials; and
- Providing notice to shareholders.

Electronic communication promotes and facilitates the participation of local entities in the international markets and will probably generate savings for your corporation.

When it comes to the management of the corporate issues of your business, the Law has many changes or advantages that can be very useful to know and understand. Here are some examples:



Corporations

- The Law empowers a corporation to use contracts and bonds to guarantee the obligations of any parent, subsidiary or affiliate corporation.
- It allows a corporation to pay dividends in the form of promissory notes, bonds or obligations of the corporation if at the time there was a surplus or net gain.
- Consent of the shareholders or members is not required to sell, lease, or exchange the property and assets of the corporation to a subsidiary.
- The Law eliminates the requirement of demonstrating that it is current in its taxes, penalties or fees owed to the state or municipalities (the "certificate of good standing") during the dissolution process. Only the last five years of Annual Reports will

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be taken into consideration when granting the certificate.
- To be considered a "close corporation" the number of shareholders cannot exceed 75 (it was 35).

Limited Liability Companies ("LLC")

- The Law allows for the merger and consolidation of corporations with local and foreign LLCs, with some reservations.
- LLCs can render professional services, subject to licensing requirements and scope of professional liability; and they can also be organized as not-for-profit companies.
- LLCs annual fees will be payable on March 1.

In conclusion, the new Corporations Law makes some important contributions to the way we manage our companies on a daily basis. These changes ought to be economically beneficial for all corporations and shall reflect in the way Puerto Rico does business.

We suggest you consult with a knowledgeable professional in the field to gain a better understanding of some of the benefits the Law can provide for you and your company and how you should update your corporate records and activities. ✦

PAUL A. FERRER
CORPORATE & BANKING LAW DEPARTMENT

Will the Trademark Act ever be amended?

A substantial revision to the local trademark act has been under work and consideration for quite a few years. Now Bill 1995 of the House of Representatives is currently making the rounds in the Senate. If passed, it will become the first significant amendment to the local trademark act since the same was adopted in 1991. The purpose of the Bill is to place the local trademark act up to speed with the current federal legislation, known as the Lanham Act, as well as with the Model State Trademark Act. For years, those who have worked with trademarks in Puerto Rico have had to refer to the Lanham Act and the case law thereunder in order to resolve their trademark related issues. Many terms and trademark provisions covered by federal legislation such as trade dress applications, dilution (by tarnishment or blurring), and domain name registrations are not covered by the local trademark act. If approved, Bill 1995 will allow trademark owners and applicants to be more familiarized with their respective rights and obligations by simply referring to the local legislation rather than having to look up federal case law or treatise writers. Often times, the Puerto Rico Supreme Court has resolved trademark issues by referring to renowned treatise writers such as J. Thomas McCarthy. Needless to say, the common Puerto Rico trademark applicant does not have a copy of McCarthy's 7 volume compilation sitting at his or her office or at home. On the other hand, the new legislation does adhere to the stricter trademark maintenance provisions of the Lanham Act, as enforced by the United State Patent and Trademark Office. Thus, if Bill 1995 is approved, trademark applicants and owners should become well familiarized with the new trademark filing deadlines. We will again be writing to you with a summary of the most important changes in the law and what to look out for if Bill 1995 is finally approved. ✦

MARIANA NEGRÓN
LITIGATION DEPARTMENT

The E-Discovery amendments to the Federal and Puerto Rico Rules of Civil Procedure: *what it means for you*

