

# LABOR PERSPECTIVES

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## LIABILITY ON EMPLOYER FOR NOT TAKING APPROPRIATE CORRECTIVE MEASURES TO ERADICATE AND PREVENT SEXUAL HARASSMENT IN THE WORKPLACE

The Supreme Court of Puerto Rico recently issued an opinion regarding an employer's obligation to take immediate and appropriate corrective measures once put on notice of sexual harassment acts between its employees. In Albino Agosto v. Angel Martínez, Inc., 2007 T.S.P.R. 111, a majority of the Supreme Court held that the corrective measures taken by an employer, although immediate, were not appropriate to effectively eradicate and prevent their recurrence. Accordingly, the Supreme Court upheld the imposition of liability on the employer under Act No. 17 of April 22, 1988 ("Act No. 17").

In this case, Ms. Ada Iris Albino ("Albino") brought a claim against her former employer and a former co-worker pursuant to Act No. 17. She alleged that her employer failed to take corrective measures in relation to acts of sexual harassment. The Court of First Instance found that Albino's co-worker incurred in conduct which constituted sexual harassment. It also concluded that her employer, after being put on notice of such conduct, failed to take corrective measures to correct the situation and prevent its recurrence. The Court of First Instance imposed joint liability on Albino's former

employer and former co-worker under Act No. 17. The Puerto Rico Court of Appeals upheld the lower court's determination; the defendant corporation filed a certiorari petition before the Puerto Rico Supreme Court.

The facts were the following: Albino worked for a retail store called Nineteen Ninety Five in Corozal. She was a manager until her resignation in March, 1997. Nineteen Ninety Five was owned by defendant corporation Angel Martínez, Inc., whose president was Mr. Angel Martínez ("Martínez"). Mr. Ramón Orsini ("Orsini") was the corporation's accountant and Albino's co-worker. Albino and Orsini maintained a cordial working relationship and saw each other during Orsini's weekly visits to Albino's store and at monthly manager meetings. The relationship between Albino and Orsini changed during the month of August of 1996. Albino alleged that Orsini engaged in the following conduct on more than one occasion: (1) touching Albino's hands; (2) staring at Albino's body parts and making inappropriate remarks, while touching his private parts; and (3) asking Albino when she was going to kiss him. Albino also alleged that sometime during

the month of September of 1996, Orsini invited her to spend the day with him in Caguas.

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Albino met with her supervisor during October of 1996; she informed him of Orsini's inappropriate behavior, not only towards her but also towards another female employee of the store. Albino's supervisor notified Martínez immediately. The following day, Martínez met personally with Albino and she reiterated to him what she had previously told her supervisor. Martínez acknowledged that the allegations against Orsini were serious and warranted his termination from employment.

Shortly after meeting with Albino, Martínez met with Orsini to inform him of the sexual harassment complaint brought against him and asked for his resignation. Orsini denied any wrongdoing and did not tender his resignation. Martínez did not discipline or terminate Orsini. Instead he gave instructions to Orsini to the effect that all matters related to the Corozal store, where Albino worked, including all telephone calls, would be channeled through Martínez or his secretary. Martínez assumed that his instructions would put an end to the situation by effectively preventing all contact between Orsini and Albino; however, Martínez did

*The Supreme Court held that the corrective measures taken by the employer, although immediate, were not appropriate to effectively eradicate and prevent the recurrence of sexual harassment*

not follow-up on the corrective measures. A few months after Martínez' instructions, Orsini resumed his prior behavior towards Albino.

The Supreme Court agreed with the lower courts in finding that Martínez had failed to take appropriate measures to eradicate and prevent the recurrence of sexual harassment acts in the workplace. The Supreme Court defined immediate and appropriate measures as those which will reasonably and promptly put an end to acts of sexual harassment and will effectively prevent their recurrence. According to the Court, the recurrence of sexually harassing conduct, will not be determinative of the reasonableness of an employer's corrective measure. Nevertheless, it will be a factor in determining whether the corrective measures were reasonable.<sup>1</sup>

The Supreme Court held that even though Martínez acted immediately, the corrective measure taken was not appropriate to reasonably and effectively correct the situation. The Court reasoned that the corrective measure taken did not prevent Orsini from visiting Albino's store on subsequent occasions, did not prevent Orsini from resuming his telephone conversations with Albino, and did not prevent Orsini from attempting to kiss Albino during one of his subsequent visits to Albino's store. In its decision, the Court hints that these flaws may have been avoided or prevented through direct and effective supervision of the situation and by following-up on the corrective measures which were imposed. After Martínez gave his instructions to Orsini, he maintained no further communication with Orsini, Albino or Albino's supervisor in order to inquire or verify if further acts of sexual harassment had occurred.

