HOPKINS & CARLEY

A LAW CORPORATION

2013 Employment Law Update

A REVIEW OF RECENT DEVELOPMENTS OF INTEREST TO EMPLOYERS

Introduction

Hopkins & Carley is once again pleased to provide its clients and friends with a summary of the new laws and legal developments from the past year that we believe will have the greatest impact on employers in 2013. As always, if you have questions or concerns relating to employment law or human resource management, we invite you to contact us.

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Seminars

2013 Schedule of Seminars

Hopkins & Carley's Employment Law Department is dedicated to providing comprehensive tools for success to its clients and community. Rather than merely reciting laws or telling clients what they can't do, our attorneys provide practical, real-world answers that clients can use and understand. You are invited to attend any or all of the seminars that we will host in 2013.

Month	Topic
January 8, 2013	2013 Annual Update
March 12, 2013	Developing Effective Employee Handbooks
April 17, 2013	Employment Law Q&A
May 16, 2013	Alphabet Soup of Leave Laws
May 22, 2013	A Manager's Guide to Discrimination & Harassment
September 10, 2013	Performance Management, Discipline, & Termination
October 16, 2013	Pay Them Now, or Pay Them Later: A Review of Current Issues and Recent Developments in Wage and Hour Law
November 6, 2013	A Manager's Guide to Discrimination & Harassment

Visit www.hopkinscarley.com for time and location details. Dates are subject to change.

Wage & Hour

California courts issued several important decisions during 2012 in cases involving wage and hour issues, highlighted by the California Supreme Court's long-awaited opinion in *Brinker Restaurant Corp. v. Superior Court*. In a departure from recent trends, all of the decisions represented victories for employers. While the Court decisions were beneficial to employers, newly enacted wage and hour laws create more burdens for employers in 2013.

Brinker Decision Clarifies Meal Period and Rest Break Rules

The *Brinker* decision, which had been pending before the Supreme Court for three years, resolves or clarifies numerous issues concerning meal periods and rest breaks and represents a significant victory for California employers in many respects.

Meal Periods

The Supreme Court's decision in the *Brinker* case resolves the primary dispute regarding meal periods in favor of employers. According to the Supreme Court's opinion, employers are required only to provide non-exempt employees with an opportunity to take meal periods; they are not required to ensure that employees actually stop work and take a meal period. Although employers are not required to ensure that employees take meal periods, they cannot impede or discourage them from doing so.

In order to comply with the law, employers must provide non-exempt employees who work five or more hours on a given workday with an opportunity to take an unpaid meal period of at least 30 minutes. If a non-exempt employee works ten or more hours on a given workday, the employer must provide the employee with an opportunity to take a second meal period.

During meal periods, employers must relieve employees of all job responsibilities. Employees must be free to leave the premises if they wish to do so. If an employee is required to monitor or respond to email or voicemail messages during a meal period, the employer has not relieved the employee of all duties and arguably has not complied with the law.

Employees can waive their meal period if they work a total of no more than six hours on a given workday, and can waive their second meal period within a given day if they work no more than 12 hours and did not waive the first meal period. Written waivers are not strictly required by law, but we recommend that employers seek written waivers from employees who elect to forego a meal period.

The *Brinker* decision also clarifies when employers must provide meal periods to eligible non-exempt employees. According to the Supreme Court, employers must provide the meal period by the conclusion of an employee's fifth hour of work. If an employee is entitled to two meal periods during a given day, the second meal period must be provided by the end of the tenth hour of work. Meal periods should not be provided at the beginning or end of an employee's shift, however.

In limited circumstances, employees may take so-called "on-duty meal periods" without subjecting their employers to liability. "On duty" meal periods are permitted only when (a) the nature of an employee's work prevents the employer from relieving the employee of all job duties, and (b) the employee agrees in writing to accept an "on duty" meal period. The standard utilized in determining whether an employee's work prevents him or her from being relieved of all duty is a high one; the mere preferences of the parties or inconvenience to the employer will not justify an "on-duty" meal period. An "on-duty" meal period may be appropriate for a sole worker at an all-night convenience store or a security guard at a remote site, for example, but usually would not be appropriate for administrative assistants or most IT Helpdesk employees.

If an employer fails to provide an employee with a meal period in accordance with the law, the employer must pay one additional hour of pay at the employee's regular rate of pay for each workday that the meal period was not made available. If an employee voluntarily foregoes a meal period, the time that would otherwise represent the unpaid meal period counts as time worked and is compensable.

Rest Breaks

Employers must provide non-exempt employees with opportunities to take rest breaks of at least ten minutes based on the number of hours worked by the employees during the workday. Rest breaks should be offered during the middle of each work period to the extent that it is practicable to do so. Employers must offer rest breaks to non-exempt employees consistent with the following schedule:

Hours worked during day	Number of breaks to be offered
0 to 3.5	0
3.5 to 6	1
6 to 10	2
10 to 14	3

Rest breaks are considered work time and employers must pay employees for time spent on rest breaks. Since employees are paid for their rest periods, however, employers can require them to remain on the work premises throughout a rest period.

As is true with respect to meal periods, employers are not required to ensure that employees take rest breaks. Instead, they must make rest breaks available to employees and cannot impede or discourage employees from taking rest breaks.

If an employer fails to provide an employee a rest break in accordance with the law, the employer must pay one additional hour of pay at the employee's regular rate of pay for each workday that the rest break was not made available.

Class Action Implications

Aside from clarifying the rules regarding meal periods and rest breaks, the *Brinker* decision also offers guidance on whether claims for violation of the rules are suitable for resolution in class action suits. The Supreme Court did not adopt a clear-cut rule endorsing or rejecting class action litigation in all cases, but indicated that class action suits are not appropriate when the claims of multiple employees do not depend primarily on common facts. The existence or non-existence of policies or practices applicable to all employees in a purported class will be a significant factor in determining whether claims should proceed as class actions or be litigated separately by individual employees.

What should employers do now?

The *Brinker* decision represents a victory for employers in many ways and should reduce the volume of claims alleging violation of meal period and rest break rules. Nevertheless, employers would be wise to review their practices regarding meal periods and rest breaks and take the following steps to minimize their exposure:

- **Adopt or update written policies**. Employers that have not adopted written policies concerning meal periods and rest breaks should adopt policies consistent with the *Brinker* holding. Organizations which have policies in place already should review and revise them as necessary. Many existing policies do not provide employees with rest periods as frequently as the *Brinker* decision now mandates and should be revised at this time.
- **Written acknowledgment**. In order to confirm that employees are aware of the availability of meal periods and rest breaks, employers should require non-exempt employees to acknowledge in writing (either through an Employee Handbook acknowledgement form or separately) that meal periods and rest breaks are available to them on terms consistent with the *Brinker* decision. Acknowledgments should contain language addressing the key elements of the meal period and rest break rules (i.e., the duration and frequency of the meal periods and rest breaks, being relieved of all duty, etc.).
- **Record meal times**. Notwithstanding the *Brinker* decision, employers should require non-exempt employees to record the times at which they begin and end their meal periods each day. These records will provide useful evidence of the organization's compliance with the law and are also arguably necessary to comply with the obligation to maintain accurate records of employees' hours of work.
- **Inquire when you become aware of employees who don't take meal periods or rest breaks**. Since employees who routinely forego meal periods or rest breaks may argue that they were not permitted to take such breaks, employers

should try to preempt such disputes by inquiring when they become aware of employees skipping meal periods or rest breaks on a recurring basis. Employers should confirm that employees are aware of the company's policy, ask the employee to explain the reason(s) for which he or she did not take a meal period or break and, after conferring with counsel, consider whether documentation of the conversation or some other further action is appropriate.

Court Decision Favors Employers on Reporting Time Pay and Split Shift Premiums

Rules regarding reporting time pay and split shift premiums usually do not receive as much attention from employers as overtime and meal period rules. Employee attorneys have recognized the Labor Code and Wage Orders as a source of many potential claims, though, and are now asserting claims for a wide variety of alleged violations in addition to the overtime and meal period claims that have become commonplace in recent years. The recent case of *Aleman v. AirTouch Cellular* clarified the rules regarding reporting time pay and split shift premiums, and represents another victory for employers.

