Squire, Sanders & Dempsey L.L.P.'s

# Labor and Employment Law Seminar

# WAGE AND HOUR UPDATES

## I. WAGE AND HOUR UPDATES

### A. Overtime Exemptions

*Pellegrino v. Robert Half Int'l Inc. (2010) 181 Cal.App.4th 713*

Maria Pellegrino and other account executives of temporary staffing firm Robert Half International ("RHI") filed this action against RHI for its failure to pay overtime compensation and commissions and to provide meal periods and itemized wage statements and for unfair competition. RHI had classified Pellegrino and the other account executives as administratively exempt employees. Among other things, the account executives' duties included recruiting, interviewing and evaluating candidates to be placed as temporary employees. RHI relied upon two principal affirmative defenses, including an agreement by which the account executives purportedly agreed to limit the time period within which to file any claims against RHI to six months and, secondly, that plaintiffs were exempt from overtime. The trial court bifurcated the unfair competition claims and ordered that those claims first be tried to the court (without a jury). After 17 days of trial and at the end of RHI's case in chief on the exemption defense, plaintiffs moved for judgment pursuant to Cal. Code Civ. Proc. § 631.8, which the trial court granted before entering a judgment in favor of plaintiffs in the amount of $615,000. The Court of Appeal affirmed, holding that the six-month purported limitation on plaintiffs' claims was unenforceable under Labor Code § 219. The Court further held the administrative exemption was inapplicable to plaintiffs because their work did not directly relate to management policies or general business operations of RHI or its customers. *See also Pellegrino v. Robert Half Int'l, Inc*., 182 Cal.App.4th 87 (2010) (attorney's fees award of $978,122 remanded to trial court for recalculation); *Villalobos v. Guertin*, 2009 WL 4718721 (E.D. Cal. Dec. 3,2009) (prevailing party employer's motion for $21,000 in attorney's fees granted against attorney of former employees in wage-and-hour class action).

*D'Este v. Bayer Corp. (9th Cir. 2009) 565 F.3d 1119*

The Ninth Circuit has certified two questions of law to be answered by the California Supreme Court pursuant to Cal. Rule of Court 8.548: (I) Does a pharmaceutical sales representative ("PSR") qualify as an "outside salesperson" under Industrial Welfare Commission Wage Orders 1-200 I and 4-200 I if the PSR spends more than half the working time away from the employer's place of business and personally interacts with doctors and hospitals on behalf of drug companies for the purpose of increasing individual doctors' prescriptions of specific drugs? (2) In the alternative, is a PSR involved in duties and responsibilities that meet the requirements of the administrative exemption under California law?

## B. Employees May Agree to Two On-Duty Meal Periods

*McFarland v. Guardsmark, LLC, 538 F.Supp.2d 1209 (N.D. Cal. 2008), aff'd, 588 F.3d 1236 (9th Cir. 2009)*

Johnny McFarland is a security officer for Guardsmark who alleged that on some occasions when he and other officers worked in excess of 10 hours in a day, they were not properly provided with a second meal period as required under California law. Pursuant to Labor Code § 512, an employee may waive the first meal period if the work day does not exceed six hours and may waive the second meal period if the work day does not exceed 12 hours and the first meal period was not waived. Plaintiff alleged that an "on-duty" meal period is the same as a waived meal period and, therefore, if the first meal period is provided on duty, the second one cannot be. On cross motions for summary judgment, the district court held that Guardsmark's position "is the correct one...where the employee agrees to take an 'on duty' meal period, and gets paid for working during the time he is eating, there is no 'waiver' of the meal period" within the meaning of Section 512. The district court rejected a contrary interpretation of the statute as set forth in the DLSE Manual on the ground that the Manual is a "void regulation." The Ninth Circuit affirmed and adopted the "district court's thorough decision" and rejected plaintiffs additional argument, which was raised for the first time on appeal, that his signed employment agreement did not represent an actual agreement to take two on-duty meal periods in a single day.

## C. Compensable Table

*Bamonte v. City of Mesa (9th Cir. 2010) 598 F.3d 1217*

The plaintiffs in this case are employed as police officers for the City of Mesa, Arizona. They contended that the city violated the Fair Labor Standards Act ("FLSA") by failing to compensate them for the time spent donning and doffing their uniforms and accompanying gear. The district court dismissed the lawsuit on summary judgment, and the Ninth Circuit affirmed, holding that because "[n]o requirement of law, rule, the employer, or the nature of the work mandates donning and doffing at the employer's premises" rather than at home, the time spent doing so was not compensable under the FLSA.

*Rutti v. Lojack Corp. (9th Cir. 2010) 596 F.3d 1046*

Mike Rutti filed this putative class action on behalf of all Lojack technicians who installed alarms in customers' automobiles. Rutti sought payment under the Fair Labor Standards Act for time spent on preliminary and postliminary activities performed by technicians in their homes both before and after their shifts. The district court granted summary judgment in favor of Lojack, but the Ninth Circuit vacated the judgment insofar as it precluded Rutti from seeking compensation for his commute time under California law and on his postliminary activity of sending daily portable data transmissions to the company and remanded the matter to the district court for further proceedings. The Court concluded that although Rutti was not entitled to reimbursement for his commute time under federal law or the preliminary activities

spent "receiving, mapping, and prioritizing jobs and routes for assignment," he might be entitled to reimbursement for the postliminary activity of sending a daily transmission to Lojack from his home via a Lojack-supplied portable data terminal because the evidence "does not compel a finding that the daily transmission of the record of the day's jobs takes less than ten minutes."

## D. Employer Status

*Martinez v. Combs (2010) 49 Cal.4th 35*

Plaintiffs are seasonal agricultural workers whom Munoz & Sons had employed during the 2000 strawberry season. The employees sued Munoz and two produce merchants (through whom Munoz sold strawberries) for alleged minimum wage violations. Following Munoz's bankruptcy, plaintiffs contended that the produce merchants were joint employers along with Munoz; that plaintiffs were the third-party beneficiaries of the contract between Munoz and the merchants; and that they were parties to an oral employment agreement with one of the merchants. The California Supreme Court held that although the Industrial Wage Commission's ("IWC") wage orders do generally define the employment relationship in actions to recover unpaid minimum wages, the IWC's definition of "employer" does not impose liability on individual corporate agents acting within the scope of their agency. The Court held that the merchants did not "suffer or permit" the employees to work on their behalf and did not "exercise control over their wages, hours or working conditions." Furthermore, the employees were not third-party beneficiaries of any contract to which Munoz was a party.

## E. Tip-pooling

*Lu v. Hawaiian Gardens Casino, Inc. (2010) 50 Cal.4th 592*

Louie Hung Kwei Lu, a card dealer at Hawaiian Gardens Casino, filed this class action challenging the casino's tip-pooling policy that required dealers to set aside 15 to 20 percent of the tips they received, which the casino distributed to other employees who provided service to casino customers. The Supreme Court granted review in this case to determine the narrow issue of whether Cal. Lab. Code § 351 provides employees with a private right of action or whether, instead, the labor commissioner is charged with enforcing the statute. The Supreme Court held there is no private right of action under the statute but observed that a common law claim for conversion may be available to employees under appropriate circumstances.

*Cumbie v. Woody Woo, Inc. (9th Cir. 2010) 596 F.3d 577*

Misty Cumbie worked as a waitress at the Vita Cafe (owned and operated by Woody Woo, Inc.). Woo required its servers to contribute their tips to a "tip pool" that was redistributed to all restaurant employees, including the kitchen staff (dishwashers and cooks). Cumbie filed this putative collective and class action against Woo, alleging that its tip-pooling arrangement violated the minimum-wage provisions of the federal Fair Labor Standards Act ("FLSA"). The district court dismissed Cumbie's complaint for failure to state a claim, and the Ninth Circuit affirmed, holding that "nothing in the text of the FLSA purports to restrict employee tip-pooling arrangements when no tip credit is taken" by the employer.

## F. Wage Statements

*Morgan v. United Retail, Inc. (2010) 186 Cal.App.4th 1136*

Amber Morgan filed this class action lawsuit against her former employer under Cal. Lab. Code § 226, alleging United Retail had violated the law because the wage statements issued by the employer listed the total number of regular hours and overtime hours separately and did not provide the sum of the regular and overtime hours as a separate line item. During her deposition, Morgan testified she was injured by United Retail's failure to include an additional line item showing the sum of hours worked because "[i]t makes it a little difficult to count how many hours I have been working." The trial court granted United Retail's motion for summary adjudication, and the Court of Appeal affirmed, holding that "United Retail's wage statements complied with section 226's requirements... by showing the actual number of regular hours worked and the actual number of overtime hours worked during the applicable pay period."

## G. Wage and Hour Class Action Trends

*Faulikenbury v. Boyd & Assoc., Inc. (2010) 185 Cal.App.4th 1363*

Plaintiffs sought to represent and certify a class of 4,000 current and former employees of Boyd & Associates, which provides security guard services throughout Southern California. Plaintiffs alleged that Boyd denied the putative class members off-duty meal periods and rest breaks and that it had failed to include certain reimbursements and an annual bonus payment in calculating the employees' hourly rate of overtime pay. The trial court denied certification as to all three subclasses, and the Court of Appeal affirmed as to the claims for meal and rest periods on the ground that the evidence submitted by Boyd showed the ability of each of its security guards to take breaks depended on individual issues. However, the Court reversed the denial of class certification as to the overtime subclass, reasoning that the trial court abused its discretion to the extent it decided common issues did not predominate.

*Arenas v. El Torito Restaurants, Inc. (2010) 183 Cal.App.4th 723*

The plaintiffs in this case are salaried managers at El Torito, El Torito Grill and GuadalaHarry's restaurants in California from May 2002 to the present. Plaintiffs alleged they were misclassified as employees exempt from overtime because they routinely spent more than half of their working hours performing duties delegated to non-exempt employees such as operating and closing cash registers, preparing food products, cooking, preparing drinks, tending bar, etc. In support of their motion to certify the class, plaintiffs alleged common questions of law and fact, including that all managers share the same or similar employment duties and activities, are automatically classified as exempt and are denied the benefits and protections of the employment laws and regulations in the same manner. Plaintiffs moved for certification of three subclasses of employees: kitchen managers, department managers and general managers. The trial court denied class certification after determining that resolution of the common issues would require mini-trials concerning the circumstances of each individual's job duties. The Court of Appeal affirmed, agreeing with the trial court's conclusion that "managers, based solely on their job descriptions, were as a rule misclassified was not amenable to common proof."

*Narouz v. Charter Commc'ns, LLC (9th Cir. 2010) F.3d 1261*

Hani Narouz filed a complaint against Charter Communications in which he alleged causes of action for wrongful termination in violation of public policy as well as statutory violations of the California Labor Code for failure to pay wages, provide meal periods, maintain accurate itemized wage statements and unfair competition under the Business & Professions Code § 17200. The wage claims were asserted as a putative class action on behalf of Charter's nonexempt employees. Following extensive discovery and a mediation, Narouz settled his individual claims. After settling his own claims, Narouz filed a motion to certify the class for settlement purposes, which was denied by the district court because it could not "ascertain a class." Narouz subsequently appealed the denial of class certification, and the Ninth Circuit reversed the district court, holding that when a class representative voluntarily settles his or her individual claims but specifically retains a personal stake in a putative class action, he or she retains jurisdiction to appeal the denial of class certification. The Ninth Circuit also held the district court erred by failing to certify a class for settlement purposes.

*Jaimez v. DAIOHS U.S.A., Inc. (2010) 181 Cal.App.4th 1286*

Alex Jaimez, a former Route Sales Representative (RSR) for DA1OHS U.S.A., Inc., dba DA1OHS First Choice Services (First Choice) filed this putative class action alleging that First with meal and rest break periods and failed to provide legally compliant paystubs. The trial court denied the motion to certify the class on the ground that Jaimez's claims were not typical, that common issues of law and fact did not predominate and that Jaimez was not an adequate class representative because he had lied on his First Choice employment application about his felony conviction and incarceration and had purportedly falsified time records and other documents. The Court of Appeal reversed the trial court's order denying class certification on the ground that nine of the RSR declarations that Jaimez provided were sufficient to demonstrate certification was appropriate - and the 25 declarations First Choice submitted only suggested that the potential damages to individual RSR's might vary. The Court did, however, affirm the trial court's determination that Jaimez was not an adequate class representative and ordered that a new class representative be appointed.

*Keller v. Tuesday Morning, Inc. (2009) 179 Cal.App.4th 1389*

Plaintiffs in this case filed a class action against Tuesday Morning (a retailer that sells brand name merchandise at discounted prices), alleging TM had misclassified the managers as exempt from overtime. Although the trial court had initially denied class certification to the managers, it subsequently granted their motion for certification in light of the California Supreme Court's opinion in Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal.4th 319 (2004). Almost three years later, a different trial court judge granted TM's motion to decertify the class on the ground that the individual inquiry predominated over any common inquiry because TM's numerous stores varied in size, layout, socioeconomic makeup, the number of employees and the manner in' which the managers conducted their supervisorial duties. The court also concluded that each manager's background and management style varied from store to store. The Court of Appeal managers, an expert witness for TM, its vice president of store operations and five of TM's attorneys. In contrast, the managers who filed declarations on behalf of the class were impeached by their own deposition testimony.

*Bates v. Rubio's Restaurants, Inc. (2009) 179 Cal.App.4th 1125*

The parties in this wage-and-hour class action litigation entered into a $7.5 million settlement, which provided for three payments of $2.5 million to approved class members. After the initial $2.5 million payment was distributed among 529 approved class members, defendant Rubio's Restaurants realized it had failed to provide the names of 140 potential class members to the settlement administrator. Initially, the trial court decided the 140 late-identified class members should receive notice and be folded into the existing settlement agreement. Later, however, the trial court reconsidered this ruling on its own motion and vacated it. In the same minute order, the judge recused himself from any further proceedings in the interests of justice. The Court of Appeal affirmed the trial court's judgment in its entirety, holding that Rubio's had failed in its appeal to address either the power of the judge to reconsider his own ruling or the standard of review to be applied by the Court of Appeal with respect to an order overturning a prior ruling after reconsideration.

*Vinole v. Countrywide Home Loans, Inc. (9th Cir. 2009) 571 F.3d 935*

Raymond Vinole and Ken Yoder filed this class action, alleging that the proposed class of current and former Countrywide External Home Loan Consultants was misclassified as exempt outside sales employees and that they were impermissibly denied overtime and other wages. Before plaintiffs filed their motion for class certification and prior to the pretrial motion deadline and discovery cutoff, Countrywide filed a motion to deny class certification, which the district court granted. Concluding that plaintiffs had "ample time" to prepare and present their certification argument, the Ninth Circuit found "no rule or decisional authority prohibit[ing] Countrywide from filing its motion to deny certification before plaintiffs filed their motion to certify." The Court further held the district court did not abuse its discretion under FRCP 23(b)(3) because the record supported its conclusion that individual issues predominated over common issues. In particular, the Court held that a "district court abuses its discretion in relying on an internal uniform exemption policy to the near exclusion of other factors relevant to the predominance inquiry." In so holding, the Ninth Circuit refused to follow *Wang v. Chinese Daily News, Inc.,* 231 F.R.D. 602 (C.D. Cal. 2005).

*Clark v. American Residential Servs. (2009) 175 Cal.App.4th 785*

Derain Clark and Maxine Gaines filed a class action lawsuit against American Residential Services, seeking unpaid minimum and overtime wages, payment for missed meal and rest periods and other violations. Eighteen months after the lawsuit was filed, the parties engaged in a one-day mediation with a respected mediator and agreed to settle the matter for $2 million, out of which Clark and Gaines would receive $25,000 each. The other class members would receive an average of $561.44. Notice of the proposed settlement elicited objections from 20 putative class members who alleged the settlement resulted in their recovering only about one percent of the total value of their claims and that no evidence was presented to the court to justify the settlement. After a hearing, the trial court approved the settlement, and the objectors filed this appeal. The Court of Appeal vacated the settlement because the trial court lacked sufficient information to make an informed evaluation of the fairness of the settlement - among other things, the objectors asserted that class counsel's evaluation of the case was based on a "staggering mistake of law," concerning which the trial court

apparently made no independent assessment. The appellate court also concluded it was an abuse of discretion to permit incentive or enhancement awards of $25,000 each to Clark and Gaines (more than 44 times the average payout to other class members) as well as costs totaling more than $44,500 when the notice to class members stated that plaintiffs' counsel were requesting reimbursement "of costs up to $40,000."

## H. Kin Care" Statute is Applicable to Uncapped Sick Leave Policies

*McCarther v. Pacific Telesis Group (2010) 48 Cal.4th 104*

Plaintiffs in this case worked as service representatives for different Pacific Telesis companies, which are signatories to various collective bargaining agreements ("CBA"). The applicable CBA in this case provides employees with paid time off for any day in which they miss work due to their own illness or injury for up to five consecutive days in any seven-day period so long as the employee returns to work (even for a partial day) following any period of absence. The employer did not pay employees for absences to care for ill family members. In 1999, California enacted the so-called "kin-care" statute (Labor Code § 233), which requires employers that provide sick leave to permit the employees to use up to half of their annual accrued and available sick leave entitlement to attend to an illness of a child, parent, spouse, or domestic partner of the employee. The legal question in this case was whether the statute applied to policies that provide for an uncapped number of days off, and the Supreme Court held that it does not.

## I. Wage & Hour Questions Certified to California Supreme Court

*Brinker v. Superior Court, review granted, argued and still under submission*

This case was brought by a group of hourly restaurant workers against their employer, Brinker Restaurant Corp. Brinker owns and operates 137 restaurants in California, including Chili's and Macaroni Grill. The plaintiffs (seeking to represent a class of 95,000 employees) claimed that Brinker failed to provide them with meal and rest periods -- specifically, they challenged Brinker's practice of having employees take "early lunches" shortly after starting work and then having employees work another five to ten hours without receiving another meal period. The employers also claimed that they should have received a rest break before the meal periods. Finally, the employees argued they worked "off the clock" during meal periods without pay. The Court of Appeal issued a published opinion on July 22, 2008. In a victory for employers facing expensive and mounting claims over missed meal and rest periods, the court held that employers only have to provide an opportunity for employees to take meal periods, not police employees to ensure that the meal periods provided are actually taken. On October 22, 2008, the California Supreme Court granted review of the *Brinker* case -- the Court of Appeal opinion is now "depublished" and cannot be cited or relied upon for precedent -- we are still awaiting a decision on the meal period issue.

