The Year in Review

An Overview of Recent Developments in Labor and Employment Law

by

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NEWS FOR EMPLOYERS

I. INTRODUCTION

Signs of recovery in the economy have appeared but this is still a far cry from the robust business climate of a few years ago. As a consequence, employers are cautious about hiring, compensation, benefits and otherwise expanding the bottom line. In a time of great uncertainty employers are also subject to more and more workplace laws and regulations. Greater numbers of claims from employees and enforcement actions from government agencies have contributed to the sense of tension and risk avoidance in the modern workplace. As employers proceed, they do so with great care and caution. The tools and resources employers use to navigate these issues are more important than ever before. These materials cover many of the more significant developments in this increasingly complex and contentious area of the law.

II. WORKPLACE DISCRIMINATION

A. Overview

The trends we first saw develop in 2008 and 2009 continued in 2010 with yet another increase, on a national and local level, in the number of charges of discrimination filed with the EEOC and the New Hampshire Commission for Human Rights. In 2009 the total number of charges filed with the EEOC was 93,277. While the numbers were down a bit in FY 2009 from the all-time high of 95,402 charges filed in FY 2008, in FY 2010 the charge numbers jumped to a new record high of 99,922.

In New Hampshire, FY 2010 also saw an increase in the number of charges filed with the Human Rights Commission. In FY 2009 there were a total of 208 employment-related charges filed with the Commission. In FY 2010 that number increased to 257 charges. While that total was below the totals from the previous eight years, it is still a significant number given the limited staff and resources of the New Hampshire Commission.

While sex harassment is a familiar concept in the workplace (perhaps because of the well-developed body of law and the fact that it is now a common topic in many management training programs), it is no longer the leading or most common form of discrimination complaint filed each year in New Hampshire on the national level, with the EEOC. Sex harassment claims are still common but they have been surpassed by other workplace discrimination claims. In FY 2010, the most common charge filed with EEOC was retaliation (36,258 charges filed). That was an increase of nearly 3,000 charges in one year and that total is more than double the number of retaliation claims filed with EEOC in FY97. Race discrimination claims followed with 35,890 charges filed with EEOC in FY 2010. Sex harassment and other gender claims represented nearly one-third of all charges filed with 29,029 charges filed: the most ever filed in one year with EEOC. Disability (25,165) and age discrimination claims (23,264) rounded out the top slots with EEOC in FY 2010.

In New Hampshire, the statistics for FY 2010 were a bit different. For the first time (perhaps attributable to national trends, the amendments to the ADA and/or the amendments to RSA 354-A) disability discrimination claims (88) represented the greatest number of charges, in one category, filed with the New Hampshire Commission. Retaliation claims (82) followed the national trend and were second highest number of the charges filed in New Hampshire last year. The next most common claim was sex (88: 37 harassment and 24 pregnancy). Age (46), color/race (24), and national original (9) were the other top claims. Sexual orientation (6), religion (1) and marital status (1) continued to be the most infrequently filed claims of employment discrimination in New Hampshire.

The following are some recent and interesting discrimination cases and agency developments:

B. <u>Recent Court Decisions</u>

1. UNITED STATES SUPREME COURT CASES

a. Retaliation's Reach Under Title VII Extended: Thompson v. North American Stainless case.

Employees who are victims of third-party retaliation can state a claim under Title VII of the Civil Rights Act of 1964. This was the finding in the recent decision by the U. S. Supreme Court in Thompson v. North American Stainless LP, U.S., No. 09-291 (1/24/11), 111 FEP Cases 385 (U.S. 2011).

Eric Thompson and his fiancée Miriam Regalado were both employed by North American Stainless. Three weeks after receiving notice that Regalado had filed a charge of discrimination with the EEOC, the company fired Thompson. Thompson filed his own EEOC charge and sued the company, claiming he had been fired in retaliation for his fiancées EEOC complaint. The company's motion for summary judgment was granted by the district court and affirmed by the 6th Circuit Court of Appeals. The appellate court held Thompson was not protected by the anti-retaliation provisions of Title VII, because he did not personally engage in protected activity on his own behalf or on behalf of his fiancée.

The Supreme Court unanimously reversed, holding that the anti-retaliation provisions of Title VII must be broadly construed to cover any employer action that might dissuade a worker from making a discrimination charge. The Court reasoned it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

The ruling does not identify a fixed class of relationships which may maintain a third-party reprisal claim, but stated the "a mild reprisal on a mere acquaintance will almost never do so."

b. Cat's Paw Theory of Liability under USERRA: Staub v. Proctor Hospital case. *Buyer [Employer] Beware!*

The Supreme Court recently allowed the theory of "cat's paw" liability under the Uniform Services Employment and Reemployment Rights Act (USERRA). Staub v. Proctor Hospital, U.S., No. 09-400 (3/1/11), 190 LRRM 2257, 111 FEP Cases 993 (U.S. 2011). In this case, Vincent Staub, an Army Reservist, was allowed to proceed with his lawsuit, because he had evidence that his two immediate supervisors expressed anti-military bias and contributed to an unbiased human resources manager's decision to discharge him. The Seventh Circuit had granted summary judgment for the hospital, ruling that an employee had to prove the immediate supervisors had a "singular influence" on the unbiased decision maker in order to succeed on a cat's paw theory.

In its majority opinion by Justice Antonin Scalia, the Court concluded that a successful application of the cat's paw theory required evidence that a biased supervisor's discriminatory intent was a "proximate cause" of the employee's termination. This was required, even if an unbiased employer representative made the ultimate discharge decision.

Justices Clarence Thomas and Samuel Alito said an employer would not be liable if the unbiased official who makes the termination decision conducts "a reasonable investigation" and does not just "rubberstamp" the biased supervisor's recommendation. Here, the facts indicated the decision maker took the biased supervisors' statements at face value.

Justice Elena Kagan recused herself from the case.

2. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) ENFORCEMENT CASES

a. Use of Credit History Alleged to Cause Disparate Impact on Black Applicants: Kaplan Higher Ed Sued by EEOC.

Employers' use of credit histories in the hiring process has been cyclical over the last forty years. Recently, EEOC has raised the issue of whether that use in the hiring process may constitute race discrimination, as it tends to screen out a disproportionate number of black applicants.

In December 2010 EEOC filed suit against Kaplan Higher Education Corp. in the U.S. District Court of the Northern District of Ohio, Civil Action No. 1:10-cv-02882. The suit alleges that Kaplan engaged in a pattern and practice of discrimination by refusing to hire a class of black applicants nationwide based on their credit history. EEOC claims that Kaplan has no job-related or business necessity for using such information as a screening tool. This suit also follows EEOC's decision to return to pursuing systemic discrimination cases.

b. Random Alcohol Testing as a Violation of the Americans with Disabilities Act: EEOC sues U.S. Steel over Nationwide Drug Testing Policy.

EEOC sued U.S. Steel over its nationwide policy requiring random alcohol testing of probationary employees. U.S. District Court for the Western District of Pennsylvania, Civil Action No. 2:10-cv-01284. The requirement for testing was in its union contract and did not require a reasonable basis to believe that an employee had violated the company's drug and alcohol policy.

The suit arose out of an incident where the company tested a probationary employee. The test showed a false positive result for alcohol. The employee told the nurse who administered the test that she had not drank any alcohol in the past month and that her medical condition might have caused or contributed to the positive test result.

EEOC used this case to attack the company's national policy. Alcohol testing is considered a medical inquiry/test, so the company would need to show the test was job-related and it had a business-necessity for each test.

3. NATIONAL LABOR RELATIONS BOARD CASES

a. NLRB Challenged Employers Discipline of Employee for Facebook Posting: Limits on Employer discipline even in non-union setting?

American Medical Response (AMR) discharged a union employee for disparaging remarks she made on her Facebook page about her supervisor. AMR claimed the remarks violated its written policy against making disparaging and defamatory remarks about the company, supervisors or employees. A Regional Office of the National Labor Relations Board issued a complaint against AMR alleging that the policy interfered with employees' Section 7 rights to engage in concerted activity, i.e., to discuss terms and conditions of employment, and the discharge for violating the illegal rule became illegal. The case settled right before trial, so it is not clear what the NLRB would have ruled.

Another Regional Office has issued a similar complaint in February 2011 against Student Transportation of America for the same kind of policy. The complaint contains no allegation of application of the policy, so the case is on the policy alone.

The advice section of the General Counsel's office of the NLRB issued a letter in 2009 in a Sears case over a social media policy. It concluded the policy did not violate the NLRA, because the policy was written in a way that would not interfere with employees' rights to discuss terms and conditions of employment, i.e., Section 7 rights. The policy listed prohibited conduct and included making defamatory comments about the company along with other conduct, such as violence and theft. The conclusion was that no employee would look at the list and assume that defamatory comments included comments about terms and conditions of employment.

b. The NLRB Lacked Jurisdiction to Decide more than 600 cases: New Process Steel v. NLRB case.

The U.S. Supreme Court held the NLRB had no authority to issue decisions in a two-year period where it had only two members. That was the High Court's decision in New Process Steel v. NLRB, 130 S.Ct. 2635, 188 LRRM 2833 (2010). The Board normally has five members with three being a quorum. In most cases, three members issue decisions on cases. In 2007 Congress failed to fill vacancies, but the NLRB continued to decide cases with two members. The Board has four members now due to recess appointments.

Only about 75 of those 600 cases were appealed to a circuit court of appeals or the Supreme Court. The Board must reconsider these cases, but there is a question about the other cases. The assumption is the charged parties have remedied the violations, so there is no real impetus to challenge the decisions, even if that were possible without a prior appeal.

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4. U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

a. After Seven Long Years – Settlement Agreement Bars a Retaliation Lawsuit: Galera v. Johanns case.

A knowing and voluntary waiver in a settlement concludes a seven year case. That was the decision of the First Circuit Court of Appeals in Galera v. Johanns, 08-2435 (7/14/10),109 FEP Cases 1289 (1st Cir. 2010). The case began in 2001 when Juan Galera claimed his employer, a federal agency, discriminated against him because of his national origin. He filed an internal complaint. In 2003 he claimed the agency retaliated against him for his claim of discrimination. In July 2004 he and his lawyer signed a Settlement Agreement waiving and releasing any claims prior to the agreement. A month later he filed a formal EEO complaint with the agency's Office of Civil Rights and then sued in 2006, two years and thirteen days after executing the settlement.

The 1st Circuit upheld the dismissal of the case. Precedent for upholding a release of rights required a knowing and voluntary release of any federal statutory rights, as shown by the totality of circumstances. The court looked only at the terms of the Settlement agreement, because Galera had not claimed an unknowing or involuntary release of rights. Therefore, the court only had to determine what rights he had given up in the terms of the Settlement Agreement.

The court held that the terms of the agreement clearly identified all the types of claims being released, i.e., any conduct by the employer prior to its execution. The term claims included any discrimination and retaliation claims that may have existed before that date.

The court set out the language of the agreement, which may assist in drafting these kinds of releases.

b. Unsuccessful Challenge to the Reasonableness of the Company's Sales Quota: Melendez v. Autogermana Inc. case.