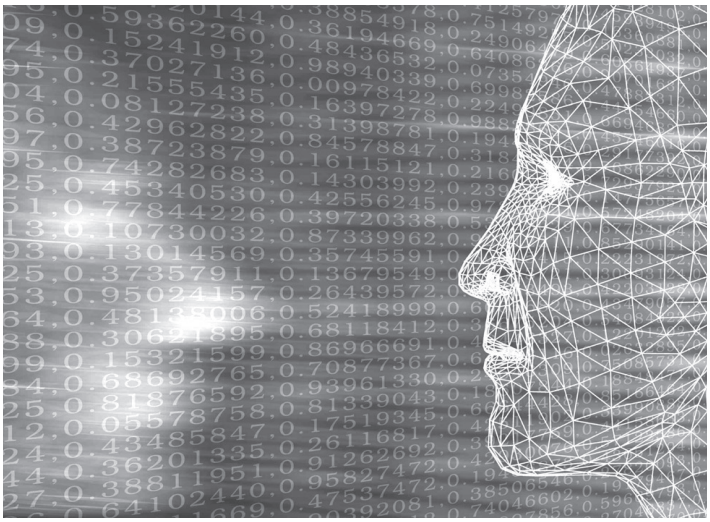
With the immense technological advances of the past twenty years, and the advent of computers, cellular telephone text messaging, emails, and Blackberries®, the amount of data that is produced and exchanged in all businesses has increased exponentially. In order to deal with this new informational landscape, on December 1, 2006, amendments to the Federal Rules of Civil Procedure came into effect to provide for the preservation and discovery of "electronically stored information" ("ESI") in civil litigation.

These amendments provide for significant changes in the way that litigants must preserve and produce ESI, which consists of more than 90 percent of all information created today. The Sedona Conference, *The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for Addressing Electronic Document Production* (June 2007). As defined by The Sedona Conference, ESI "includes email, web pages, word processing files, audio and video files, images, computer databases, and virtually anything that is stored on a computing device... " The ESI subject to preservation under these rules may be maintained on a portable or desktop computer, hard drive, server, network, legacy system, diskette, CD, CD-ROM, PDA, Blackberry®, pager or other removable media or storage device, whether owned by the business or by an individual employee or official.

If you are sued – or have been advised that there is a likelihood that you will be sued – either in federal court or the courts of the Commonwealth of Puerto Rico, you have a duty to preserve all documents and information (including, but not limited to, ESI) that is pertinent to the resolution of the claims. This duty to preserve includes:

- Keeping all email and documents that pertain to this matter;
- modifying your email filters and preference settings to prevent automatic email deletion; and
- stopping the recycling or deletion of backups and keeping your electronic files safe from deletion.

Of course, the duty to preserve relevant information and documents also encompasses "hard copies" of documents, including all writings (whether typed, printed, in final or draft form), all handwritten notes, sketches, photographs, drawings, videotapes, product packaging, manuals, and other tangible objects.



Failure to comply with these rules may result in court-ordered sanctions against your business, so it is advisable for your business to articulate and implement an ESI preservation policy under the guidance of a litigation attorney in order to avoid the potential pitfalls of non-compliance.

Do note that the Puerto Rico Legislature recently approved an amendment to Rule 23.1 of the Puerto Rico Rules of Civil Procedure, 32 L.P.R.A. App. III, which adds a duty to preserve ESI analogous to that of the Federal Rules. That amendment is currently pending the Governor's signature. However, even in the absence of such an express provision, there is of course a duty to preserve and produce all documents that are relevant to the resolution of the litigated claims. ✦

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ALICIA LAMBOY
ENVIRONMENTAL PRACTICE GROUP

Energy and environmental law updates

Renewable energy

P.R. Senate's Bill No. 2 proposes to encourage the development of renewables by adding a new section to the Law of the Economic Development Bank for Puerto Rico. The proposed amendment requires the Economic Development Bank to assign priority to the evaluation of loans requested by a small or medium business for the manufacturing, sale and installation of solar equipment, wind turbines and/or any other system using electricity from renewable sources. The Bill was recently referred to the Governor.

Amendments to the regulation for administrative adjudication procedure of the Puerto Rico Energy Affairs Administration

The Energy Affair Administration has adopted rules for creating a procedure for the challenging, denial, suspension or revocation of certifications of equipment, designer or installer of systems under its jurisdiction. Any affected party must file a written document before the E.A.A. within a term of 15 days that will begin to run once the determination on the certification is received. The E.A.A. will have a 90-day term for issuing its final determination.