Moreover, Martínez had failed to notify Albino of the nature or extent of the corrective measure which was taken.

According to the Supreme Court, when an employer takes a measure to correct or prevent sexual harassment, it must provide notice to the aggrieved employee. According to the Supreme Court, this is particularly important where the alleged harasser remains in the workplace, as was the case with Orsini.

In reaching its conclusion, the Supreme Court also paid special attention to the Company's manual; it concluded that the corrective measure taken by Martínez did not comply with the language and requirements contained in the manual. According to the manual, Martínez should have disciplined Orsini, yet failed to do so. The Supreme Court was quick to point out that Act No. 17 does not establish termination from employment as the immediate and appropriate corrective measure to be taken by employers. However, the Court made it clear that the instructions given by Martínez, without more, were not appropriate to eradicate and prevent the recurrence of sexual harassment acts in the workplace.

This Supreme Court decision is a reminder to employers. They should evaluate and consider carefully the actions or measures they will implement upon learning of the occurrence of sexual harassment acts in the workplace. Employers should follow-up on their measures. The goal is to eradicate and prevent the recurrence of sexual harassment incidents. These obligations should not be taken lightly. *M&V*

<sup>1</sup> The Supreme Court also mentioned that in determining whether an employer has taken an immediate and appropriate corrective measure after being notified of the occurrence of sexual harassment acts, courts should evaluate if the employer was complying with the obligations imposed by Act No. 17, such as expressing its policies to its supervisors and employees, creating awareness of the prohibition of sexual harassment, giving sufficient publicity in the workplace to such policies and establishing adequate and effective internal procedures for the handling of sexual harassment complaints. Although Martínez had policies and internal procedures in place for the handling of sexual harassment complaints, the Court found that he did not create sufficient awareness with regards to the contents of its own policies and the prohibition of sexual harassment in the workplace.



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# IN A 5 TO 4 DECISION, THE UNITED STATES SUPREME COURT FINDS SEX DISCRIMINATION CLAIM TO BE UNTIMELY

In the case of Ledbetter v. The Goodyear Tire & Rubber Company, Inc., 127 S.Ct. 2162 (May 29, 2007), the Supreme Court of the United States recently affirmed a decision of the U.S. Court of Appeals for the Eleventh Circuit dismissing Ledbetter's claims under Title VII of the Civil Rights Act of 1964. They were time barred.

Ledbetter, a retired employee, brought an action before the Equal Employment Opportunity Commission ("EEOC") alleging that during the course of her employment she was given poor evaluations because of her sex. As a result of the evaluations, her salary increases were lower than they should have been, thereafter affecting subsequent salaries and raises during her employment. She alleged that the subsequent paychecks and raise denials violated Title VII thus triggering in each case a new time period to initiate her charge at the EEOC.

The Court held that an employee who wishes to challenge the employer's alleged discriminatory decision or act must file a charge with the EEOC within the period specified in Title VII (either 180 or 300 days) after the alleged discriminatory employment act occurred. The time period runs from the day the alleged intentional discriminatory act occurred, and not from the date the effects of the practice were felt by the employee. If the employee does not submit the charge within the specified time period, he/she may not challenge the practice in federal court. The challenged specific practice must be identified when filing the charge with the

EEOC in order to determine whether it was challenged on time.

Citing Justice Stevens in the previous opinion of United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977), Justice Alito, who delivered the Ledbetter opinion, stated: "A discriminatory act which is not made the basis for a timely charge... is merely an unfortunate event in history which has no present legal consequences."

Justice Alito was joined in the decision by four other Justices. The other four dissented.

Considering the specific factual background of the Ledbetter case, we must bear in mind that the employer violates Title VII whenever it issues paychecks using a discriminatory pay structure. But when an employer issues subsequent paychecks based on a system which is not discriminatory, even when the subsequent paycheck amounts are adversely affected by previous discriminatory practices, those future paychecks do not constitute new violations in order to restart the time period to file the EEOC charge.