A car salesman could not show the company's sales quota was pretext for discrimination. That was the decision in Melendez v. Autogermana Inc., 622 F.3d 46, 110 FEP Cases 832 (1st Cir. 2010). In that case Robert Melendez lost his job when he could not meet a new sales quota during the last 18 months of his employment. He had received sales awards during his ten years with the dealership. He claimed employees called him old man several times and a supervisor called him old lady, because he wore unstylish shoes.

The court went through the shifting-burden analysis. It refused to consider Melendez's failure to meet new sales quota at this stage of the analysis and held he had made a minimal showing of a prima facie case. The court then concluded the company showed a non-discriminatory reason for discharging him, i.e., failure to meet the quota. It found the statements to him of old man/woman to be stray remarks by non-decision makers and not evidence of age

discrimination. Finally, the court found no pretext. It rejected Melendez's contention that the goals were "unreal" and impossible to meet during the economic conditions. The court stated, "Autogermana's decision to adopt a new sales quota is a business decision that we may not question in an employment discrimination case," citing Mesnick v. General Electric Co., 950 F.2d 816,825, 59 FEP Cases 576 (1st Cir. 1991).

5. U.S. DISTRICT COURT OF NEW HAMPSHIRE

a. Ambiguous Statement by Employer that it Would Not Hire Transsexual who had Applied Previously as a Man: Cook v. PC Connection Inc. case.

A transsexual who was not hired lost this case because she was not truthful during the application process. That was the decision in Cook v. PC Connection Inc., 108 FEP Cases 723 (D.N.H. 2010). In that case Brianne Cook claimed sex discrimination under Title VII when the company failed to hire her for a sales job in 2006. This was the second time Cook had sought a job at the company. She had applied for a sales job in 2000 as Brian Cook, a male, but was not hired because he wanted to use the sales job as an entrée into a marketing job. In the application process in 2006 as Brianne Cook, she denied having applied before or when using another name.

The refusal to hire was described as being because she had applied before as a man. The court found this statement to be ambiguous. Cook lost the case, because she was untruthful in the application process and could not show the company had allowed this before.

6. OTHER INTERESTING CASES *OUTSIDE* NH AND THE 1ST CIRCUIT

a. Discrimination Against a White Employee Who Uses the *N-word*, When the Employer Did Not Discipline Black Employees for the Same Conduct: Burlington v. News Corp. case.

The African-American community continues to discuss whether the use of the *N-word* by blacks is acceptable, while not being acceptable for use by whites. The court in this case, Burlington v. News Corp., No. 09-1908 (1/10/11), 111 FEP Cases 439 (E.D. Pa. 2010), allowed a white employee to claim race discrimination after his employer discharged him for the same conduct it allowed from black employees: using the *N-word*. The court denied the employer's motion for summary judgment, holding than an employer may be liable for racial discrimination, if it punishes a white employee for using the racial epithet, but permits black employees to use the same term freely.

Thomas Burlington, a white TV news anchor in Philadelphia, used the *N-word* during a newsroom editorial meeting. In the discussion about the NAACP holding a symbolic burial for the "*N-word*", he asked, "Does this mean we can finally say the word [*N-word*]?" His use of the word upset many station employees and Burlington was suspended and ultimately terminated.

The district court permitted him to proceed with his allegation that his firing was race discrimination, even though the station claimed legitimate reasons for Burlington's termination,

i.e., chemistry issues and adverse publicity. Burlington claimed the employer knew of black employees using same word on two occasions and had not disciplined them. The court concluded that the station's decision to tolerate the use of the word by black employees, while forbidding Burlington from doing the same, showed that race factored into its decision to fire him.

This is an interesting case also, because the infrequent use of the *N-word* by white employees has been used as evidence of racial harassment against black employees. Courts have found that the word is so offensive to blacks when used by whites that pervasiveness is not required.

b. Employee's Messages via Company e-mail to Her Lawyer Do Not Create a Privilege and Can Be Used by the Employer (at least in California): Holmes v. Petrovich Development Co. case.

Petrovich Development had an e-mail policy notifying employees that the computers were company business only and the company could monitor the computers for compliance with policy. In addition, the policy clearly provided that employees had not right of privacy in any message or information.

Notwithstanding the policy, Gina Holmes used company e-mail to contact her attorney. The court analogized her use of company e-mail to talking in a loud voice to her lawyer in a company office with the door open. Her use of e-mail in violation of the policy showed she could not believe a third party would not see the communication, a factor necessary to claim privileged communications. Thus, the company was allowed to use the information to show she did not suffer emotional distress. *See* Holmes v. Petrovich Development Co., No. C059133 (1/13/11), 111 FEP Cases 424 (Cal. Ct. App. 2011)

c. Employer Has No Duty to Accommodate "Stressed" and "Anxious" Employee: At Least Not in this Case.

An employee who failed to reveal to his employer that he was under treatment for depression had no claim under the Family and Medical Leave Act when he is fired for excessive absenteeism. That was the decision of a federal appeals court in St. Louis. *See* Kobus v. The College of St. Scholastica, Inc., No. 09-1583 (8th Cir. June 21, 2010). The Court also ruled that the employee has no claim under the Americans with Disabilities Act or the Minnesota Human Rights Act for a failure to reasonably accommodate his disability when he did not inform the employer that an accommodation was needed.

Michael Kobus worked as a painter from August 1997 to January 2007 at the College of St. Scholastica. In mid-2005, due to personal and family problems, Kobus was diagnosed with depression and was prescribed the antidepressant Paxil. He did not disclose this to his supervisor, saying, instead, he was suffering from stress and anxiety.

In a November 2006 meeting, Kobus told his supervisor that he "may need time off from work to deal with his stress and anxiety because . . . everything was piling up…." The supervisor later put the College's "Request for Family Medical Leave" form in Kobus's mailbox at the College and told him he could apply for FMLA leave if he had a serious medical condition. In response, Kobus told his supervisor, "I didn't need any leave. Not just FMLA; any leave." Not long after that, the supervisor issued Kobus a written warning for excessive absenteeism. When Kobus was absent from January 15 to 18, 2007, he left his supervisor a message each day saying he was experiencing headaches and neck pain. He had no vacation or sick leave time available and his time card recorded he was "out sick."

On January 18, 2007, Kobus phoned his supervisor and asked for a "mental health leave" because of family problems. The supervisor again asked whether Kobus wanted to apply for FMLA leave. Kobus asked what was involved. The supervisor then told him, "[Y]ou'd have to get a doctor to sign some piece of paper to apply for the leave." Kobus replied, "I don't have a doctor."

The College didn't grant the leave. The supervisor told Kobus there was nothing available and the college would pay him two weeks' severance if he resigns. Kobus submitted a letter of resignation on January 19. He did not mention depression or his medication during his calls with his supervisor and did not refer to his condition or FMLA leave during an exit interview with the Associate Director on January 19.

Michael Kobus sued his former employer, alleging his forced resignation interfered with or denied his rights under the Family and Medical Leave Act and the College discriminated against him on account of disability in violation of the Americans with Disabilities Act and the Minnesota Human Rights Act.

The district court granted the College summary judgment, dismissing the claims. Kobus appealed.

Kobus alleged that the College violated the ADA and the MHRA when it denied a leave of absence to reasonably accommodate his depression disability.

To establish a claim of disability discrimination under the ADA, the complainant must inform the employer that an accommodation is needed. The Court agreed with the lower court that Kobus did not inform his employer he needed an accommodation. Accordingly, the Court dismissed Kobus's ADA claims. Claims under state disability laws generally proceed the same way as does a claim under the ADA and the Court did not address the Kobus state law claim separately.

Finally, Kobus argued that the Equal Employment Opportunity Commission's *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* supports his claim. The Enforcement Guidance instructs that an employee's request for time off because he is "depressed or stressed" is "sufficient to put the employer on notice that the employee is requesting reasonable accommodation." The Court rejected this argument, stating,

"None of our prior ADA notice cases cited the Enforcement Guidance as controlling . . . Instead, those cases apply the requirement in the regulations that an employee 'inform the employer that an accommodation is needed.'" Moreover, the Court pointed out that EEOC's Enforcement Guidance also states, "if the employee's need for accommodation is not obvious, the employer may ask for reasonable documentation concerning the employee's disability and functional limitations."

d. Individual in Remission Does Not Have to Be Substantially Limited to be a Covered Disability Under the ADA.

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) clarified the Americans with Disabilities Act in a number of ways. In one significant clarification, the ADAAA provides that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Based on that wording, a federal district court in the Northern District of Indiana has held that an employee with cancer is considered to be disabled under the act, even if his condition is in remission at the time of the alleged adverse action taken by his employer. Hoffman v. Carefirst of Fort Wayne, Inc., N.D. Ind., No. 1:09-CV-00251 (Aug. 31, 2010).

Stephen Hoffman worked as a service technician in 2007 when he was diagnosed with Stage III renal carcinoma and underwent surgery to remove his left kidney. Hoffman took time off work for surgery and recovery, and returned to his job on January 2, 2008, without restrictions or limitations. As a service technician, Hoffman delivered home medical devices such as wheelchairs and oxygen tanks to patients. Although his job description with Carefirst required him to be "available after hours and on call," his typical schedule was 9 a.m. to 5 p.m. on weekdays. Hoffman worked his regular schedule from January 2008 through January 2009 and did not miss significant time from work, other than for regular doctor visits.

On January 26, 2009, Hoffman met with his supervisor, David Long, who told Hoffman that the company had acquired a contract with a hospital system that would require service technicians, including Hoffman, to work substantial amounts of overtime each week, to do a night shift once a week and to be on call on weekends. Hoffman expressed concern that the required schedule would "put me in the grave." Hoffman then obtained a note from his doctor that limited him to "8 hours/day, 5 days/week."

Although Long initially told Hoffman that Hoffman would be fired, he then retracted that statement and said that the company would allow Hoffman to work a 40-hour week out of its Fort Wayne office. Hoffman objected to that, based on the two hours of additional commuting time that the new location would add to his workday. He told Long, "You have already fired me" and asked Long to communicate directly with Hoffman's attorney.

Hoffman then sued Carefirst under the ADAAA, alleging that his renal cancer – which admittedly was in remission at the time of his firing – was a disability. Carefirst argued that Hoffman was not disabled, based on the facts that Hoffman had returned to work without

restrictions, had worked a full schedule for a year and did not miss significant time from work during that period.

Because the ADAAA went into effect on Jan. 1, 2009, there is little case law under those amendments. However, based on the clear wording of the act (that disability includes impairments "in remission" if the impairment would be a substantial limitation when active), the court held that Hoffman did not need to show that he was substantially limited in a major life activity at the actual time of his termination, because his cancer would have substantially limited him had it been active. It therefore found him to be "disabled" for purposes of the ADAAA and denied Carefirst's motion for summary judgment.

e. Employment Agency Didn't Violate Title VII By Not Referring Woman in Khimar for Job.

Employment agency Kelly Services Inc. did not discriminate against a Muslim woman when it decided not to refer her to a client because she wears a khimar, the U.S. Court of Appeals for the Eighth Circuit held March 25 (Equal Employment Opportunity Commission v. Kelly Services Inc., 8th Cir., No. 08-3880, 3/25/10).