*Pineda v. Bank of Am., N.A. (2009) 87 Cal.Rptr.3d 864, review granted*

Jorge Pineda filed this class action against Bank of America for unpaid wages and for "waiting time" penalties under Labor Code § 203. Although Pineda gave the bank two weeks' advance notice of his resignation, the bank failed to pay him his final pay until four days after his employment had ended. Pineda acknowledged that all wages due to him

were paid before this action was filed. The trial court granted the bank's motion for judgment on the pleadings after applying a one-year statute of limitations, but Pineda asserted that a four-year statute of limitations should be applied pursuant to the Unfair Competition Law. The trial court and the Court of Appeal disagreed with Pineda, holding that "continuation wages made payable by section 203 are a penalty, rather than wages, the recovery of which does not constitute restitution within the meaning of Business and Professions Code section 17203."

*Sullivan v. Oracle Corp. (9th Cir. 2009) 557 F.3d 979, review dismissed, cause remanded by 216 P.3d 520 (Cal. 2009)*

The Ninth Circuit has withdrawn its published opinion in this case and certified the following questions to the California Supreme Court: (1) Does the California Labor Code apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs in the circumstances of this case, such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week? (2) Does Business & Professions Code § 17200 apply to the overtime work described in question one? and (3) Does Section 17200 apply to overtime work performed outside California for a California-based employer by out-of state plaintiffs in the circumstances of this case if the employer failed to comply with the overtime provisions of the FLSA?

## II HOT TOPICS

### A. Preliminary and Postliminary Activities

1. The most prevalent area of litigation concerning the compensability of pre- and post-shift activities continues to be "donning and doffing" disputes, which concern whether employees are entitled to compensation for the time they spend putting on and taking off the uniforms and sanitary and protective clothing that they wear while performing their jobs. The focus of much of this litigation has been the food processing and law enforcement industries.

2. Recent decisions expand the definition of "work" and conflate the "work" test with the determination of whether an activity is a "integral and indispensable" and, thus, a principal activity

3. The Supreme Court long ago defined the term "work" as "[i] physical or mental exertion (whether burdensome or not) [ii] controlled or required by the employer and pursued necessarily and [iii] primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R. Co*., 321 U.S. at 598.

4. Courts have reached differing results as to clothes-changing and other similar activities depending on the circumstances at issue.

   Ninth Circuit:

   a. *Bamonte v. City of Mesa* held that at-home donning and doffing was not compensable. 598 F.3d 1217, 1228-29 (9th Cir. 2010). The court distinguished the facts before it from previous case law when it stressed that the employees in question were not required by their employer, by law, or by the nature of the work to don and doff their uniforms and gear at the employer's premises. *Id*. (citing Steiner, 350 U.S. at 256; Alvarez, 339 F.3d at 903; Ballaris, 370 F.3d at 911). In so doing, it adopted the reasoning of a 2006

Department of Labor memorandum which "opines that employees are not entitled to compensation when they are not required by the employer to don and doff uniforms and gear at the employer's premises, and have the option and ability to don and doff at home." Id. at 1229.

b. Another recent Ninth Circuit decision provides guidance in the donning and doffing context. In *Rutti v. Lojack Corp., Inc*., plaintiff sued under the FLSA for time spent commuting on a company vehicle and activities performed before his travel to his first job site of the day. No. 07-56599, slip op. (9th Cir. Mar. 2, 2010). The court used the following guidelines in deciding whether the pre-shift activities were compensable "principal activities": (1) "principal activities" are to be given a liberal construction per Lindow v. United States (9th Cir. 1984); (2) the court should pay particular attention to whether the activities are "performed as part of the regular work of the employees in the regular course of business,": and (3) the court should consider the extent to which the work impacts the employee's freedom to engage in other activities. Because most of the plaintiff's preliminary activities were related to his noncompensable commute, the Ninth Circuit concluded that they too were noncompensable.

c. A *de minimis* act cannot start the continuous workday

5. The § 203(o) exemption does not extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job." *Id*. The DOL also explains that "clothes changing covered by § 203(o) may be a principal activity. Where that is the case, subsequent activities, including walking and waiting, are compensable." *Id.*

## B. Wage and Hour Claim Outside the Workplace

### 1. Commuting Time

*Rutti v. Lojack Corp., Inc* (9TH CIR. 2010)

a) Class action filed on behalf of technicians who install alarms in customers' cars. Lojack paid for when plaintiff arrived at first work site, ending when he left the last work site.

b) Plaintiff asserted claims for preliminary and postliminary activities, as well as commute time to/from work sites.

Commute time is non-compensable under the FLSA, even if done in a company car and as a condition of employment.

(1) Court based its decision on the federal Employee Commuter Flexibility Act (ECFA)(which provides that employees need not be compensated for travel time, preliminary and postliminary activities that take place outside of normal work day)

(2) Restrictions on use of company car (e.g., no personal stops) did not create additional legally cognizable work.

c) Mapping routes and prioritizing jobs, checking assignments for the day before starting are also not compensable under the FLSA (because it is *de minimus* preliminary activity).

d) The 9th Cir. Panel was split on whether this would be compensable time under California law.

(1) Hotly contested issue: two of the three judges agreed that commuting was compensable time under California law, because of the restrictions placed on his use of the vehicle (he was required to use it, and could not stop for personal errands or take passengers)

e) Panel also split on whether more significant time spent uploading data after work was compensable two of the three judges found it was compensable work under federal law. (reversing summary judgment on this issue).

Implications for Employers

a) Under Federal law, Rutti provides guidance and clarity about the use of company vehicles for commuting, as well as preliminary and postliminary activities.

b) California employers, however, remain open to liability because they cannot claim the benefit of the ECFA.

c) Time-consuming preliminary or postliminary activities (taking more than a minute or two) may constitute compensable principal activities.

**2. Off-Site Work**

**a) Traveling for work -** Travel to meetings, seminars, and required training should be counted as time worked. See DLSE Enforcement Policies and Interpretations Manual, §§ 46.2-46.3.1

(1) Travel to voluntary training seminars, for example, should not be compensable time

(2) Time spent taking a break from traveling (eating, sleeping, personal pursuits on the way or upon arrival) are not compensable time worked.

(3) If the employee's travel from home to the airport is substantially the same as the distance and time between her home and usual place of reporting to work, then travel time does not begin until the employee reaches the airport. The employee must be paid for all hours spent between the time she arrives at the airport and the time she arrives at her hotel.

(4) California law does not recognize distinction in Federal regulations between "normal working hours" and outside normal working hours, or overnight out of-town assignments vs. one-day assignment. *See* DLSE Opinion Letter 2002.02.21. In California, it is all hours worked.

(5) Federal regulations provide that a special assignment one-day trip is all compensable time worked except time that would be spent in the employee's ordinary commute. 29 CFR § 785.37.

(6) Federal regulations also provide that for overnight travel away from home, travel time is worktime if it is during the employee's normal work hours (even if during non-working days). The DOL will not consider time spent as a passenger outside of regular working hours on overnight travel as worktime. 29 CFR § 785.39

(7) Travel time compensable at different rate of pay:

- (a) California law does permit an employer to establish a different pay scale for travel time as long as it is not less than minimum wage, and the employee is informed of the different pay rate before travel begins.
- (b) For calculating overtime, however, California uses a weighted average method for all rates paid during the workweek.

(8) Overtime issues

- (a) Employer needs to keep accurate records of travel time and include in overtime calculations for nonexempt employees
- (b) If multiple pay rates are involved, use weighted average

(9) Meal and rest period issues

- (a) As travel time is included as time worked, employer must make meal and rest periods available to employee, and keep accurate records.

(10) E.g., lawsuit filed in Hawaii against the City of Honolulu, including off-the-clock claims for the following claims: (See http://hawaiiflsalawsuit.com)

- (a) Training during off-duty hours
- (b) Homework or practice do be done off-duty
- (c) Commuting and travel time when reporting to a different worksite or temporary location
- (d) When transporting company equipment or other employees to/from a worksite
- (e) When traveling from a central reporting site to other worksites

(f) When actually working while commuting

(g) Travel time for trips off the island

**b) Compensable Work Form Home**

(1) Knowledge by employer that employee is working from home

(2) Blackberry issues (see below)

**c) Telecommuting**

(1) Ensuring proper recording of hours is important

(a) Overtime

(b) Meal and rest breaks

(2) Equipment/expenses

(a) Employer may be obligated to reimburse for certain expenses incurred by employee, including maintenance of equipment for company use

(b) Consider and clarify ownership of equipment

**d) Non-wage/hour issues**

(1) Productivity/Monitoring

(2) Work from home as accommodation under ADA or FEHA

(3) Discrimination issues may arise if employer allows some employees to work from home.

(4) Safety/insurance

(5) Confidentiality/Security/Privacy. E.g., usage policies - e.g., internet, email, phones - how do those apply to home equipment?

**3. Blackberry Issues -** New wave of overtime lawsuits arising as a result of wired-in non-exempt employees.

a) Chicago police officer filed lawsuit on May 24, 2010, *Jeffrey Allen v. City of Chicago* (N.D. Ill.).

(1) Complaint alleges he routinely had to use his Blackberry when off duty, and was not being compensated for it.

(2) Collective action under the FLSA, asserting claims for off-the-clock work and overtime for non-exempt police department employees.

b) Another example:

(1) In 2008, ABC News was negotiating with the Writers Guild of America in NY regarding the use of company-issued Blackberrys. The Guild would not agree to waivers of pay for checking Blackberrys after hours; ABC took away their Blackberrys in response. Agreement reached was that ABC would pay OT to writers who put in "substantial work" outside regular hours, but not for occasional email or idea.

See www.overtimelaywerblog.com/2009/02/blackberry_overtime.html; http://www.amanet.org/training/articles/Bewareof- the-Thoms-in-the-BlackBerry-Patch.aspx.

(2) In July 2008, an employee working at home with a Blackberry sued Verizon and a subcontractor in Florida for overtime. See http://www2.tbo.com/content/2008/jul/11/bz-verizoncontractor- face-suit-on-ot-pay/

(3) In July 2009, another class action lawsuit was filed against T-Mobile, claiming that employees were issued smartphones and were required to review and respond to numerous company-related e-mails and text messages at all hours of the day and night, whether or not they were logged into the computer-based timekeeping system. See http://www.wirelessweek.comiArchives/2009/07/ LawsuitAimed- at-T-Mobile-Overtime/ The same attorneys are seeking plaintiffs employed by the other wireless companies who claim their phone numbers and email addresses were given to customers, or were required to respond to customer (and co-worker) phone calls, text messages and emails while not punched into the employer's timekeeping system, see http://peltonlaw.com/cases-investigations/ wirelessinvestigation/

**c) Prevention Alternatives?**

(1) Policy disallowing off-duty use of blackberrys or email

(2) Policy requiring permission before off-duty use

(3) Disable Blackberry after hours

(4) Don't give Blackberries to non-exempt employees

# KEY CONSIDERATION WHEN USING ELECTRONIC SIGNATURES AND ELECTRONIC STORAGE OF FORMS I-9

The Department of Homeland Security (DHS) issued a final rule in July, 2010 which made minor changes to an interim final rule promulgated four years ago, providing that employers and recruiters who are required to complete and retain Form I-9, Employment Eligibility Verification, may sign the I-9 electronically and retain it in an electronic format.[1] Employers and recruiters are required to complete Form I-9 for each new employee within 3 business days of hire. The completed Form I-9 is to be retained by the employer who must make it available for inspection and audit upon request by US Immigration and Customs Enforcement (ICE) investigators or other authorized federal officials. Failure to properly complete and retain each Form I-9 can subject the employer or recruiter to civil monetary penalties.

While the new rules for electronic signature and storage may seem straightforward, employers should take note that the regulations require specific recordkeeping standards and technical safeguards are implemented in order to ensure compliance. As a result of a recent $1 million plus fine against the retailer Abercrombie & Fitch for "technology-related deficiencies" in their I-9 system, ICE announced that "[e]mployers are responsible not only for the people they hire but also for the internal systems they choose to utilize to manage their employment process and those systems must result in effective compliance."[2]

With the above-mentioned in mind, below we provide the following summary of the applicable regulations along with some practical guidelines employers should take into consideration when implementing an electronic I-9 system or purchasing one from a vendor.

**Electronic Forms, Signatures and Storage**

The regulations permit employers to execute the I-9 verification process by using paper, electronic systems or a combination of both. Employers may also change which type of electronic system they use as long as the new system complies with the regulations. Below are key components of a compliant system.

1. **Electronic signatures.** If the form is completed electronically, the system must include a method to acknowledge that the employee's attestation (in Section 1 of the I-9) has been read by the signatory and that the electronic signature is associated with the given I-9. The system must:

   - Affix the electronic signature at the time of the transaction;
   - Create and preserve a record verifying the identity of the person producing the signature; and
   - Provide a printed confirmation to the signatory of the transaction at the time the I-9 is completed.

   As to the employer's attestation in Section 2, the system should also include a method that the attestation to be signed has been read by the signatory. Common systems used include assignment of a unique PIN number or a

[1] Electronic Signature and Storage of Form I-9, Employment Eligibility Verification, 75 Fed. Reg. 42575 (July 22, 2010).
[2] U.S. Immigration and Customs Enforcement, News Release, "Abercrombie & Fitch fined after I-9 audit" (September 28, 2010).

"Click to Accept" feature. While either system is acceptable, the employer is required to document which system they use and produce such documentation in the event of an I-9 audit.

2. **Electronic Storage and Copying.** Pursuant to the regulations, employers must retain completed I-9s for all active employees *for the longer of*: 3 years after the date you hire an employee; or 1 year after an employee's termination. A paper I-9 document can be stored by scanning into an electronic format (e.g., pdf), via microfilm or microfiche. If an employer retains copies of the supporting I-9 documents from the employee, such documents must be retained for all employees, regardless of national origin or citizenship status, or you may be in violation of anti-discrimination laws. The supporting I-9 documents must be retained with the I-9 or stored separately and should be retrievable as described below.

3. **System requirements.** If an electronic system is used to create the I-9, only the pages where employer and employee enter data must be retained. In other words, the employer is not required to reproduce the instructions and list of acceptable documents for each form. The regulations require any system for electronic storage include reasonable controls to ensure integrity, accuracy and reliability as well as audit trail functions. The requirements include:

   - Retrieval system which includes an **indexing** system that permits the identification and retrieval for viewing and reproduction of relevant documents and records maintained in the electronic storage system;
   - Audit trail is created whenever an electronic record is created, completed, updated, modified, altered or corrected. The audit trail must record the date of access, the identity of the individual who accessed the electronic record and the action taken. No such trail is required for merely viewing the I-9 and related documents;
   - Provide the inspecting government agencies with resources (e.g., hardware and software, personnel and documentation) necessary to locate, retrieve, read and reproduce the electronically stored I-9s and supporting documents; and
   - Upon request of an employee, provide a printed confirmation (or receipt) of the I-9 transaction.

**Avoiding Buyers Remorse**

There are a plethora of off-the-shelf software tools designed for I-9 compliance. While many systems purport to comply with the above-mentioned regulations, not all are created equal. When choosing the right system, employers should consider the following:

- Is the system audit tested and does the vendor offer audit support?
- Can the system reproduce large batches or selective I-9 documents on demand?
- What kind of security and back-up components are built into the system?
- How will the vendor support updates to the system due to changes in regulatory requirements and changes to the I-9 form?

Before establishing or purchasing such a system, consult with an immigration compliance counsel to assure the system will stand up to an ICE audit. In today's environment it's no longer a question as to whether an employer will be targeted for an I-9 audit, but when. As exemplified by the Abercrombie & Fitch matter, it is essential that employers who have adopted an electronic I-9 storage system can meet the documentation and system requirements in order to placate the ICE auditors and avoid or mitigate any fines.

# GRANDFATHERED HEALTH PLANS

## Introduction

As the debate over health care reform dragged on, to paraphrase, the Obama administration made this promise, "If you like your health care, the law is not going to force you to change it". This was the genesis of what has now become the "grandfathered plan".

Section 1251(a)(1) of the PPACA states that nothing in the PPACA shall be construed to require an individual to terminate his or her health coverage. In addition, as a general proposition, Section 1251(a)(2) of the PPACA provides that none of the PPACA shall apply to a plan in which an individual is enrolled on the date the law was enacted (March 23, 2010). This is the source of the "grandfathered plan".

Nevertheless, after stating those platitudes, the PPACA carves out a variety of its provisions that will nevertheless apply to "grandfathered plans". In quite a few cases, the applicable laws only apply in the small group and individual markets. The end result is a patchwork of PPACA provisions that do and do not apply to grandfathered plans. They are reviewed in this outline.

It also must be remembered that even if a plan is grandfathered, there continue to be other pre-existing provisions of law (e.g. ERISA) that apply to that grandfathered plan. Thus, although the concept of providing some "grandfathering" for pre-existing plans sounds enticing, it is not clear that at the end of the day, there will really be any significant benefits for grandfathered plans, especially those of large employers and self-insured employers.

On June 17, 2010, regulations were issued relating to grandfathered plans. The regulations define grandfathered plans and describe onerous conditions for maintaining grandfathered plan status. On October 8, 2010 the DOL issued a set of "Frequently Asked Questions" that elucidated parts of the regulations.

In summary, it appears that it is going to be very difficult for a plan to maintain its grandfathered status; and it is unclear that it will even be financially advantageous to do so. Thus, it appears that the grandfathered plan exemption is one that will not be significant for most employers.