U.S. House introduces bill to modify the incentives for the production of biodiesel

The U.S. tax credit of $1.00 per gallon of biodiesel currently available under the Internal Revenue Code of 1986 is set to expire on December 31, 2009. In order to provide certainty and stability to the biodiesel market, the U.S. Senate introduced Senate Bill 1589 on August 6, 2009. On November 18, 2009, the House of Representatives introduced Bill H.R. 2040, which is the companion of Senate Bill 1589. Both bills propose to extend the biodiesel tax credit for five years.

The Puerto Rico Senate Rejects the Approval of House's Bill 1184

Early this year, the Puerto Rico House of Representatives introduced Bill 1184 for creating a Public Utilities Board.

The Board would be in charge of setting the tariffs, costs and other rights relating to services of potable water, sewer, electric power and telecommunications and regulate their implementation. In the summer, the House approved the Bill and referred the same to the Senate. Representatives of the private sector supported the Bill since there is a general perception that it would be the only way to reduce electricity costs in Puerto Rico. However, in light of

comments submitted by the principal utility providers the Senate rejected the Bill.

The U.S. Patent and Trademark Office Announces the Implementation of a Green Technology Pilot Program

Normally, the U.S. Patent and Trademark Office of the U.S. Commerce Department requires about three years for examination of patent applications. In order to promote the development of green technology, it will pilot a one-year program to accelerate the review of applications pertaining to certain green technologies including greenhouse gas reduction. The applicable requirements will depend on the invention claim in the application.

Delineation of Coastal Zone

In a recent opinion, the Puerto Rico Supreme Court reiterated that the terrestrial maritime zone or coastal zone's definition in the 1880 Spanish Harbors Act, enacted for Puerto Rico by Spanish Royal Decree in 1886 and currently included in the Harbors and Docks Act of 1968, is the same that was adopted in the regulations of the Department of Natural and Environmental Resources and the Puerto Rico Planning Board. The Court found that the Department's Regulation No. 4860 was reasonable since it further elaborated the aspects that the agency will consider for evaluating cases involving demarcation of the coastal zone. The Court did hold that the Department must determine which of the following conditions apply to the case: (1) whether the zone is subject to the ebb and flow of the sea, where tides are noticeable; or (2) whether the zone is subject to the largest waves during a storm, where tides are not noticeable. The Department must only apply one of the aforementioned conditions.

Federal Energy Regulatory Commission Issues Order Regarding Sales to End-Use Customers

Sun Edison, LLC requested the Federal Energy Regulatory Commission to issue a declaratory order clarifying the extent of the Commission's jurisdiction, among others, on sales of power from a generation facility to an on-site end-use customer participating in a state net metering program. The Commission determined that sales of solar generated electricity by certain subsidiaries of Sun Edison to end-use customers participating in a net metering program do not constitute the sale at wholesale or the transmission of electric energy in interstate commerce where the net metering participant does not make a net sale to the utility over the applicable billing period and, thus, are not subject to the Commission's jurisdiction. The Commission's rule, however, leaves open the possibility that payment for excess energy of these types of facilities may turn a net metering system into a wholesale system. ✦

"Energy conservation is the foundation of energy independence."

Thomas H. Allen

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MICHELLE L. HOLLEY
LABOR & EMPLOYMENT LAW DEPARTMENT

Labor and employment proposed bills

The Puerto Rico Legislative Assembly has submitted various bills relating to labor and employment matters which, if approved, will have a great impact on business operations. The following is a brief summary of the proposed bills pending to be approved as of the printing date of this edition.

- HR 693 proposes the creation of an eight-hour paid leave annually for full-time private sector employees to visit their children's schools.

- HR 2029 proposes the creation of the *Act to Establish Preference Parameters on Products Manufactured* to grant an additional 5% on the preference margin in government purchases manufactured by businesses in which 50% of the employees are persons with physical or mental disabilities, pursuant to the Puerto Rio Industry Investment Act.

- Senate Bill 108 would amend the *Working Mothers Protection Act* by extending the maternity leave period for mothers of infants with congenital anomalies to four additional weeks without pay. The bill also proposed a ten-day paternity leave for fathers whose child has this medical condition.

- HR 929 would amend the *Minimum Wage, Vacation and Sick Leave Act* by prohibiting private sector employers from using justified absences due to sickness as a criterion of an employee's efficiency during the annual evaluation process.