A khimar is a traditional garment worn by Muslim women that covers their hair, forehead, sides of the head, neck shoulders, chest, and sometimes extends down to their waist. Kelly's client, Nahan Printing Inc., operates an industrial plant with large machines that have fast-moving parts that pose a safety risk to workers wearing loose-fitting clothing or headwear. For that reason, Nahan has a strict policy that prohibits employees from wearing head war and loose-fitting clothes to work.

In keeping with Nahan's policy, Kelly did not refer Asthma Suliman, a Muslim woman who wears a khimar, to Nahan. The Equal Employment Opportunity Commission argued that Kelly violated Title VII of the 1964 Civil Rights Act by not making the referral.

In an opinion by Judge Lavenski R. Smith, the court said that the EEOC did not show that Nahan had a position available at the time in question, and, even if it did, Kelly had a legitimate, nondiscriminatory reason for not making the referral that was not shown to be pretext for discrimination.

Suliman wears her khimar as part of her religion. Kelly is an employment agency that places workers in temporary positions with its clients.

When Suliman came to Kelly for help finding work, it spoke to her about Nahan, which uses large machines to pull paper into printing presses using conveyor belts with rollers, sorting and jogging machines, binding machines, and packaging machines. Nahan requires all temporary workers to work on the assembly line, which places them near all the moving parts. For their safety, the company has a policy prohibiting loose-fitting clothing and headwear at work.

A staffing supervisor at Kelly considered Suliman's khimar to be headwear under Nahan's policy. Suliman told the supervisor that she could not remove the khimar because her religion required her to wear it.

Although Suliman was not offered a job with Nahan, she was offered at least seven other temporary jobs, which she turned down. The EEOC investigated Suliman's complaint and sued Kelly for religious discrimination under Title VII. The district court granted Kelly's motion for summary judgment.

On appeal, the EEOC argued that Title VII required Kelly to refer Suliman to Nahan without reference to the khimar unless Nahan could not reasonably accommodate Suliman's religious need to keep her head covered. It said that Kelly's Title VII obligations as an employment agency were independent of Nahan's generalized statements about safety precluding the possibility of a religious accommodation for a particular individual. It also argued that Kelly had a duty to investigate whether Nahan's generalized rules could be safely modified to accommodate Suliman.

It is illegal under 42 U.S.C. § 2000e-2(b) "for an employment agency to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of his…religion.

The court noted that an employment agency's referral obligation under the statute presented a question of first impression for it. Nevertheless, it adopted the same test used for cases involving alleged religious discrimination by an employer. Under that test, a plaintiff must show that she (1) had a bona fide religious belief that conflicted with an employment requirement, (2) that the employer knew about the conflict, and (3) that she suffered an adverse employment action. Once proven, the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse action, which the employee may then show is pretextual.

The only question in this case was "whether an employment agency's failure to refer an applicant may constitute an 'adverse employment action,'" the court said. Under Section 2000-2(b), "the plaintiff must show that the employment agency discriminated against her 'based on her [religion] in relation to referrals,'" it said, quoting a 1997 federal district court case.

The court determined that it was not required to "decide whether an employment agency's failure to refer a plaintiff for employment qualifies as an 'adverse employment' action to resolve this case. The EEOC has failed to show that Nahan had an available position to which Kelly could actually refer Suliman when she applied for available temporary work through Kelly."

Even if the EEOC established a prima facie case of religious discrimination, "Kelly would still be entitled to summary judgment, as it provided a legitimate, non-discriminatory reason for its failure to refer Suliman to Nahan for employment, and EEOC failed to show that this reason was pretextual," the court said.

The court explained that there is no reason to vary the burden-shifting scheme "simply because the claim is against an employment agency instead of an employer." Nevertheless, it said that the inquiry is complicated by 42 U.S.C. § 2000e(e)'s requirement that an employer accommodate a worker's religious beliefs unless doing so would create an undue hardship.

The court said that "the EEOC sued Kelly in its capacity as an 'employment agency,' not an 'employer,' and nothing in § 2000e(j) suggests that an 'employment agency,' in defending itself against a claim of religious discrimination, must demonstrate that *the employer* to which it would be referring the temporary worker would suffer an undue hardship if it had to accommodate that worker. Therefore, the only question before us is whether Kelly has provided a legitimate, nondiscriminatory reason for declining to refer Suliman to Nahan for employment."

The court continued by finding "Kelly's legitimate, nondiscriminatory reason for not referring Suliman to Nahan was Nahan's facially neutral, safety-driven dress policy prohibiting all employees – permanent and temporary – from wearing loose clothing or headwear of any kind," the court said. It also said that there was "no evidence in the record that Nahan's safety-driven dress policy was a pretext for discriminating against employees requiring religious discrimination or that Kelly had knowledge of such pretext." It added that "[n]othing in § 2000e-2(b) suggests that an employment agency should be held liable if the agency has no reason to believe that the 'employer's claim of bona fide occupations qualification is without substance.'"

7. REGULATIONS, GUIDANCE AND OTHER AGENCY DEVELOPMENTS

a. Long-Awaited Final ADAAA Regulations Issued by the EEOC

The U.S. Equal Employment Opportunity Commission (EEOC) last week announced the availability of the **final rule** implementing the Americans with Disabilities Act Amendments Act (ADAAA). This has been in the works for a few years. The online version was available on March 24, 2011 and the publication of the final rule was in *Federal Register* on March 25, 2011. The final rule was developed after the proposed rules were subjected to an extended review and comment period. The final rule represents a scaled back from the proposed rule in several respects, including the definition of "disability." This is good news for employers.

1. Nine Rules of Construction: The New Approach in the Final Rule

The proposed rule stated that certain impairments would consistently meet the definition of disability.

The final rule took a different approach. Instead of providing a list of impairments that would consistently, sometimes or usually not be disabilities, as was done in the proposed rule, the final regulations provided **nine rules of construction to guide the analysis of what constitutes a disability**. Applying these rules of construction, the EEOC provided examples of impairments that should easily be concluded to be disabilities.

The nine rules of construction are:

1. The term **"substantially limits"** shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the Americans with Disabilities Act (ADA). "Substantially limits" is not meant to be a demanding standard.

2. An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. **An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting**. But not every impairment will constitute a disability.

3. The primary focus in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. **Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.**

4. The determination of whether an impairment substantially limits a major life activity *still* requires an individualized assessment. **However, in making this assessment the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.**

5. The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical or statistical analysis. However, nothing prohibits the presentation of scientific, medical or statistical evidence to make such a comparison where appropriate.

6. The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. But the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

8. An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

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9. The six-month “transitory” part of the “transitory and minor” exception to “regarded as” coverage does not apply to the definition of an actual disability. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.

2. Regulations help with Disability Determination

While the final rule reinstated language to clarify that “disability” remains an individualized determination, the **regulations provided examples of impairments** that should “easily be concluded to be disabilities” under these rules of construction, including:

- **Deafness** that substantially limits hearing.
- **Blindness** that substantially limits seeing.
- **An intellectual disability** (formerly termed mental retardation) that substantially limits brain function.
- **Partially or completely missing limbs or mobility impairments** requiring the use of a wheelchair that substantially limit musculoskeletal functions.
- **Autism** that substantially limits brain function.
- **Cancer** that substantially limits normal cell growth.
- **Cerebral Palsy** that substantially limits brain function.
- **Diabetes** that substantially limits endocrine function.
- **Epilepsy** that substantially limits neurological function.
- **Human Immunodeficiency Virus (HIV)** infection that substantially limits immune function.
- **Multiple Sclerosis** that substantially limits neurological function.
- **Muscular Dystrophy** that substantially limits neurological function.
- **Major depressive disorder, bipolar disorder, post-traumatic disorder, obsessive compulsive disorder** and **schizophrenia** that substantially limits brain function.

The regulations provided that these impairments may substantially limit additional major life activities.

What the EEOC did was tie the presumptive list of disabilities to the bodily functions listed in the ADAAA but it's still close to a per se list. It is important to note that unlike the proposed rule, the final rule follows the language of the ADAAA.

3. Other Provisions

In addition, the final regulations state that major life activities include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions. Although not specifically stated in the proposed rule, the final rule states that major

bodily functions include the operation of an individual organ within a body system, such as the operation of the kidney, liver or pancreas.

In **questions and answers** on the final rule, the agency said that as a result of the ADAAA's recognition of major bodily functions as major life activities, it will be easier to find that individuals with certain types of impairments have a disability.

The final rule retains the existing familiar language of "class or broad range of jobs" and retains the concepts of "condition, manner or duration." Assessing the condition, manner or duration under which a major life activity can be performed may include consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. But the EEOC added that with respect to many impairments, including those that should easily be concluded to be disabilities, it may be unnecessary to consider the condition, manner or duration to determine whether an impairment substantially limits a major life activity.

b. EEOC Issues Guidance for Managing Employee Medical Information

Last year, the Equal Employment Opportunity Commission issued an advisory opinion that stated federal agencies and contractors must ensure that a medical records custodian (MRC) works in an environment that does not allow for unauthorized co-workers to have access to employee medical information. While the opinion (in response to an inquiry) addresses medical confidentiality under the Rehabilitation Act and applies specifically to MRCs, the same legal standards apply to private-sector employers under the Americans with Disabilities Act's medical confidentiality rules. The February 18, 2010, letter can be accessed at **http://www.eeoc.gov/eeoc/foia/letters/2010/ada-confident-medicalinfo.html**.

In that letter, the EEOC lists the following steps federal agencies should take to safeguard the confidentiality of employee medical information:

1. **Remind all employees that medical information is confidential** and only MRCs are authorized to have access to such information on a need-to-know basis.

2. Issue a **memorandum informing all employees that anyone who discusses another employee's medical information** with unauthorized persons or reads medical documents not intended for him or her **will be disciplined**.

3. To **ensure that other employees, including other MRCs, cannot overhear conversations about an employee's confidential medical information**, consider providing an office with a door that an MRC can use when he or she needs to discuss an employee's medical condition or history by telephone or in person.

4. A fax machine that is shared only by other MRCs also could be installed in this office, with the **door kept locked** except when in use by an MRC.

5. Remind MRCs to keep any employee medical information in a **locked file cabinet** in their cubicles or in a file cabinet in the shared office to which only other MRCs have access.

6. **Periodically audit policies and procedures to ensure sufficient measures are in place to guarantee the confidentiality** of employee medical information and protect against unauthorized disclosures.

The EEOC Office of Legal Counsel's letter on the confidentiality of medical information is not an official opinion of the Commission. However, it provides insights into the EEOC's view of potential safeguards to protect against unlawful disclosure of employee medical information under the ADA and Rehabilitation Act. Organizations with multiple departments reviewing employee medical information in connection with an injury or illness (such as departments for occupational health, risk management, HR and benefits) may have the greatest need to adopt recommended safeguards to protect employee medical information from unlawful disclosure.

c. EEOC Issues Proposed Criteria for ADEA Defense.

The EEOC has proposed redefining a key defense available to employers facing claims by employees under the Age Discrimination in Employment Act by adding criteria by which courts will be asked to take into consideration. Some employment law practitioners believe the proposed amendments, if adopted, would change radically the legal landscape by making it easier for plaintiffs to prevail on "disparate impact" age discrimination claims, often requiring employers to undertake time-consuming and costly studies prior to performing reductions in force.