## Laws That Still Apply to Grandfathered Plans

The following is a list of the PPACA laws that still apply to grandfathered plans:

1. PPACA §2708 – Waiting Periods.

   - A group health plan ("GHP") cannot have a waiting period of more than 90 days. Effective in 2014.

NOTE: Grandfathered plans would continue to be subject to pre-existing rules enacted under HIPAA that require immediate enrollment of spouses and dependents in certain circumstances (*e.g.* birth, adoption, marriage).

2. PPACA §2711 – Lifetime Limits

- A GHP is prohibited from imposing lifetime dollar limits on benefits. Effective for the first plan year after September 23, 2010.

3. PPACA §2711 – Annual Limits

- In general, a GHP cannot impose annual dollar limits on benefits. Effective for the first plan year after September 23, 2010.

- However, prior to the 2014 plan year, the GHP can impose an annual limit based on regulations to be issued HHS.

4. PPACA §2712 – Rescission

- This portion of the law restricts a GHP from cancelling coverage absent fraud or material misrepresentations of fact. Effective for the first plan year after September 23, 2010.

  NOTE: Section 510 of ERISA prohibits an employer from taking adverse employment related action against an employee for utilizing the coverage offered under a plan.

  NOTE: Section 702 of ERISA also prohibits a GHP from denying coverage on account of a health status-related factor.

5. PPACA §2704 – Pre-Existing Conditions

- A GHP cannot impose any pre-existing condition exclusions

  ➢ Effective for the first plan year after September 23, 2010 for enrollees under age 19.

  ➢ Otherwise effective for the 2014 plan year.

  NOTE: Currently, ERISA §701 places restrictions on the imposition of pre-existing conditions based on the amount of the individual's "creditable coverage".

  NOTE: ERISA §702 also prohibits exclusions for coverage based on health status-related factors.

6. PPACA §2714 – Extension of Dependent Coverage

- Coverage for children must be provided to age 26, without regard to dependent status. Effective for the first plan year after September 23, 2010.

- Prior to the 2014 plan year, coverage does not have to be extended to age 26 if the child is eligible to enroll in an employer-sponsored group health plan.

7. PPACA §2715 – Standard Benefit Summaries. Effective for the first plan year after September 23, 2010.

   - HHS is supposed to provide a standard summary of benefits that GHPs will have to provide to plan participants.

   - 60-day advance notice is required for any material modifications of the terms of the GHP not reflected in the standard summary.

8. PPACA §2718 – Insurer Rebates. Effective for the first plan year after September 23, 2010.

   - This provision of the law only applies to insurers. They are required to account for the way premiums are spent and to provide rebates if not enough dollars are being spent on benefits.

## Some Laws That Do Not Apply to Grandfathered Plans

1. PPACA §2713 – Preventive Care. Effective for the first plan year after September 23, 2010.

   - GHPs are required to cover, without cost-sharing, certain types of preventive care.

     NOTE: It may be desirable to provide this type of coverage anyway if it would reduce plan costs.

     NOTE: Grandfathered plans continue to have certain types of coverage mandated under ERISA, including minimum hospital stays for newborns, mental health parity and mastectomy reconstructive surgery.

2. PPACA §2716 – Nondiscrimination Rules. Effective for the first plan year after September 23, 2010.

   - Tax law "nondiscrimination rules" that are being extended to insured plans.

     NOTE: This may be an important consideration for employers with executive insurance plans.

3. PPACA §2717 – GHP Reporting Requirements. Effective for the first plan year after September 23, 2010.

   - Reporting requirements designed to foster improvements in health care.

4. PPACA §2719 – Appeals Process. Effective for the first plan year after September 23, 2010.

   - Supplements existing claims review process under ERISA §503. Has a mandated external review process feature.

5. PPACA §2719A – Patient Protections.

- Primary physician designations – any within the network
- Emergency services –
  - No prior authorization
  - Any provider
  - No cost-sharing differences
- Pediatric Care – designate pediatrician if a primary care physician is otherwise required under the plan.
- OB/GYN Care – No referral needed if in network.

6. PPACA §2705 – Prohibited Discrimination Based on Health Status.

- In 2014, supplements current ERISA rules that prohibit discrimination-based on health status-related factors. HHS may expand the factors.
- Creates new rules for Wellness Plans. Provides new and revised safe harbor plan designs.

7. PPACA §2706 – No Discrimination Against Health Care Providers.

- GHPs with networks must allow any health care provider in the network that is willing to sign on.

8. PPACA §2709 – Required coverage for clinic trial volunteers.

9. PPACA §2701 – Restrictions on Insurer Rate Designs in the Small Group and Individual Market. Effective in 2014.

This law is designed to restrict the premiums that insurers can charge in the small group and individual markets around carefully designed parameters, so as to prevent discriminatory underwriting and thereby make expanded coverage available in these markets.

NOTE: This would not be relevant to large employers and self-insured employers.

10. PPACA §2702

Requires insurers to make coverage available to all applicants in the small group and individual markets. Effective in 2014.

Also designed to expand insurance coverage in the small group and individual markets.

NOTE: This would not be relevant to large employers and self-insured employers.

11. PPACA §2703

Requires insurers to provide guaranteed renewability of coverage in the small group and individual markets.

Designed to expand availability of coverage in those markets.

NOTE: This is not relevant to large employers or self-insured employers.

12. PPACA §2707

Insurers in the small group and individual market are required to offer insurance that has an "essential health benefits" package of coverage. In addition, cost-sharing for plan participants and policy holders cannot exceed certain limits.

This is designed to prevent insurers in these markets from offering deceptive coverage.

NOTE: This is not relevant to large employers and self-insured employers.

13. PPACA §2715A

This provision of the law would require a plan to comply with extensive "disclosure" rules pertaining to a wide range of things, such as claims payment policies, enrollment, cost-sharing, etc.

NOTE: These appear to be somewhat burdensome requirements that apply to all plans.

## Grandfathered Plan Status

1. Initial Qualification

- Snapshot date – March 23, 2010
- Applies to "coverage" under a health plan or insurance contract.
- An individual had to be enrolled in that coverage on March 23, 2010.
- Applies separately to each "benefit package" under a plan or insurance contract. The DOL Frequently Asked Questions identify benefit packages in a broad brush way, such as HMO, PPO and indemnity options.

2. Documentation Requirements

- Maintain records documenting the plan or contract terms in effect on March 23, 2010.
- Maintain other records as necessary to prove continuing grandfathered status (*e.g.* employee contribution requirements).

3. Disclosure Requirements

- Plan or insurance contract materials must have a statement that the plan or contract is a grandfathered plan under Section 1251 of the PPACA.
- Regulations have model language.

4. Continuing Enrollment

- Grandfathered status applies to new enrollees.
- Grandfathered status continues even if all of the individuals enrolled on March 23, 2010 cease to be enrolled.

5. Anti-Abuse Rules – Grandfathered Plan Status Lost

- Principal purpose of business transaction is to put employees into a grandfathered plan.
- Certain transfers of employees without a bona fide business reason.

## Changes Causing a Loss of Grandfathered Status

1. Elimination of all or substantially all benefits to diagnose or treat a particular condition.

2. Any increase in a percentage cost-sharing requirement (as of March 23, 2010)

- *e.g*. a co-insurance percentage

3. An increase in a fixed amount copayment that exceeds the greater of:

- $5, medical inflation indexed from March, 2010.
- A "maximum percentage increase". This is equal to the sum of (i) 15%, and (ii) the percentage rate of medical inflation since March of 2010.

4. An increase in a fixed-amount cost-sharing requirement that is other than a co-payment.

- *e.g*. deductibles and out-of-pocket limits.
- Increase is permitted up to the "Maximum percentage increase". This is equal to the sum of (i) 15%, and (ii) the percentage rate of medical inflation since March, 2010.

5. Decrease in the "employer contribution rate".

a. Expressed as a percentage of the plan's or insurance contract's premium cost for each "tier" coverage for all similarly situated individuals.

- Tiers of coverage are identified in the DOL's Frequently Asked Questions as being denominations such as single coverage, single +1, and family coverage.
- The Plan's premium costs for a plan year are based on the COBRA premium costs for that plan year (without the 2% COBRA surcharge).

- The employer contribution rate for a tier of coverage is the percentage of the cost that was being paid for by the employer during the coverage period (e.g. the plan year) that included March 23, 2010. The amount being paid by employees is determined without regard to whether payments made by the employees for the coverage are being paid with pre-tax salary reduction under a Section 125 cafeteria plan.
- Similarly situated individuals is defined in 29 CFR §2590.702(d). That term includes participants and beneficiaries. Employers will need to focus on employment categories used by the Plan.

b. Expressed as a formula.

- This will apply to union plans that have employer contributions fixed as an amount per hour worked or on some production basis (*e.g.* tons of coal mined).
- Same requirements as above. Reduction in the amount cannot be more than 5%.

6. Changes in Dollar Limits

- If no dollar limits exist on March 23, 2010, new dollar limits cannot be imposed.
- If lifetime dollar limit exists on March 23, 2010, it cannot be lowered.
- If annual dollar limit exists on March 23, 2010, it cannot be lowered.

7. Transitional Rules

- There is an exception for certain changes made to the plan if they are made pursuant to certain actions taken before March 23, 2010 (*e.g.* a binding collective bargaining agreement).
- There also is an exception for changes that were adopted after March 23, 2010 and before June 14, 2010, if they are revoked.

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# RECENT UPDATES IN LABOR & EMPLOYMENT LAW

## WAGE AND HOUR LAW

A. Status Of The California And Federal Minimum Wage.

The minimum wage in California remains unchanged at $8.00 per hour. Employers should be aware that the minimum salary requirement for executive, administrative, and professional exemptions in California is $2,773.33 per month, or $33,280.00 per year.

Though, San Francisco's minimum wage remains unchanged at $9.79 per hour, employers should be aware that effective January 1, 2011, San Francisco's minimum wage will be increased to $9.92 per hour. Employers with employees working in the city and county of San Francisco should make sure that they are in compliance with the new minimum wage.

The federal minimum wage also remains unchanged at $7.25 per hour. Because California already has a higher minimum wage, California employees are entitled to the higher of the two minimum wages, in this case, the California minimum wage. California employers with employees in other states should verify that they are in compliance with those states' minimum wage requirements.

B. IRS Rate Change For Mileage Reimbursement.

On January 1, 2010, the optional standard mileage rate used to calculate deductible costs of operating an automobile for business purposes decreased from 55 cents per mile in 2009, to 50 cents per mile. The mileage rate for 2010 reflects the relatively lower transportation costs compared to one year ago. In California, California Labor Code section 2802 requires employers to reimburse their employees for all necessary expenditures or losses incurred by the employee in direct consequence of his or her duties, including operating an automobile for business purposes.

C. Card Dealers Had No Standing To Challenge Mandatory Tip-Pooling Policy.

In *Lu v. Hawaiian Gardens Casino, Inc.,* 50 Cal. 4th 592 (2010), a card dealer at Hawaiian Gardens Casino, filed a class action challenging the casino's tip-pooling policy that required dealers to set aside 15 to 20 percent of the tips they received, which the casino distributed to other employees who provided service to casino customers. The Supreme Court granted review in this case to determine the narrow issue of whether Cal. Lab. Code § 351 provides employees with a private right of action or whether, instead, the Labor Commissioner is charged with enforcing the statute. The Supreme Court held there is no private right of action under the statute but observed that a common law claim for conversion may be available to employees under appropriate circumstances. See also *Gutierrez v. California Commerce Club*, 2010 WL 2991875 (Cal. Ct. App. 2010) (dismissal of wage and hour class action on demurrer is reversed because it was "premature to make determinations pertaining to class suitability on demurrer").

D. Tip-Pooling is Not Prohibited by the FLSA.

In *Cumbie v. Woody Woo, Inc*., 596 F.3d 577 (9th Cir. 2010), Misty Cumbie, a waitress at the Vita Cafe (owned and operated by Woody Woo, Inc.), filed a putative collective and class action against Woo, alleging that its tip-pooling arrangement (requiring its servers to contribute their tips to a "tip pool" that was redistributed to all restaurant employees) violated the minimum-wage provisions of the federal Fair Labor Standards Act ("FLSA"). The district court dismissed Cumbie's complaint for failure to state a claim, and the Ninth Circuit affirmed, holding that "nothing in the text of the FLSA purports to restrict employee tip-pooling arrangements when no tip credit is taken" by the employer.

E. Company May Be Liable For Unpaid Wages For Time Spent Transmitting Data.

In *Rutti v. Lojack, Corp*., 596 F.3d 1046 (9th Cir. 2010), the plaintiff, Mike Rutti filed a putative class action on behalf of all Lojack technicians who installed alarms in customers' automobiles. Rutti sought payment under the Fair Labor Standards Act for time spent on activities performed by technicians in their homes both before and after their shifts. The district court granted summary judgment in favor of Lojack, but the Ninth Circuit vacated the judgment insofar as it precluded Rutti from seeking compensation for his commute time under California law and on his activity of sending daily portable data transmissions to the company and remanded the matter to the district court for further proceedings. The Court concluded that although Rutti was not entitled to reimbursement for his commute time under federal law or the preliminary activities spent "receiving, mapping, and prioritizing jobs and routes for assignment," he might be entitled to reimbursement for the activity of sending a daily transmission to Lojack from his home via a Lojack-supplied portable data terminal because the evidence "does not compel a finding that the daily transmission of the record of the day's jobs takes less than ten minutes."

F. Employees May Agree To Two On-Duty Meal Periods.

In the case of *McFarland v. Guardsmark, LLC,* 538 F. Supp. 2d 1209 (N.D. Cal. 2008), *aff'd,* 588 F.3d 1236 (9th Cir. 2009), Johnny McFarland, a security officer for Guardsmark, alleged that on certain occasions he and other officers worked in excess of 10 hours in a day but were not properly provided with a second meal period as required under California law. Pursuant to Labor Code § 512, an employee may waive the first meal period if the work day does not exceed six hours and may waive the second meal period if the work day does not exceed 12 hours and the first meal period was not waived. Plaintiff alleged that an "on-duty" meal period is the same as a waived meal period and, therefore, if the first meal period is provided on duty, the second one cannot be.

On cross motions for summary judgment, the district court held that Guardsmark's position "is the correct one ...where the employee agrees to take an 'on duty' meal period, and gets paid for working during the time he is eating, there is no 'waiver' of the meal period" within the meaning of Section 512. The district court rejected a contrary interpretation of the statute as set forth in the DLSE Manual on the ground that the Manual is a "void regulation." The Ninth Circuit affirmed and adopted the district court's decision and rejected plaintiff's additional argument, which was raised for the first time on appeal, that his signed employment agreement did not represent an actual agreement to take two on-duty meal periods in a single day.

G. The FLSA Does Not Prevent Employers From Changing Pay Rates For Those Working Alternative Workweeks.

The Fair Labor Standards Act required Pomona Valley Hospital Medical Center ("PVHMC") to pay its employees 1- 1/2 times the employees' regular rate for any employment in excess of eight hours in any workday and in excess of 80

hours in a 14-day period. However, many of PVHMC's nurses preferred working 12-hour shifts in order to have more days away from the hospital. In response to the nurses' requests to work 12-hour shifts, PVHMC developed and implemented an optional 12-hour shift schedule that lowered the base hourly salary so that nurses who worked overtime (in excess of eight hours in a day) would end up making approximately the same amount of money as they would make working an eight-hour shift (i.e., without any overtime).

In the case of *Parth v. Pomona Valley Hosp.*, 584 F.3d 794 (9th Cir. 2009), Parth alleged that PVHMC's use of different base hourly rates violated the FLSA. Although the district court found that Parth met the requirements for conditional class certification to bring the FLSA claim, the court granted the hospital's motion for summary judgment. The Ninth Circuit affirmed, holding that "Parth cannot cite any relevant case law to support her argument that PVHMC cannot respond to its employees' requests for an alternative work schedule by adopting the sought-after schedule and paying the employees the same wages they received under the less-desirable schedule."

H. Individual Managers May Be Liable For Unpaid Wages Under The FLSA.

In *Boucher v. Shaw*, 572 F.3d 1087 (9th Cir. 2009), three former employees of the Castaways Hotel, Casino and Bowling Center and their local union sued the employees' individual managers for unpaid wages under the federal Fair Labor Standards Act (the "FLSA") and Nevada law. Although the Nevada Supreme Court determined there could be no individual liability under state law, the Ninth Circuit concluded that the three individual managers (the Chairman/CEO, the CFO and the head of labor and employment matters - two of whom also owned the Castaways) could be considered "employers" within the meaning of the FLSA: "Where an individual exercises control over the nature and structure of the employment relationship ... that individual is an employer within the meaning of the Act, and is subject to liability."

## DISCRIMINATION, HARASSMENT & RETALIATION

A. Age Discrimination: EEOC Proposes Rule to Clarify "Reasonable Factors Other Than Age" Defense Under ADEA.

The U.S. Equal Employment Opportunity Commission (EEOC) published in the Federal Register a Notice of Proposed Rulemaking (NPRM) addressing the meaning of "reasonable factors other than age" (RFOA) under the Age Discrimination in Employment Act (ADEA). The agency solicited comments from the public and other interested parties between February 18 and April 19, 2010.

The proposed rule seeks to clarify the "reasonable factors other than age" (RFOA) defense to disparate-impact claims first articulated by the United States Supreme Court in Smith v. City of Jackson, 544 U.S. 228 (2005). In that case, the Supreme Court held that the ADEA authorizes recovery for disparate impact claims of discrimination and that the "reasonable factors other than age" test, rather than the business-necessity test used in Title VII disparate-impact cases, is the appropriate standard for determining the lawfulness of a practice that disproportionately affects older individuals.

According to the EEOC, the proposed rule "emphasizes the need for an individualized, case-by-case approach to determining whether an employment practice is based on reasonable factors other than age. It also emphasizes that "the RFOA defense applies only when an employment practice is not based on age." In addition, it provides a non-exhaustive list of factors relevant to determining whether an employment practice is "reasonable" and whether it is based on a factor "other than age."