The Court affirmed its previous holding in National Railroad Passenger Corporation v. Morgan, 536 U.S. 101 (2002), when it expressed that the time for filing a charge with the EEOC commences when the "discrete act" of discrimination occurs. In conclusion, the Court explained that a "pay-setting decision is a discrete act that occurs at a particular point in time" and therefore the period for filing starts when the act occurs. The Court, as in Morgan, distinguished between a "discrete act" of discrimination, which in itself constitutes

a separate unlawful practice that occurs at a distinct point in time, and a hostile work environment, which comprises a series of harassing acts which create an environment but do not occur at a particular moment and are not actionable on their own.

Therefore, the Court rejected the proposition that: "...an employment practice committed with no improper purpose and discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period."

The Court also concluded that Ledbetter's claims were not supported by analogies to the Equal Pay Act, the Fair Labor Standards Act, the National Labor Relations Act, or policies giving special treatment to pay claims. **M&V**

*The time period to file a charge with the EEOC runs from the day the alleged intentional discriminatory act occurred, and not from the date the effects of the practice were felt by the employee*



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# FINAL HIPAA NONDISCRIMINATION AND WELLNESS PROGRAM RULES FOR GROUP HEALTH PLANS

On December 13, 2006, the United States Departments of the Treasury, of Labor, and of Health and Human Services issued final nondiscrimination and wellness program regulations. These regulations are in accordance with the Health Insurance Portability and Accountability Act (“HIPAA”). The final regulations became effective February 12, 2007; they apply for plan years beginning on or after July 1, 2007.

The rules prohibit group health plans and issuers of health insurance coverage from establishing rules for eligibility<sup>1</sup> that discriminate against plan participants and their beneficiaries (spouses and dependent children). The eligibility rules may not be based on the following “health factors:” (1) health status; (2) medical condition (including both physical and mental illnesses); (3) claims experience; (4) receipt of health care; (5) medical history; (6) genetic information; (7) disability; and/or (8) evidence of insurability<sup>2</sup>.

According to HIPAA nondiscrimination rules, a group health plan or insurance issuer is not required to provide coverage for any particular benefit. However, benefits provided under a plan must be uniformly available to all similarly situated individuals. Likewise, any restriction on a benefit must apply uniformly to all similarly situated individuals and must not be directed at individual participants based on any health factor.

Thus, for example, a plan or issuer may limit or exclude benefits in relation to

a specific disease or condition, limit or exclude benefits for certain types of treatments or drugs, or limit or exclude benefits based on a determination of whether the benefits are experimental or not medically necessary. The benefit limitation or exclusion is valid only if it applies uniformly to all similarly situated individuals and is not directed at individual participants based on any of the participants’ health factors.

In addition, a plan or issuer may impose annual, lifetime, or other limits on benefits. It may also require payment of a deductible, co-payment, coinsurance, or other cost-sharing requirement. All of this may be done if the limit or cost-sharing requirement applies uniformly to all similarly situated individuals, and is not directed at individual participants based on any of their health factors.<sup>3</sup>

## Specific Rule Relating to the Source-of-Injury Exclusion

A group health plan cannot exclude an individual from plan eligibility because that person engages in certain recreational activities, e.g., motorcycle riding. However, benefits for a particular injury can be excluded based on the “source-of-injury.” For example, motorcycle riders are eligible to participate in a plan, but injuries sustained in a motorcycle accident may be excluded.

There is an exception to this exclusion: when the injury results from an act of domestic violence or from a physical or a mental medical condition. In the above example, if the motorcycle rider

lost control of the bike because he had an epileptic seizure, the injury would have to be covered because it resulted from epilepsy, a medical condition.

## Similarly Situated Individuals

A plan or issuer may treat participants as two or more distinct groups of similarly situated individuals. This treatment is allowed if the distinction between or among the groups of participants is based on a *bona fide* employment-based classification. The classification must be consistent with the employer’s usual business practice. Examples of such classifications include full-time versus part-time status, different geographic locations, membership in a collective bargaining unit, date of hire, length of service, current employee versus former employee status, and different occupations.