Most claims of discrimination are brought under a "disparate treatment" model where the plaintiff alleges that the employer *intentionally* took adverse action against him because of his protected characteristic, such as race, sex or age. In 2005, the U.S. Supreme Court ruled that the ADEA allowed claims under a "disparate impact" theory, as well. Smith v. City of Jackson, 544 U.S. 228 (2005).

Under a disparate impact theory, an employer may be found liable for discrimination based on its use of facially neutral policies or criteria that disproportionately affect a particular protected class in an adverse way. In Smith, the employer implemented a new pay plan to attract and retain qualified city employees. The new pay practice resulted in younger employees receiving higher raises than older employees. The Supreme Court, however, held that ADEA defendants need not prove a policy that disparately affects older employees was justified by the high hurdle of "business necessity" in order to escape liability. Rather, it said, the policy at issue need be based on only a reasonable factor other than age.

While the Supreme Court in Smith readily deferred to the employer's discretion in determining its business practice, the proposed EEOC regulations create six factors the agency deems relevant in determining whether a practice is reasonable:

1. whether the practice is a common business practice;

2. the extent to which the practice is related to the employer's business goal;

3. the extent to which the employer took steps to define and apply the practice accurately;

4. the extent to which the employer took steps to assess the adverse impact on older workers;

5. the potential harm to older workers; and

6. whether other options were available.

The proposed regulations are likely to burden considerably the way companies conduct a variety of business activities, including reductions in force (RIFs), compensation plans, and succession planning, among others. For example, while many larger employers conduct impact studies, which they view as prudent, prior to performing a RIF, such studies are not required by law. Under the EEOC's proposal, though, all employers, regardless of size and resources, likely will be required to perform such studies.

Disparate impact studies typically can be costly, requiring expert statisticians to perform regression analyses. These studies also can be time-consuming. If an employer utilizes multiple factors in performing a RIF, a separate analysis of each factor's effect on the workforce may be necessary.

The proposed regulations also would require employers performing RIFs to survey "common business practices." Those using a creative, but uncommon, business strategy may find themselves fighting an uphill battle for justification.

RIFs often involve contemporaneous assessments by supervisors of subordinates' skill sets and performance abilities (RIF evaluations) or measure how employees performed on their most recent performance reviews. As a practical matter, many of these assessments are subjective in nature. The proposed regulations suggest that "subjective decision making" by supervisors is based on "unconscious age-based stereotypes" and will be found to be age-based. This calls into question whether employers will need to eliminate such categories as "initiative," "drive," "flexibility" and "risk-taking" from RIF evaluations and, perhaps, performance reviews.

The EEOC apparently expects employers to train and instruct managers who perform RIF evaluations to ensure they are not utilizing age-based stereotypes. How much training would be needed is unclear. RIFs may have to be done expeditiously. Training, excessive analysis, inability to use subjective factors, and multiple levels of review would risk impeding businesses from operating with the agility needed to compete in the marketplace.

The regulations, if implemented, could restrict the ability of employers to exercise their business judgment in other ways. For example, courts may find compensation plans designed to reward highly skilled employees as having an unlawful disparate impact on older workers.

Some specialized employers may face stricter examination. Courts previously have allowed public safety employers and providers of private security services to test employees for minimum standards of physical fitness. These employers may come under greater scrutiny as to whether their tests were "common business practices" or related to the employers' "business goals."

8. AND A FEW MORE RECENT CASES FOR GOOD MEASURE (FROM RECENT EEOC PUBLICATIONS)

a. Air Conditioning & Heating Company Sued By EEOC For Race Discrimination. *Company Allegedly Paid Non-Caucasian Employees Less Because of Race.*

United Air Temp / Air Conditioning & Heating, Inc., located in Lorton, Va., for allegedly violating federal law by discriminating against non-Caucasian employees based on their race by paying them less than at least one Caucasian colleague. These were the claims in a lawsuit filed on March 21, 2011. United Air Temp, which provides preventive maintenance for residential and commercial heating and air conditioning systems, has approximately 247 employees at 13 locations within Florida, Georgia, the District of Columbia, Northern Virginia and Maryland.

According to the EEOC's complaint, from around Feb. 1, 2001, until around April 20, 2006, Patricia Burch, who is African-American, and other non-Caucasian telemarketers were paid less than a Caucasian telemarketer because of their race. The lawsuit alleges that Burch was one of ten telemarketers employed by United Air Temp in Lorton. According to the EEOC, a Caucasian telemarketer who performed the same job, or a substantially similar job as Burch and other non-Caucasian telemarketers, made a higher hourly wage than the non-Caucasian telemarketers. The EEOC's complaint further charged that Burch complained to United Air Temp's management about the pay disparity to no avail. Burch's base salary remained the same until her separation from United Air Temp around April 20, 2006.

The EEOC filed suit in the U.S. District Court for the Eastern District of Virginia, Alexandria Division (EEOC v. United Air Temp, Air Conditioning and Heating, Inc., Civil Action No. 1:11-cv-281) after first attempting to reach a pre-litigation settlement through its conciliation process. The EEOC seeks back pay, compensatory damages, punitive damages and injunctive relief.

b. EEOC Settles Religious Discrimination Suit with Major Retail Store. *Employee (Jehovah's Witness) Fired for Allegedly Refusing to Wear Santa Outfit.*

In a settlement agreement reached recently with EEOC, Belk, Inc. has agreed to pay $55,000 and furnish other relief to settle a religious discrimination lawsuit. The EEOC had

charged in its lawsuit that Belk violated federal law when it failed to accommodate an employee's religious beliefs and then fired her because of her religion.

According to the EEOC's lawsuit, during the 2008 Christmas holiday season, Belk, Inc. required Myra Jones-Abid, who worked at Belk's Crabtree Valley Mall store in Raleigh, to wear a Santa hat and apron. Jones-Abid's religion, Jehovah's Witnesses, prohibits her from recognizing holidays, and therefore she declined to wear the holiday garb. On November 27, 2008, Belk terminated Jones-Abid for refusing to wear the apparel.

Title VII of the Civil Rights Act of 1964 requires employers to attempt to make reasonable accommodations to sincerely held religious beliefs of employees as long as this poses no undue hardship. The EEOC filed suit in U.S. District Court for the Eastern District of North Carolina (EEOC v. Belk, Inc., Civil Action No. 5:10-CV-00300) after first attempting to reach a pre-litigation settlement through its conciliation process.

In addition to paying monetary relief to Jones-Abid, the settlement requires Belk to take other actions, including providing annual training on religious discrimination to all of its managers and supervisors at the store where Jones-Abid worked. In addition, Belk must post there a notice on employees' rights under federal anti-discrimination laws and provide periodic reports to the EEOC on actions taken in response to employees who have requested religious accommodations.

c. EEOC Settles Disability Lawsuit Federal with Health Care Provider: *$340,000 for Health Care Workers Denied Hire Due to Latex Allergy Test Results.*

John Muir Health, a health care system with hospitals and other medical facilities throughout Contra Costa County, California, recently entered into an agreement to pay $340,000 to eight health care workers and to implement preventative measures to settle a disability discrimination lawsuit filed by the EEOC.

The settlement resolves the EEOC's suit, which had charged that John Muir withdrew job offers to seven nurses and one lab technician based on workplace restrictions imposed by independent doctors contracted by John Muir to conduct pre-employment health screenings. John Muir assumed that the eight workers had life-threatening latex allergies and could not safely work in a hospital setting. Subsequently, however, some of the workers were independently evaluated by board-certified allergists, who concluded that they did not have an allergy or sensitivity that would preclude them from working safely in hospital settings. All eventually continued to work in the health care profession.

Pursuant to the consent decree executed by Judge Phyllis Hamilton, John Muir will also revise its policies to ensure safeguards against potential latex-related disability discrimination. For example, employment candidates determined to have latex sensitivities will be evaluated by an allergist to determine what work restrictions, if any, may be appropriate. The Company also will provide staff training on evaluating whether workers with latex sensitivity can be accommodated. In addition, John Muir agreed to report to the EEOC concerning any complaints

of disability discrimination and/or retaliation as well as any job restrictions placed upon applicants and employees with latex allergies.

d. *There no place like home, or here, here is nice too!* Employment Contract Extends Discrimination Law Protections to Non-Citizens.

In February 2011, the 7th U.S. Circuit Court of Appeals issued an order enforcing an employment contract provision that extended the protections of U.S. employment discrimination laws to a non-citizen working outside the country. (Rabé v. United Airlines, Inc., 7th Cir., No. 09-3300 (Feb. 28, 2011)).

Laurence Rabé, a French citizen, worked as a flight attendant out of the Hong Kong and Paris bases of United Air Lines. Rabé's individual employment contract specified that her work would be performed throughout United's "worldwide system" and that the aircraft would constitute her place of employment. Rabé's employment contract further provided, pursuant to United's demand, that it would be governed exclusively by "applicable United States law" and that only courts and administrative bodies of the U.S. and Illinois could hear disputes relating to her terms of employment.

In September 2007, Rabé's supervisor initiated an investigation of her for allegedly misusing company-issued travel vouchers. Rabé, a lesbian, contended that the investigation was a pretext for the supervisor to fire her for "invidious reasons." At the end of the investigation in April 2008, United fired Rabé, who was then 40 years old.

Rabé sued claiming that United had discriminated against her on the basis of her national origin, age, and sexual orientation in violation of Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act (ADEA). United moved to dismiss for lack of subject matter jurisdiction, arguing that Title VII and the ADEA do not apply to non-citizens working outside the United States. The district court dismissed Rabé's complaint reasoning that U. S. employment discrimination laws do not apply to her because she did not spend significant time working in Illinois or elsewhere in the United States.

The 7th Circuit observed that the protections of Title VII and the ADEA do not generally extend to aliens who work outside the United States. However, under United's theory, the 7th Circuit commented, no country's employment discrimination laws would protect Rabé.

The 7th Circuit remarked that United chose to address the complications and uncertainties of litigating the relevant employment location for employees who work in international transportation with a contract that required the employee to agree to be governed by U. S. law. Therefore, the 7th Circuit held that the "most reasonable interpretation" of the employment agreement was that United agreed to application of the substance of U. S. law notwithstanding statutory provisions that would otherwise point against its coverage because of Rabé's status as an alien and the changing locations of her work.

While offering no comment on the merits of Rabé's claims, the 7th Circuit asserted that the employment contract had the effect of applying the substantive provisions of U. S. and Illinois employment discrimination laws as a matter of contract law, and accordingly she was entitled to try to prove them on the merits.

e. EEOC Revises Its Compliance Manual to Conform to Ledbetter Fair Pay Act.

The EEOC has revised its Compliance Manual to implement the Lilly Ledbetter Fair Pay Act. The Act, in January 2009, overturned the U.S. Supreme Court's holding in Ledbetter v. Goodyear Tire & Rubber Co., 550 US 618 (2007), which held that a charge of compensation discrimination under Title VII of the 1964 Civil Rights Act, the Americans with Disabilities Act, the Rehabilitation Act or the Age Discrimination in Employment Act must be filed within 180 or 300 days of the first alleged "discriminatory" paycheck, depending upon whether the state has a state fair employment practice ("deferral") agency. Under the Court's decision, subsequent "discriminatory" wage payments did not resuscitate the prior filing period under the "continuing violation" theory. The Act, which significantly expanded the relevant statute of limitation, is retroactive to May 28, 2007, (the day before the Supreme Court's decision) and permits suit as to pay discrimination claims pending on or after that date.