The proposed rule is based on the EEOC's analysis of Smith, as well as the Supreme Court's decision in Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395 (2008), in which it held that the employer bears the burden of proving the RFOA defense. Because neither Smith nor Meacham gave a standard for what is "reasonable," the EEOC has adopted the common tort law interpretation of that term.

Under the proposed rule, a "reasonable" factor is one that is "objectively reasonable when viewed from the position of a reasonable employer under like circumstances, both in its design and in the way it is administered." To aid in assessing whether an employment practice is based on reasonable factors other than age, the proposed regulation provides a non-exhaustive list of factors relevant to whether a factor is reasonable. Those factors include:

- whether the employment practice and the manner of its implementation are common business practices;
- the extent to which the factor is related to the employer's stated business goal;
- the extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately (e.g., training, guidance, instruction of managers);
- the extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;
- the severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and
- whether other options were available and the reasons the employer selected the option it did.

It is not necessary that all factors be present in every case.

According to the EEOC, the RFOA defense applies only when an employment practice is not based on age: "Disparate-impact challenges typically involve practices that are based on objective, non-age factors. Sometimes, however, disparate impact results from giving supervisors unchecked authority to engage in subjective decision-making. In that case, the criteria at issue may not be distinct from age."

To aid in assessing whether an employment practice is based on a non-age factor, the proposed rule sets forth a non-exhaustive list of factors relevant to the RFOA defense. The proposed rule lists the following factors:

- the extent to which the employer gave supervisors unchecked discretion to assess employees subjectively;
- the extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes; and
- the extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

It is not necessary that all factors be present in every case.

With the period for public comment now closed, the EEOC will make revisions in response to those comments. The EEOC then will vote on a final rule, and, after it is approved by the EEOC, the final rule will be sent to the Office of Management and Budget and coordinated with other federal agencies before it is published in the Federal Register (CFR).

B. EEOC Aggressively Pursuing Suits Against Employers Under Expanded ADA Law.

As was expected when former President Bush signed the ADA Amendments Act (ADAAA) into law two years ago, the EEOC will be aggressively pursuing litigation against employers that it deems are not complying with the expanded ADA standards. The EEOC has announced that it has brought lawsuits against three employers under the ADAAA, and the agency made it clear that this is just the beginning of its efforts to enforce the new law.

The lawsuits are against Eckerd Corporation, now operating as Rite Aid, a Maryland-based surveying company named Fisher, Collins & Carter, and IPC Print Services. The cases are pending in federal court in Georgia, Maryland, and Michigan. According to the EEOC, "[t]he cases—all filed under the broader and simplified definition of disability set forth in the ADA Amendments Act (ADAAA)—allege discrimination against qualified individuals with diabetes, cancer and severe arthritis."

The EEOC's announcement is a clear shot across the bow of employers. "The ADAAA made clear what the EEOC had always asserted: People with a range of disabilities are protected from unlawful discrimination," stated EEOC Chair Jacqueline A. Berrien. "We hope that these cases send a clear message that the commission will vigorously enforce the ADA."

In Atlanta, the EEOC charged Eckerd Corporation with "refusing to provide a reasonable accommodation -- a stool to sit on -- to a long-time employee who experienced severe arthritic symptoms in her knees." According to the EEOC, "Fern Strickland, who had worked as a cashier for Rite Aid with this reasonable accommodation for seven years without incident, lost the use of her stool in January 2009 when a new district manager decided that the company would no longer accommodate her disability." The EEOC alleges that the district manager "did not like the idea" that Strickland used a stool. The EEOC's suit claims that Strickland "was terminated several weeks later because of the manager's failure to accommodate her disability."

The EEOC has alleged that surveying company Fisher, Collins & Carter fired two employees "because they had diabetes and hypertension." The suit alleges that "the company asked Robert Gray and Wayne Seifert and other employees to complete a questionnaire regarding their health conditions and medications." According to the EEOC, "[t]he suit asserts that, despite their many years of successful performance, the company unlawfully selected Gray and Seifert for a reduction-in-force on January 21, 2009, on the basis of their disabilities, while retaining less qualified, non-disabled employees."

In the third lawsuit, the agency has charged that IPC Print Services violated the ADAAA by failing "to allow an employee to work part time while being treated for cancer." According to the EEOC, "Derek Nelson, who had been employed by IPC as a machinist for over ten years, went on medical leave in 2008 in order to undergo chemotherapy." The EEOC claims that in January 2009, "when Nelson sought to continue working part-time while he completed his treatment, IPC discharged [him] for exceeding the maximum hours of leave allowed under company policy." The EEOC is taking the position that those actions "violated IPC's obligation to reasonably accommodate Nelson's disability."

The EEOC made clear that these lawsuits are only the beginning. "These cases, among the first filed by the EEOC under the ADA Amendments Act, illustrate the continuing need for rigorous enforcement of the law in this area, as well as further education about the ADA's requirements," said EEOC General Counsel David Lopez. "Congress has made the scope of the ADA clear and broad: Individuals with disabilities—including serious medical conditions such as cancer, diabetes, and severe arthritis—must be evaluated according to their qualifications, and not their disabilities. Where a reasonable accommodation will enable a person with a disability to perform the essential functions of her job, an employer must provide it. Through cases like those announced today, the EEOC's litigation program will focus on deterring willful violations of this important civil rights law."

C. Federal District Court Finds That HIV Infection Will Consistently Meet New Definition Of Impairment Under ADAAA.

While there is still a dearth of federal court decisions interpreting the new ADAAA standards, at least one federal district court has had the opportunity to weigh in. In Horgan v. Simmons, 2010 U.S. Dist. LEXIS 36915 (N.D. Ill. Apr. 12, 2010), the federal district court sitting in Chicago, Illinois, held that HIV infection, which some courts had previously held was not a per se impairment under the former ADA, will in fact consistently meet the ADAAA's new definition of impairment.

Plaintiff Kenneth Horgan had been HIV positive for 10 years, but disclosed his diagnosis only to close friends. He began working for Morgan Services, Inc., in 2001, where he received promotions and good reviews. During that time, Horgan's HIV remained under control to where it did not progress to AIDS. Plaintiff alleged that in 2009 (after the ADAAA's new provisions took effect), the President of the company had a private meeting with him in which he was pressured into disclosing his condition. The next day, the President sent an e-mail to the company's workforce informing it that Plaintiff was no longer with the company.

Horgan brought suit under the ADAAA. Morgan Services moved the federal district court to dismiss the suit, arguing that Horgan was unable to show a "protected disability," even under the new ADAAA, based on being HIV positive. Although some courts had held under the former ADA that HIV did not automatically constitute a disability, the federal district court determined that this was no longer the case under the new ADAAA. Relying on the EEOC's proposed regulations to implement the ADAAA, which lists HIV as an impairment that consistently will meet the definition of disability, the court held that Horgan's HIV-positive status "substantially limits a major life activity: the function of his immune system."

The Horgan decision is just the tip of the iceberg of what is to come under the new ADAAA. The decision illustrates how under the new ADAAA standards, even manageable and controlled conditions may meet the definition of impairment.

D. Judicial-Forum Waiver Is Not Enforceable If Details Of Employer's Internal Grievance Procedure Are Not Disclosed Until After Waiver Is Signed.

Employers that want workers to waive their right to assert employment claims in court in favor of internal grievance procedures must be mindful of the Sixth Circuit's recent decision in Alonso v. Huron Valley Ambulance Inc., 2010 U.S. App. LEXIS 8592 (6th Cir. Apr. 26, 2010). In that case, the Sixth Circuit held that an employee's waiver of a judicial forum is not knowing and voluntary, and thus not enforceable, if the employee was not provided with the details of the internal grievance procedure before signing the waiver.

Plaintiffs Alan and Kimberly Alonso applied for jobs with Huron Valley Ambulance Inc. ("HVA"), a non-profit organization that provides ambulance and educational assistance within the local community. Whenever HVA interviews

a potential employee, it has the potential employee sign an employment application. The application contains a waiver provision requiring the potential employee to submit any and all employment claims to HVA's internal grievance procedure. The waiver provision explains that the internal grievance procedure will be the exclusive remedy for employment claims, and that the potential employee is waiving the right to a judicial forum. It also states that the potential employee has read and understood the waiver provision before signing. The waiver provision, however, does not provide details about the internal grievance procedure. Both Plaintiffs signed the application prior to their interviews and were eventually hired.

During their job orientation, which took place a month after they signed their employment applications, Plaintiffs were provided with employment handbooks that detailed HVA's four-step grievance process. Mr. Alonso, a member of the Army National Guard, was later terminated for lying about requiring leave for National Guard training, and for working while under the influence of a mind-altering prescription medication. Mr. Alonso utilized the internal grievance process, but his termination was upheld. Mr. Alonso filed suit, alleging various claims for discrimination and wrongful discharge. Mrs. Alonso, though still employed, also filed suit for hostile work environment, among other claims. Mrs. Alonso had not utilized the internal grievance procedure.

The federal district court for the Eastern District of Michigan granted summary judgment in HVA's favor, holding that the Plaintiffs had waived their right to bring suit when they signed their employment applications. The Sixth Circuit disagreed and vacated the judgment.

The Sixth Circuit held that the Plaintiffs' waiver was not made "knowingly and voluntarily," and therefore was not enforceable. Although the Plaintiffs were educated and had read the waiver provision before signing -- Mr. Alonso had even utilized the internal grievance procedure before filing suit -- the Sixth Circuit found that the absence of detail in the waiver provision about the internal grievance procedure precluded its enforcement. The Sixth Circuit explained, "[a]t the time the Alonsos signed waivers of their rights to a judicial forum, they had no idea what the [internal grievance] process entailed . . . They cannot be said to have knowingly and voluntarily waived their right to a judicial forum when they were not informed of the alternative procedures until a month after they began working for HVA."

Employers seeking to have employees waive their right to a judicial forum in favor of internal grievance procedures must pay close attention to the Alonso decision. Waiver provisions should be accompanied by a detailed explanation of the grievance process and the employees' rights and obligations under that process, at the time the employee is presented with the waiver for signature. To avoid any question of whether the employee's agreement to the waiver is knowing and voluntary, employers should err on the side of providing more detail than necessary.

### E. Supreme Court To Decide When Employer May Be Held Liable For Discriminatory Motive Of Employee Who Only Influenced But Did Not Make Ultimate Employment Decision.

In a case that may have a significant impact on how employers defend discrimination lawsuits, the United States Supreme Court will consider the circumstances under which an employer may be held liable for the discriminatory motive of an employee who merely influenced an employment decision, but did not actually make the ultimate decision.

The Supreme Court will review the Seventh Circuit's decision in Staub v. Proctor Hospital, 560 F. 3d 647 (7th Cir. 2009), in which Vincent Staub sued his former employer, Proctor Hospital, under the Uniformed Services Employment and Reemployment Rights Act (USERRA), after he was discharged from his position as an angiography technologist. Staub, an Army reservist, alleged that the reasons given for his termination -- insubordination, shirking, and attitude problems -- were false, and that employer's real reason was his association with the military. Staub argued a "cat's paw" theory at trial, i.e., that even though the human resources executive who fired him did not have a discriminatory motive, his direct supervisors, who had openly expressed an anti-military sentiment, influenced the decision to such an extent that

their unlawful motive should be imputed to the human resources executive's actions, and thus the employer. The "cat's paw" refers to a 17th-century French fable in which a monkey convinces a cat to steal chestnuts from a fire. The cat burns its paw doing so while the monkey profits by eating the chestnuts. In the legal context, the "cat's paw" is a "tool" or "one used by another to accomplish his purposes."

Staub prevailed at trial, but the Seventh Circuit found that there was insufficient evidence to support liability under a "cat's paw" theory and ordered the federal district court to enter judgment in Proctor Hospital's favor. The Seventh Circuit held that there was no evidence of anti-military sentiment on the part of the human resources executive, and further, unless the official decision maker is shown to have acted in blind reliance on an individual who harbors a discriminatory motive, the "cat's paw" standard has not been met.

Whether the Supreme Court endorses the application of a "cat's paw" theory of liability, and under what circumstances, will directly impact the ability of employers to defeat claims on summary judgment and defend cases at trial. Employers are typically able to undercut the evidentiary value of inappropriate or biased workplace remarks or conduct by arguing that the employee responsible for the remark or conduct did not make the ultimate decision. The Supreme Court's decision will impact this strategy.

When the Supreme Court hears the case it will be without Justice Kagan, who has recused herself because, as Solicitor General, she argued in favor of the Court granting certiorari in the matter.

F. The Supreme Court Continues To Slam The Door On Employee Challenges To Arbitration Agreements.

On June 21, 2010, the Supreme Court issued a 5-4 decision in favor of the employer in Rent-A Center, West, Inc. v. Jackson, 130 S.Ct. 1133 (2010). The issue before the Court was whether, under the Federal Arbitration Act (FAA), a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator. The Court concluded that the answer to the question depended on what type of challenge is made to the validity of the agreement.

In Rent-A Center, Jackson sued his former employer for employment discrimination under 42 USC §1981. The employer, Rent-A-Center, then filed a motion under the FAA to dismiss the proceedings and compel arbitration. The district court granted the employer's motion, but was later reversed by the Ninth Circuit Court of Appeals. The Supreme Court ultimately reversed the Ninth Circuit, compelling arbitration in favor of the employer.

Writing for the majority, Justice Scalia explained that where an arbitration agreement contains a clause where the parties have agreed that the arbitrator will also decide any "gateway" issues of enforceability, any challenges to the validity of this particular clause (or agreement) must be decided by the district court and any challenges to the enforceability of the agreement as a whole should be decided by the arbitrator. According to the majority, the provision within the agreement requiring gateway issues of enforceability to be decided by an arbitrator is simply a separate and additional agreement to arbitrate and a district court will intervene only when the challenge of enforceability is directed specifically at the agreement to arbitrate gateway issues. All challenges to other provisions of the agreement, or to the agreement as a whole, are within the domain of the arbitrator.

After determining the correct legal standard, the Court concluded that the employee challenged only the validity of the arbitration agreement as a whole, rather than the specific agreement to arbitrate the gateway issues. As a result, the Supreme Court ruled in favor of the employer and compelled arbitration.

This decision furthers the Supreme Court's recent pro-arbitration push and continues to cut away at employee attacks on arbitration agreements.

G. Supreme Court Holds That Each Application Of A Discriminatory Employment Practice Can Lead To A New Violation Of Title VII Disparate Impact.

In Lewis v. City of Chicago, 130 S. Ct. 2191 (2010), decided May 24, 2010, the U.S. Supreme Court held that an employer's later application of a discriminatory practice can amount to a new violation of disparate impact under Title VII, regardless of when the practice was first adopted.

In 1995, the City of Chicago administered a written examination to applicants seeking firefighter positions. In January 1996, the City adopted a practice of selecting only applicants who scored 89 percent or higher on the examination to advance to the next stage of hiring. During May and October of 2006, the City selected its first two rounds of applicants under the new criteria. The City relied upon this same examination and criteria nine more times over the next six years.

Beginning in March 1997, several African-American applicants who scored less than 89 percent on the exam and were passed over during the hiring process filed discrimination charges with the EEOC. Eventually they sued the City as part of a certified class consisting of more than 6,000 African-American applicants, alleging the City's practice of selecting only applicants who scored 89 percent or higher on the exam had a disparate impact on African-Americans in violation of Title VII of the Civil Rights Act of 1964.

The question before the Supreme Court was whether a plaintiff who does not file a timely charge challenging the adoption of a discriminatory employment practice may assert a timely disparate-impact claim based upon the employer's later application of that practice. In answering the question unanimously, the Court responded with a resounding "YES."

Writing for the Court, Justice Scalia first pointed out that "a plaintiff establishes a prima facie disparate-impact claim by showing that the employer 'uses a particular employment practice that causes a disparate impact' on one of the prohibited bases." Thus, as Justice Scalia explained, the threshold issue is not whether the plaintiff files a charge within 300 days of the employer's adoption of a discriminatory employment practice, but whether the plaintiff files a charge within 300 days of the employer's use of the discriminatory practice.

Although the City conceded that its January 1996 adoption of the employment practice in question was unlawful, it claimed that its later implementation of the policy was an automatic consequence of its previous adoption and did not amount to separate acts of discrimination. In support of its argument, the City relied on previous Supreme Court decisions that purportedly stood "for the proposition that present effects of prior actions cannot lead to Title VII liability."

In rejecting the City's arguments, the Court responded: (1) "[u]nder the City's reading, if an employer adopts an unlawful practice and no timely charge is brought, it can continue using the practice indefinitely, with impunity, despite ongoing disparate impact" and (2) "the City's reading may induce plaintiffs aware of the danger of delay to file charges upon the announcement of a hiring practice, before they have any basis for believing it will produce a disparate impact." The Court reasoned that, while it may be true the City's January 1996 decision to adopt the cutoff score gave rise to a freestanding disparate-impact claim, "it does not follow that no new violation occurred – and no new claims could arise – when the City implemented that decision down the road." Finally, the Court distinguished the cases relied upon by the City, clarifying that "those cases establish only that a Title VII plaintiff must show a 'present violation' within the limitations period." As the Court explained, this means something very different for disparate-impact claims as compared to disparate-treatment claims. "For disparate-treatment claims – and others for which discriminatory intent is required – that means the plaintiff must demonstrate deliberate discrimination within the limitations period. But for claims that do not require discriminatory intent [such as disparate-impact claims], no such demonstration is needed."

Although the City adopted and announced its intention to implement the 89 percent or higher selection process more than 300 days prior to the filling of the first EEOC charge, it made use of the practice each time it filled a new class of firefighters. As a result, the Supreme Court concluded that the petitioners stated a cognizable claim of disparate impact under Title VII by filing charges with the EEOC within 300 days of each round of selections under the discriminatory practice.

As the City of Chicago pointed out and the Supreme Court recognized, the implications of this decision may "result in a host of practical problems for employers and employees alike." These problems include: (1) the resurrection of new disparate-impact claims against employers for practices they have regularly used for years; (2) the strong possibility that evidence or reliable memories essential to employers' business-necessity defenses will be unavailable due to the filing of lawsuits alleging historic practices; and (3) affected employees and prospective employees may not know they have claims if they are unaware the employer is still applying the disputed practice.