- Senate Bill 970 proposes the creation of the *Private Sector Vacation Leave Transfer Act* which would authorize the transfer of accrued vacation leave between employees within the same private company if an employee or member of his/her immediate family has an emergency that makes it impossible for the employee to perform his/her duties for a considerable period of time.

- Senate Bill 971 would amend the *Minimum Wage, Vacation and Sick Leave Act* by allowing the payment of three sick leave days accrued in excess of 12 days.

- Senate Bill 831 would amend the *Minimum Wage, Vacation and Sick Leave Act* by providing the benefits of accumulation of vacation and sick leave to any employee who works 48 to 114 hours per month.

- HR 704 would amend the *Act to Regulate the Breastfeeding of Breast Milk Extraction Period* by penalizing psychological discrimination against breastfeeding mothers.

- HR 171 seeks to amend the *Sex Discrimination in Employment Act* to impose liability for a sum equal to *triple* the amount of damages if an employer discriminates in any way against an employee because of her or his sex.

- HR 1653 would amend the *Internal Revenue Code* by granting a special 10% rate for severance payments for wrongful termination and any payment of similar nature.

- Senate Bill 817 would amend the *Wrongful Termination Act* by establishing the right of employees to ascertain the existence of the compensation for wrongful termination. The bill would also establish an extrajudicial procedure for the recovery of compensation for wrongful termination. Finally, the proposed amendment would impose a *double penalty* to the employer who recklessly or in bad faith refuses to pay the compensation for wrongful termination. ✦

MARÍA I. RAMOS
LABOR & EMPLOYMENT LAW DEPARTMENT

Watch out! The social bias against an employee's association with other co-employees

When an employee is fired, he will sometimes file suit claiming he was unlawfully terminated for being treated differently because of his/her age, gender, race, religion, disability or any other protected class under federal and state law. However, there has been a recent trend in employees increased success in bringing "associational discrimination" claims. The peculiarity of this claim is that the plaintiff is not one regarded to have "protected characteristics," but is considered to have had some type of adverse employment action taken against him/her solely based upon his/her association with a member of a particular protected category.

Associational discrimination claims have been brought under the Americans with Disabilities Act ("ADA") and under Title VII of the Civil Rights Act of 1964 ("Title VII"). The statutory language of the ADA explicitly prohibits discrimination based on an employee's relationship with a disabled person. On the other hand, courts have long afforded protection under Title VII because of an employee's relationship with a person in a protected class. Under these two provisions, some court decisions have expanded greatly the scope of federal anti-discrimination laws.

For instance, in *Holcomb v. Iona College*, 521 F.3d 130, 139 (2nd Cir. 2008), a former assistant basketball coach at Iona College was fired allegedly due to performance reasons. The plaintiff claimed that various college officials made derogatory comments about his wife, who is African American. The Court considered that *Holcomb* was a member of a "protected class" under Title VII. Even though *Holcomb* was not African American, his wife was, and the evidence showed that the main reason for his termination was based upon his interracial marriage. The Court reasoned that, "where an employee is subjected to an adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race."

Another case pertaining to our jurisdiction, *Oliveras Sifre v. Puerto Rico Department of Health*, 38 F. Supp. 2d 91 (1st Cir. 1999), recognized associational discrimination under ADA. The Court of Appeals for the First Circuit ruled against the plaintiffs and imposed a requirement that the relationship

be with a specific person with HIV/AIDS. In this case, the Court held that ADA's association provision is not violated when a public health organization refuses to renew employees' contracts to perform HIV/AIDS advocacy work because they opposed the organization's policies or regulations. Since the plaintiff did not assert that the contract nonrenewal was the result of their association with a specific individual with a disability, as opposed to advocating generally for individuals with HIV/AIDS, no claim prevailed under ADA's associational discrimination provision.