Reporting Time Pay

Wage Order 4 defines the obligation of employers to provide so-called "reporting time pay" to non-exempt employees whose work day is divided into two or more distinct work periods separated from one another by more than a regular rest break or meal period. The Wage Order provides:

> Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two hours nor more than four hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

Many employers and employees have interpreted the Wage Order to require payment for at least two hours whenever an employee reports to work. The *Aleman* court concluded otherwise, however, holding that an employee who was scheduled to come to work to attend a mandatory meeting for 90 minutes, but left after only one hour because the meeting ended early, was not entitled to reporting time pay. According to the *Aleman* decision, the reporting time rules do not apply at all if an employee works more than half of his or her scheduled time on the day in question. If an employee works less than half of his or her usual or scheduled time on the day in question, however, reporting time pay of at least two hours, and no more than four hours, is owed.

Split Shift Premiums

Wage Order 4 defines a "split shift" as "a work schedule, which is interrupted by non-paid, non-working periods established by the employer, other than bona fide rest or meal periods." When an employee works a split shift, the

Wage Order requires the employer to pay "one hour's pay at the minimum wage" in addition to the minimum wage for that workday.

In *Aleman*, the employee argued that the Wage Order requires payment of a split shift premium whenever any non-exempt employee works a split shift. The court rejected Aleman's analysis, however, and held that a split shift premium is not owed unless the employee's total compensation on the date in question falls below the minimum wage for all hours worked plus one additional hour. In other words, if an employee works a split shift of eight hours and is paid $10.00 per hour for his work, he would not be entitled to any split-shift premium, because his total compensation of $80.00 exceeds $72.00, which represents the minimum wage of $8.00 per hour for all hours worked (eight) plus one additional hour. If the employee were paid $8.50 per hour, however, he would be entitled to a split-shift premium, because his total compensation of $68.00 ($8.50 multiplied by eight hours) would be less than $72.00.

What should employers do now?

- **Train managers and human resources representatives**. Many employers have interpreted the reporting time and split shift premium rules in a manner that is more favorable for employees than the *Aleman* court's interpretation of the rules. As such, employers should train their managers and human resources representatives to ensure that they understand the law correctly.
- **Review policies and practices**. Employers should review their policies and practices to ensure that they are consistent with the *Aleman* decision. Many Employee Handbook policies may contain provisions that are more generous to employees than the *Aleman* court's interpretation of the rules, and such policies should be revised to conform with the new decision.

See's Candy Decision Endorses Rounding of Employee Time Cards

In order to comply with their obligation to maintain accurate records of the hours worked by their non-exempt employees, most employers require employees to record the times at which they start and stop work each day. Some employers utilize electronic timekeeping software, while others utilize mechanized time clocks or timecards that are completed by hand. Regardless of the method they utilize to track the time worked by non-exempt employees, however, employers are often confronted with time records that reflect employees working slightly more or less than they actually worked, or were scheduled to work. An employee scheduled to work from 8:00 a.m. to 4:30 p.m. may clock in at 7:57 a.m., for example, and clock out at 4:29 p.m.

When calculating time worked for payroll purposes, however, federal law permits employers to round starting and stopping times to the nearest increment of five, six or 15 minutes. The California Division of Labor Standards Enforcement (DLSE) has similarly endorsed the rounding practices permitted under federal law, and many employers have long utilized rounding practices based on federal law and the DLSE's enforcement policy. Early in 2012, however,

a California trial court held that rounding times to the nearest six minutes violated state law. The California Supreme Court ordered review of the decision. The Court of Appeal then issued a new opinion that reverses its prior decision. As hoped and expected, the court essentially endorsed the rounding practices authorized by federal law and utilized by many employers.

According to the new court decision in *See's Candy Shops, Inc. v. Superior Court*, employers may round employee timecards to the nearest tenth of an hour if the rounding policy (a) is fair and neutral on its face, and (b) "is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all time they have actually worked." Although the court's decision specifically endorsed only rounding practices that involve rounding to the nearest tenth of an hour, federal law also authorizes employers to round employee timecards to the nearest five minutes or quarter hour, and the court's opinion suggests strongly that employers may utilize five-minute or 15-minute increments for rounding as well as six-minute increments, as long as they use the same increment consistently. When rounding, employers should round recorded times to the nearest increment. If rounding in increments of five minutes for an employee scheduled to start work at 8:00 a.m., for example, an entry of 7:58 a.m. should be rounded forward to 8:00 a.m. (the nearest increment of five minutes), while an 8:02 a.m. entry should be rounded back to 8:00 a.m.

The *See's Candy* decision endorses the rounding of employee timecards for payroll purposes, but employers should be careful to ensure that they round in an even-handed manner and that, over time, they fully compensate employees for all time they actually spend working. Employers should note that the decision, while intended to endorse rounding practices, could create some unintended complications with its requirement that employees be paid for all time they actually spend working. An employer that rounds in 15-minute increments may not pay an employee for all time spent working if the employee typically "clocks in" six or seven minutes before her scheduled starting time, for example, and begins work immediately. In some cases, employers may not be able to determine whether employees were paid for all time they worked until well after paychecks have been issued, so it is important both to analyze rounding policies carefully at their inception to minimize the risk of underpayment, and to review them periodically to confirm that employees are paid for all time actually spent working.

What should employers do now?

- **Review policies and practices**. Employers who utilize rounding practices should review their policies and practices to ensure that they are consistent with the *See's Candy* decision. Employers should confirm that they are utilizing one of the approved rounding increments (five minutes, six minutes or 15 minutes), and should pay particular attention to whether rounding practices are administered evenhandedly and consistently, and whether, over time, they fully compensate employees for all time they actually spend working.
- **Distinguish rounding from the correction of inaccurate time records**. While the legality of rounding practices has been confirmed, employers should be careful to distinguish rounding issues from the correction of incorrect time entries. If employees record their starting or ending times inaccurately, employers are not required to pay for time

that does not actually represent hours worked. If an employee's time records are inaccurate, the employer should ask the employee to correct the entries in question.

Muldrow Decision Highlights Requirements of Inside Sales Exemption

Over the past decade, employers have faced a continuing stream of claims alleging that employees have been misclassified as exempt from overtime compensation rules, as well as state laws regarding meal periods and rest breaks. Most misclassification claims have involved the so-called "white collar" or computer professional exemptions. Another judicial decision from 2012 helps to clarify the rules applicable to the inside sales exemption, and serves as a warning of a possible increase in such claims to come in the future.

Both California and federal law create an exemption from normal overtime rules for employees engaged in inside sales that satisfy specific criteria. As always, an employee must satisfy the exemption criteria under <u>both</u> state and federal law in order to be treated as an exempt employee.

Many employers erroneously assume that employees qualify for the exemption merely by engaging in sales from the employer's office. Under California law, however, the inside sales exemption is applicable only if (a) the employee earns more than 150% of the minimum wage, (b) more than 50% of the employee's compensation is derived from commissions, and (c) the employee works in the mercantile industry (covered by Wage Order 7) or in a professional, technical, clerical, mechanical or similar occupation (covered by Wage Order 4).

In *Muldrow v. Surrex Solutions Corporation*, a California Court of Appeal reviewed an employee's allegation that employment recruiters did not qualify for the inside sales exemption because (a) they were not primarily engaged in sales, (b) their compensation was not sufficiently related to the price of the services they sold to constitute a commission, and (c) the close relationship between their draws and commissions belied the existence of a bona fide commission system. The court had little trouble concluding that the employee was engaged in sales, and rejected his contention that a complex commission formula that based commissions on numerous factors in addition to gross sales revenue was inconsistent with the applicable Wage Order. Finally, the court examined the relationship between the subject employees' draws and their commissions and concluded that the employer had established a bona fide commission system.