Despite awareness of these potential issues, Justice Scalia made it very clear that "it is not [the Court's] task to assess the consequences of each approach and adopt the one that produces the least mischief." Instead, the Court's "charge is to give effect to the law Congress enacted[,]" and if "that effect was unintended, it is a problem for Congress, not one that federal courts can fix."

Due to the far-reaching implications of this decision, employers should contact their legal counsel to evaluate whether current use of tools or evaluative criteria assisting in making employment decisions may lead to costly litigation and possible liability.

H. Affirmative Defense For Employers In Sexual Harassment Cases Gets A Trimming.

Over a decade ago, the U.S. Supreme Court laid out the rules for when an employer could use an "affirmative defense" (in what's known as the Faragher/Ellerth cases). This defense can be used by employers in hostile work environment cases where the employer shows "that (1) 'the employer exercised reasonable care to prevent and correct promptly any [discriminatory] harassing behavior,' and (2) 'the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.'"

A decision by the Second Circuit highlights for employers that simply having a policy prohibiting sexual harassment is not sufficient to overcome a sexual harassment claim. In Gorzynski v. JetBlue Airways Corp., Docket No. 07-4618-cv, (2d Cir. Feb. 2010), the court allowed the plaintiff to overcome summary judgment determining that a jury must decide if the employer could make out its Faragher/Ellerth defense.

In Gorzynski, the Second Circuit limited the defense in situations where the victim of alleged harassment only reports the alleged harassment to her supervisor -- who is also the alleged harasser. The plaintiff's hostile work environment claim was based in part on multiple comments made by her supervisor Celeste including after assisting a crewmember in cleaning up a spill of a passenger's breast enhancement cream, Celeste made massaging gestures with his hands and stated that he had the impulse to massage breasts.

The court determined that the employer does not automatically get to use the affirmative defense finding that it is dependent on the circumstances in each case to determine whether it was unreasonable for the employee to have to complained to others. The court noted that "We do not believe that the Supreme Court, when it fashioned this affirmative defense, intended that victims of sexual harassment, in order to preserve their rights, must go from manager to manager until they find someone who will address their complaints. There is no requirement that a plaintiff exhaust all possible

avenues made available where circumstances warrant the belief that some or all of those avenues would be ineffective or antagonistic."

The court found that an employer is not entitled to the Faragher/Ellerth affirmative defense simply because it has a sexual harassment policy providing "that the plaintiff could have complained to other persons as well as the alleged harasser." Instead, each case must be evaluated to determine whether the plaintiff unreasonably failed to take advantage of the employer's preventative measures by not pursuing other avenues provided in the employer's sexual harassment policy. In this case, the court found that a jury must determine whether it was reasonable for the plaintiff to believe that any other avenues would be futile.

In light of this case, employers should ensure that the individuals designated to receive such complaints are viewed as receptive to complaints and responsible enough to follow up. Employers should also consider conducting additional training for such individuals and ensure that front-line supervisors and managers and human resources administrators understand how to handle such complaints.

I. Courts Strike Down Equal Opportunity Harasser Defense.

Two federal appellate courts recently determined that an alleged harasser who makes gender-specific slurs and comments can create a hostile work environment for a female employee, even though the harasser is an "Equal Opportunity Harasser" who makes sexually offensive remarks to "anybody, any time." Sharon Kaytor v. Electric Boat Corp., 2d Circ., No. 09-1859-cv, June 29, 2010; EEOC v. Fairbrook Medical Clinic, P.A., 4th Circ., No. 09-1610, June 18, 2010.

In Kaytor, the plaintiff worked for Electric Boat Corporation for nearly 20 years as an administrative assistant, beginning in 1998. During most of that time, Ms. Kaytor reported to Daniel McCarthy, a manager in the engineering department. Ms. Kaytor alleges that in 2004, McCarthy seemed to "undergo a change of character" and began to make inappropriate remarks to Kaytor including references to her body and how she smelled. Further, according to Kaytor, on nearly a dozen occasions, McCarthy threatened to hurt, choke, or kill her. Initially, Kaytor ignored the remarks as she was attributed it to McCarthy going through his divorce. However, in April 2005, Kaytor informed McCarthy that she was going to report certain offensive remarks that he had made regarding Kaytor's visit to her gynecologist. In response, McCarthy is alleged to have stated "I'll kill you" if a report was made. After McCarthy gave Kaytor a plant– a pussy willow – with an arguably sexual message attached to it for Administrative Assistant's Day, Kaytor complained to human resources.

Ms. Kaytor was then immediately transferred to work for an engineer who reported to directly to McCarthy. Ms. Kaytor alleged that her new supervisor treated her poorly, changed her hours and screamed at her in front of the entire department. Ms. Kaytor subsequently filed administrative charges and later a lawsuit alleging retaliation. The trial court granted summary judgment to the employer finding that the incidents complained of were not sufficiently severe and pervasive to constitute a sexually hostile work environment. The trial court found that "a reasonable jury" could not infer that the multiple threats to kill the plaintiff were made "because of Plaintiff's sex," and absent those threats, the other incidents complained of were not pervasive enough to adversely affect her work environment. The lower court also pointed out that because McCarthy was insensitive to everyone, regardless of their gender, he did not target the plaintiff because of her sex.

The appellate court disagreed, finding that a rational jury could infer from McCarthy's sexual comments and inappropriate remarks that the gender neutral threats of violence that he directed toward Kaytor were, in fact, because of her gender. The court highlighted a prior decision in which it held that "It would be exceedingly perverse if a male [supervisor] could buy . . . his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female."

In EEOC v. Fairbrook Medical Clinic, P.A., 4th Circ., No. 09-1610, June 18, 2010, Dr. Deborah Waechter was employed at Fairbrook Medical Clinic, which is owned and run by Dr. John Kessel. During her employment, Waechter was the target of a number of remarks by Kessel having to do with her body, her sexual relationship with her husband, and Kessler's self-label as a "breast man." In addition, Kessler made crude jokes to both the men and the women in the office, and reveled in being a "shock jock" who made outrageous remarks to both male and female employees. Waechter ultimately resigned her position and filed a lawsuit against Fairbrook. The trial court granted summary judgment for the employer finding that Kessler's conduct was not based on Waechter's gender and was not "severe," and that it was not uncommon in a medical setting to use off-color jokes to "ease the tension." Similar to Kaytor, the appellate court disagreed with and reversed that determination. The Fourth Circuit found that although Kessel made offensive remarks to both men and women, his use of sex-specific and derogatory terms indicated that he intended to demean women. Further, the court pointed out that Kessel's proposals of sexual activity were not of the type that would have been made to someone of the same sex, as they involved breast pumping and "wild" sex after pregnancy. Based on these remarks, a jury could reasonably conclude that the purpose of Kessel's comments was to humiliate a woman in his employ.

The court also rejected the employer's argument that because a medical setting deals with human anatomy on a regular basis, it is somehow "liberated from professional norms" and noted that Kessel's remarks went beyond merely crude behavior when they "ventured into highly personal territory," including Waechter's pregnancy, her body, and her personal life with her husband. Thus, the court found that a jury could find that Kessel's behavior was sufficiently severe and pervasive to establish an objectively hostile work environment.

These cases highlight the limits on the "Equal Opportunity Harasser" defense. Importantly, a company must recognize that the fact that an harasser also makes remarks to male employees will not, by itself, serve as a defense to claims for sexual harassment or hostile environment. If the remarks made by an alleged equal opportunity harasser are gender-based and could be interpreted to shock, intimidate, or alienate an individual of that gender, the courts will reject such defense. Antidiscrimination training and policies should be developed and implemented to assist employers in dealing with these issues and in avoiding legal liability for claims of hostile work environment.

J. Employers Can Still Terminate Employees Who Complain of Harassment.

A recent federal appeals court decision upholding the dismissal of a suit over the firing of a sales representative for drugmaker Novo Nordisk Inc. highlights that companies can still terminate employees who complain of sexual harassment when the employee violates company policies. In Garriga v. Novo Nordisk, Inc., Dock No. 08-00708-CV-T-17-MAP (11th Cir. Aug. 5, 2010), the appellate court found that although the plaintiff was treated rudely by a male superior, she was not terminated in retaliation for reporting sexual harassment. Ms. Garriga, a six year employee, was praised by her supervisors until the company hired Brian Taylor as her area manager. At the first district-wide meeting with Mr. Taylor, he asked each employee "to name the celebrity with whom they would like to have sex". Mr. Taylor also allegedly gave Ms. Garriga a nickname which she believed to be sexual in nature and he allegedly leered at her. When the harassment did not stop, Ms. Garriga complained to human resources. However, her claims could not be corroborated. Ms. Garriga was subsequently terminated after she expensed a meal for a physician and his spouse, in violation of the policies of the Pharmaceutical Research and Manufacturers of America, and the appellate upheld her termination finding that it was not in retaliation for her report of sexual harassment.

K. U.S. Supreme Court Considers Whether Title VII Prohibits Retaliation Against An Individual For A Third-Party's Protected Activity.

In June 2010, the Supreme Court granted certiorari in Thompson v. North American Stainless, to determine whether Title VII creates a cause of action for third-party retaliation for persons who did not themselves engage in protect

activity. Thompson v. N. Am. Stainless, LP, 130 S. Ct. 3542 (2010). In a 10 to 6 decision, the Sixth Circuit en banc decided that Title VII does not create a cause of action for third-party retaliation for persons who did not themselves engage in protect activity. Thompson v. N. Am. Stainless, LP, 567 F.3d 804 (6th Cir. 2009).

Eric Thompson worked as a metallurgical engineer for North American Stainless, a stainless steel manufacturing facility in Kentucky. He met Miriam Regalado, who is currently his wife, after she was hired by the employer, and they were openly engaged at the time of Thompson's termination. Regalado filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging sex discrimination in 2002. Three weeks after the EEOC notified North American Stainless about the charge, they terminated Thompson. Thompson then filed a suit alleging that he was terminated in retaliation for his then-fiancée's EEOC charge, while North American Stainless contended that performance-based reasons supported the plaintiff's termination.

Thompson sued the employer for violation of Title VII alleging retaliatory discharge based on the protected activity of Thompson's fiancée, a co-worker. The trial court granted the employer's motion for summary judgment. The Sixth Circuit originally reversed the trial court relying on the underlying policy. Thompson v. N. Am. Stainless, LP, 520 F.3d 644 (6th Cir. 2008). However, the en banc panel of the Sixth Circuit went the opposite way, opting for the clear language of the statute and found that that statute "explicitly identifies those individuals who are protected – employees who "opposed any practice made an unlawful employment practice" or who "made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing" under Title VII. Section 704(a) thus clearly limits the class of claimants to those who actually engaged in the protected activity." Thus, Thompson "did not engage in protected activity, but . . . merely associated with another employee who did oppose an alleged unlawful employment practice."

If the Court determines that it will broadly interpret the opposition clause to include an employee who is closely associated with another who engaged in protected activity until next year, the doors may swing wide open for the filing of more retaliation claim.

L. Federal Jury Verdict For Plaintiff In Retaliation Case After Remand From U.S. Supreme Court.

In Crawford v. Metro Gov't of Nashville and Davidson County, Tenn., 129 S. Ct. 846 (2009), the Supreme Court abrogated the Sixth Circuit's view that the opposition clause required active, consistent behavior. Vicky Crawford claimed she was fired in 2003 after more than 30 years with the district after she reported sexual harassment during an internal investigation. The U.S. Supreme Court one year ago held that Title VII's anti-retaliation provision extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. Her lawsuit was originally dismissed by a federal judge and upheld on appeal. In 2009, the U.S. Supreme Court ruled that Crawford could sue claiming retaliation even though she was not the one who brought the original sexual harassment claims. The Supreme Court held that the opposition clause of Title VII's retaliation provision covers an employee who merely answers questions during an employer's purely internal investigation into a co-worker's allegations of harassment against a different employee. In that case, the Court took a broad reading of the meaning of "opposition" to impart a policy choice against retaliation.

Upon remand from the Supreme Court, a jury trial was held and the jury returned a verdict of almost $1.5 million to Ms. Crawford. Tenn. Woman Awarded $1.5M for Wrongful Firing, January 25, 2010 available at http://abcnews.go.com/Business/wireStory?id=9658810

M. Failure to Investigate Complaint Is Not An Adverse Action.

In Fincher v. Depository Trust & Clearing Corp., No. 08-5013-cv (2d Cir. May 14, 2010), the Second Circuit affirmed summary judgment for the employer in a race discrimination and retaliation action and held that the employer's failure to investigate a complaint of alleged employment discrimination is not an adverse employment action taken in retaliation for the filing of the same discrimination complaint.

The plaintiff, Cynthia Fincher, worked for Depository Trust and Clearing Corporation ("DTCC") as a Senior Auditor from 2004 until she resigned her employment on June 5, 2006. During that time, Fincher received several critical performance appraisals. In late March 2006, Fincher complained to Charles Smith, the Senior Director of Employee Relations at DTCC, that "black people were set up to fail at [the Auditing] department because they were not provided and given the same training opportunities as the white employees." Fincher maintained that she asked Smith whether he planned to respond to her complaint, and Smith told her that he would not. In May 2006, Fincher claimed that her manager, Mark Hudson ("Hudson"), admitted to her that she did not receive proper training and that she was "discriminated against." Fincher subsequently resigned, saying her resignation was due to racial discrimination, including inadequate training.

She then filed suit alleging race discrimination, retaliation, harassment, and constructive discharge. DTCC moved for and the district court granted summary judgment on all claims. Fincher appealed and argued that: (1) DTCC's failure to investigate her discrimination complaint constituted retaliation; (2) the failure to investigate her complaint created a hostile work environment; (3) she was constructively discharged based on the alleged hostile environment; and (4) the district court erred in failing to consider her testimony about Hudson's alleged comment.

The appellate court found that the plaintiff could not establish a prima facie case of retaliation because the failure to investigate her alleged complaint was not an adverse action. It noted that "[a]n employee whose complaint is not investigated cannot be said to have thereby suffered a punishment for bringing that same complaint" because the employee is no worse off than she would have been had she not complained or if the employer investigated the complaint and denied it. Accordingly, the Court affirmed summary judgment on Fincher's retaliation claim.

This case is a significant win for employers by confirming the failure to investigate an alleged complaint of discrimination is not, in itself, an adverse employment action and cannot serve as the basis for a retaliation claim. However, employers should note that this is highly fact-specific inquiry.

N. States Consider Creating New Causes Of Action For Bullying In The Workplace.

Since 2003, 17 states, including California, have introduced legislation attempting to provide legal redress for employees who have been subject to an abusive work environment. See http://www.healthyworkplacebill.org/states.php. Though California's anti-bullying legislation died in committee, the New York State Senate recently passed legislation (S.1823-B) that if enacted would create a private cause of action to all employees, even those who do not qualify for protected status under current employment discrimination statutes, who are subjected to certain types of bullying in the workplace. New York would have been the first state to pass such a law. However, it was placed on hold by State Assembly's Labor Committee in June 2010.

Although no states have officially adopted a anti-bullying statute for the workplace, such statutes are receiving more attention and support particularly in light of stories like Kevin Morissey's.

Mr. Morrissey was the managing editor of the *Virginia Quarterly Review* who took his life on July 30, 2010, after making numerous calls to the University of Virginia complaining about the workplace. His family have alleged that his suicide was the result of workplace bullying alleging that Morrissey's boss, VQR editor Theodore H. "Ted" Genoways was a bully "who created a work environment so hostile it become unbearable." McNair, Dave. Tale of Woe: The death of Kevin Morrissey, August 18, 2010, available at http://www.readthehook.com/blog/index.php/2010/08/18/cover-tale-of-woe-

the-death-of-the-vqrs-kevin-morrissey/. Just hours before Mr. Morrissey committed suicide, he received an email from his supervisor criticizing his work.

O. Flight Engineer's Whistleblower Claim Was Not Preempted By Federal Law.

In Ventress v. Japan Airlines, 603 F.3d 676 (9th Cir. 2010), Martin Ventress, a flight engineer for Japan Airlines ("JAL"), alleged his employment was terminated in violation of the California whistleblower statute (Labor Code § 11 02.5(b)) for allegedly reporting safety violations six months after they occurred. JAL moved for judgment on the pleadings, asserting complete federal preemption by the Federal Airline Deregulation Act of 1978, as amended by the Whistleblower Protection Program. The Ninth Circuit held that because Ventress did not interrupt "service" (i.e., "the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo or mail"), his claim was not preempted by federal law. Compare Wise v. Verizon Commc 'ns Inc., 600 F.3d 1180 (9th Cir. 2010) (employee's claims arising from denial of disability benefits were preempted by ERISA).

## WRONGFUL TERMINATION

A. Employee With Mistaken But Good Faith Belief He Was Owed Overtime May Have Been Wrongfully Terminated.

In Barbosa v. IMPCO Techs., Inc., 179 Cal. App. 4th 1116 (2009), plaintiff worked as a carburetor assembler and supervised up to eight other assemblers for IMPCO. As non-exempt employees, Barbosa and the other assemblers were eligible for paid overtime when it was worked. After two of the employees in his "cell" told him they were missing two hours of overtime pay, Barbosa complained to the company. In response to Barbosa's complaint, the company paid him and the other employees an additional two hours of overtime. Later, however, the company checked the security entrance gate records and determined the employees could not have worked the overtime Barbosa had claimed. Although Barbosa offered to pay the money back after he realized he had been "confused," IMPCO terminated him for falsifying time records. Barbosa sued IMPCO for wrongful termination in violation of public policy. The trial court granted IMPCO's motion for non-suit on the ground that Barbosa's alleged good faith belief that he and the others were owed the money was irrelevant. The Court of Appeal reversed the non-suit, holding that an employee's good faith but mistaken belief is protected from employer retaliation in the whistle-blowing context.