Although association discrimination cases are on the rise, is not always as easy to plead as it appears. In order to prevail, employees must establish some inference that their "association" with someone in a protected class was the reason for the alleged discriminatory treatment. Thus, it is best for an employer to document the employment decisions properly, enforce policies consistently and treat the employees fairly. Taking these preventive measures will help to eliminate baseless association discrimination claims and at the same time reinforce the need for employers to be vigilant in maintaining a workplace environment free from discrimination. ✦

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CARLOS R. PASTRANA
LABOR & EMPLOYMENT LAW DEPARTMENT

A brief primer on changes made by ARRA to HIPAA's Privacy and Security Rules

In addition to its stated purpose of stimulating the American economy and recovering from the deep financial crisis which begun last year, the American Recovery and Reinvestment Act of 2009 ("ARRA") has made several major changes to the Health Insurance Portability and Accountability Act ("HIPAA") which bear mentioning, particularly to HIPAA's Privacy and Security Rules. These changes to HIPAA are contained in a provision of ARRA called the Health Information Technology for Economic and Clinical Health ("HITECH") Act. The affected provisions are the following:

- **Business Associates:** Previously, HIPAA only applied to so-called "covered entities," which specifically included health plans, health care providers, and health care clearinghouses. HIPAA only applied to so-called "business associates" indirectly, and mandated that covered entities execute a business associate agreement in order to ensure that the business associate would comply with the provisions of HIPAA. Under the amendments made by HITECH, HIPAA's rules apply directly to business associates, much as they already do to covered entities. Additionally, vendors providing data-transmission services related to Protected Health Information ("PHI") are now "business associates" under HIPAA, and thus bound to business associates agreements with the covered entities.

- **Privacy and Security Breaches:** As originally enacted, HIPAA created no duty or requirement to report privacy and security breaches, except insofar as the breach was attributable to a business associate who then had to report it to the covered entity. Under HITECH, covered entities now have the obligation of informing individuals when their unsecured PHI was compromised, and must create and maintain a breach log, which must be submitted to the United States Department of Health and Human Services every year. Individual notifications of breaches must be made without unreasonable delay within a maximum of 60 days from the date in which the breach is discovered. If the owner of the unsecured PHI cannot be located, the covered entity may have the duty of posting a notice on its website. Larger breaches require additional notification, including the duty to notify the Department of Health and Human Services and broadcast through local print and broadcast media for breaches in which more than 500 people are affected.

- **Marketing of Health Care Operations:** HITECH clarifies any doubts that may have previously existed regarding whether or not PHI could be used for marketing purposes. Henceforth, any such communication must specifically qualify as an exception to "marketing," and the covered entity cannot receive any compensation in the process. The Act does provide an exception, insofar as the communication describes only a prescription drug and the payment amount is reasonable.

- **PHI Disclosure, Sales and Accounting:** HITECH bars the previously-prevalent practice of selling PHI for various health-related purposes. Although, under HIPAA, individuals already had the right to be notified and receiving a covered entity's accounting of PHI disclosures other than those needed for payment, treatment or health care

operations, HITECH provides that this exception does not apply to electronic disclosures made within the past three years. An individual can now direct a health care provider to grant him or her access to PHI in electronic format and have it sent to another person or entity.

- **Enforcement:** Although, under HIPAA, civil monetary penalties had been available for several years, the Department of Health and Human Services had never imposed a specific penalty. Under HITECH, noncompliance due to willful neglect will result in the imposition of civil penalties. Additionally, the Attorney General of every State can sue individuals for HIPAA violations, and the cap on various penalties has been raised to upwards of $1.5 million. HITECH also mandates that periodic audits be conducted, instead of leaving them up to the Department's discretion.

Any company or organization that is a covered entity, or has previously been the business associate of any covered entity or provided data-transmission services related to PHI, would be well-advised to study the provisions of ARRA and HITECH, or to consult its legal counsel, to ensure that it is in compliance with the new provisions. ✦

JOSÉ E. VILLAMARZO
TAX DEPARTMENT

Employers with dual qualified plans in Puerto Rico take note

The Federal Internal Revenue Service issued its Revenue Ruling 2008-40 providing the long awaited guidance regarding the transfer of assets from a retirement plan qualified under Sections 401(a) of the Federal Internal Revenue Code of 1986, as amended (the "IRC"), and 1165(a) of the Puerto Rico Internal Revenue Code of 1994, as amended (the "PR Code"). The guidance relates to the transfer of funds relating to Puerto Rico participants from a qualified retirement plan with a situs in the United States to a plan qualified exclusively under the PR Code and funded in a trust with a situs in Puerto Rico. Puerto Rico plans are exempt from United States taxes pursuant to Section 1022(i)(1) of the Employee Retirement Income Security Act of 1974, as amended.