The criteria that an employee must satisfy to qualify as an exempt inside sales representative under federal law are similar, but not identical, to those applicable under state law. Under federal law, the inside sales exemption applies only to employees who (a) earn more than 150% of the minimum wage, (b) derive at least 50% of their income from commissions, and (c) work in the "retail and service industry." Employers are engaged in the "retail and service industry" within the meaning of the Fair Labor Standards Act if they derive at least 75% of their annual sales revenue

from goods or services not for resale and are recognized as a retail or service establishment in their industry. Employers who have questions about the applicability of the inside sales exemption should consult counsel to provide advice in the determination.

If an employee qualifies as an exempt inside sales representative, he or she is not entitled to overtime compensation for hours worked in excess of eight in a single day or in excess of 40 in a single week, but the state laws entitling non-exempt employees to meal breaks remain applicable, meaning that employers must provide meal periods and rest breaks to otherwise exempt inside sales representatives.

What should employers do now?

- **Review classification of inside sales personnel**. Many employers have classified inside sales personnel as exempt without understanding the exemption criteria clearly. Employers who treat inside sales personnel as exempt should review the validity of their classifications in light of the criteria discussed above. In the event that an employee appears misclassified, employers should confer with counsel to discuss the courses of action available to them.

Written Commission Agreements – Labor Code Section 2751

Former Labor Code section 2751 required out-of-state employers to have written contracts with their California employees who are paid on a commission basis, including details regarding the method of computing and paying commissions. It was ultimately determined that the statute violated the United States Constitution as it treated California-based companies more favorably than employers that had no fixed place of business in the state. In response to that determination and to correct the defect, the state assembly passed AB 1396 amending Labor Code section 2751 and imposing the same requirements on California employers. Accordingly, by January 1, 2013, all California employers must have written contracts in place with any employees who are paid in whole or part on a commission basis. While the new requirement appears simple enough, there are multiple important factors to consider when drafting commission agreements, and promoting commission plans in general.

When employers create commission plans they sometimes focus myopically upon the amount of commission or bonus to be paid if certain goals are achieved, neglecting to give due consideration to other critical elements of their plans. When employees are later disappointed not to earn as much as they had expected from the plan, they frequently file lawsuits or claims with the Labor Commissioner, alleging that the company has failed to pay compensation owed to them pursuant to the commission plan. In many cases, such claims are the result of a poorly-conceived plan and can be avoided through careful consideration and drafting as the plan is created.

One of the essential questions to be answered in connection with any commission plan concerns the event which triggers accrual of the commission. Does the employee earn a commission upon procurement of a purchase order, for example, or is the commission earned only upon achievement of some later milestone, such as shipment of the product

or receipt of payment from the customer? Many commission agreements also fail to identify the base upon which commissions are calculated—gross sales revenue, gross profit, or net profit? Even more commonly, many commission plans do not address the effect of a cancelled or returned order upon the salesperson's right to a commission. Each of these deficiencies is a potential—and common—source of controversy. Commission and bonus plans should eliminate potential sources of confusion and controversy by defining the employee's right to a commission as precisely as possible, eliminating ambiguity and addressing foreseeable bumps in the road such as a customer's failure to pay.

Payment of an employee's final wages also poses challenges when compensation includes commissions. If the employer terminates the employment relationship, the employee's final wages are due and payable on the date on which the employment relationship ends. If the employee resigns and provides more than 72 hours advance notice of the effective date of his or her resignation, final wages are also due and payable on the date of termination. If the employee resigns and provides less than 72 hours advance notice of the effective date of his resignation, however, his or her final wages are due within 72 hours.

To the extent that commissions have accrued and are subject to calculation at the time of termination, they are payable at that time together with other wages. Note that the relevant distinction is between commissions which are subject to calculation and those which are not, rather than those which have been calculated and those which have not been calculated, but can be calculated with available information. Employers are obligated to pay commissions at termination if they can be calculated at that time; the employer's failure to complete calculations with available information does not excuse it from payment at that time.

What should employers do now?

- **Ensure that all employees paid in whole or part on commission are working under a written commission agreement**. At minimum, the statute requires the contract to include the method by which the commission is to be computed and paid, and requires that the employer provide a signed copy of the contract to the employee. Note that the law specifically excludes from the definition of "commission" short-term productivity bonuses, and profit-sharing plans so long as there has not been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work performed.
- **Review all commission agreements in place before January 1, 2013, to ensure compliance with the law**. Employers are well advised to review all commission agreements in place prior to January 1, 2013, to ensure compliance with the statute. With respect to those agreements that require modification and reissue, employers should take the opportunity to clear up any confusion regarding the event or events that trigger a right to a commission payment, and any related ambiguities that may cause trouble down the road.

Wage Statements – Labor Code Section 226

In 2012, the California Legislature approved two bills amending California Labor Code section 226. One impacts all employers in the state, and the other is specific to those employers that provide temporary employment services.

California Labor Code section 226 requires employers to provide, semi-monthly or at the time of each payment of wages, an accurate itemized statement in writing showing:

- gross wages earned;
- total hours worked by the employee;
- the number of piece-rate units earned and the applicable piece-rate rate;
- all deductions;
- net wages earned;
- the inclusive dates of the period for which the employee is paid;
- the name of the employee and the last four digits of the employee's social security number;
- the name and address of the legal entity that is the employer; and
- all applicable hourly rates in effect during the pay period and the corresponding numbers of hours worked at each rate by the employee.

An employee suffering injury as a result of a "knowing and intentional" failure to comply with certain sections of the code is entitled to statutory damages, and an award of costs and reasonable attorney's fees. Although the Code imposes statutory penalties and other remedies upon offending employers, employees often times had difficulty proving actual "injury" as a result of the employer's failure. Recognizing this situation, the California Legislature passed Senate Bill 1255 such that effective January 1, 2013, Labor Code section 226 will define "injury" in a fashion that permits employees to recover damages under the statute even in the absence of actual injury caused by the alleged deficiency in the wage statement.

The second piece of legislation, Assembly Bill 1744, amends Labor Code section 226 effective July 1, 2013, to require temporary services employers to include the rate of pay and the total hours worked for each temporary services assignment on the corresponding wage statements.

What should employers do now?

- **Review current wage statement formats to ensure compliance with existing Labor Code requirements**. Although the amendments to Labor Code section 226 did not change the specific items required to be included in itemized

wage statements, the amendments make it easier for an employee alleging injury as a result of receiving a non-compliant statement to recover damages as a result of the employer's failure.

- **If your company places temporary services employees, review current pay statements contents to ensure compliance with the new law**.

Fixed Salaries & Non-Exempt Employees – Labor Code Section 515

In early 2011, the Second District Court of Appeals issued its opinion in the matter of *Arechiga v. Dolores Press, Inc*. The Appellant, Carlos Arechiga, worked as a janitor for Dolores Press under an agreement that he work 11 hours per day, six days per week, including in that schedule 26 hours of overtime work. The agreement provided that Mr. Arechiga be paid a weekly salary of $880. Almost seven years after beginning employment, Dolores Press terminated Mr. Arechiga and soon thereafter Mr. Arechiga brought suit against his former employer alleging, among a number of causes of action, that his $880 a week salary only compensated him for the 40 regular hours worked. As a consequence, Mr. Arechiga alleged that he was owed compensation for the vast number of overtime hours worked while employed with the company. Unfortunately for Mr. Arechiga, the court found for Dolores Press indicating that an explicit mutual wage agreement existed between employer and employee under which Mr. Arechiga's fixed salary of $880 lawfully compensated him for both his regular and overtime hours. In so finding, the court specifically rejected Mr. Arechiga's assertion that Labor Code section 515 outlawed such an explicit wage agreement.

In response to that decision, and in clear disagreement with the court's determination, the California Legislature passed Assembly Bill 2103 which, effective January 1, 2013, amends Labor Code section 515 to provide that regardless of an agreement between and employer and employee to the contrary, a salaried non-exempt employee must be paid for each overtime hour worked at a rate that is at least 1.5 times the weekly salary divided by no more than 40. In other words, the payment of a fixed salary to a non-exempt employee will only be deemed to provide compensation for an employee's regular, non-overtime hours, notwithstanding a private agreement, like the agreement between Dolores Press and Mr. Arechiga, to the contrary.