The *Compensation Discrimination* section of the EEOC's Compliance Manual denotes the period for submitting a claim of pay discrimination under Title VII, the ADA, the Rehabilitation Act or the ADEA. It explains that the period begins when any of the following occurs:

- the employer makes a discriminatory compensation decision or adopts a discriminatory practice affecting compensation;
- the charging party becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- the charging party's compensation is affected adversely by application of a discriminatory compensation decision or other discriminatory practice, e.g., each time wages, benefits, or other compensation is paid.

Courts interpreting the Act now are faced with deciding what qualifies as a compensation decision for purposes of calculating the statute of limitations. According to a recent decision by the United States Court of Appeals for the Third Circuit, the failure to answer a request for a raise qualifies as a compensation decision because the result is the same as if the request had been explicitly denied. Mikula v. Allegheny County of Pennsylvania, No. 07-4023 (3d Cir. Sept. 10, 2009). However, the Court found an internal investigation into an employee's complaint relating to a pay disparity does not constitute a compensation decision or other practice.

To illustrate the change in the EEOC's enforcement position, the revised Manual provides the following example of an actionable claim:

> After working for the Respondent for nearly 10 years as a production supervisor, CP [charging party] learns she is being paid less than the other four production supervisors in her department, who are all men. Immediately after learning about the pay discrepancy, CP files an EEOC charge alleging sex-based wage discrimination in violation of Title VII. The investigation shows that CP generally received lower pay raises than her male counterparts as the result of lower performance ratings, which CP alleges to have been discriminatory. Although these performance ratings and related pay raises all occurred more than 300 days before CP filed her charge, they affected her pay within the filing period. Therefore, CP's pay discrimination charge is timely.

Not surprisingly, the expanded statute of limitation for wage discrimination claims is expected to spur increased litigation. To minimize the risks of liability, employers should consider:

- auditing in a manner which preserves the attorney/client privilege current pay practices to identify and develop strategies to remedy potential pay disparities;
- developing written and precise criteria for making compensation decisions;
- revising document retention practices to ensure that the employer will have access to documentation regarding compensation decisions;
- training supervisors and managers to support objectively-based compensation decisions; and
- conducting periodic statistical analysis of compensation data to identify potential adverse impact concerns.

C. FAMILY AND MEDICAL LEAVE CASES

1. Introduction

FMLA claims are also on the rise, and like ADA issues, FMLA matters are often difficult to sort out and resolve. Just as with the ADA, there have been many recent changes to the FMLA. By contrast, the FMLA has new regulations that clarify long-standing issues whereas there still is no guidance on the amendments to the ADA. Employers and employees still struggle with and stumble through the FMLA. Time and care should be taken with matters that could be covered under the FMLA to avoid confusion and other problems down the road. Just as we have said in the past, an orderly approach to these cases can help identify important issues as well as set the course for proper resolution.

2. Sample Court Cases

a. 9th Circuit Clarifies Successor Liability Under the FMLA.

As more mergers and acquisitions take place in the retail industry, acquiring companies need to be mindful of whether they are successor employers for determining liability under the FMLA. In Sullivan v. Dollar Tree Stores, 623 F.3d 770 (9th Cir. 2010), the 9th Circuit articulated eight factors which are critical to determining whether a company is a successor employer under FMLA, including: (1) substantial continuity of the same business operations, (2) use of the same plant, (3) continuity of the workforce, (4) similarity of jobs and working conditions, (5) similarly of supervisory personnel, (6) similarity of machinery, equipment and production methods, (7) similarity of products or services, and (8) the ability of the predecessor to provide relief.

In this case, the 9th Circuit found that although both employers were in the retail business operations, this was too general to demonstrate a substantial continuity giving rise to liability.

b. Company Call-in Policy Upheld, No Interference with Employee's FMLA Rights: *Important Decision for Employer Attendance/Call-in Policies.*

An employer did not interfere with its employee's rights under the Family and Medical Leave Act by firing her for violating repeatedly the company call-in policy, a federal appeals court in St. Louis has ruled in an unpublished decision. Thompson v. CenturyTel of Central Arkansas LLC, No. 09-3602 (Dec. 3, 2010). The Court also ruled that the FMLA did not require an employer to provide its employee with written notice of its call-in policy each time she requests leave.

In that case Loretta Thompson worked as a facility assigner for the Programming Department for CenturyTel of Central Arkansas, a telecommunications company. The company's employee handbook contained the following policy:

> *Unless otherwise directed by the supervisor, employees must call the supervisor each day during a period of absence.*
>
> *An employee who fails to provide proper and timely notification for three consecutive workdays or three workdays in a 12-month period will be deemed to have voluntarily terminated their employment….*

Mrs. Thompson was given a copy of the company's employee handbook when she was hired, which she acknowledged receiving. The company also gives employees its written policies annually.

The Programming Department additionally required its workers to call the supervisor if they were to be absent. If they could not speak to the supervisor personally, they were to leave a voice message notifying her of their absence. The supervisor also permitted Programming

Department workers to call in weekly, instead of daily, once their FMLA leave had been approved by human resources.

Thompson was fired on February 5, 2008, for violating the company's call-in policy seven times during the previous 12-month period. Even though her supervisor told her following each absence that she has to call in, Thompson consistently failed to do so. In the final incident, Thompson left work early on January 30, 2008, saying in a voice message to her supervisor that she could not return to work until February 5 because of illness. She called in the next day, but did not talk to her supervisor, instead telling a co-worker that she would call her supervisor later. She did not do so that day or the next two days she was scheduled for work.

Almost three weeks after her firing, Thompson's doctor certified that Thompson had a serious health condition under the FMLA and needed to be off work from January 29 through February 4, 2008.

Although she did not dispute that she failed to comply with the call-in requirement, Thompson asserted FMLA interference and retaliation claims against her former employer. The district court rejected both claims. On appeal, Thompson pursued only the interference claim.

The Court held that the Company did not interfere with Thompson's exercise of her FMLA rights. The Court explained that a call-in policy "is permissible, as FMLA regulations specifically provide '[a]n employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work.'" Moreover, without interfering with an employee's statutory rights, the Court found that an employee on FMLA leave may even be fired if she did not comply with her employer's call-in requirements.

The Court also rejected Thompson's argument that the company violated the FMLA's notice requirement by failing to provide her written notice of the call-in policy each time she requested FMLA leave. The Court held that the company satisfied the notice requirement with its handbook (which Thompson acknowledged receiving), and written and verbal warnings in which it again explained the policy to her.

c. Lay and Medical Evidence Sufficient to Show a "Serious Health Condition" Under FMLA.

The 3rd Circuit Federal Appeals Court in Philadelphia ruled recently that an employee may use a combination of lay and medical testimony to establish that she has a "serious health condition" under the Family and Medical Leave Act, even though lay testimony alone (her own) would not suffice to establish that such condition resulted in her incapacitation. Schaar v. Lehigh Valley Health Servs. Inc., No. 09-1635 (3d Cir. Mar. 11, 2010). The Court, in this case of first impression, reversed summary judgment in favor of the employer and ruled that the employee could proceed with her claim that the employer interfered with her FMLA rights and terminated her in retaliation for taking protected leave.

The employer in that case, a medical practice, employed the plaintiff, Rachel Schaar, as a receptionist from December 2002 to October 2005. On September 21, 2005, Schaar was treated for low back pain, fever, nausea, and vomiting. Schaar's physician, who also worked for the

employer, diagnosed her with a urinary tract infection, prescribed antibiotics, an anti-inflammatory, and gave her a note stating that her illness would prevent her from working on September 21 and 22. Schaar taped the note on her supervisor's door and went home. Schaar had previously scheduled vacation days on September 23 and September 26. Schaar claims that she was sick in bed with pain, fever, and vomiting on September 21, 22 and 23. Schaar began to feel better slowly over the next three days and returned to work on September 27.

Upon returning to work, Schaar told her supervisor that she had been sick all weekend. She did not request that the employer convert her vacation days into paid sick days or FMLA leave. Schaar claimed that her supervisor threatened to fire her for violating the company policy requiring her to call off on her two sick days. Schaar told her supervisor that she did not believe she needed to so because she had left a note. Thereafter, on October 3, 2005, the employer terminated Schaar for failing to call off from work and for performance issues. Schaar sued the employer for interference with her FMLA rights and retaliation, and the employer moved for summary judgment. The district court granted the motion, holding that Schaar failed to present medical evidence that she had a serious health condition. Schaar appealed.

On appeal, the Court first reviewed the FMLA's language and its regulations. The FMLA defines "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves . . . continuing treatment by a health care provider." The Court also held that "Continuing treatment by a health care provider" is defined as a "period of incapacity . . . of more than three consecutive calendar days . . . that also involves . . . [t]reatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider."

Schaar argued that her physician's statement and her testimony were sufficient to establish that she had a serious health condition, i.e., that she experienced a period of incapacity of more than three days.

The Court reviewed the decisions from other federal appeals courts regarding proof of incapacitation to establish a "serious health condition." It found, for example, the Courts of Appeals for the 5th and 9th Circuits have held that lay testimony alone is sufficient to establish incapacitation, while the 8th Circuit has allowed lay testimony only to supplement medical evidence.

The Court noted that the relevant provision FMLA regulations provides that "continuing treatment by a health care provider can be satisfied by showing at least three days of incapacitation." 29 C.F.R. § 825.144. The Court also noted that the regulation is silent as "to whether medical testimony is required." Based on the regulation's language, the Court found "no support . . . to exclude categorically all lay testimony regarding the length of an employee's incapacitation."

Because Schaar had presented both expert and lay testimony regarding her illness, she had raised a material issue of fact regarding whether she suffered from a "serious health condition" to qualify for FMLA protection. Thus, the Court vacated the trial court's judgment and remanded the case for further proceedings.

d. Court finds that Employee who was Demoted Following Maternity Leave Had No FMLA Claim: *Be Careful Folks!*

After affirming the dismissal of an employee's Family and Medical Leave Act claims, the 6th Circuit Court of Appeals held recently that an employer did not violate the law by demoting an employee when she returned from maternity leave for performance deficiencies discovered while the employee was out on leave. Schaaf v. SmithKline Beecham Corp. d/b/a GlaxoSmithKline, No. 09-10806 (11th Cir. Apr. 6, 2010). The Court also rejected the employee's retaliation claim for failure to demonstrate that the employer's reason for her demotion – her poor performance – was a pretext for retaliation.

In that case, Ellen Schaaf worked for SmithKline as a Regional Vice President since 1999. In July 2002, three District Sales Managers complained to the Company's Human Resources Department that Schaaf had an "antagonistic and inflexible management style," was inaccessible, had poor communications skills, tended to play favorites, and failed to give feedback on performance. Consequently, they claimed that morale in the region was poor.

In response, the Company issued Schaaf a verbal warning, and Schaaf's supervisor, Lisa Gonzalez, directed Schaaf to complete a Performance Improvement Plan ("PIP"). Among other things, the PIP required Schaaf to issue previously uncompleted written performance reviews and to attend management-training programs. At about the same time, Schaaf informed Gonzalez that she was pregnant and would take maternity leave in early 2003. Schaaf also expressed her concern that she would be unable to complete the PIP before her leave.