## COMPETITION BY FORMER EMPLOYEES

A. Employee Terminated For Violating Non-Compete May Proceed With Lawsuit.

In Silguero v. Creteguard, Inc., 187 Cal. App. 4th 60 (2010), the Court of Appeal ruled that an employer's decision to honor an unenforceable non-compete violated the public policy of California as expressed in Section 16600. Shortly after Creteguard hired Rosemary Silguero, her former employer (FST) contacted Creteguard and "requested the cooperation and participation of [Creteguard] in enforcing the confidentiality agreement [between Silguero and FST], including those provisions prohibiting Silguero from all sales activities for 18 months following Silguero's departure or termination from FST." In response to the letter from FST, Creteguard terminated Silguero's employment even though "we believe that non-compete clauses are not legally enforceable here in California." In her lawsuit against Creteguard, Silguero alleged the non-compete that Creteguard enforced violated Cal. Bus. & Prof Code § 16600 and that her

termination, therefore, violated the public policy of the State of California. The trial court sustained Creteguard's demurrer to the complaint, but the Court of Appeal reversed.

## VICARIOUS LIABILITY

A. Employees Of Wal-Mart's Suppliers Could Not Sue Wal-Mart For Poor Working Conditions.

In Doe 1 v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009), plaintiffs (all foreign employees of Wal-Mart suppliers) filed a class action complaint against Wal-Mart based on the working conditions in their employers' factories located in China, Bangladesh, Indonesia, Swaziland and Nicaragua. Plaintiffs relied upon a code of conduct that Wal-Mart developed for its suppliers in 1992, entitled "Standards for Suppliers," which requires foreign suppliers to adhere to local laws and industry standards regarding working conditions such as pay, hours, forced labor, child labor and discrimination. The complaint alleged that Wal-Mart does not monitor its suppliers and that it knows they often violate the Standards adopted by Wal-Mart. Among other things, plaintiffs alleged they are third-party beneficiaries of the Standards, that Wal-Mart is plaintiffs' joint employer and that Wal-Mart negligently breached its duty to monitor the suppliers and to protect plaintiffs. The district court granted Wal-Mart's motion to dismiss, holding that Wal-Mart owed no contractual or other duty to plaintiffs; the Ninth Circuit affirmed dismissal of the action. Cf. Bauman v. DaimlerChrysler Corp., 579 F.3d 1088 (9th Cir. 2009) (claims asserted by Argentinean residents against their former employer (Mercedes Benz Argentina) under the Alien Tort Claims Act were properly dismissed for lack of personal jurisdiction).

## BENEFITS

A. "Kin Care" Statute Is Inapplicable To Uncapped Sick Leave Policies.

In McCarther v. Pacific Telesis Group, 48 Cal. 4th 104 (2010), the plaintiffs worked as service representatives for different Pacific Telesis companies, which are signatories to various collective bargaining agreements ("CBA"). The applicable CBA in this case provides employees with paid time off for any day in which they miss work due to their own illness or injury for up to five consecutive days in any seven-day period so long as the employee returns to work (even for a partial day) following any period of absence. The employer did not pay employees for absences to care for ill family members. In 1999, California enacted the "kin-care" statute (Labor Code § 233), which requires employers that provide sick leave to permit the employees to use up to half of their annual accrued and available sick leave entitlement to attend to an illness of a child, parent, spouse, or domestic partner of the employee. The legal question in this case was whether the statute applied to policies that provide for an uncapped number of days off, and the Supreme Court held that it does not.

## CLASS ACTIONS

A. Class Action Should Have Been Certified As To Claims For Overtime, But Not Meal And Rest Periods.

In Faulkinbury v. Boyd & Assocs., Inc., 185 Cal. App. 4th 1363 (2010), attorneys attempted to represent and certify a class of 4,000 current and former employees of Boyd & Associates, which provides security guard services throughout Southern California. Plaintiffs' counsel alleged that Boyd denied the putative class members off-duty meal periods and rest breaks and that it had failed to include certain reimbursements and an annual bonus payment in calculating the employees' hourly rate of overtime pay. The trial court denied certification as to all three subclasses, and the Court of Appeal affirmed as to the claims for meal and rest periods on the ground that the evidence submitted by Boyd showed the ability of each of its security guards to take breaks depended on individual issues. The Court, however, reversed the denial of class certification as to the overtime subclass, reasoning that the trial court abused its discretion to the extent it decided common issues did not predominate.

B. FLSA Action Cannot Be Certified Under California Class Action Statute.

In Haro v. City of Rosemead, 174 Cal. App. 4th 1067 (2009), Randy Haro and Robert Ballin filed an action against the City of Rosemead alleging a violation of the federal Fair Labor Standards Act ("FLSA"). The trial court denied plaintiffs' motion to have the class certified pursuant to Cal. Code Civ. Proc. § 382 (the California class action statute) on the ground that an FLSA collective action (which requires members of the collective action to affirmatively opt-in) cannot be prosecuted as a class action under California law (which requires class members to opt-out). The Court of Appeal dismissed the appeal from the trial court's orders denying class certification and denying leave to amend the complaint, holding that "an FLSA action has to be litigated according to rules that are specifically applicable to these actions and if litigants do not like these rules, they should not file under the FLSA."

## TECHNOLOGY

A. The Use of A Company Laptop to Send and Receive E-mail Communications Does Not Eliminate the Attorney-Client Privilege.

In Marina Stengart v. Loving Care Agency, Inc., the New Jersey Supreme Court affirmed the Appellate Division of the Superior Court's decision that an employee has a reasonable expectation of privacy regarding communications with attorneys using a personal, password protected, web-based email account, though accessed with employer equipment. 990 A.2d 650 (N.J. 2010).

In the Stengart case, the plaintiff's employer issued her a laptop and e-mail address to perform her duties. Prior to resigning, plaintiff used her employer-issued laptop to communicate with her attorney about a lawsuit against her employer using her personal, password-protected, Yahoo e-mail account.

During discovery, the employer created a forensic image of plaintiff's laptop. While reviewing the laptop's contents, the employer's attorney discovered and read several communications between plaintiff and her attorneys. The employer's attorney referenced and attached some of the plaintiff's communications with her attorneys in interrogatory responses.

Plaintiff sought a restraining order preventing the employer from using the communications and the trial court held that the communications were not protected by the attorney-client privilege because the company had an electronic communications policy that notified the plaintiff that her e-mails would be considered company property.

The Appellate Division determined the company policy to be ambiguous with insufficient notice to employees that their personal communications were subject to review by the company and reversed the trial court's decision.

In its March 30 opinion, the New Jersey Supreme Court affirmed the Appellate Division's decision and held that the plaintiff could reasonably expect communications with her attorney through her personal, password-protected, web-based e-mail account to remain private. The Court further ruled that sending and receiving communications using a company laptop did not eliminate the attorney-client privilege.

The Stengart decision is a clear example of the dangers of ambiguous provisions in policies governing electronic media. The employer's policy was unclear on whether it was applicable to personal, password-protected, web-based e-mail accounts accessed through an employer computer. Moreover, the policy did not warn employees that the contents of such e-mails were stored on a hard drive and could be forensically retrieved and read by the employer. The employer also expressly permitted occasional personal use of e-mail.

B. Emerging Social Media Does Not Allow Employers to Monitor Employees.

In December 2009, the National Labor Relations Board's Division of Advice issued an advice memorandum addressing whether an employer's social media policy promulgated by Sears Holdings Corp. violated §8(a)(1) of the National Labor Relations Act. Although advice memorandums do not constitute formal adjudication or binding precedent, they often provide important insight. Among the "Prohibited Subjects" listed in the policy at issue were confidential or proprietary information, intellectual property, explicit sexual references and, most critical to the issue before the division, "[d]isparagement of company's ... executive leadership, employees [or] strategy."

Relying on the framework set forth by the Bush board in Lutheran Heritage Village -- Livonia, 343 NLRB 646 (2004), the Division of Advice opined that the Sears Holdings social media policy did not violate the Act: "While the ban on '[d]isparagement of company's ... executive leadership, employees, [or] strategy ... 'could chill the exercise of Section 7 rights if read in isolation, the Policy as a whole provides sufficient context to preclude a reasonable employee from construing the rule as a limit on Section 7 conduct. The Policy covers a list of proscribed activities, the vast majority of which are clearly not protected by Section 7."
The Division of Advice therefore concluded that the charge should be dismissed.
Since Lutheran Heritage Village was decided, every member of the Board but one has been appointed by President Obama. Current Chairwoman Wilma Liebman strongly dissented from the Lutheran Heritage Village decision -- which suggests she likely would have applied a broader standard in the Sears Holdings case had it reached the board.

1. The Register-Guard Case

In the closing days of former NLRB Chairman Robert Battista's term, the Board ruled in Guard Publishing Co., d/b/a The Register-Guard, 351 NLRB 1110 (2007), that an employer did not violate §8(a)(1) by maintaining a policy that prohibited use of the employer's e-mail system for any "non-job-related solicitations."

Although the U.S. Court of Appeals for the D.C. Circuit denied enforcement of the Board's order in part, it did not address the Board's analysis of the employer's e-mail policy. Liebman filed a caustic dissent from the board's opinion on this point, calling the board the "Rip Van Winkle of administrative agencies." In one of the dissent's most forceful passages, she wrote: "In 2007, one cannot reasonably contend, as the majority does, that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper. ... National labor policy must be responsive to the enormous technological changes that are taking place in our society."

The Register-Guard case did not deal specifically with employee use of social media, but it appears the Board's future decisions will require a balancing of employees' §7 rights with the employer's legitimate business interests. The take-away lesson from the Sears Holding memo and the Register-Guard litigation is that discrimination against employees for protected union activity is always unlawful and that employers who allow some non-business use of social media during the work day, but exclude use for union-related activity, will be found to have violated the Act.

2. Unlawful Surveillance of Union Activity

An employer commits an unfair labor practice when it engages in surveillance of union or organizing activity, or when it creates the "impression of surveillance" of such activity. See Cannon Elec. Co., 151 NLRB 1465 (1965); Flexsteel Indus. Inc., 311 NLRB 257 (1993). Employers are generally free to observe employees participating in union or other protected activity when those employees are doing so openly and in public. But at least one administrative law judge has found that suggesting to employees that the employer is regularly monitoring or recording the employees' protected activity can create an unlawful impression of surveillance. In Magna Int'l Inc., No. 7-CA-43093, 2001 WL 1603861 (Amchan, A.L.J., March 9, 2001), the United Automobile, Aerospace and Agricultural Implement Workers of America had posted a photo on its public website of an employee organizing committee. The next day, a supervisor told an employee organizer that he "liked her picture."

The administrative law judge held that the supervisor's visit to the website did not violate the Act but that his comment to the employee did: "By merely observing open union activity, an employer does not engage in surveillance in violation of §8(a)(1). I consider [the supervisor's] visit to the UAW website analogous. However, when [the supervisor] made a point of telling [the employee] that he had seen her picture on the internet, he was conveying the impression that he was keeping track of her union activities and thus was creating the impression of surveillance."

So, how might an employer apply these principles to employee use of social media? In all likelihood, a supervisor's review of anything open to the public on the internet -- such as a public Facebook page or Twitter feed -- will not constitute unlawful surveillance. Most social networking sites, however, provide "privacy" options. A Facebook user, for example, can allow only his verified "friends" to view his postings; can allow the general public to view; or can select options in between -- e.g., to allow only people in a particular network to view. If an employee has requested or allowed a supervisor to have access to her page or "wall" posts by confirming him as a "friend," the employee should presume that the supervisor is likely to read anything the employee posts there -- including any information about union or protected activities.

On the other hand, one might expect a finding of unlawful surveillance if a supervisor presses other employees to join co-workers' networks to report on their activities or if supervisors begin to request entry into employees' networks conspicuously only after the commencement of union organizing. See, e.g., Communication Systems Construction, 209 NLRB 652, 653-55 (1974) (employer engaged in unlawful surveillance by soliciting two employees to listen into conversations of other employees to determine their union sentiments); The Hertz Corp., 316 NLRB 672 (1995) (supervisors engaged in unlawful surveillance when they began sitting in a break room only when two specific union supporters were present). Finally, even if an employer lawfully reads protected comments on employees' Facebook pages, it almost certainly creates an unlawful "impression of surveillance" if and when it indicates to employees that it is doing so on a regular basis or in a manner likely to reveal their union sympathies.

The pace at which social media is infiltrating the workplace does not allow employers the luxury of waiting for the board to pass upon a case of first impression. To be sure, these are new technologies, and perhaps they require new standards to ensure all parties the protections of the National Labor Relations Act. Fortunately, there may be enough guidance in the various writings and decisions outlined above for a prudent employer to connect the dots and implement a lawful workplace social media policy.

## FEDERAL LEGISLATION

A. DOL Issues Guidelines on Break Time Requirements for Nursing Mothers.

On March 23, 2010 the Patient Protection and Affordable Care Act (PPACA) was signed into law, amending section 7 of the Fair Labor Standards Act (FLSA) to require reasonable break time and space for nursing mothers to express milk. The US Department of Labor (DOL) has now issued a fact sheet to help employers comply with these new requirements.

The new health care law applies only to employees who are not exempt from the FLSA's overtime pay requirements and specifically requires employers to provide: (1) reasonable break time for nursing mothers to express breast milk for up to one year after the child's birth; and (2) a location shielded from view and free from intrusion from coworkers and the public – other than a bathroom – that can be used by nursing mothers to express breast milk.

According to the fact sheet, the frequency and duration of breaks needed to express breast milk will likely vary on a case-by-case basis, but employers must allow a reasonable amount of time for such breaks as frequently as needed. The fact sheet further specifies that employers are not required to dedicate space solely for the nursing mother's use, but any space temporarily created or converted into space for expressing breast milk must be made available whenever needed for such purpose to meet the new statutory requirements.

Employers with fewer than 50 employees total (regardless of worksite) are exempt from the new FLSA requirement if compliance with the provision would impose an undue hardship. Whether an undue hardship exists is determined by reviewing the employer's compliance difficulty or expense in comparison to the size, financial resources, nature and structure of the employer's business.

The fact sheet also clarifies that employers are not generally required to compensate employees for lactation breaks, unless the employer already provides for compensated breaks and the nursing employee uses such break time to express milk. It is also important to note that the new requirements do not preempt state laws that provide for greater employee protections.

B. DOL Extends Family Medical Leave Act Coverage To Same-Sex, Non-Traditional Parents.

On June 22, 2010, the U.S. Department of Labor issued a clarification of definitions under Section 101 (12) of the Family and Medical Leave Act ("FMLA") regarding the definition of "son or daughter" as it applies to an employee taking FMLA-protected leave for the birth or placement of a child, to care for a newborn or newly placed child, or to care for a child with a serious health condition.

The FMLA entitles an employee to 12 workweeks of leave for the birth or placement of a son or daughter, to bond with a newborn or newly placed son or daughter, or to care for a son or daughter with a serious health condition. 29 U.S.C. § 2612(a)(1)(A) - (C). The definition of "son or daughter" under the FMLA includes not only a biological or adopted child, but also a "foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis." 29 U.S.C. § 2611(12). See also 29 C.F.R. §§ 825.122(c), 825.800.

The administrative interpretation clarifies and expansively reads the term "in loco parentis." In short, a person standing in loco parentis means he or she is acting in place of the child's biological or legal parents. Whereas courts have held that a finding of in loco parentis requires some demonstration of day-to-day care and financial support, the Department's reading of the term will not require such a showing. Instead, the Department will look to either day-to-day care or financial support as a way to show employees are actually acting as parents to children. Employers who have questions about whether their employees stand in loco parentis to the children they seek leave to care for may require documentation of the family relationship. The Department has stated that that "a simple statement asserting that the requisite family relationship exists is all that is needed" to establish in loco parentis status. See 29 C.F.R. § 725.122(j). Additionally, the Department notes that the presence of another adult in a child's home who is the child's legal or biological parent does not prevent an employee from accessing FMLA for birth, adoption, or care of that same child.

Notably, this new interpretation does not apply to the recently enacted provisions in the law that allow parents to access FMLA leave due to issues arising from the employee's son's or daughter's deployment (or impending deployment) in the Armed Forces or from the child's injuries sustained while he or she is on active duty. Though they also cover people standing "in loco parentis" to a member of the armed services, the definitions of "son and daughter" in the military related provisions are contained in different sections of the law than the family related provisions, and are different in that they apply to children "of any age." 29 C.F.R. § 822. I22(g), (h).

## PROPOSED FEDERAL LEGISLATION

- HR 3721 – Protecting Older Workers Against Discrimination Act. HR 3721 would reverse the Supreme Court's 2009 decision in Gross v. FBL Financial Services, Inc. In Gross, the Supreme Court rejected the availability of a mixed-motive theory under the ADEA, and held that age must be the reason for a challenged employment decision, as opposed to merely a reason for the decision. HR 3721 would extend to ADEA cases the mixed-motive standard otherwise applicable to Title VII cases. The bill, however, is stalled in committee.

- HR 3149 – Equal Employment for All Act. HR 3149 would prohibit discrimination based on an employee's credit score or history. This bill is stalled in committee.

- S 1584 – Employment Non-Discrimination Act of 2009. S 1584 would prohibit discrimination against employees based on sexual orientation and gender identity. This bill is stalled in committee.

## PROPOSED CALIFORNIA LEGISLATION

A. Assembly Bill 569.

A.B. 569 would exempt construction employees, commercial drivers in the transportation industry, and employees in the security services industry from provisions requiring a 30-minute meal period if they work more than five hours per workday -- if those employees are covered by a collective bargaining agreement containing specified terms, including meal period provisions.

B. Assembly Bill 2340.

Assembly Bill 2340 would give employees the right to take three days of unpaid time off in the event of the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner. It would also prohibit employers from discharging, disciplining, or discriminating against an employee for requesting or taking such leave. The bill would not apply to employees covered by a collective bargaining agreement that provides bereavement leave and other specified working conditions. Gov. Schwarzenegger vetoed a similar bill in 2007.