What should employers do now?

- **Review current fixed-salary agreements in connection with new Labor Code requirements**. Amended Labor Code section 515 will likely change the impact of fixed-salary agreements currently in place. Accordingly, fixed-salary agreements should be reviewed and revised with the amended Labor Code section in mind, or terminated altogether.

San Jose Minimum Wage Ordinance

San Jose voters approved a $10 per hour minimum wage for certain covered employers and employees within the City. Essentially, this results in a minimum wage in San Jose that is $2 per hour higher than California's minimum wage. San Francisco is the only other city in California with a higher minimum wage. It is expected that the ordinance will take effect on March 4, 2013, after the election results will have been certified for 90 days.

The ordinance defines an employer as "any person, including corporate officers or executives, as defined in Section 18 of the California Labor Code, who directly or indirectly through any other person, including through the services of a temporary employment agency, staffing agency or similar entity, employs or exercises control over the wages, hours or working conditions of any employee, and who is either subject to the Business License Tax Chapter 4.76 of the Municipal Code or maintains a facility in the City [of San Jose]." The ordinance essentially covers all San Jose employers except employers that (a) do not maintain a facility in San Jose, or (b) are exempt from the business license tax under the San Jose Municipal Code.

The ordinance defines an employee as any person who performs at least two hours of work for an employer in a calendar week and who "[q]ualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission, or is a participant in a Welfare-to-Work Program." The ordinance does allow for the waiver of the requirements of the ordinance in a collective bargaining agreement "provided that such waiver is explicitly set forth in such agreement in clear and unambiguous terms."

Future wage increases will be announced by December 1 for effective increases to take place on January 1. The City will by December 1 of each year publish and make available to employers, in all languages spoken by more than five percent of the work force in the City, a notice suitable for posting by employers in the workplace informing employees of the current minimum wage rate and of their rights under the City law. Every employer must post in a conspicuous place at any workplace or job site where any employee works the notice published each year by the City informing employees of the current minimum wage rate and of their rights under this law. Every employer is required to post the notices in any language spoken by at least five percent of the employees at the workplace or job site. Every employer shall also provide each employee at the time of hire with the employer's name, address, and telephone number in writing.

Employers must retain payroll records pertaining to employees for a period of four years, and must allow the City access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of the ordinance. Where an employer does not maintain or retain adequate records documenting wages paid or does not allow the City reasonable access to such records, the employee's account of how much the employee was paid will be presumed to be accurate, absent clear and convincing evidence otherwise.

The ordinance also makes it unlawful for an employer to discriminate against any person in retaliation for exercising rights protected under the ordinance. According to the ordinance, rights protected include, but are not limited to (a) the right to file a complaint or inform any person about any party's alleged noncompliance with the ordinance, and (b) the right to inform any person of his or her potential rights under the ordinance and to assist them in asserting such rights. Protections of the ordinance apply to any person who mistakenly, but in good faith, alleges noncompliance with the ordinance. Taking adverse action against a person within ninety (90) days of the person's exercise of rights protected under the ordinance raise a rebuttable presumption of having done so in retaliation for the exercise of such rights.

Finllay, the ordinance provides employees—and others—with options for reporting potential violations of the ordinance and the City will then investigate and attempt to resolve any violations. If violations are not resolved, the City is authorized to "take any appropriate enforcement action to secure compliance." The City may impose a fine of up to $50 per day for each employee (or other person) as to whom the violation occurred. Alternatively, the City can issue a compliance order demanding certain action. Ultimately, the City can initiate a civil lawsuit seeking monetary and/or injunctive relief. Additionally, an individual alleging violations of the ordinance can initiate a civil action seeking penalties or injunctive relief and upon prevailing can obtain an award of attorneys' fees.

What should employers do now?

- **Ensure compliance with the new ordinance**. San Jose's minimum wage law ordinance will go into effect in March 2013.

New Laws Impacting Hiring Practices

The Wage Theft Protection Act – Labor Code Section 2810.5(a)

The Wage Theft Protection Act is one of the most important legislative enactments affecting California employers in recent years. The Act adds a number of provisions to California's Labor Code, and amends many others. Among the most important additions included in the Act is Labor Code section 2810.5(a), which requires employers to provide a written notice to non-exempt employees at the time of hire. Since the law became effective on January 1, 2012, employers are required to provide non-exempt employees with specific information in a single document. While some of the information would typically be included in an offer letter, not all of the required information is commonly provided to employees.

The Wage Theft Protection Act requires employers to provide non-exempt employees with the following information at the time of hire:

- rate or rates of pay (whether hourly, salary, commission, etc.), including any rates for overtime;
- any allowances claimed as part of minimum wage (e.g., meals or lodging);
- the regular payday designated by the employer;
- the name of the employer, including any "doing business as" names used by the employer;
- the physical address of the employer's main office, or the principal place of business and a mailing address, if different;
- the telephone number of the employer; and
- the name, address, and telephone number of the employer's workers compensation carrier.

The statute also authorized the Labor Commissioner to require disclosure of any other information it deems material and necessary and, in a template published on December 29, 2011, by the Division of Labor Standards Enforcement ("DLSE"), the Labor Commissioner called for disclosure of the following additional information:

- the policy number of the employer's workers' compensation insurance;
- whether an oral or written employment agreement exists with the employee;

- the name, address and telephone number of any entity used to hire employees or administer wages and benefits, and a description of the type of service it performs; and
- the form of entity of the employer (corporation, LLC, sole proprietor, etc.).

However, the initial template promulgated by the DLSE prompted questions and objections from employers and as a result, on April 12, 2012, the DLSE revised the template and updated its list of associated "Frequently Asked Questions" ("FAQ") concerning compliance with the still relatively new Labor Code section. Notable clarifications include:

- the "Acknowledgment and Receipt" section of the template is optional;
- providing the notice at "the time of hiring" means a date determined by the employer and the employee, so long as it is not later than the employee's actual start date; and most notably
- employers no longer need to designate the employment agreement as either written or oral. However, if there is a written employment agreement that provide the rate(s) of pay, the notice must state whether all rate(s) of pay are included in the written agreement.

While much of this information is ordinarily included in an offer letter or other document provided to the employee at the time of hire, some of it is not typically included in a new hire package. For example, very few employers specifically identify the form of the employer entity (whether a corporation, LLC, partnership, etc.), and most do not disclose any "doing business as" names at the time of hire. Similarly, while information regarding workers' compensation coverage is generally available to employees in the workplace, most employers do not provide employees with the name and telephone number of their workers' compensation insurer, or their workers' compensation insurance policy number, at the time of hire.

Perhaps the most notable aspect of the law is the Labor Commissioner's insistence that all of the required information be contained in a single notice, like the template developed and ultimately modified by the DLSE. According to the Labor Commissioner, employers are free to develop their own notice, but employees cannot be required to piece together the information from multiple documents. The Labor Commissioner has specifically rejected the notion that a portion of the information could be contained in an offer letter and the remainder in an Employee Handbook provided at the time of hire.

The notice requirement generally applies to all private sector employers in California, but the notice need not be provided to exempt employees. Nor does the notice requirement apply to employees covered by a valid collective bargaining agreement, provided the collective bargaining agreement covers wages, hours and working conditions and provides for premium wage rates for all overtime worked. Lastly, the law also requires employers to notify employees of any changes in the information within seven days of the change.

What should employers do now?

- **Review the notification form currently in use**. If the form currently in use is one developed by the employer, the employer should review it to make sure the information included within is consistent with the revised FAQ's published by the DLSE, includes all the information required by the code, and is consistent with the DLSE's current template.

EEOC Issues Guidance on Criminal Background Checks

This past year the federal Equal Employment Opportunity Commission (EEOC) announced its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964.

Employers and their attorneys have been anticipating the EEOC guidance for the past few years, especially in light of significant recent rulings against employers related to criminal background checks. The guidance does not prohibit criminal background checks, but rather require a practice of "individualized assessment" in order for the employer to establish that they are not engaging in discriminatory behavior.