In addition, beneficiaries may be treated differently based on any of the following factors: a *bona fide* employment-based classification of the participant through whom the beneficiary is receiving coverage; the relationship to the participant (spouse or dependent children); marital status; and/or with respect to children, age or student status.

However, a classification based on any health factor is not normally a *bona fide* employment-based classification. Nevertheless, it is *bona fide* if the purpose of the classification is to provide favorable treatment to individuals with adverse health factors.<sup>4</sup>

### Nonconfinement and Actively-at-work Provisions

A group health plan cannot include so-called “nonconfinement clauses.” These are rules which establish eligibility or set premiums or contribution rates based on whether an individual is confined to a hospital or other health care institution.

Also, normally plan provisions that establish a rule for eligibility or set premium or contribution rate based on whether an individual is “actively-at-work” are prohibited. Nevertheless, if the plan defines “actively-at-work” to include those who are not at work because of a health factor, the rule is permitted. The only other exception which is allowed is that a plan may require an individual to begin work for the employer sponsoring the plan before coverage becomes effective. This, however, provided that such a rule for eligibility applies regardless of the reason for the absence.

### Wellness Programs

The final rules define a wellness program as “any program designed to promote health or prevent disease.” In order to be subject to these rules, the wellness program must be based on an individual satisfying a standard related to a health factor to obtain a reward. If none of the conditions for obtaining a reward is based on an individual satisfying a health-related standard (for example, the program is measured merely by participation and not the end result), the program would not be subject to these rules.

Examples of wellness programs that are not based on a health factor are programs that reimburse cost of membership in a fitness center; a diagnostic testing program that provides a reward for participation and does not base any part of the reward

on outcomes; a program that reimburses employees for smoking cessation classes without regard to whether the employee stops smoking; or a program that rewards employees for attending a monthly health education seminar.

According to the final rules, if an employer’s program offers a reward to an employee for achieving a health standard, the wellness program must meet the following five requirements:

1. **Amount of Reward** - The total reward for the wellness program, coupled with the reward for other wellness programs under the plan, must not exceed 20% of the cost of employee-only coverage under the plan. When the plan offers family coverage, the regulations provide that the 20% limit applies to the entire family. In addition, if only the employee is eligible for the wellness program, the 20% limit must be based on the cost of individual coverage (even if the employee has family coverage). If other family members are eligible for the program, the 20% should be based on the cost of family coverage.
2. **Reasonableness Standard** - A program must be reasonably designed to promote health or prevent disease. A program will be “reasonable” if it has a reasonable chance of improving health or preventing disease, is not overly burdensome, is not a subterfuge for discriminating based on a health factor, and is not highly suspect in the method chosen to promote health or prevent disease.
3. **Opportunity to Qualify Once Per Year** - The plan must give participants the opportunity to

qualify for the reward at least once per year.

4. **Reasonable Alternatives** - The program must allow a “reasonable alternative standard” to any individual for whom qualifying is unreasonably difficult, due to a medical condition or medically inadvisable, to satisfy the otherwise applicable standard.
5. **Plan Must Disclose Reasonable Alternatives** - The plan must disclose the availability of an alternative standard in all plan materials describing the wellness program, unless the materials merely mention the program, without describing its terms.

Should you have any questions regarding these new rules, please contact any of the members of the Labor and Employment Law Practice Group’s ERISA and Welfare Benefits Practice Area. **M&V**

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1. Rules for eligibility include: enrollment, the effective date of coverage, waiting (or affiliation) periods, late and special enrollment, eligibility for benefit packages (including rules for individuals to change their selection among benefit packages), benefits (including rules relating to covered benefits, benefit restrictions and cost-sharing mechanisms such as coinsurance, co-payments and deductibles), continued eligibility, and terminating coverage of any individual under the plan.

2. Evidence of insurability includes conditions arising out of acts of domestic violence and participation in activities such as motorcycling, snowmobiling, all-terrain vehicle riding, horseback riding, skiing, and other similar activities.

3. Notwithstanding the above, HIPAA nondiscrimination rules forewarned us that there are other laws which may prohibit the exclusion of benefits. For example, plans that do not cover prescription contraceptives, but do cover other preventive treatments, violate Title VII of the Civil Rights Act because only women use prescription contraceptives.