C. Senate Bill 990.

Existing law requires an employer to provide an employee who works more than five hours in a workday with a 30-minute meal period unless the employee works no more than six hours and the period is waived by mutual consent. Employers must also provide an employee who works more than 10 hours with a second 30-minute meal period -- unless the employee works no more than 12 hours, the first meal period wasn't waived, and the second period is waived by mutual consent.

S.B. 990 would apply only to employees subject to the meal period provisions of an Industrial Welfare Commission order. It would specify that a meal period based on working more than five hours must be provided before the employee completes six hours of work, unless waived. It would also permit an employer and employee to agree to waive either the first or second meal period if the employee is otherwise entitled to two periods. And it would specify conditions under which on-duty meal periods are allowed in place of meal periods in which the employee is relieved of all duties. The bill would not apply to employees covered by a collective bargaining agreement with meal period provisions.

D. Senate Bill 1304.

Under current California law, state employees who have exhausted all available sick leave are entitled to take a paid leave for organ donation (not exceeding 30 days) and bone marrow donation (not exceeding five days). S.B. 1304 would extend the right to private employees. Private employers would further be required to restore an employee returning from such leave to the same position he or she held when the leave began or an equivalent position. The bill would also prohibit private employers from interfering with an employee taking the leave, retaliating against an employee for taking the leave, or opposing an unlawful employment practice related to organ or bone marrow donation.

# NAVIGATING FEDERAL AND STATE LEAVES OF ABSENCE, SUCH AS LEAVES UNDER THE FAMILY MEDICAL LEAVE ACT, THE CALIFORNIA FAMILY RIGHTS ACT AND THE AMERICANS WITH DISABILITIES ACT

## Mandatory Leaves/Time Off

E. Family Medical Leave Act (FMLA) and California Family Rights Act (CFRA)

Both Federal and California state laws provide eligible employees with leave or time off to care for themselves or immediate family members. The Federal FMLA and state CFRA laws cover only those employers with 50 or more employees in the United States, the District of Columbia or any Territory or possession of the United States. Under both laws, an employer is covered if it employs 50 or more employees (including part-time employees) for each working day during at least 20 workweeks in the current or preceding calendar year. An employee that is on the payroll for an entire workweek will be counted as employed for that workweek, even if he or she was not compensated. In addition, employees on leaves of absence will also be counted if the employer reasonably expects the employee to return to work. An employee will not be counted as employed for the workweek if he or she is hired or terminated in the middle of the workweek.

To qualify for FMLA or CFRA leave, the employee must have one (1) year of service with the employer, worked at least 1,250 hours during the previous 12-month period and work at a worksite with 50 employees within a 75-mile radius of that worksite. Employees desiring to take advantage of these eligibility rules should verify that company handbooks do not contain less restrictive rules. Employees will typically get the benefit of the more permissive rules. Both the FMLA and CFRA entitle eligible employees to take unpaid, job-protected leave for up to 12 workweeks in a 12-month period. Although employees may be eligible for both FMLA and CFRA leave, FMLA leave and CFRA leave generally run concurrently.

Under these laws, leave may be taken: (a) for the birth, adoption, or foster placement of a new child, in which case the leave must be taken within one year of the birth, adoption or placement; (b) to care for a child, parent, spouse or registered domestic partner who has a serious health condition; (c) for the employee's own serious health condition; or (d) under the FMLA, for any qualifying exigency arising out of the fact that the spouse, son, daughter or parent of the employee is on "covered active duty" in the Armed Forces, or has been notified of an impending call to "covered active duty" status. Leave for a qualifying exigency include the following: leave to address issues that arise from the fact that a covered military member is notified of an impending call or order to active duty less than eight calendar days prior to the date of deployment, leave to attend official ceremonies, programs or events sponsored by the military that relate to the active duty or call to active duty, leave to arrange for alternate childcare, leave to address financial and legal arrangements to address the covered military member's absence, leave to attend counseling for the employee, the covered military member or for children of the covered military member, and leave to spend time with a covered military member who is on short-term, temporary leave during the period of deployment.

The FMLA also provides for Military Caregiver Leave, which entitles an eligible employee (as defined above) who is the spouse, son, daughter, parent, or next of kin of a "covered servicemember" who is recovering from a "serious illness or injury" to a total of twenty-six (26) weeks of leave in a single 12-month period to care for the servicemember.

The treatment of pregnancy-related disabilities is a key distinction between the FMLA and CFRA. Under the FMLA, pregnancy-related conditions count against the 12 weeks of FMLA leave. Under the CFRA, time off related to pregnancy is excepted from the definition of a "serious health condition" and does not qualify as CFRA leave. Instead, employees suffering from pregnancy-related disabilities may take leave under the Pregnancy Disability Leave law ("PDL"). Under California's PDL law, an employee is entitled to up to 4 months of leave for pregnancy-related disabilities. This PDL may be followed by 12 additional weeks of leave to care for the newborn child. The 12 additional weeks are considered CFRA leave. This CFRA leave is available to all eligible employees after the birth or placement of a child to allow the employee time to bond with the child. PDL is not subject to the same eligibility rules. Individual employees are eligible for PDL regardless of how short a time they have been employed. Please note that when an employee takes time off to care for a newborn, right to reinstatement is governed by the FMLA or CFRA, not PDL.

If both parents are eligible for family leave but are employed by the same employer, the employer may limit leave for the birth, adoption or foster-care placement of their child to a combined total of 12 workweeks in a 12-month period between the two parents.

1. **Serious Health Condition**

One of the most common problems that surfaces from medical leave policies results from the failure to distinguish true medical leaves from non-medical leaves. A true medical leave is one that falls under the category of a serious health condition, as determined by both the existence and duration of a medical disability. A serious health condition includes any illness, injury or impairment, or physical or mental condition, that involves inpatient care in a hospital, hospice or residential care facility, or causes incapacity for more than three consecutive, full calendar days coupled with continuing treatment or continuing supervision by a health care provider. Thus, a 24-hour flu would not qualify as a serious health condition, but a four-day case of fever and flu would qualify as long as the employee was under the continuing care of a doctor for treatment.

2. **Intermittent Leave**

Leave may total up to 12 workweeks in a 12-month period. However, it does not have to be taken in one continuous period of time. Where FMLA or CFRA leave is taken for the serious health condition of an employee's parent, child, spouse or registered domestic partner, or for the serious health condition of the employee, leave may be taken intermittently or on a reduced work schedule when medically necessary. An employer may limit leave increments to the shortest period of time the employer's payroll system uses to account for absences. An employer may choose how to calculate the 12 weeks using any of the four calculation methods allowed under the government regulations. The four calculation methods are: the calendar year; any fixed 12-month "leave year", i.e. a fiscal year or year starting on the employee's anniversary date; the 12-month period measured forward from the date of an employee's first FMLA leave; or a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

Regardless of the methods used, only the amount of leave actually taken may be counted toward the 12 weeks of leave. Finally, in order to better accommodate intermittent leaves, the employer may temporarily transfer the employee to a comparable position with equivalent pay and benefits.

3. **Notice**

An employee seeking to take FMLA or CFRA leave must provide notice sufficient to make the employer aware that the employee needs family medical leave. This notice should include the reason for the leave and the anticipated time and duration of the leave. An employer may require 30 days notice before the leave is to begin, if the leave is foreseeable. However, if the need for leave is unforeseeable, employees must provide notice "as soon as practicable under the facts and circumstance of a particular case." While it is the employee's responsibility to inform the employer that they are seeking leave under the FMLA or CFRA, it is the employer's responsibility to notify the employee of how the request is being counted against the employee's family medical leave entitlement. In addition, the employer shall respond to a family medical leave request as soon as possible, but at least within five business days after receiving the request.

An employer shall provide notice to his or her employees of the right to request FMLA or CFRA leave and shall post the notice in a conspicuous place (or places) where employees tend to congregate. If the employer publishes a handbook describing other kinds of personal or disability leaves available to its employees, the employer should include a description of these family medical leaves.

4. **Paid or Unpaid Family Leave and Benefits**

a. **Paid Family Leave**

California employees have a right to six (6) weeks of Paid Family Leave ("PFL") under the Family Temporary Disability Insurance Program. PFL allows almost any employee to receive, under certain circumstances, up to six (6) weeks per year (in any 12 month period) of partial wage replacement for periods of leave in which (1) the employee needs to care for a child, spouse, parent, or registered domestic partner with a serious health condition, or (2) the employee will bond with a new child. For purposes of PFL, a "serious health condition" has the same definition as that under the FMLA or CFRA. However, unlike the FMLA and CFRA, there is no requirement that an employer have a certain number of employees to be subject to this law; all California employees covered by State Disability Insurance will qualify. Where the employee is entitled to PFL benefits and leave under FMLA and/or CFRA, however, employers can require that the PFL benefits period run concurrently with FMLA or CFRA leave.

b. **Use of Vacation Time**

If the employee has exhausted his/her PFL benefits, his/her remaining FMLA and CFRA leave is unpaid, unless the employee elects or the employer requires the employee to use any accrued vacation time. Under the CFRA, if the leave is for the employee's own serious health condition or the serious health condition of a close family member, the employer may require the employee to use any accrued sick time. Under PFL, the employer may require the employee to use up to two weeks of accrued vacation time prior to any use of PFL benefits.

c. **Continuation of Benefits**

If the employer provides health benefits under any group health plan, the employer has an obligation to provide such benefits during an employee's FMLA or CFRA leave. This obligation commences on the date family care medical leave first begins and continues for the duration of the family care medical leave(s), up to a maximum of 12 work weeks in a 12-month period. Moreover, during the period of family medical leave, the employee is entitled to participate in employee benefit plans, including life insurance, short-term or long-term disability or accident insurance, and pension and retirement plans to the same extent and under the same conditions as would apply to leave for any reason other than family medical leave.

5. **Medical Certification**

Under the FMLA or CFRA, an employer may require the employee to provide medical certification prior to obtaining medical leave. The regulations governing information that can be requested in the certification form are designed to protect the employee's privacy. For example, the request for certification must be made to the employee, not the treating physician, and the employer may not require the employee to identify the serious health condition. Note that employers may request more specific information in the event the employee may be eligible for a reasonable accommodation due to a disability. Employers should seek the certification within 15 calendar days of employee's request for time off, if practicable. To avoid a potential violation of employee privacy laws, employers should seek legal counsel when drafting their medical certification form.

a. **Genetic Nondiscrimination Act (GINA)**

The Genetic Nondiscrimination Act prohibits discrimination by employers and health insurers based on genetic information. The purpose of GINA is to alleviate individuals' fears of discrimination and encourage people to take advantage of genetic testing. GINA applies to private, state, and local government employers with fifteen or more employees.

Under GINA, genetic information includes a person's genetic tests, genetic tests of family members, and family medical history. The definition of genetic information does not include information about the sex or age of the individual or his family members, or that the individual currently has a disorder or disease. Tests for drug or alcohol use are also excluded from the definition.

GINA prohibits a covered employer from making any employment decisions based on genetic information, prohibits an employer from intentionally acquiring genetic information, requires confidentiality with respect to genetic information, and prohibits retaliation. In addition, an employer must treat genetic information as confidential and maintain any such records a confidential.

An exception to this is the acquisition of family medical history "to comply with the certification provisions of [the FMLA] or such requirements under State family and medical leave laws." A second exception is the inadvertent acquisition of family medical history. This exception is sometimes referred to as the "water cooler" exception, and occurs when a supervisor overhears a conversation where genetic information is revealed, or where she received genetic information in response to a question about the employee's general health.

Employers should be mindful about maintaining the confidentiality of genetic information obtained through FMLA or CFRA certifications, and should not improperly seek genetic information from employees.

6. **Right to Reinstatement**

Under the FMLA and CFRA, an employee returning from leave is guaranteed reinstatement to the same or a comparable position. Employment in a comparable position means employment in a position that is virtually identical to the employee's original position in terms of pay, benefits, and working conditions, including privileges, prerequisites, and status. It must also involve the same or substantially similar duties and responsibilities, and it must be performed at the same or proximate geographical work site.

An employer may deny reinstatement to an employee if his or her position ceased to exist for reasons unrelated to the employee's absence prior to his or her return from leave. An employer may also deny reinstatement if the employee taking the leave is a key employee (salaried and among the highest paid 10 percent), and the denial of

reinstatement is necessary to prevent substantial and grievous economic injury to the operations of the employer. However, the employer must notify the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary.

7. **Recent Updates to the FMLA**

a. **Expanded Definition of "Son or Daughter"**

The Wage and Hour Division of the Department of Labor has recently interpreted the FMLA's definition of "son or daughter" broader than ever before. The Department of Labor now takes the position that an eligible employee can take leave for the birth, bonding or to care for the child of a domestic partner or same-sex domestic partner, as well as other children for whom an employee has responsibility for day-to-day care or financial responsibility, even though the employee has no biological or legal relationship with the child.

b. **Expanded Definitions of "Covered Servicemember" and "Serious Injury or Illness" Under Military Caregiver Leave**

The 2010 National Defense Authorization Act ("NDAA") expands the definition of covered servicemember to include veterans who were members of the Armed Forces at any time during the preceding five years, if the veteran is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. Prior to the 2010 NDAA, a covered servicemember only included members of the Armed Forces, National Guard or Reserves.

The 2010 NDAA also amended the definition of "serious injury or illness" for current members of the Armed Forces to include a serious injury or illness that "'existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces' that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating." Prior to this amendment, a serious injury or illness was one incurred by the member in the line of active duty. For veterans, a "serious injury or illness" is one that is "a qualifying injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran."

c. **Expanded Definition of "Covered Active Duty" for Qualifying Exigency Leave**

As part of the 2008 NDAA, the normal 12 workweeks of FMLA job-protected leave became available to eligible employees with a spouse, son, daughter, or parent serving in the National Guard or Reserves in support of a contingency operation to use for "any qualifying exigency" arising out of the fact that a covered military member is on active duty. A qualifying exigency may include a short-notice deployment, rest and recuperation, childcare and school activities, and financial and legal obligations. The 2010 NDAA expands the qualifying exigency leave to include members of the Armed Forces, not just the National Guard or Reserves.

Specifically, "'covered active duty' for members of a **regular** component of the Armed Forces means duty during deployment of the member with the Armed Forces to a foreign country. 'Covered active duty' for members of the **reserve** components of the Armed Forces (members of the U.S. National Guard and Reserves) means duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in a contingency operation."

d. **Eligibility Requirements for Airline Flight Attendants or Crew Members**

Airline flight attendants or flight crew members meet the hours of service requirement if, during the previous 12-month period, the employee (1) has worked or been paid for not less than 60 percent of the applicable total monthly guarantee (or its equivalent), and (2) has worked or been paid for not less than 504 hours, not including personal commute time, or time spent on vacation, medical, or sick leave. All other eligibility requirements apply to airline flight attendants or crew members.

F. Pregnancy Disability Leave Law (PDL)

1. **Federal Law**

As discussed above, pregnancy disability qualifies the employee for FMLA leave so long as the disability qualifies as a serious health condition. Therefore, pregnancy disability counts towards the 12 weeks of FMLA leave (but does not exhaust the employee's CFRA leave). For example, if an employee takes 12 weeks of leave due to her pregnancy, childbirth or other related medical condition and the employer designates the leave as FMLA leave, the employee will have exhausted her annual entitlement to FMLA leave and will have exhausted 12 weeks of the four-month PDL provided under California law. However, the employee will be entitled to an additional 4 weeks of PDL if she is still disabled due to a pregnancy-related condition plus an additional 12 weeks under CFRA to bond with her baby. Employers should be aware of these distinctions and how pregnancy disability leave intersects with family medical leave.

2. **California Law**

California's PDL law is part of the Fair Employment Housing Act (FEHA) and requires employers with five (5) or more employees to provide up to four (4) months of leave for a disability due to an employee's pregnancy, childbirth, or a related medical condition. An employee is considered disabled by pregnancy if, in her health care provider's opinion, she is: (1) unable to work; or (2) unable to perform any one or more of the essential job functions; or (3) unable to perform these functions without undue risk to herself, the successful completion of her pregnancy, or to other persons. It includes such things as prenatal care, severe morning sickness, doctor-ordered bed rest, childbirth, and recovery from childbirth. PDL does not cover leave for parental "bonding" if the woman is not medically disabled. Time off for parental "bonding" is covered by CFRA leave.

a. **Intermittent Leave**

Like FMLA and CFRA leave, PDL does not need to be taken in one continuous period of time. It can be taken on an as-needed basis when medically advisable. Again, the minimum leave increment may be limited to the shortest time period used by an employer's payroll system to account for absences or use of leave. When computing the amount of PDL used by an employee, time worked on a modified schedule or absences due to reasons unrelated to pregnancy are excluded.

To better accommodate intermittent leaves, an employer may temporarily transfer the employee to an alternative position with equivalent pay and benefits. The employer must also reasonably accommodate a temporary transfer if medically advisable. The employer is not required to create a position, discharge another employee, violate terms of a collective bargaining agreement, transfer another employee with more seniority, or promote or transfer the employee if she is not qualified for the position.

b. **Notice**

Employers are obligated to notify employees of their right to take PDL , and employees have a reciprocal duty to notify their employers of their intention to take such leave. The employer notice requirements under the FMLA and CFRA apply to PDL as well.

c. **Benefits**

Employers are not required to compensate employees out on PDL nor do they need to continue employee benefits during the leave, subject to FMLA requirements. Most women on pregnancy disability are eligible for state disability insurance. If, however, an employer pays for other temporary disability leaves or continues health benefits while on other types of leave, it must do the same for employees on PDL. Employers may require the employee to use any available accrued paid sick leave during the leave, but using accrued vacation leave or other paid time off during leave is a matter of employee choice. Seniority and other benefits accrue on the same basis as other leaves, but forfeiture of seniority accrued prior to leave is unlawful.

d. **Reinstatement Rights**

If an employee returns from leave within four months, she is entitled to reinstatement in her original job, unless: (1) she would not otherwise have been employed in the same position at the time reinstatement is requested because of a legitimate business reason unrelated to her taking the leave, or (2) the means of preserving the job would substantially undermine the employer's ability to operate safely and efficiently. If an employee cannot be reinstated into the same position she has a right to be reinstated to an available comparable position. A job is available if it is open on the scheduled date of the employee's reinstatement, or within ten working days thereafter. A position is comparable if it is similar in terms of pay, location, job content and promotional opportunities.