In engaging in this individualized assessment, the EEOC directs employers to consider the following factors:

> "Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity."
>
> "The individual's showing may include information that he was not correctly identified in the criminal record, or that the record is otherwise inaccurate."

Other relevant individualized evidence for employers to consider includes:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;

- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts (e.g., education/training);
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

While the individualized assessment is not required, in the EEOC's opinion, the lack of a screen that includes the individualized assessment will make it difficult, if not impossible, for an employer to justify a criminal background check as job related and consistent with business necessity.

If an employer does decide to conduct an individualized assessment, the guidance suggests that the employer: (1) inform the applicant that he or she may be excluded based on the past criminal conduct; (2) provide an opportunity to the individual to establish that the exclusion should not apply; and (3) consider whether the individual assessment shows that the policy should not be applied to the applicant.

The EEOC suggests the following best practices for employers who consider criminal record information when making employment decisions:

- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct;
- The policy should identify essential job requirements and the actual circumstances under which the jobs are performed;
- The policy should also determine the specific offenses that may demonstrate unfitness for performing such jobs, and the duration of exclusions for criminal conduct;
- Record the justification for the policy, procedures, and exclusions, including a record of consultations and research considered in crafting the policy and procedures; and
- Train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with Title VII.

The guidance also reiterates that an employer must apply its screening standards in an even-handed manner as between similarly situated applicants of different racial and ethnic backgrounds. The EEOC is making clear its position that criminal background checks can cause "disparate impact" discrimination. Disparate impact discrimination may result from the administration of a facially-neutral policy or procedure. The EEOC is concerned that criminal background check and screening policies disproportionately affect protected class members. If a disparate impact resulting from these policies is shown, the EEOC maintains that the employer can be liable for discrimination unless it can demonstrate that its policy is job related for the positions in question and consistent with business necessity.

What should employers do now?

- **Review the EEOC guidance and ensure policies are consistent with the guidance**. Employers conducting criminal background checks should develop policies that adhere to the best practices described above and provide for individualized assessment. Employees making hiring decisions and administering the background checks should be trained in the policy and in the prevention of unlawful discrimination.

Social Media Privacy Law

As a result of the explosion in popularity of social media in recent years, employers frequently seek information regarding applicants or employees through various forms of social media. In some instances, information is available from social media websites to anyone who seeks it. In other instances, those seeking information from a social media resource must utilize usernames and/or passwords in order to gain access. Applicants and employees who seek to protect their privacy in social media have objected, albeit often ineffectively, to employers' insistence on obtaining access to social media to gather information to be used in employment decisions. Effective January 1, 2013, Senate Bill 1349 generally prohibits California employers from requiring applicants and employees to disclose social media information.

More specifically, Senate Bill 1349 generally prohibits employers from requiring applicants to (a) disclose their social media usernames and passwords, (b) access social media in the presence of the employer (so-called "shoulder surfing"), or (c) disclose any information posted or stored in social media. The new law defines "social media" as videos, photographs, blogs, instant messages, text messages, email, websites or online accounts, and other web-based profiles. Employers are also forbidden from retaliating against applicants or employees who refuse to disclose protected information in response to an unlawful request.

Although the prohibitions set forth in Senate Bill 1349 are broad, the new law does permit employers to request access to social media when information in such media is "reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws." In those circumstances, employers may seek access to social media for the limited purpose of investigating the potential misconduct. In addition, employers may still require disclosure of information needed to access social media associated with electronic devices owned by the employer.

Interestingly, Senate Bill 1349 does not authorize applicants and employees to file lawsuits against employers who violate the law, and it also expressly excuses the Labor Commissioner from investigation complaints of violations. As such, the remedies available to applicants and employees in the event of a violation remain unclear.

While Senate Bill 1349 regulates employers' ability to compel disclosure of social media information from applicants and employees, prudent employers will also utilize great care even when social media information regarding an

applicant or employee is freely accessible to them. In addition to conveying valuable information which employers can legitimately consider when making employment decisions (such as information regarding a person's communication skills, judgment and professionalism), social media may also convey a wealth of additional information that employers cannot lawfully consider in making personnel decisions. Social media profiles and postings often reveal information such as a person's sex, race, marital status and age (or approximate age), and may also convey information regarding one's religion, sexual orientation, medical condition and political opinions. Employers, of course, cannot consider such information when making employment decisions, and usually obtain only a limited volume of such information in the ordinary course of business. As a result, when employers seek information regarding applicants or employees through social media, they may leave themselves more vulnerable to claims of discrimination than they would be if they relied solely on information obtained through more traditional channels.

The Equal Employment Opportunity Commission has expressed concern regarding the potential for discrimination arising from the use of video resumes, and the EEOC's concerns regarding video resumes would seem to apply with equal force to social media. As a result of this risk, we generally recommend that employers not seek information from social media when conducting their initial screening of a pool of applicants. At a minimum, employers should refrain from seeking information from social media until after they have decided to interview an applicant. If an applicant's social media profiles or postings reveal information regarding matters that might not otherwise be readily apparent in an interview, the employer should be prepared to rebut potential allegations of discrimination by citing legitimate business reasons for not hiring the applicant.

Establishing guidelines and policies can help keep employers in compliance. Policies should consider the following recommendations:

- If you are going to conduct searches, consider informing the applicant that you will conduct an online search of public information and obtain the written consent of the applicant to do so;
- It may be best to refrain from searching all applicants and instead refrain from searches until you make preliminary determinations about qualifications and only search for the final applicants;
- If possible, have other individuals, not the individuals making the hiring decision, evaluate the online searches;
- Establish criteria with as much specificity as possible as to what the searches are attempting to seek and be certain to train the individuals searching to ensure that they omit information revealing applicant's race, gender, national origin, sexual orientation, age or genetic predisposition;
- Determine specific search criteria that will be used for all applicant searches and ensure that the individual conducting the search only looks at those sites;
- Do not try to access sites that are password protected;
- Do not "friend" an applicant on Facebook in order to conduct your search; and
- Retain records from your Internet searches.

What should employers do now?

- **Review existing policies and practices to ensure that they comply with the provisions of the law.** If the form currently in use is one developed by the employer, the employer should review it to make sure the information included within is consistent with the revised FAQ's published by the DLSE, includes all the information required by the code, and is consistent with the DLSE's current template.
- **Make changes to existing policies to avoid violations.** While online searches provide useful information regarding an applicant's character, employers must be cautious in gathering this information. Establishing and following screening guidelines, as set out above, will help reduce risks and provide a fair process for applicant selection.

Discrimination & Harassment

Attendance May Be an Essential Job Function Under the ADA

The recent decision of *Samper v. Providence St. Vincent Medical Center* confirmed that attendance is essential, especially when an employee's presence at the worksite is an essential job function.

Monika Samper was a nurse in the neo-natal intensive care unit (NICU) who suffered from fibromyalgia. This condition disrupted her sleep and caused her chronic pain resulting in unplanned absences from work. Her employer attempted to provide a reasonable accommodation and allowed Samper to call in when she could not come to work and to move her shift to another day without finding a replacement. Despite these arrangements, Samper continued to have attendance problems and her employment was ultimately terminated by the hospital. Samper then filed a lawsuit claiming, among other things, that her employer failed to accommodate her disability in violation of the Americans with Disabilities Act (ADA).

While regular attendance is not always an essential function of all jobs, a majority of the federal circuits have held that attendance may be necessary for a variety of reasons including teamwork, face-to-face interaction with clients, and working with items or equipment that are at the employer's place of business. In *Samper*, the Ninth Circuit easily found that the job of a NICU nurse clearly involved all three of these requirements. The court concluded that an employer is not required to provide a reasonable accommodation that exempts an employee from an essential job function.

While *Samper* helps to clarify the attendance question, it is important to remember that the employer has the burden of showing what job functions are essential. The employer in *Samper* was able to point to a written job description which required strict adherence to the attendance policy. The job description also listed "attendance" and "punctuality" as essential functions of the position.

Even though the Ninth Circuit looked favorably on the hospital's efforts to accommodate Samper, employers should also be aware that allowing employees to work from home or providing flex-time and telecommuting options for some employees may make it more difficult to argue that regular on-site attendance is essential.