In Rev. Rul. 2008-40, the IRS held that a transfer of assets and liabilities from a US Plan to a PR Plan will be treated as a taxable distribution from the US Plan and such transfer, absent a distributable event, will disqualify the US plan.

This is of utmost importance for those United States employers who have Puerto Rico employees currently participating in their dual qualified plans. Normally, United States employers that decide to establish a Puerto Rico only qualified plan for the benefit of their Puerto Rico employees make a trust-to-trust transfer of the Puerto Rico participants' accounts from the United States trust to the Puerto Rico trust, event that based on this recent pronouncement will disqualify the United States plan and will trigger a federal tax event for the Puerto Rico participants.

Fortunately, the IRS provided some relief because the holding of Rev. Rul. 2008-40 will be effective **January 1, 2011**. Therefore, transfers before said date will not be treated as a taxable distribution from the US Plan and will not disqualify such plan, to the extent such transfer is made in compliance with other requirements of the IRC. Further, as an added bonus, the portion of a distribution from the PR Plan that is attributable to amounts that were transferred from the US Plan before January 1, 2011, will be treated entirely as income from sources within Puerto Rico, and therefore, not subject to United States income taxes. ✦

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ANGEL D. MARRERO
TAX DEPARTMENT

Moratory on Treasury penalties

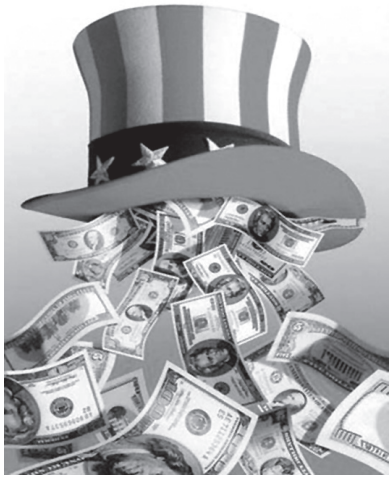
On October 21, 2009, the Puerto Rico Treasury Department issued Circular Letter 09-11 ("CC 09-11") regarding the implementation of Act No. 93 of September 10, 2009 ("Act No. 93"). Act No. 93 authorizes the Secretary of the Treasury to reduce, condone or eliminate certain surcharges or administrative penalties in cases where such reduction or elimination is justifiable, is beneficial to the public interest or is necessary or convenient to comply with the Puerto Rico Internal Revenue Code of 1994, as amended (the "Code").

Act No. 93 and CC 09-11 can only be used to reduce, condone or eliminate the following surcharges or administrative penalties ("Authorized Penalties") imposed under the Code:

- Surcharges in cases of nonpayment of tax liabilities;
- surcharges in cases of businesses that did not obtain a required license no later than the date the business or occupation subject thereto commenced;
- surcharges in cases of jeopardy assessments;
- surcharges in cases of bankruptcy and receivership procedures; and
- surcharges in cases of late payment of license renewal fees (only in cases where the amount owed or the amount of the license fees does not exceed $5,000).

According to CC 09-11, the Treasury can reduce, condone or eliminate the Authorized Penalties under the following circumstances:

- Cases that have been approved under the Voluntary Disclosure Program;
- when the taxpayer submits to a payment plan by way of salary withholdings or direct debit from a bank account ("Automatic Payment Plan");
- when the noncompliance that resulted in the surcharge was due to reasonable causes and not due to intentional negligence;
- when there exists doubts as to the validity of the tax liability; and
- in cases in which the collection of the total tax debt and surcharges would be detrimental economically to



the taxpayer or in case in which the collection of the total tax debt and surcharges would be improbable.