4. HIPAA nondiscrimination rules allow plans to provide a more favorable treatment to those individuals with adverse health factors. For example, a plan that provides coverage to dependent children until the age of 21 could provide coverage to dependent children beyond age 21 if they are disabled.



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# DO NOT UNDERESTIMATE LITIGATION HOLD LETTERS: GENERAL GUIDELINES FOR EMPLOYERS IN THE ELECTRONIC DISCOVERY ERA

As part of any litigation or investigation proceeding, a party is usually requested to produce or permit inspection of relevant evidence. The defense in any such proceedings heavily depends on the evidence that is available. Not only is protecting relevant evidence crucial to a successful disposition of a claim, but it could also avoid the imposition of liability, high monetary sanctions, or other serious adverse consequences. Accordingly, the timely identification and preservation of relevant evidence is essential. However, this process may prove difficult due to the current trend of using ever-changing electronic means and devices to communicate and store information, more so in the absence of an efficient policy addressing the same.

A litigation hold letter is a useful tool that could assist employers in properly identifying, segregating, and preserving relevant evidence in this electronic discovery era. It can be described as a communication issued as a result of current or anticipated litigation, audit, investigation or other such matter that suspends the routine destruction of records. Consequently employers must learn how and when to use it.

Employers should understand that the obligation to preserve evidence does not only arise when litigation commences, but rather when a party has notice that certain evidence may be relevant to facts that could result in litigation or should have known that such evidence might be relevant to a threatened litigation. Thus, employers should be mindful that oftentimes the event that triggers the duty to preserve evidence takes place prior to the filing of a lawsuit. After such triggering event, a party is required to make reasonable and good faith efforts

to identify, segregate, and protect any relevant evidence from destruction.

For instance, in some cases where the court has found that evidence was destroyed negligently (not intentionally), it has applied an inference that such evidence would have reflected negatively on the employer. On the other hand, in some cases where intentional destruction or “spoliation” of evidence has been proved, the court has imposed, among other measures, multi-million dollars in sanctions. The consequences may vary depending on the particular circumstances of the case.

In order to avoid the potentially devastating consequences of not properly preserving evidence, including electronically stored information (“ESI”), employers should take into consideration the following recommendations when drafting or reviewing a litigation hold letter:

## **Timeliness**

As previously stated, the duty to preserve evidence is triggered when a party knows or should have known of a pending or threatened litigation or investigation. A party may reasonably anticipate litigation when, for example, it is on notice of a credible threat of litigation. At that moment, it is important to identify any relevant evidence and the individuals who should be on notice of such circumstance. For instance, that a production worker instead of the general manager of the company knows of a threatened litigation would not necessarily be considered as a triggering event.

The duty to implement measures to preserve evidence lies on high

management officials and the delegation of such duties to lower level employees will not necessarily avoid liability if the evidence is not properly preserved.

## **Identify and inform the relevant audience**

Employers should avoid spreading confidential and highly sensitive information to employees who were not involved in the events giving rise to a pending or threatened litigation. For this reason, employers must identify who the relevant audience is as soon as possible in order to specifically instruct them of their duties to preserve evidence and ask for their cooperation. The audience is comprised of those individuals who have knowledge of the facts related to the pending or threatened litigation or investigation. Needless to say, the audience should always include the personnel from the information technology department that are responsible of maintaining the company’s computer / electronic system. Finally, an employer must make certain that all the relevant audience has notice of the duty to preserve evidence.

## **Be clear, specific, and concise**

An employer must ensure that the relevant employees carefully read and understand the contents of the litigation hold letter. For that reason, the letter should contain all necessary information and yet be kept as simple as possible. First, each employee should understand his/her role in protecting evidence. For this reason, the information to be preserved and the measures that should be taken to accomplish this goal have to be clearly specified. For example, an employer should indicate the subject-matter and

a brief explanation of the pending or threatened litigation/investigation. Second, the employer should also provide some general guidance as to the type of ESI, data, sources, documents, or tangible things that may contain relevant information to ensure that its employees understand their duties and are able to identify potential places where the information might be located. Third, the employees must comprehend the legal duty to preserve all the information they already have as well as all the information they may obtain or create in the normal course of business. Fourth, they must also understand the serious legal consequences in failing to do so, whether intentionally or unintentionally.