What should employers do now?

- **Review job written job descriptions**. Employers should also consider including regular attendance as an essential job function in its written job descriptions and explain why it is essential.

- **Make thoughtful decisions regarding alternative work arrangements**. Employers should proceed with extreme caution when making personnel decisions allowing employees to work from home or providing other options including telecommuting and flextime as these decisions could have implications undermining attendance requirements.

Clarifying the Definition of Religious Creed

California's Fair Employment and Housing Act (FEHA) regulates employment discrimination based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age or sexual orientation. Generally, these protected groups have been broadly construed by California courts and could implicitly include the protection of individuals' religious dress and grooming practices, such as the wearing of hijabs or yarmulkes.

Effective January 1, 2013, changes to FEHA resulting from the passage of the Workplace Religious Freedom Act of 2012, will specifically require employers to accommodate their employees' religious dress and grooming practices. The amendments make three changes to the FEHA.

First, the bill clarifies that the California definition of "undue hardship" is a higher "significant difficulty or expense" standard for religious accommodation instead of the "*de minimus*" standard. Second, the Act specifies that religious dress and grooming practices shall be considered a protected religious observance under the Fair Employment and Housing Act. Finally, the bill prohibits an employer from segregating an employee from customers and the public to accommodate an employee's religious beliefs.

Under the amended FEHA, the term "religious dress practice" must be broadly construed. "Religious dress practice" specifically includes the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed, while "religious grooming practice" includes all forms of head, facial and body hair that are part of the observance by an individual of his or her religious creed. In addition, an accommodation of an individual's religious dress or grooming practice that would require that person to be segregated from the public or other employees is not a reasonable accommodation.

AB 1964 makes it clear that an action that segregates or hides an individual, either from other employees or the public, because of that individual's religious dress or grooming practices is not a reasonable accommodation of an employee's religious dress or grooming practices.

What should employers do now?

- **Avoid discrimination claims by accommodation of religious practices.** With certain limited exceptions, employers subject to FEHA must reasonably accommodate an individual's religious creed.

Employers May Not Discriminate Against Breastfeeding Mothers

The Fair Employment and Housing Act (FEHA) was amended to provide that, for purposes of the Act, the term "sex" also includes ***breastfeeding or medical conditions related to breastfeeding***. AB 2386 amends California Government Code Section 12926 and makes it clear that breast feeding is protected by law and discrimination on that basis is illegal.

The new legislation was enacted, in part, to reflect a decision by the Fair Employment and Housing Commission (FEHC) in 2009 in which an employee was terminated because she was nursing her baby during her lunchtime break.

The FEHC's decision was designated as having precedential authority, thus such discrimination is a violation of FEHA.

The amended Government Code definition of "sex" includes, but is not limited to: pregnancy or medical conditions related to pregnancy; childbirth or medical conditions related to childbirth; breastfeeding or medical conditions related to childbirth.

The rest of the definition of "sex" remains unchanged:

> "Sex" also includes a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

What should employers do now?

- **Ensure compliant policies and practices related to breastfeeding**. Employers should ensure that policies and practices avoid discriminating against mothers who are breastfeeding and that supervisors are aware of the protections.

Developing Law Regarding Employer Arbitration Agreements

The battle over when arbitration agreements in the employment context will be enforced continued to be a hot topic of debate in 2012. Historically, the California courts have been fairly resistant to enforcing agreements to arbitrate that are presented to employees on a "take it or leave it" basis as part of the employment offer. Recent court decisions, however, are suggesting to commentators that the tide against arbitration agreements may be slowly turning.

In 2011, the United States Supreme Court issued a decision in *AT&T Mobility v. Concepcion* that has been widely heralded by management commentators as a potential tool for defending arbitration agreements against challenges by employees. In *Concepcion*, the Supreme Court confirmed that under the Federal Arbitration Act ("FAA") class action waivers in consumer arbitration agreements will be enforced notwithstanding conflicting California law that had found such class action waivers unconscionable. Many management commentators began arguing that the reasoning of the *Concepcion* opinion will be the death knell for the California Supreme Court's decision over a decade ago, in *Armendariz v. Foundation Heath Psychcare Services* (2000), holding that arbitration agreements in the employment context are required to pass a strict test for unconscionability.

Two decisions issued this year suggest that the law may be changing, but not as quickly or starkly as some initially projected. In June, the California Court of Appeal issued its decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, confirming that the FAA mandates enforcement of arbitration agreements that waive employees' rights to resort to class actions and representative actions. Mr. Iskanian signed an arbitration agreement, as a condition of his employment, that not only provided that "any and all claims" arising out of his employment were to be submitted to binding arbitration, but also provided that neither "class action [nor] representative action" procedures or claims could be asserted in any arbitration. He then filed a class action against his employer CLS Transportation Los Angeles for various claims that included failure to pay overtime and for failure to provide meal and rest breaks. Although the employer originally filed a motion to compel arbitration, it withdrew the motion in light of a then-recent California Supreme Court decision. In *Gentry v. Superior Court*, the Court held that a class waiver provision in an arbitration agreement should not be enforced if certain factors indicate that class arbitration would be more effective than individual arbitration. Following the *Concepcion* opinion, however, CLS Transportation Los Angeles renewed its motion to compel arbitration and to dismiss the class claims, which it won.

In July, however, the California Court of Appeal issued another decision, in *Sparks v. Vista Del Mar Child & Family Services*, affirming the trial court's denial of an employer's petition to compel arbitration. Mr. Sparks signed a document upon his hire that he had received the Vista Del Mar employee handbook. The lengthy handbook contained an arbitration provision providing that all employment-related disputes would be subject to arbitration under the FAA and the applicable rules of the American Arbitration Association. When he sued his employer for wrongful

termination, Vista Del Mar moved to compel arbitration. In rending its decision, the court distinguished the *Concepcion* opinion by finding that *Concepcion* neither abrogated the principle that the existence of an agreement to arbitrate must be determined under state law contract principles nor the use of unconscionability as a defense to the enforcement of contracts. Thus, notwithstanding the handbook's statement that the FAA controlled, the Court of Appeal found it could freely determine the enforceability of the arbitration provision under California law. The Court of Appeal then held, under state law contract principles, that there was no contractual agreement to arbitration because the acknowledgement of receipt signed by Mr. Sparks merely stated that he agreed to "read and understand" the handbook (rather than agreed to be bound by its terms) and the handbook expressly disavowed any intent to create a contractual relationship. Even if it had created an agreement to arbitration, the Court of Appeal found the arbitration provision unenforceable because any agreement to arbitrate was illusory, given the statement in the handbook that Vista Del Mar could unilaterally modify the handbook at any time without notice. Additionally, the provision was unconscionable, given Vista Del Mar's failure to provide Mr. Sparks with a copy of the American Arbitration Association rules governing any arbitration proceeding. The arbitration proceeding was buried in the handbook and not subject to negotiation, and there was no express provision for discovery rights during arbitration.

The California Supreme Court has granted review of both lower court decisions in *Iskanian* and *Sparks*. Whether the Court will adopt those rulings, or follow a different path, remains in question.

What should employers do now?

- **Consult with legal counsel to determine whether your arbitration agreement satisfies current interpretation of California and federal law**. In this review, consider the doing the following: (1) use a stand-alone arbitration agreement instead of relying on an employee handbook to form the arbitration agreement; (2) attach a copy of the applicable arbitration rules to the agreement; and (3) include an express provision allowing for discovery.
- **Remember that the law in California is still uncertain pending Supreme Court review**. There remains the risk that a waiver of employee rights to resort to class actions and representative actions may soon be found unenforceable by the California Supreme Court.

Employer Responsibility Under the Affordable Care Act

Much attention in 2012 focused on the United States Supreme Court's landmark decision to uphold the Affordable Care Act, the sweeping new health care law enacted by Congress and signed into law by President Obama in 2010. Proponents and opponents of the law each continue to hold strong feelings about its merits, as highlighted in the recent Presidential election. In light of the Supreme Court's decision, however, the law remains intact, and employers should familiarize themselves with its key provisions and take necessary actions.