When the taxpayer does not comply with the payments made pursuant to an Automatic Payment Plan, the Treasury is authorized to reestablish the Authorized Penalties condoned under such plan.

When the noncompliance that resulted in the surcharge was due to reasonable causes and not to intentional negligence, the taxpayer must submit a written statement detailing the reasons that justifies such determination including the alleged facts, the time that such noncompliance lasted and any other documentation or evidence required by the Treasury. Please note that the term "reasonable cause" means the occurrence of an event or a circumstance outside the taxpayer's control. As such, the taxpayer must at a minimum show that he was both diligent and prudent in determining his tax filings and obligations and was still unable to file the corresponding returns or declarations on time. The taxpayer must also submit a written statement in cases in which there exists doubts as to

the validity of the tax liability, including any evidence that supports the taxpayer's position.

Finally, to determine whether the collection of the tax debt and surcharges would be economically detrimental to the taxpayer or whether the collection of the total tax debt and surcharges would be unlikely, the Treasury will evaluate the following factors:

- existence of prolonged illness, medical conditions or impediments of the taxpayers or his dependents, which would limit his income-generating capabilities;
- the liquidation of the taxpayer's determined assets to pay the totality of the tax debt would impede the taxpayer from satisfying his basic necessities; and
- the taxpayer is unable to obtain any type of loans, including those that could be guaranteed by his determined assets, and the sale or other disposition of such assets would result in adverse consequences that would make collection improbable.

While the provisions of CC 09-11 are effective immediately, Act No. 93 states that the authorization to reduce, condone or eliminate the Authorized Penalties shall only be effective until **June 30, 2010**. ✦

JOHANNA E. ESTRELLA
CORPORATE & BANKING LAW DEPARTMENT

Banks increase and prepay their assessments to the FDIC: an approach to strengthen the FDIC's cash position

In an effort to replenish the funds of the Federal Deposit Insurance Corporation (FDIC) and maintain the depositor's confidence in the banking system, the Board of Directors of the Federal Deposit Insurance Corporation adopted on September 29, 2009, a Notice of Proposed Rulemaking that would require:

- Insured institutions to prepay their estimated quarterly risk-based assessments for the fourth quarter of 2009 and for all of 2010, 2011, and 2012 at the same time that they pay their regular quarterly deposit insurance assessments for the third quarter of 2009;
- a uniform three-basis point increase in assessment rates effective on January 1, 2011; and
- an extension of the restoration period from seven to eight years.

The FDIC estimates that the total prepaid assessments collected would be approximately $45 billion and will replenish the cash position of the FDIC's Deposit Insurance Fund (DIF) gradually over time. The FDIC projects that bank failures will peak in 2009 and 2010 and that by 2011 the banking industry earnings will have recovered sufficiently to absorb the 3 basis point increase in deposit insurance assessments.

The Notice of Proposed Rulemaking's intent is to preserve the banks' liquid capital and enable the banks to lend while they rebuild the DIF. The FDIC's analysis indicates that this proposed arrangement is less likely to impair bank lending than the Special Assessments Final Rule adopted by the Board in May 2009, and recommends that no further special assessment shall be imposed under such Final Rule because the amounts recovered ($11 billion in revenue) would not prevent the DIF from becoming significantly negative or prevent the DIF's liquidity needs from exceeding its liquid assets on hand in 2010. ✦

• • • We wish you a great year 2010 • • •
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DID YOU KNOW...?

Did you know? That Act No. 132 of October 26, 2009, requires the Police Department to establish the SILVER Alert? The SILVER Alert is very similar to the AMBER Alert, but with respect to persons that have been found to suffer from Alzheimer Disease. If any of your loved ones suffers from this disease and is lost, you can contact the police so that a public alert is issued to locate the missing person. ✦

Did you know? That the Puerto Rico Transit and Motor Vehicles Act provides that a ticket of $50 can be issued to any person that travels on a road at a speed of 20 miles per hour less than the maximum limit established for such road? In other words, if you are travelling in an expressway in which the speed limit is 65 m/h, your speed limit cannot be less than 45 m/h, except for security reasons, when there is a slope or hill, or if you are traveling in a heavy vehicle. The Highways Authority can specify other minimum speed limits. Also, a $50 ticket can be issued to a person that does not travel at the maximum speed limit while travelling on the left lane when there are two or more lanes in one direction. ✦