As a condition of an employee's return from leave, the employer may require a release from her health care provider stating that she is able to resume her original job duties, but only if this requirement is uniformly applied to other leaves. Once reinstated, the employee must receive the same benefits as before the leave, with no new qualification period. If the employee fails to return to work on the date she is medically cleared to return or after the four months leave has expired, she may be subject to discharge.

G. Paid Family Leave (PFL)/Family Temporary Disability Insurance Program (FTDI)

PFL allows almost any employee to receive, under certain circumstances, up to six (6) weeks per year (in any 12 month period) of partial wage replacement for periods of leave in which (1) the employee needs to care for a seriously ill child, spouse, parent, or domestic partner, or (2) the employee will bond with a new child. Under the law, a "serious health condition" has the same definition as that under the FMLA or CFRA. However, unlike the FMLA and CFRA, there is no requirement that an employer have a certain number of employees to be subject to this law; all California employees covered by State Disability Insurance will qualify.

PFL does not establish new leave of absence requirements or change rights afforded employees under existing leave laws. Where the employee is entitled to PFL benefits and leave under FMLA and/or CFRA, however, employers can require that the PFL benefits period run concurrently with FMLA or CFRA leave.

1. **Notice Requirement**

Unlike the FMLA or CFRA, which require up to 30 days advance notice of requested leaves, an employee is not required to give notice under the new law. Accordingly, employers may want to consider amending their policies and procedures to require advance notice where practical.

Employers, however, must provide new employees copies of FTDI/PFL notices. These notices are available from the California Employment Development Department (EDD).

2. **Benefits**

An eligible employee will receive up to 55 percent of his or her weekly wage (subject to a cap) during six weeks of his or her PFL. For 2010, benefits are capped at $987 per week. Like SDI, the employee must wait a period of seven (7) consecutive days during which no benefits are available. Subject to collective bargaining agreements, the law also provides that an employer may require an employee to take up to two weeks of earned but unused vacation leave prior to the employee's initial receipt of the benefits. Where an employer requires the use of vacation, the first week of vacation taken must be applied to the one-week waiting period.

3. **Medical Certification and Eligibility**

The employee is required to establish eligibility for each uninterrupted period of PFL. To establish eligibility, the employee must first file a claim for disability benefits with the EDD supported by a medical certification from the treating physician that establishes the illness of the family member that warrants the care of the employee. The certification requirements are similar to those under the FMLA and CFRA.

4. **Reinstatement Rights**

Although the qualifying absences under the FTDI substantially overlap those provided under the FMLA and CFRA, reinstatement rights differ. Under the FMLA and CFRA, only businesses with 50 or more employees (or 5 or more where the employee's leave is protected by California's PDL law) are ordinarily required to hold open a job for an employee who chooses to take PFL. PFL itself does not protect an employee's job or require reinstatement.

5. **What PFL Means for Employers**

Because PFL is funded entirely through employee contributions to the state disability fund, employers are only responsible for processing employee contributions. Employers should review their personnel policies to determine when leave time is currently being provided, including where it is not mandated by the FMLA or CFRA. Because PFL covers many employees who are not covered by these laws, employees, permanent, temporary or otherwise, will now have a greater financial option of taking available leaves. This could place businesses in the position of incurring more tangential costs as more employees take advantage of existing leave policies. These costs may include overtime when other workers are asked to fill in for absent workers and training workers who replace those employees on leave.

To address the above issues, employers may revise their leave policies to require that PFL run concurrently with any protected leaves. Employers may also want to consider requiring the use of vacation time (up to two weeks) prior to the employee becoming eligible for PFL. Because employees generally do not like taking vacation time for any purpose other than vacation, such a policy will discourage employees from taking unnecessarily lengthy leaves. This may help ensure that those employees taking longer leaves truly are those with a legitimate need.

H. Disability Leaves

1. **Work-Related Disability**

The California Labor Code provides for workers' compensation, which requires employers to grant leaves of absence to employees who are temporarily disabled due to a work-related injury or illness. The employee may not be discharged or discriminated against in any manner because the employee has filed a workers' compensation claim.

Workers' compensation law is a complex and highly regulated area of the law; employers should seek legal counsel for specific rules and regulations governing workers' compensation.

2. **Other Disabilities**

Both the Federal Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA) require employers to provide "reasonable accommodations" to disabled individuals in hiring, firing, benefits, and other terms, conditions and privileges of employment. The ADA applies to employers with 15 or more employees; the FEHA applies to employers with 5 or more employees.

a. **Definition of Disability**

The FEHA defines a disability as a physiological condition which "limits" a major life activity. Thus, under California Law, a person is physically disabled when he or she has a physiological condition, which "limits a major life activity" such as working, sleeping, procreating, and interacting with others. The California Legislature has emphasized that while the ADA provides the minimum protections to individuals with disabilities, the FEHA was enacted with the intention of providing additional protections from discrimination " due to an actual or perceived physical or mental impairment."

Under the ADA, an individual has a disability if he or she: (1) has a physical or mental impairment that **substantially** limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. Thus, it is more difficult to prove a disability under the ADA than it is under FEHA.

b. **Employer Obligations - The Interactive Process and Reasonable Accommodations**

It is the ***employer's obligation*** to cooperate or interact with employees or applicants to determine whether a reasonable accommodation would enable the employee to perform the essential functions of a job. If an employee or applicant asks for a reasonable accommodation, the employer must respond timely, act in good faith, and interact with the employee to determine an effective reasonable accommodation.

The employer has duty to engage in an interactive process when an employee requests a reasonable accommodation or upon recognition of the need for an interactive process. The request for accommodation does not need to be in writing to trigger the employer's duty to begin interactive process. Employers must train their supervisors and managers to recognize and anticipate employees in need of accommodations to avoid ADA and FEHA liability.

Reasonable accommodations include:

- the acquisition or modification of equipment and devices;
- making existing facilities accessible;
- job restructuring, including modified work schedules and reassignment to a vacant position; and
- elimination of non-essential job functions.

Unreasonable accommodations are those that impose an *undue hardship* on the employer or accommodations that involve significant difficulty or excessive cost.

Under FEHA, both the employer and employee must demonstrate a good faith effort to communicate in order to achieve the shared goal of providing the employee with a reasonable accommodation. Courts have found that interactive process between an employer and employee "requires good faith communication by both parties in order to achieve the mutual goal of identifying an accommodation that will allow the employee to perform her job effectively". A failure to participate in the process and document the steps taken along the way may lead to unnecessary litigation and costs.

In assessing whether an employee's request for accommodation is reasonable, an employer must make a particularized showing that an accommodation would cause an undue hardship. Whether a requested accommodation is reasonable is based on the particular facts and circumstances of each case.

Here are the steps an employer may want to undertake during the interactive process:

- The interactive process should start with the employer analyzing the position, identifying the job's purpose and identifying the essential functions. (Note that all of this information should be contained in the job description.)
- The employer should then consult with the individual to ascertain the job-related limitations imposed by the disability, and discuss how those limitations may be overcome with a reasonable accommodation.
- The employer should ask the employee what he or she would like as an accommodation.
- Once the employer has met with the employee, the employer should identify the potential accommodations and weigh the pros and cons of each accommodation.
- Most importantly, the employer should consider whether the accommodation will enable the individual to perform the job's essential functions.
- The employer should give priority to the accommodation the employee feels is best, but should implement the accommodation that is most appropriate to both the employee and employer.
- Please note that if you select an accommodation that was not the one preferred by the employee, be sure to have a legitimate business reason for doing so.

c. **Seniority programs and accommodation**

While employers' seniority programs are typically shown deference by the courts, there are some situations in which it may be reasonable to allow an exception to accommodate an employee's disability. While an employee's request for a reasonable accommodation does not "trump" an employer's seniority system, an employee "nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system, the requested 'accommodation' is 'reasonable' on the particular facts."

d. **FEHA and the Hiring Process**

During the application phase, employers may ask if the applicant is able to perform essential job-related functions and may respond to applicant's request for a reasonable accommodation. Once an offer of employment is made and prior to commencement of employment, employers may require that applicants respond to an inquiry or take a medical or psychological examination as long as the inquiry or exam is job-related, is consistent with business necessity, and all employees in the same classification are subject to the same exam or inquiry.

The United States Supreme Court has held that an employer may refuse to hire an applicant with a disability where that disability poses a significant risk of causing serious injury. This is consistent with California's FEHA, which also denies protection to an employee who, due to his disability, is unable to perform the essential functions of the job in a manner which would not endanger the employee's health or safety even when a reasonable accommodation is provided.

## ADDITIONAL LEAVES MANDATED BY LAW

I. School Visitation/Activities Leave

Employers with twenty-five (25) or more employees working at the same location, must allow a parent, grandparent or guardian to take up to forty (40) hours per year, but no more than eight (8) hours per month, to participate in activities at the child's kindergarten - grade 12 school, including a licensed day care facility. The employee must give reasonable notice to the employer. Employees may be required to first utilize vacation, personal leave or compensatory time off for this purpose. Otherwise, compensation for this time off is not mandatory.

Moreover, all employers, regardless of size, must allow a parent, grandparent or guardian of a pupil to appear at the school when the school has given advance notice that their attendance is required for a school discipline conference. Again, the employee is required to give reasonable notice to the employer and the employee does not need to be compensated for this time.

J. Time Off to Vote

If a voter does not have sufficient time to vote outside of work hours, he or she may take time off to vote at a statewide election at the beginning or the end of the employee's shift. The employee may take off no more than two hours without loss of pay, provided that he or she has given at least two working days' notice that time off is desired. An employer must allow its employees as much time off as necessary for the employee to vote, but is only required to pay for two hours. Employers must post a notice detailing this right at least 10 days before every statewide election.

Employees who serve as election officers on Election Day are also entitled to time off. Unlike voting leave, election officer leave applies not just to statewide elections but also to local and special elections. Military Leave – Uniformed Services Employment and Reemployment Rights Act (USERRA).

1. **Eligible Employees**

The USERRA requires employers to grant employees unpaid leave so they can serve in the U.S armed forces, including the Army, Navy, Air Force, Marines, the Army or Air National Guard, the U.S. Coast Guard, or the Uniformed Health Service. The USERRA applies to all employees holding a job other than a temporary position. This has been broadly interpreted to include full-time, as well as part-time workers whose services are of a continuing nature, most employees in probationary, apprenticeship or training positions, and employees on leaves of absence. The USERRA covers those absences on account of voluntary or involuntary duty in a uniformed service activity, including active duty, active and inactive duty training, and absence from work for an examination to determine the individual's fitness to perform these duties.

2. **Notice**

An employee is required to provide his or her employer with advance written or oral notice of their service obligations in order to be entitled to the USERRA's reemployment rights or benefits. This requirement is waived when military necessity precludes providing it, or if giving notice is impossible or unreasonable.

3. **Benefits**

The USERRA does not require an employer to compensate employees taking extended military leave, unless the employee elects to use accrued vacation or similar paid leave during military leave. However, employers cannot require an employee to use accrued vacation. Exempt employees who perform any service for the employer in a week in which they take military leave must be paid for the entire week.

An employee on military leave is entitled to the same benefits provided to employees on other forms of leave. Employers must permit the employee to continue employer-sponsored coverage for themselves and their dependents for up to 18 months. Employees serving more than 30 days cannot be charged more than 102 percent of the normal premium. When service members are re-employed, their health coverage must be resumed as if no break in employment had occurred. This means that there can be no lapse in coverage or waiting period or exclusions on pre-existing conditions for returning employees or their dependents. Pension plan accrual and vesting continues as if there had been no break in service. Employees are also entitled to accrue vacation upon their return at the rate they otherwise would have attained if they had continued working.

Military leave also counts as active employment for the purpose of determining whether an employee has met the requirement of 12 months' service and completing 1,250 work hours under the FMLA and CFRA.

4. **Reinstatement Rights**

Employees who take USERRA leave, at least up through a five-year limitation, are entitled to re-employment unless they receive a dishonorable or bad-conduct discharge. However, as a preliminary matter, the employee must give notice that they are ready to return to work. The amount of time in which the employee must notify the employer varies based on the length of the employee's service, and may be extended if the employee is hospitalized for a service related illness or injury. If the employee does not give prompt notice, the employer cannot refuse reinstatement, rather the employer can only subject the employee to its regular absenteeism policy. Employers can request documentation that proves the returning service member is eligible for re-employment. But, if such documentation does not exist or is not readily available, re-employment cannot be denied. Instead, the service member must provide the documentation as soon as possible after the employment.

Employees who serve less than ninety-one days must be re-employed in the position they would have attained if they had remained continuously employed, so long as the employee is qualified for the job or can become qualified with reasonable efforts. If the employee is not qualified, the individual must be reemployed in the position he or she occupied prior to service. Employees that serve more than ninety-one days have similar rights to reemployment. However, in this case, if the employee cannot be re-employed in the position he or she would have attained or if re-employment in the employee's former position is impossible, the employee must be re-employed in a position equivalent in pay, rank and seniority to the position for which they are qualified. All employers must comply with USERRA, unless they can show that re-employment is impossible, unreasonable, or creates an undue hardship.

The law protects returning service members from discharge, except for cause, for six months after they serve 31 to 180 days. Employees who serve more than 180 days cannot be discharged, except for cause, for one year after they return to work.

K. Leave for Spouses of Military Personnel

An employer with 25 or more employees must allow eligible employees to take up to 10 days of unpaid time off when the employee's spouse is on leave from deployment during a period of military conflict. An eligible employee is one that works at least an average of 20 hours per week, and whose spouse is a member of the Armed Forces who has been deployed to an area designated as a combat zone during a period of military conflict, is a member of the National Guard who has been deployed during a period of military conflict, or is a member of the Army Reserves who has been deployed during a period of military conflict.

L. Jury Duty or Witness Duty

An employer may not discriminate against an employee for taking time off to serve as a juror at a trial or when the employee is the victim of a crime and is required to appear as a witness. An employee must give reasonable notice to the employer. Whether an employer must pay wages depends on an employee's status as exempt or not exempt.

M. Domestic Violence/Sexual Assault

Employees who are victims of domestic violence or sexual assault are entitled to time off to take actions to protect the health or safety of the employee or his or her child, including seeking a restraining order or other injunctive relief. Moreover, under the California Labor Code, employers with twenty-five (25) or more employees must provide victims of domestic violence time off from work to attend to issues arising out of domestic violence or sexual assault, including seeking medical attention, going to domestic violence shelters or programs and getting psychological counseling. The duration of this leave can be capped at 12 weeks. Domestic Violence Leave is unpaid. However, an employee is ordinarily entitled to use vacation time, personal leave or compensatory time-off.

As a condition for taking time off, the employee must give reasonable advance notice of the employee's intention to take time off, unless advance notice is not feasible. If an unscheduled absence occurs, the employer may not take any action against the employee if the employee, within a reasonable time after the absence, provides a certification to the employer. Certification can be a police report, court order, or documentation by a medical professional certifying that the employee was a victim of domestic violence or sexual assault.

The employer must take reasonable efforts to maintain the confidentiality of any employee requesting leave because of domestic violence or sexual assault. Moreover, an employer may not discriminate against an employee for taking time off to obtain relief as a result of domestic violence. Violation of this law is a misdemeanor

N. Victims of Serious or Violent Felonies and their Relatives

Every employer, regardless of size, must permit an employee who is a victim, the immediate family member of a victim, the registered domestic partner of a victim, or the child of a registered domestic partner of a victim, of a serious or violent felony to be absent from work to attend judicial proceedings related to the crime. Leave for this purpose is unpaid, but an employee may elect to use accrued paid vacation time, personal leave, or other compensatory time off that is otherwise available to the employee.

O. Family Sick Leave/Kin Care

While employers are not required to provide paid sick leave for employees, an employer that does provide paid sick leave must permit the employee to use at least one-half of the yearly sick leave accrual to attend to an illness of a child, parent, spouse, domestic partner, or child of a domestic partner. Conditions that apply to sick leave used by an employee also apply to sick leave used to care for a sick child, parent, domestic partner, or spouse.

P. Emergency Duty as a Volunteer Firefighter, Reserve Police Officer, or Emergency Rescue Personnel

All employers must provide leaves of absence for employees who are required to perform emergency duty as a volunteer firefighter, a reserve police officer, or emergency rescue personnel. In addition, employers with 50 or more employees must give leaves of absence for up to 14 days per year for fire or law enforcement training. There is no requirement that the employee must be compensated during this time off.

Q. Literacy Education

Employers with twenty-five (25) or more employees must reasonably accommodate and assist an employee in enrolling in an adult literacy education program. Compensation is not required and as long as the employee performs his or her job satisfactorily, he or she cannot be terminated for revealing a problem with illiteracy. In addition, the employer may deny accommodating the employee if to do so would impose an undue hardship on the employer.

R. Drug and/or Alcohol Rehabilitation

Employers with twenty-five (25) or more employees must reasonably accommodate an employee's voluntary participation in an alcohol and/or drug rehabilitation program, provided that the accommodation does not impose an undue hardship on the employer. The employer must also make reasonable effort to safeguard the employee's privacy with regard to his or her enrollment in a rehabilitation program.

Despite the above requirements, an employer may refuse to hire or may discharge an employee because of the employee's current use of alcohol and/or drugs, or where the employee is unable to perform his or her duties, or cannot perform the duties in a manner which would not endanger his or her health and safety or the health and safety of others.

S. Religious Observances

Under federal, state and local discrimination laws, employers must reasonably accommodate an employee's request for time off to observe religious holidays if such time off does not pose an undue hardship on the employer. Again, undue hardship is determined on a case-by-case basis. Examples of reasonable accommodations may include: make-up time, flexible work schedules, change of job assignments, and time off.