The Affordable Care Act puts in place comprehensive health insurance reforms and tax regulations that roll out over the course of several years. Because the legal and political issues surrounding the Affordable Care Act are numerous and complex, further amendments, regulations, and judicial challenges are likely in the future. However, some of the key provisions already in effect in 2012 included:

- **Small business tax credit**. Certain small employers that offer health care coverage to their employees are eligible to receive tax credits. In order to be eligible for the tax credits, the business must employ no more than 25 employees, and must pay at least 50 percent of its employees' health care premiums. The amount of the credit is based on the number of employees and average employee compensation, but small businesses can receive credits of up to 35 percent of their premiums.
- **Nondiscrimination**. The nondiscrimination rules that previously applied only to self-insured health plans will now apply to fully-insured group health plans as well.
- **Extended coverage for dependent adult children**. Group health insurance plans that offer coverage to dependent children must extend coverage to dependent adult children until the year in which they turn 27 years old. (Until 2014, grandfathered plans must offer extended coverage only if the dependent child is not eligible for other employer-sponsored coverage.)
- **Elimination of lifetime limits, and restriction of annual limits**. The new legislation prohibits group insurance plans from imposing lifetime limits on essential benefits and permits them to impose annual limits on such benefits only until January 1, 2014.

Some additional key provisions that are effective in 2013 include:

- **Form W-2**. When issuing Form W-2 to employees in January 2013 (for income paid in 2012), employers must report the value of employer-provided health care coverage on Form W-2. In general, the amount reported should include both the portion paid by the employer and the portion paid by the employee. The reporting requirement is for informational purposes only. The value of the coverage provided remains excluded from taxable income.

- **FICA Medicare Tax Increase**. For tax years beginning after December 31, 2012, the FICA Medicare tax rate will increase by 0.9% for wages over $200,000 ($250,000 for married couples filing jointly). FICA taxes are comprised of Social Security and Medicare taxes, thus this change increases the employee's portion of the FICA Medicare tax from 1.45% to 2.35% for wages over $200,000 ($250,000 for married couples filing jointly). An employer will be required to collect the employee's portion of this FICA Medicare tax.
- **Health Flexible Spending Account ("FSA") Contribution Limits**. The maximum annual contribution limit permissible under a health FSA, effective for plan years on or after January 1, 2013, is reduced to $2,500 subject to an annual cost-of-living adjustment. Prior to January 1, 2013, there were no legally imposed limits on the amount of money that could be contributed to a health FSA.
- **Written Notice of State Insurance Exchange**. Starting in 2014, individuals and small employers will be able to buy health insurance from a state health insurance exchange. However, by March 1, 2013, employers must provide all current employees and new hires a written notice of the existence of a state health insurance exchange.

The Affordable Care Act does not require employers to provide health benefits to their workers, but certain employers face penalties starting in 2014 if they fail to provide sufficient health care coverage to all full-time employees. The so-called "play or pay" mandate provides that employers with more than 50 "full-time equivalent" employees will be required to pay at least $2,000 for each full-time employee in excess of 30 if any of their full-time employees receive a tax credit because the employer (a) did not offer coverage at all, (b) did not offer coverage at affordable rates, or (c) did not offer coverage meeting the minimum standards established by law. Various means will be used to determine compliance with the law, but requirements (and penalties for non-compliance) will generally be more burdensome for larger employers than smaller employers.

The landscape of health insurance coverage is undeniably changed by the Affordable Care Act. Although the law is lengthy and complicated, most of the new rules affect insurers more directly than employers. Employers must be certain that they understand the requirements that are imposed upon them, however, and be ready to comply with those rules in a timely manner.

What should employers do now?

- **Determine the extent to which the new rules apply**. Since the Affordable Care Act does not apply to all employers in exactly the same manner, employers should review the law to identify the requirements applicable to them, and the compliance deadlines corresponding to each requirement. Employers who maintain so-called "grandfathered plans," for example, will not be subject to the new rules in the same manner as employers whose plans do not qualify for grandfathered status.
- **If the law is applicable to them, employers should decide whether to "play or pay"**. If the Affordable Care Act is applicable to a particular employer, the employer should decide whether it will offer health care insurance to its employees or pay the penalties otherwise imposed by the law.

- **If you elect to provide insurance, confirm that your coverage complies with the new rules**. Employers who elect to comply with the Affordable Care Act by providing coverage to their employees should consult their benefits providers to ensure that their plans comply with all aspects of the new law that may are applicable to them.
- **Seek tax advice regarding potential tax benefits resulting from the payment of premiums**. Employers that offer health care coverage to employees should confer with their accountant or tax advisor to ensure that they are taking advantage of any tax credits that may be available to them.

The NLRB's Continued Campaign for Relevance Creates Problems for Employers

In last year's Update, we included a Primer on the National Labor Relations Act (NLRA) for non-union employers. It may have come as a surprise that a 77-year old federal law typically associated with union elections and collective bargaining applies also to employers without unions. With less than 7% of the private sector workforce belonging to unions, the Democratically-controlled National Labor Relations Board (NLRB) seems committed to regaining relevance in the 21st century which means effecting change in workplaces where there are no unions.

The NLRB has an expansive of Section 7 of the NLRA, which applies to all employers, unionized or not:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Last year, one of the big issues was the NLRB ordered posting of employee unionization rights by millions of employers—an order that in 2012 was blocked by federal courts. This year, the NLRB has focused on several issues commonly found in employee handbooks, including at-will employment policies, confidentiality admonitions in investigations, off-duty access to company property, arbitration clauses, particularly class action waivers, and employee technology use. The NLRB has continued to struggle with defining who should be considered a supervisor under the NLRA, as well as the permissible limits of employee social media use.

At-Will Employment Policies

At-will employment policies are pervasive in private sector employment. Such provisions are typically found in job applications, offer letters, and employee handbooks. After an NLRB administrative law judge (ALJ) found one at-will employment provision to be unduly restrictive, many NLRB watchers worried about an impending all-out assault on at-will clauses. In *American Red Cross Arizona Blood Services Region*, Case 28 CA-23443 (February 1, 2012), the ALJ determined that the employer's at-will clause could be construed by employees as waiving any possibility of improving their job security by unionizing. The offending at-will clause provided "I further agree that the at-will employment relationship cannot be amended, modified, or altered in any way." As written, this provision sounds like it could never be changed, even if the parties wanted to change the terms of their employment relationship. Typically, to prevent claims by employees of special treatment, at-will clauses include language restricting the authority of

supervisors from changing the at-will nature of employment without the written authorization of the CEO. In reviewing a typical at-will employment clause, the NLRB General Counsel's Office concluded that provision did not impermissibly restrict the union organizing rights of employees.

Confidentiality Admonitions

Workplace investigations occur with increasing frequency. One of the challenges for any investigator is to discern the facts from witnesses as they actually happened, and not as reconstructed by committee. To prevent contamination of witnesses, investigators often instruct witnesses to not discuss their recollection with anyone but the investigator. That common confidentiality admonition has just become problematic. In *Banner Health System d/b/a Banner Estrella Medical Center* (July 30, 2012) 358 NLRB No. 93, the NLRB ruled that employers must have a "legitimate business justification" for imposing a confidentiality requirement during a workplace investigation and cannot lawfully maintain a policy of routinely prohibiting employees from discussing matters under investigation. The NLRB wrote: "… we find that the [Employer's] generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights." According to the Board, such specific reasons as protecting a witness, preventing destruction or fabrication of evidence, or preventing a cover-up would be "legitimate business justifications." Real or imagined, the NLRB is of the opinion that confidentiality admonitions restrict an employee's ability to discuss workplace grievances, safety issues, or terms and conditions of employees with co-workers, thereby violating rights granted by the NLRA.