Schaaf, true to her prediction, failed to complete the performance evaluations or take any training, and failed to meet the PIP's deadline. Gonzalez subsequently extended the deadline until after Schaaf returned from leave. During Schaaf's leave, an interim RVP assumed Schaaf's duties, and the region functioned significantly better – productivity increased, communication improved, and morale was higher. The interim RVP also discovered and corrected several significant administrative problems that had occurred under Schaaf's watch.

Shortly before Schaaf's return, the DSMs met with Gonzalez to express their concerns that the region's increased morale and productivity would end if Schaaf resumed her RVP position. When Schaaf returned to work in April 2003, she met with Gonzalez, who gave her a choice of either accepting a demotion to DSM or leaving the company. Schaaf accepted the demotion to DSM and then sued the Company for interference with her FMLA rights and retaliation.

The Company moved to dismiss Schaaf's claims as a matter of law, and the district court granted the Company's motion. Schaaf appealed.

The FMLA permits covered workers to take up to twelve weeks of unpaid leave each year to attend to the birth and care of the new child. When an employee returns from leave, she must be reinstated to her original or an equivalent position. However, the right to reinstatement

is not “absolute.” The FMLA permits an employer to deny reinstatement if it can demonstrate it would have discharged the employee if she had not been on leave. The employer must prove the employee was discharged for reasons unrelated to the leave.

The Company argued it demoted Schaaf for reasons unrelated to her FMLA leave and she would have been demoted even if she had not taken leave. Schaaf argued that, because the Company learned of certain performance issues while she was on leave, her leave caused her demotion.

The Court flatly rejected Schaaf's argument, finding it “legally incorrect” and “logically unsound.” It found that in an FMLA interference case, the employee must prove the failure to restore her to her position was the “proximate cause” of the action, i.e., the employer took the action *because of* the leave. It is not enough to simply show that “but for” the employee's use of leave she would not have been demoted.

The Court explained, “[T]he statute's purpose is not implicated in the least if an employee's absence permits her employer to discover past professional transgressions that then lead to an adverse employment action against the employee.”

Schaaf's reading of the statute, the Court observed, would “effectively protect deficient employees from adverse employment actions, such that those workers could actually attain job security by seeking leave under the FMLA.” The Court found such a result “laughable” and unsupported by policy, common sense, or the FMLA itself. The evidence established that Schaaf was demoted because of her performance deficiencies, not the leave itself. Accordingly, the Court affirmed the dismissal of Schaaf's FMLA interference claim.

Addressing Schaaf's retaliation claim, the Court found that, although Schaaf presented a *prima facie* case of retaliation, she failed to establish that the employer's stated reason for her demotion –poor performance – was a pretext for retaliation.

e. U.S. DOL “Interpretation” of FMLA Rules Expands Protections for Non-Traditional Families.

The U.S. Department of Labor has issued an Administrator's Interpretation of the FMLA Regulation that includes “*in loco parentis*” relationships as part of the FMLA's definition of “son” or “daughter.” It also has issued a press release announcing this is a “win for all families no matter what they look like. The DOL seemed to re-write an important provision of Section 825.122(c)(3) of the FMLA Regulations, which became effective on January 16, 2009. That section defines *“in loco parentis”* as including those “with day-to-day responsibilities to care for *and* financially support a child.” (Emphases added.) The Administrator's Interpretation states, “[T]he regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child.” Thus, according to the DOL Administrator, the word “and” should be interpreted to mean “or” in Section 8.25.122(c)(3). Only time will tell if courts agree with such an interpretation.

Prior to this DOL interpretation, employees weren't foreclosed from arguing that individuals standing *in loco parentis* to a child covered under the FMLA could take FMLA leave for the birth or adoption of that child or to care for a child with a serious health condition. Absent a further interpretation from the DOL, individuals taking FMLA leave because they stand *in loco parentis* to a child are *not* subject to the FMLA regulations (Sections 825.120(a)(3) and 825.127(d)) that limit the amount of leave to a combined total of 12 weeks (or 26 weeks to care for an injured servicemember); those limitations apply only to a "husband and wife" working for the same employer. Thus, for example, an employee who is the biological parent of a child and a grandparent or same sex partner standing *in loco parentis* to that child each would be entitled to take the full complement of 12 workweeks of FMLA leave upon the birth or placement of the child. While this is not new, it may create additional complications under the DOL's broader interpretation of *in loco parentis*.

III. WAGE AND HOUR ISSUES

A. New Hampshire Wage and Hour Issues

The news here is the increased statute of limitations for wage claims, the powers of the commissioner and the increased civil penalties assessed by the Department for wage violations. Later in these materials we outline the top wage and hour violations from 2010 and how to avoid them. We will also review state and federal wage law compliance tips and how to handle workplace audits. In the meantime, here are some recent developments in this always-challenging area of workplace law.

B. Federal Wage Claim/Issues

1. No Relief in Sight as FLSA Lawsuits Continue to Increase

Class actions filed under the Fair Labor Standards Act were more numerous in 2010 than other types of employment-related class actions, which also reported a similar trend last year. FLSA class actions outnumbered similar suits filed under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the Employee Retirement Income Security Act. It has been suggested that continued economic challenges and low hiring rates during 2010 fueled more class action and collective action litigation. Even more class action litigation is expected in 2011, as businesses continue to retool their operations and adjust to economic conditions.

C. Recent Cases

1. Supreme Court Finds Oral Complaints Can Form Basis for FLSA Retaliation Suit.

In late March 2011,the U.S. Supreme Court held that an employee may proceed with his retaliation lawsuit brought under the Fair Labor Standards Act (FLSA). According to the high court, the statutory term "filed any complaint" includes oral, as well as written, complaints. This

ruling signals yet another expansion of the anti-retaliation laws. Kasten v. Saint-Gobain Performance Plastics Corp., No. 09-834, U.S. Supreme Court (March 22, 2011).

Kevin Kasten was employed by Saint-Gobain Performance Plastics Corp. in Portage, Wisconsin. According to company policy, hourly employees must use a time card to swipe in and out of time clocks located in the plant.

During 2006, Kasten received three disciplinary notices (one verbal and two written) due to several "issues" he had with regard to punching in and out on the time clock. The third notice, which was issued in November 2006, was accompanied by a one-day suspension. In addition, Kasten was warned that "[t]his was the last step of the discipline process" and if another violation occurred, further discipline (including termination) could result. Kasten signed each notice, acknowledging that he read and understood it.

From October through December 2006, Kasten alleged that he verbally complained to supervisors about the location of the time clocks. According to Kasten, the location of the time clocks prevented employees from being paid for time spent donning and doffing their required protective gear. Saint-Gobain denied that Kasten complained to any of his supervisors about the time clock location.

On December 6, Saint-Gobain suspended Kasten based on his fourth violation of the company's timekeeping policy. Five days later, the company terminated his employment. Kasten then sued Saint-Gobain under the FLSA, claiming that he had been fired in retaliation for his verbal complaints regarding the location of the time clocks. The trial judge ruled in favor of the company and Kasten appealed. The Seventh Circuit Court of Appeals upheld the dismissal of Kasten's suit, finding that the FLSA's anti-retaliation provision does not cover oral complaints. The case ultimately reached the U.S. Supreme Court.

The FLSA includes an anti-retaliation provision that forbids employers "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the Act]." The sole question before the high court was whether the term "filed any complaint" includes oral as well as written complaints.

In writing for the majority, Justice Breyer first noted that the text of the statute alone cannot provide a conclusive answer because the word "filed" has different meanings in different contexts. The Court found that some dictionary definitions of the word contemplate a writing while others permit the use of the word "file" in conjunction with oral material. State statutes and federal regulations similarly contemplate oral complaints. "Even if the word 'filed,' considered alone, might suggest a narrow interpretation limited to writings," the majority wrote, "the phrase 'any complaint' suggests a broad interpretation that would include an oral complaint."

Finally, the Court refused to consider the employer's argument that the FLSA's anti-retaliation provision applies only to complaints filed with the government. According to the majority, the company did not raise this issue in its certiorari briefs and its resolution is not a

"predicate to an intelligent resolution" of the oral/written question. Thus, concluding that oral complaints should fall within the scope of the phrase "filed any complaint" in the FLSA's anti-retaliation provision, the Court returned Kasten's suit to the lower court to decide whether he would be able to satisfy the Act's notice requirement.

2. Mobile Technology Blurs Work and Nonwork Hours.

In the not-so-distant past, a clear line separated work and nonwork hours for most employees. With the advent of personal digital assistants, e-mail and other mobile technology, however, this line has blurred for many employees. Although this shift brings potentially positive increases in productivity, it also comes with the risk of a new class of wage-and-hour litigation: overtime claims related to the off-hours use of mobile technology.

Overtime claims related to the use of mobile technology are limited to nonexempt employees. When job-related use of mobile technology outside of traditional work hours first began, it was largely limited to "exempt" employees, such as those employed in an executive capacity. Since these employees are not statutorily entitled to receive overtime under the federal Fair Labor Standards Act or applicable state wage-and-hour regulations, their off-hours use of mobile technology did not implicate overtime laws.

The ever-growing popularity of mobile technology, however, has caused off-hours use to spread to traditionally nonexempt employees, such as sales associates. Under the FLSA and corresponding state laws, these employees are generally entitled to receive time-and-a-half compensation for hours worked in excess of 40 hours a week. This off-hours use of mobile technology by nonexempt employees could leave employers vulnerable to wage-and-hour litigation and liability.

Two issues that courts may analyze to determine whether time spent checking mobile technology during off-hours is compensable are whether the time is de minimis (an insubstantial or insignificant period of time) and whether calculation of the workday begins and ends with the checking of mobile technology.

An initial issue is whether time spent checking mobile technology is de minimis. FLSA regulations include instructions on how employers must calculate hours worked by nonexempt employees. Most importantly, the regulations state that "insubstantial or insignificant periods of time beyond the scheduled work hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." 29 C.F.R. 785.47. But this rule only applies when time is "de minimis," defined as "uncertain and indefinite periods of time involved of a few seconds or minutes duration." While there is no precise threshold for de minimis, most courts have found daily periods of approximately 10 minutes to be de minimis. *See* Lindow v. U.S., 738 F.2d 1057, 1062 (9th Cir. 1984).

In order to determine whether time is de minimis, courts look at three factors: the practical administrative difficulty of recording the additional time; the aggregate amount of compensable time; and the regularity of the work. Id. at 1063. Using these factors, for example,

the 9th U.S. Circuit Court of Appeals found that the time employees spent prior to their shifts reviewing log books and exchanging information was de minimis because of the difficulty of recording the time and the irregularity of the preshift work.

3. Supreme Court Lets Stand Donning, Doffing Ruling.

The U.S. Supreme Court has declined to review a federal appeals court's decision that allowed pre-emption of the Fair Labor Standards Act by a state law more beneficial to employees, with the result that a group of workers had to be paid for time they spent donning and doffing protective gear before and after their shifts.