#### Give proper follow-up

Employees must understand that their duty to identify and protect information will be ongoing until they receive specific instructions to the contrary from the same person who sent the litigation hold letter. To confirm that employees are complying with their duties, the employer must routinely follow up and inquire as to affirmative steps taken. Employers should also make it clear to each employee that if any doubt or concern arises as a result of the litigation hold letter, that he/she should immediately contact the individual(s) identified in the litigation hold letter as authorized to address any related issue. An employer may also periodically review the litigation hold letter and, if necessary, reissue it in its original or an amended version. Finally, employers should adapt the litigation hold letter to the particular circumstances of a case. For that reason, generic or template form letters should be avoided.

By following the above general guidelines, an employer will minimize any liability or exposure that may result from the inadvertent mishandling or destruction of relevant evidence, specially ESI.

# PRACTICE GROUP NEWS

**Luis R. Amadeo-Carrón** was promoted to Income Member, position formerly known as Income Partner, of McConnell Valdés LLC in June, 2007. Mr. Amadeo first joined McConnell Valdés in 1997 and served until 2001. Prior to returning as counsel to the Labor & Employment Practice Group in 2006, Mr. Amadeo practiced Commercial Litigation and Employment Law in the State of Florida from 2002 until 2006.

**Francisco (Frankie) Chévere**, Vice-Chairman of the Labor and Employment Practice Group, and **Radamés (Rudy) A. Torruella**, two of our Capital Members, recently attended the Fall Conference of CUE, Inc. (formerly known as "Center for Union-Free Environment") held in Colorado Springs, Colorado. CUE, Inc. is an organization of H.R. professionals dedicated to the development of strategies and policies directed to fostering positive employee relations and union-free environments in workplaces across the United States. At said Conference both Rudy and Frankie participated in the annual meeting of CUE, Inc.'s Labor Lawyers Advisory Committee ("LLAC") of which Rudy has been a member for many years. McConnell Valdés LLC is the only law firm from Puerto Rico represented in said prestigious organization.

**Zahira Colón Collazo** joined McConnell Valdés LLC's Labor & Employment Law Practice Group in October, 2007. Ms. Colón graduated from the University of Puerto Rico School of Law in May, 2007. She obtained a bachelor of science degree in biology, *magna cum laude*, from the University of Puerto Rico, Bayamón Campus, in 2003.

**Anne Michelle Galanes** joined McConnell Valdés LLC's Labor & Employment Law Practice Group in October, 2007. Ms. Galanes graduated from the University of

Puerto Rico School of Law in May, 2007. She obtained a bachelor of science degree in Business Administration from Boston University in 2003.

**Alfredo Hopgood Jovet**, chairman of McConnell Valdés LLC's Labor & Employment Law Practice Group, was a speaker at a seminar hosted by the Association of Labor Relations Practitioners of Puerto Rico on September 21, 2007. The Seminar, titled, "From a Federal Judge's Bench and the Litigation Practice," covered new tendencies in employment discrimination, retaliation legislation and case law. The Hon. District Court Judge Daniel Domínguez provided the judge's viewpoint from the bench. **Radamés (Rudy) A. Torruella** was also a speaker in the same seminar.

**Luis F. Llach Zúñiga** joined McConnell Valdés LLC's Labor & Employment Law Practice Group in August of 2007. Mr. Llach-Zúñiga is a graduate of the University of Puerto Rico School of Law and holds a bachelor's degree from the University of Virginia. Mr. Llach Zúñiga served as a student law clerk in the U.S. District Court for the District of Puerto Rico for the Hon. Judge Daniel Domínguez. Mr. Llach Zúñiga has several years' experience in the field of Labor & Employment Law.

**James D. Noel III** and **Iraida Diez** were speakers at a Round Table Seminar hosted by the Labor & Employment Law Practice Group. The Seminar, which was held at McConnell Valdés LLC's facilities on September 13, 2007, was attended by over 50 of our clients and focused on whistleblowing and retaliation in the work place. This is the first of two scheduled Round Table Seminars of the Practice Group before the end of the year, the second of which is to be held in November. These Round Table Seminars are provided free of cost to clients and friends of the Firm. **M&V**

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