Off-Duty Access to Company Property

Employers with 24-hour operations, such as hotels and hospitals, frequently restrict off-duty access of employees for security and operational reasons. It has always been the rule that a policy restricting off-duty employee access is permissible if it (1) only restricts off-duty employees from entering non-public work areas, (2) is disseminated to all employees, and (3) restricts off-duty access to company facilities for any purpose and not just to prevent off-duty employees from engaging in union organizing activities. *Tri-County Medical Center,* 222 NLRB 1089 (1976). In a spate of recent decisions, the NLRB has invalidated off-duty access policies that allowed discretionary exceptions contrary to the third prong of the *Tri-County* test, for even such innocuous reasons as retrieving forgotten belongings, picking up paychecks, or attending a going away party for a co-worker. For instance, in *J.W. Marriott Los Angeles at L.A Live*, 359 NLRB No. 8 (Sept. 29, 2012), the NLRB determined that an employer's off-duty employee access policy violated the NLRA. The hotel policy at issue prohibited employees from accessing the inside areas of the hotel more than 15 minutes before or after their scheduled shift. While acknowledging that there may be exceptions, the policy required that any exceptions had to receive prior approval from management. The policy provided that employees who failed to receive prior approval may be disciplined. The NLRB determined that to be valid, off-duty access policies could not allow discretionary exceptions which would treat access for some purposes differently than for union organizing.

Arbitration Agreement Class Action Waivers

Perhaps unsurprisingly, the NLRB disagrees with the United States Supreme Court about the enforceability of class action waivers in arbitration agreements. The Supreme Court ruled in *AT&T Mobility v. Concepcion* (2011) 563 U.S. __, 131 S.Ct. 1740, that contracts containing arbitration agreements with class action waivers are enforceable under the Federal Arbitration Act. Although *Concepcion* involved a consumer agreement rather than an employment agreement, several courts have held the Supreme Court's ruling controls in the employment context as well. The NLRB, however, believes that the Section 7 guarantee of protection for "concerted activities" trumps the Federal Arbitration Act's preferential treatment of arbitration agreements and therefore invalidates class action waivers. *D.R. Horton, Inc*., (2012) 357 N.L.R.B. No. 184. This is may be an unsustainable position, particularly since the Federal Arbitration Act pre-dated the NLRA by ten years. A number of federal courts have disagreed with the NLRB's reasoning and refused to invalidate arbitration agreements as a violation of employee's Section 7 rights. However, in early November of 2012, an NLRB ALJ invalidated the arbitration agreement of 24 Hour Fitness because it required employees to waive the right to bring multiparty or class action lawsuits. The enforceability of arbitration agreements, particularly with class action waivers, remains an open question that may require resolution by the Supreme Court.

Employee Technology Use

The NLRB held in *The Guard Publishing Company d/b/a The Register-Guard* (2007) 351 NLRB No. 70 that employer rules prohibiting the use of company email systems for union solicitation purposes were enforceable, even if employees were permitted to use Company email for other non-business reasons.

> In numerous cases, however, where the Board has addressed whether employees have the right to use other types of employer-owned property—such as bulletin boards, telephones, and televisions—for Section 7 communications, the Board has consistently held that there is "no statutory right . . . to use an employer's equipment or media," as long as the restrictions are nondiscriminatory.

The NLRB held in *Register-Guard* that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." In doing so, the NLRB allowed distinctions such as individual solicitations (such as jokes, party invitations, and such) from institutional solicitations (such as from Avon® or unions).

In a traditional property access case involving handbilling at a Roundy's grocery store, the NLRB has requested briefing concerning whether the *Register-Guard* case has any applicability in the case, perhaps signaling that it may be reconsidering the lawfulness of such email use distinctions and whether there is any continuing validity to distinctions between physical access and virtual access to employer property. If the NLRB changes the *Register-Guard* standard, significant changes may need to be made to employer technology policies.

Supervisory Status

Healthcare employers, particularly in the long-term care context, are leading the way in the development of the law concerning the definition of a "supervisor" under federal labor law. Supervisors are defined by Section 2(11) of the NLRA:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Supervisors do not have the right to organize unions or collectively bargain under the NLRA.

Highlighting the fact-specific nature of the determination as to which employees are considered supervisors, 1n 2012, there were two U.S. Court of Appeals decisions concerning the supervisory status of charge nurses in long term care facilities that reached opposite conclusions. In *Frenchtown Acquisition Company, Inc. v. NLRB* (6th Cir. 2012) 683 F.3d 278, the appeals court found that the charge nurses at issue possessed insufficient authority to discipline, assign, or direct the work of other employees and therefore could unionize. In L*akeland Health Care Associates, LLC v. NLRB* (11th Cir. October 2, 2012) __ F.3d __, the court determined that the licensed practical nurses hired as "team leaders" did in fact possess the authority to discipline, assign, and direct the work of other employees and therefore were supervisors under the NLRA:

> Accordingly, an individual is a "supervisor" under the Act if: (1) he or she has the authority to perform one of the twelve supervisory functions described in the statute; (2) the exercise of that authority requires the use of independent judgment; and (3) such authority is held in the interest of the employer. See *NLRB v. Health Care & Ret. Corp*., 511 U.S. 571, 573-74 (1994) ("HCR").

It is critical in a union organizing context to determine which employees will be considered supervisors. As agents of the employer, supervisors may not lawfully be involved with the union's organizing efforts or attempt to organize themselves. The rules being developed in the charge nurse context will apply to supervisory determinations in all industries.

Social Media Use

As noted in last year's Update, the NLRB has been in the forefront of federal agencies to assess the legal implications of social media, particularly as they relate to laws enacted long before technology became commonplace. Employee use of

social media to discuss work presents sensitive problems for employers. While the NLRB has analogized social media as being the functional equivalent of conversation around the "water cooler," postings on blogs, Facebook®, or Twitter® have a longevity and vastly larger potential audience than anything ever said while socializing at work possibly could. In addition, once confidential company information is disclosed on the Internet, it is impossible to ensure the recovery and protection of such information.

In an attempt to organize and coordinate the NLRB's enforcement position with respect to employer restrictions or discipline of employees for social media use, the NLRB Acting General Counsel issued three reports on the topic in August 2011, January 2012, and May 2012. Clearly, the Acting General Counsel was concerned about overbroad social media policies that unlawfully restricted employees from exercising their protected Section 7 rights. Some of the provisions of social media policies reviewed by the Acting General Counsel include:

- Overbroad restrictions on use of social media and communicating confidential information are impermissible;
- Restrictions on "friending" co-workers are not permitted;
- Undue concerns about "respecting" and not violating the privacy of others are impermissible;
- Prohibiting bullying is permissible but restrictions on expressing opinions are not;
- Prohibiting employee electronic communication with news media or government agencies is unlawful;
- Prohibiting negative or disparaging comments about the company is impermissible.

In *Costco Wholesale Corporation* (September 7, 2012) 358 NLRB N. 106, the NLRB invalidated an employer's social media policy that provided:

> Employees should be aware that statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.

The NLRB found that this language could be reasonably interpreted by employee as prohibiting Section 7 rights in that communications protesting the employer's treatment of employees might unlawfully fall within the prohibitions. Accordingly, the NLRB found that the policy violated the NLRA.

What employers should do now?

- Review at-will employment agreements to ensure such agreements will not be construed as impermissibly restricting employee union organizing rights.

- Make individualized determinations concerning when confidentiality admonitions need to be given to witnesses during employee investigations.
- Review your policy concerning off-duty access to company policy to determine if impermissible discretionary exceptions are made.
- Review your arbitration agreements in light of continuing developments concerning the permissibility of class action waivers.
- Review your technology use agreements concerning employee use of email for non-company purposes.
- Determine whether company supervisors perform one or more of the 12 supervisory functions in NLRA Section 2(11), are delegated independent judgment in carrying out the function, and exercise their authority in the interest of the company.
- Review your social media policy to determine whether it impermissibly restricts employee Section 7 rights.

Conclusion

We hope that this summary assists you in understanding some of the recent developments that will affect employers in 2013. Please recognize that this document does not contain a comprehensive listing of all new laws or decisions that regulate employment, and that the information provided is only a brief summary and should not be used as a substitute for legal advice tailored to a specific factual scenario.

If we can be of any assistance to you in understanding these new developments or in any other matter relating to employment, please do not hesitate to contact us.

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