As a result of the High Court's denial of a request to hear Spoerle v. Kraft Foods Global, Inc., the appeals court's decision stands, remaining applicable law in the jurisdiction of the 7th U.S. Circuit Court of Appeals, which includes Illinois, Indiana and Wisconsin.

The case involves an employer, Kraft Foods, that required employees who prepared meat products to wear certain protective gear while working their shifts (see September 2010 newsletter, p.1). Donning and doffing of this gear took a few minutes each, and the company's collective bargaining agreement with the employees' union excluded this time from compensation. Under section 203(o) of the FLSA, in determining the number of hours an employee has worked, an employer need not count any time spent changing clothes or washing at the beginning or end of each workday that is excluded from working time "by the express terms of or by custom and practice under a bona fide collective bargaining agreement." However, the 7th Circuit found that the FLSA also requires all employers to comply with "any Federal or State law or municipal ordinance" that establishes a higher minimum wage and/or a lower hours standard than what exists in the FLSA (29 U.S.C. §218(a).

Wisconsin law requires employers to compensate their employees for time spent donning and offing if such activities are "closely related activities which are indispensable to [the] performance" of the employee's principal job duties (Wis. Admin. Code DWD §272.12(2)(e)). In addition, such time must be counted toward the workweek threshold after which overtime pay is required (Wis. Stat. §109.03, §103.02).

The Spoerle plaintiffs argued that section 203(o) of the FLSA did not apply to them because Wisconsin law lacks an exemption clause equivalent to section 203(o).

Because Wisconsin law – which requires that the donning and doffing at issue is compensable and establishes a lower work hours standard than the FLSA – is more rigorous than the FLSA in this case, it pre-empts section 203(o) under section 218(a) of the FLSA, they said.

The 7th Circuit agreed, stating, "Nothing in §203(o) limits the operation of §218(a)." Spoerle v. Kraft Foods Global, Inc., 614 F.3d 427 (7th Cir. 2010), *cert. denied*, No. 10-580, 2011 WL55439 (U.S. Jan. 10, 2011).

4. Overtime Misclassification Claims Continue to Trouble National Retailers.

Retailers continue to be a prime target when it comes to wage and hour collective actions. The $40 million recently paid by Staples to settle such a suit is a grim reminder that attacking the classification of store managers and assistant store managers as exempt employees has been a treasure trove for aggressive, well-financed class counsel. See, George v. Staples, Inc., Civil Action No. 2:08-cv-5746 (D.N.J.) (Doc. 111). Given the current environment, retailers should continue to pay close attention to whether their store management ranks meet the requirements for claiming the overtime exemption under the law.

5. Bankrupt Firm's Owners Ordered to Pay $226,000 for Wage Violations.

The top officials of a bankrupt steel erector company have been ordered to pay more than $226,000 for violating wage laws on public and private construction projects. In that case Glenn Pisani and Dana Pisani, president and secretary of D.F.M. Industries in Wrentham, Mass., are required to pay more than $160,000 in restitution and $66,000 in fines to Massachusetts for failing to properly pay their workers on numerous construction projects.

The company filed for Chapter 7 protection last month, but under state law employers are personally liable for payment of employee wages.

Investigators received complaints that the firm had failed to pay the proper overtime rate for work in excess of 40 hours in a workweek, and they subsequently discovered that D.F.M. had not paid workers on several projects in March 2011. Massachusetts law requires that employers pay their workers all earned wages within 6 days of the end of the pay period.

The Massachusetts Attorney General's office calculated that the company owed employees $131,000 for steel erection work on public projects and more than $29,000 for work on private projects. It issued three fines of $22,000 each for the public and private underpayments and for failure to submit true and accurate payroll records on the public projects.

6. High Court Lets Stand Ruling Approving Half-Time Damages.

In April 2011, the U.S. Supreme Court declined to review a ruling by the 7th U.S. Circuit Court of Appeals that a district court properly calculated back overtime damages for an employee misclassified as exempt by basing its calculation on half the employee's regular rate of pay rather than on the standard time-and-a-half rate.

The FLSA's "half-time," or "fluctuating workweek," method of calculating overtime pay results in lower costs to employers. With the 7th Circuit's ruling in Urnikis-Negro v. American Family Property Services left intact by the High Court, employers in that circuit — which covers Illinois, Indiana and Wisconsin — may be assured that the half-time method also properly may be used in calculating back overtime damages, thereby potentially reducing damage awards significantly.

The 7th Circuit ruled that the lower court's use of the half-time method (29 C.F.R. §778.114(a) to calculate the plaintiff's overtime damages was proper because she had agreed that her salary was a fixed amount covering *all* hours she worked each workweek, including her overtime hours. The Appeals Court did not, however, find the requisite authority for its ruling in the regulation, because section 778.114(a) has no remedial purpose. Rather, the provision offers employers an alternative method of compensating nonexempt employees whose work hours vary across workweeks.

Authority for the circuit court's decision was found instead in the Supreme Court decision in Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942). In Missel, the Court treated the plaintiffs' fixed weekly wage as compensation at his regular rate for *all* hours worked in a week, including overtime hours. The 7th Circuit in Urnikis-Negro, the statutory overtime rate was properly reached in the damages calculation by including an overtime premium of half the plaintiff's hourly regular rate for each hour worked over 40 in each workweek. When the half-time method is used, wrote the Supreme Court in Missel, the plaintiff's regular rate is calculated by, first, determining the plaintiff's weekly compensation, then dividing that fixed weekly amount by all the hours actually worked in a week. (Ervin v. OS Restaurant Services, Inc., No. 09-3029, 2011 WL 135708 (7th Cir. Jan 18, 2011).

7. Ninth Circuit Rules Pharmaceutical Sales Reps are Exempt Under FLSA: *Finds Workers "Primary Duty" Is To Increase Company Sales.*

In February 2011, a Federal Appeals Court held that pharmaceutical sales representatives qualify as exempt outside sales representatives who are not entitled to overtime pay under the Fair Labor Standards Act (FLSA). The Ninth Circuit Court of Appeals' decision strongly rebukes the arguments advanced by the U.S. Secretary of Labor, who intervened in the case, and directly contradicts a ruling issued by the Second Circuit Court of Appeals. Christopher v. SmithKline Beecham Corp., DBA GlaxoSmithKline, No. 10-15257, Ninth Circuit Court of Appeals (February 14, 2011).

In that case Glaxo, who employs outside salespeople to market drugs to physicians, treated those employees as overtime exempt. They claimed these employees were outside sales employees. That exemption was challenged because, due to regulations governing the distribution of pharmaceutical drugs, consumers cannot purchase them from a pharmacy without first obtaining a prescription from a licensed physician. Drug companies, such as Glaxo, sell their products to distributors or retail pharmacies who cannot, in turn, sell them to the end user unless the consumer first obtains a physician's authorization. It was argued that these sales did not qualify as outside sales..

In the context of what the court called "this restrictive sales environment," PSRs call on doctors and encourage them to prescribe Glaxo's drugs. They provide information and product samples, build relationships with doctors and convince them to use Glaxo's drugs over those offered by competitors.

The record confirmed that Glaxo recruits applicants who have prior sales experience and trains them on its "Assertive Selling Always Pro-fessional (ASAP)" model. They also are trained to follow Glaxo's "Winning Practices" program. ASAP and Winning Practices are similarly structured and emphasize that PSRs should: (1) analyze and understand what is happening in an assigned region; (2) work with the team to drive results; (3) master professional knowledge to understand clinical management of patients; (4) prepare for calls; (5) "Sell Through Customer-Focused Dialogue"; (6) obtain the strongest commitment possible from a health care professional at the end of the call; and (7) provide added value to the customer relationship.

The record also noted that these sales representatives usually work outside the office and spend much of their time traveling to the offices of physicians within their assigned territory. They are paid a salary, as well as a bonus that is tied to sales volume within the territory.

At issue in this case was whether the work of the sales representatives amounts to a "sale" or "sell" that is exempt under 29 U.S.C. section 203(k) of the FLSA, or whether the representatives merely engage in "promotional work that is incidental to sales made" and therefore are nonexempt under regulations promulgated by the Department of Labor (DOL). The plaintiffs and the Secretary of DOL argued that representatives do not engage in selling as contemplated by the FLSA, but rather engage only in promotional work that is "incidental" to sales made by others. To support this position, the Secretary pointed to 29 C.F.R. 541.500(a)(1), which provides that sales within the meaning of section 3(k) "include transfer of title to tan-gible property, and in certain cases, of tangible and valuable evidence of intangible property." Because the "selling" done by the sales representatives does not include transfer of property, the DOL argued that they were not engaged in selling under the FLSA.

This, of course, is not the end of the story because by use of the term "include," this provision contemplates that other activities will constitute sales. The DOL also pointed to the language of section 3(k) which states that "`[s]ale' or `sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

The 9th Circuit gave no deference to the DOL's interpretation of the law. In dismissing the argument, the court noted that the DOL had argued by "statutory *renvoi* - that is, a `sale' means a `sale'" and that the DOL's argument did not take into consideration that the statute clearly refers to "other disposition." The court focused on the activities performed by the sales representatives and concluded that they were engaged in sales, albeit to the doctors who prescribe the drugs rather than to either the distributors and retail pharmacies who buy them from Glaxo or the end users who ultimately purchase and consume Glaxo's products. In so holding, the court rejected the Secretary's view that a sale "means unequivocally the final execution of a legally binding contract for the exchange of a discrete good," and noted that its holding was buttressed by the "Secretary's acquiescence in the sales practices of the drug industry for over seventy years."

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8. U.S. Department of Labor Abandons Opinion Letters for "Administrator Interpretations".

After decades of issuing opinion letters to answer wage-hour questions submitted by employers, individuals and organizations involving their unique circumstances, the Department of Labor has announced it will no longer do so, and will issue "Administrator Interpretations" instead. These new pronouncements are described as "general interpretation[s] of the law and regulations, applicable across-the-board to all those affected by the provision in issue." The Wage and Hour Division ("WHD") maintains this new process for offering guidance is a "more efficient and productive use of resources" and will provide clarity for an entire industry or group of employees, rather than relate to only one individual scenario.

While requests for an opinion still may be submitted, the WHD will not provide definitive letters to any fact-specific requests. Instead, it merely will provide reference to the statutes, regulations, caselaw and other interpretations it deems relevant. Requests for opinion letters will continue to be retained by the WHD in order to assist in the Administrator's "ongoing assessment of what issues might need further interpretive guidance."

In its first Administrator Interpretation, the WHD reasoned that mortgage loan officers do not qualify as "administrative" employees who are exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"). Because the "primary duty" of such employees was the sale of financial products, meaning that the mortgage loan officers "perform[ed] the production work of their employer," rather than directly related to the management or general business operations of the employer's customers, they were deemed not exempt under section 13(a)(1) of the FLSA. This Interpretation was contrary to Opinion Letter 2006-31, dated September 8, 2006, which included a lengthy consideration of the topic. That Opinion Letter, therefore, was withdrawn by the WHD.

The WHD's announcement does not address potential ramifications of this decision, such as whether it changes or seeks to alter a company's right to rely on actions made in "good faith" reliance on prior wage-hour opinions, as allowed by the Portal to Portal Act of 1947. (A company can defend itself in wage and hour litigation by showing it acted in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the WHD).