Did you know? That on September 16, 2009, the Equal Employment Opportunity Commission (E.E.O.C.) voted to approve a Notice of Proposed Rulemaking (NPRM) to conform its Americans with Disabilities Act regulations to the Amendments Act of 2008? The NPRM was published in the Federal Register on September 23, 2009 (Vol. 74 No. 183; http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf. The E.E.O.C. has also issued a question and answer guide on the NPRM (http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.pdf). The E.E.O.C. and the Department of Justice Civil Rights Division held four full-day listening town hall sessions in Oakland, Philadelphia, Chicago and New Orleans during the months of October and November 2009 to obtain direct input from the business/employer community and the disability and disability advocacy community on E.E.O.C.'s proposed regulations under the ADA Amendments Act of 2008 (ADAAA). For a summary of the changes made by the Amendments Act, which became effective on January 1, 2009, please visit the E.E.O.C.'s webpage concerning this issue (http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm). ✦

ROBERTO MONTALVO
TAX DEPARTMENT

House Bill No. 2214 Real property tax self-assessment

House Bill No. 2214 will allow owners of real property that have not been previously assessed to pay the property tax based on their own self-assessment. By electing to take the benefits afforded by House Bill No. 2214, if it becomes law, all taxable years prior to the year in which the self-assessment is made will be exempted from real property tax. By electing to self-assess the properties and to pay the corresponding tax, owners of real property will be entitled to enjoy 100% property tax exemption for all years prior to the year in which the self-assessment is notified to the CRIM and the tax is paid.

House Bill No. 2214 states that the self-assessed value must be made in accordance to the procedure and guidelines established by regulations, administrative determinations, circular letters, bulletins, or any other pronouncements of general application promulgated by the CRIM. The assessed value will continue to apply for future years until the CRIM conducts its own regular assessment. Once the CRIM conducts its assessment, such evaluation will apply thereafter for all legal purposes.

Exempt entities under the Puerto Rico Tax Incentives Act of 1998, Act No. 135 of December 2, 1997, and the Puerto Rico Development Economic Act, Act No. 73 of May 28, 2008, will have the option to perform the self-assessment and to pay the corresponding tax pursuant to Section 7 of Act No. 73 or pursuant to the provisions of House Bill No. 2214. It appears that the election to self-assess under House Bill No. 2214 is more beneficial to the taxpayer. However, we need to wait until the CRIM publishes the assessment guidelines since "the devil is in the details."

House Bill No. 2214, although approved by the House, was not approved by the Senate during the last legislative session. However, it is expected that House Bill 2214 will be included in a future special session which may be called for by the Governor, or during the next legislative session. ✦

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Javier G. Vázquez-Segarra was one of the speakers in the labor and employment seminar "Human Resources: Adding Value to your Organization," offered by Puerto Rico Chamber of Commerce on October 29, 2009. ✦

The following attorneys joined the Firm: **José M. Biaggi-Landrón** as of counsel. Mr. Biaggi concentrates his practice in various areas of commercial and banking transactions such as: secured transactions, litigation, real estate law, complex acquisitions and their financing for various industries such as hospitals and shopping centers. Mr. Biaggi is also an adjunct professor in the University of Puerto Rico School of Law.

José J. Fas-Quiñones, also as of counsel, specializes in labor and employment law matters. Mr. Fas held the position of Assistant Secretary, Human Resources and Labor Affairs, for the Puerto Rico Treasury Department. **Michelle L. Holley-Vázquez** and **María I. Ramos-Artunduaga** also joined our Labor and Employment Department. Mrs. Holley clerked for the Puerto Rico Supreme Court Chief Justice Federico Hernández-Denton, and later for the Associate Justice Hon. Efraín Rivera-Pérez, before joining the firm. Ms. Ramos worked as a law clerk in our firm and became its latest associate after approving the most recent bar examination. ✦

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