IV. MISCELLANEOUS

A. Employee Resignations after Employer Announced Business Closing "Not Voluntary Departures" under WARN.

A federal appeals court rules earlier this year that employees who stopped reporting to work after their employer announced it would close in 12 days if it did not find a buyer for the business have suffered an "employment loss" under the federal Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §2101 *et seq*. *See* Collins, et al. v. Gee West Seattle LLC, No. 09-36110 (9th Cir. Jan. 21, 2011).

In a case of first impression, the Court rejected the employer's argument that as the 120 plaintiffs left of their own volition following the business closing announcement, fewer than 50 employees suffered "employment losses" at the time of the closing and WARN did not require it to provide 60 days' advance notice. The Court of Appeals found this argument "flips the basic structure of WARN on its head." Nevertheless, the Court noted that its decision does not affect other defenses or arguments (i.e., the "faltering business" exception) the employer may raise. The Court reversed summary judgment and remanded the case for further proceedings.

Federal WARN requires an employer to provide written WARN notices 60 days in advance of a "plant closing" or a "mass layoff," as the statute defines those terms. 29 U.S.C. § 2102(a). A "plant closing" occurs only "if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more full time employees … ." § 2101(a)(2). An "affected employee" is one who "may reasonably be expected to experience an employment loss as a consequence of a plant closing … ." § 2101(a)(5). WARN excludes from the definition of "employment loss" a "voluntary departure," providing, "[T]he term 'employment loss' means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement … ." § 2101(a)(6).

In January of 2007, Gee West Seattle LLC purchased and began operating several automobile franchises in Seattle, Washington. Due to financial losses, however, it commenced efforts to sell the business in July of 2007. On September 26, 2007, Gee West informed its employees, via written memo, that although it was "actively pursuing" the sale of the business, it would "be closing its doors at the end of business on Sunday October 7, 2007," and that in the event it did not find a buyer before October 7, 2007, it would terminate all employees except designated accounting and business office employees. Perhaps in an attempt to rely on WARN's "faltering company" exception, which permits an employer to provide less than 60 days of notice under specific circumstances, the memo further stated that "[n]otice could not be given sooner because Gee West was actively seeking business to keep the business running," and that it was "seeking potential purchasers, and attempting to sell inventory, and [it was] concerned that potential purchasers would not have made a purchase, had [its] workforce been seeking alternate employment."

Many employees stopped reporting to work following the announcement. By October 5, only 30 employees reported to work at the various facilities. The employer ceased business on October 5, rather than October 7, because too few employees remained to maintain operations. It reopened on October 6 only for inspection by a potential purchaser, but the sale did not go through and Gee West permanently closed the business. Documents created after the filing of this case by Gee West's Human Resources Director showed that the reason for every employee who terminated after September 26, 2007, was due to the fact that the "business closed."

The 120 employees sued Gee West, claiming it violated the WARN by not giving 60 days' advance notice of the closing. The employer argued that because the employees "voluntarily departed" within the meaning of WARN, they did not suffer an "employment loss" and did not have a WARN claim.

The lower court concluded that the 120 employees voluntarily resigned, leaving only 30 employees who suffered an "employment loss" at the time of the business closing. Because 50

full-time employees must suffer an employment loss to trigger a "plant closing" and WARN notices obligations, the Court concluded the plaintiffs had failed to set forth a cognizable WARN claim. The district court granted summary judgment in favor of Gee West and the employees appealed.

The 9th Circuit Court of Appeals reversed. Rejecting the company's argument, it found the employees who left on account of the announcement had not departed voluntarily. The appeals court ruled that employees who actually retire, are discharged, or leave for health or other reasons unrelated to an announced shutdown do not count as affected employees who suffered an "employment loss" when determining whether enough employees have been affected to constitute a "plant closing" or a "mass layoff." Therefore, the Court continued, "[U]nless there is some evidence of imminent departure for reasons other than the shutdown, it is unreasonable to conclude that employees voluntarily departed after receiving notice of [Gee West's] upcoming closure." Furthermore, to interpret the law to mean that only those employees who remain with the employer when the business closes suffered an "employment loss" under WARN, as Gee West argued, "would allow an employer to escape responsibility for failing to give proper notice simply because its employees subsequently leave the business due to its imminent closure. The unexpected and urgent need to find new employment is precisely the type of pressure that this Court held that Congress was attempting to eliminate by creating the WARN Act," the Court explained. Accordingly, the Court held that employees who departed because the business was closing did not "voluntarily" depart and indeed suffered an "employment loss." To hold otherwise, the Court noted, would be "inconsistent with [WARN's] general structure" and overall purpose and "render the 'faltering business' exception superfluous."

The Court of Appeals also noted that the affected employees must be determined prospectively, 60 days in advance of the closing, rather than at the time of the closing, in order for an employer to give proper notice. It left for the district court to determine after remand whether Gee West's conduct fell within any exception to WARN's 60-day notice requirement.

B. Supreme Court Rules Background Checks on Government Contractors Do Not Violate the Constitution.

The U.S. Supreme Court ruled earlier this year, in a unanimous decision, that the federal government may conduct wide-ranging background checks of workers employed by government contractors. *See* NASA v. Nelson, No. 09-530 (Jan. 19, 2011).

The Court ruled that when conducting background checks, the federal government need not show that certain questions are "necessary" or the least restrictive means for furthering its intent. Drawing on the widespread use of background checks in the public and private sectors, the government's role as a "proprietor" as opposed to a regulator, the uncertainty of informational privacy as a constitutional right, and the protections for background check findings under the Privacy Act, the questions in the background check simply have to be reasonable to serve the government's interests, the Court ruled.

In that case the plaintiff's 28 contract employees of the National Aeronautics Space Administration's (NASA) Jet Propulsion Laboratory (JPL), which is operated by the California

Institute of Technology (Cal Tech), were not subject to government background checks when they commenced their employment with the government. However, as a result of policies recommended by the 9/11 Commission in 2004, President George W. Bush ordered the adoption of uniform identification standards for both federal civil servants and contract employees. The Department of Commerce in turn implemented this order by directing that contract employees possessing long-term access to federal facilities undergo a standard background check. Thereafter, NASA amended its contract with Cal Tech to conform to the new requirement and JPL subsequently announced that employees who did not complete the government-mandated background checks would be denied admission to JPL and would be subject to termination by Cal Tech.

The Supreme Court reversed the Ninth Circuit's decision. Starting with an assumption that there is a constitutional right to informational privacy, the Court reasoned that since 1871, the President has had authority to gauge a prospective employee's fitness for the civil service. Furthermore, background checks similar to those involved in NASA v. Nelson became mandatory for candidates for civil-service in 1953. Writing for the Court, Justice Samuel Alito said, "[H]istory shows that the Government has an interest in conducting basic background checks in order to ensure the security of its facilities and to employ a competent, reliable workforce to carry out the people's business. The interest is not diminished by the fact that respondents are contract employees." The Obama Administration also had argued the NASA background investigations were reasonable in light of the fact that such inquiries were virtually identical to those conducted by private employers.

To allay concerns of unlawful invasion of privacy, and in support of the Court's conclusion that the questions in the background check were reasonable, the Court noted that all information collected in connection with these background checks would be subject to non-disclosure pursuant to the Privacy Act.

C. Supreme Court Will Review Workers' Compensation Dispute.

The U.S. Supreme Court on Feb. 22, 2011, announced it will review whether an employee must be injured on the outer continental shelf to be eligible for workers' compensation benefits under the Outer Continental Shelf Lands Act (OCSLA). The court granted review in a 9th Circuit case that held that when an outer continental shelf worker is injured on land, the worker or worker's heir sometimes is eligible for compensation.

Luisa Valladolid brought suit for benefits under the OCSLA after her husband, a roustabout for Pacific Operations Offshore, died when he was crushed onshore by a forklift. An administrative law judge denied her claim on the grounds that the death occurred outside the geographic situs of the outer continental shelf.

On appeal, the 9th Circuit noted that the 5th Circuit applied a situs-of-injury requirement for OCSLA claims. The 3rd Circuit, on the other hand, had rejected the situs-of-injury test, holding that a claimant need only satisfy a "but for" test in establishing that the injury occurred as the result of operations on the outer continental shelf.

The 9th Circuit rejected the situs-of-injury requirement, finding that the plain language of the statute unambiguously contains no such requirement. The statute provides workers' compensation benefits for the "disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer continental shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer continental shelf."

The only limitation on the injury is that it be the result of operations on the outer continental shelf, the court noted. The results of an operation may regularly extend beyond its immediate physical location, it added.

The 9th Circuit adopted the following test: The claimant must establish a substantial nexus between the injury and extractive operations on the shelf. To meet the standard, the claimant must show that the work performed directly furthers outer continental shelf operations and is in the regular course of such operations.

An injury sustained during employment on the outer continental shelf would, by definition, meet the standard, the 9th Circuit said. But an accountant's workplace injury would not be covered, while a roustabout's injury in a helicopter en route to the outer continental shelf likely would be.

The 9th Circuit remanded the OCSLA question to the Benefits Review Board for consideration consistent with its opinion.

The 9th Circuit in this case (Pacific Operations Offshore LLP v. Valladolid, No. 10-507) disregarded Congress' purpose in enacting the OCSLA, Pacific Operations Offshore maintained in its petition for review. Congress filled the gap in workers' compensation coverage for workers on the outer continental shelf by adopting the Longshore and Harbor Workers' Compensation Act benefits to cover nonseamen in the oil patch on the outer continental shelf. Like the decedent in this case, workers injured on land were covered by the applicable state workers' compensation scheme, it said.

The 9th Circuit rejected the gap-filling argument, asserting that because most state workers' compensation laws applied extraterritorially at the time the OCSLA was enacted, there was generally no gap to fill.

But Pacific Operations Offshore criticized the 9th Circuit decision, saying it "deepens an existing circuit split on a threshold issue of benefits eligibility and formulates a test that provides no meaningful guidance to administrative law judges and the Benefits Review Board."

D. EEOC Tackles Discrimination Against the Unemployed.

The U.S. Equal Employment Opportunity Commission held a hearing in February 2011 and later announced that it will address the question of whether it's common practice for U.S. employers to refuse to consider out-of-work job seekers, the rationale for it and its potentially disparate impact on protected groups.

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The hearing was a response to news reports that surfaced in 2010 about some U.S. companies whose posted job openings excluded unemployed persons from consideration, especially at a time when massive layoffs led to an unemployment rate hovering in the double digits.

While the unemployed are not a protected group, EEOC has considered whether the practice of excluding unemployed persons from the job applicant pool could have a disparate impact on protected groups. This is not a claim yet under law and EEOC hasn't taken an official position on this yet. Stay tuned!

V. <u>CONCLUSION</u>

It has been a challenging year. Courts and legislatures continued to change the legal landscape, especially in the area of employment law. Some issues have been clarified. Some regulations have been updated and refined. New legal theories have been introduced. Other legal boundaries have been tested and changed. Employers must stay on top of the developments in this ever-changing area of the law. We hope this outline has helped alert you to important developments in employment law.

Disclaimer

Please note: This outline is intended as general guidance and not specific legal advice. Your legal counsel should be consulted with specific questions or for advice on how to proceed with these matters.

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Thank you.
Jim Reidy