HOPKINS & CARLEY
A LAW CORPORATION

2012 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 2012. 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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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 2012.

Month	Topic
January 12, 2012	2012 Annual Update
March 13, 2012	Developing Effective Employee Handbooks
April 25, 2012	Alphabet Soup of Leave Laws
May 23, 2012	A Manager's Guide to Discrimination & Harassment
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October 17, 2012	Pay Them Now, or Pay Them Later: A Review of Current Issues and Recent Developments in Wage and Hour Law
November 7, 2012	A Manager's Guide to Discrimination & Harassment

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

Wage & Hour

When Is A Sabbatical Program Really Vacation Pay Subject To Labor Code Section 227.3?

During the boom years, a significant number of employers in Silicon Valley adopted "sabbatical programs." The programs varied but the general concept was the same. Generally, after a fixed number of years, usually seven or greater, an employee was entitled to take a paid sabbatical of two to three months. Often, the programs were available only to certain select segments of the employee population. Most employers operated on the belief that a sabbatical program was not an accruing vested benefit and therefore employees who left, voluntarily or otherwise, were not paid for an "accrued" sabbatical in the same way employees were paid for accrued vacation under Labor Code Section 227.3 and the California Supreme Court's decision in *Suastez v. Plastic Dress-Up Co*.

An August 2011 California appellate court's opinion suggests that the distinction between a sabbatical program and vacation pay subject to Labor Code Section 227.3 is not as clear as employers might like to believe. In *Paton v. Advanced Micro Devices, Inc.*, the appellate court reversed a grant of summary judgment in favor of the employer and concluded that a reasonable jury comparing the employer's sabbatical policy and the employer's vacation policy might conclude that the sabbatical policy was really a program intended to offer an increased vacation benefit for longer term employees. From the appellate court's perspective, the critical question for a jury to resolve is whether the sabbatical program was intended as an incentive to induce experienced employees to continue working for the employer and increase their productivity and creativity upon return to work or, whether the sabbatical program was actually intended as a longer vacation benefit for long-term employees. Although the facts surrounding the sabbatical program were undisputed, the appellate court concluded that a jury was required to decide the ultimate fact of the employer's purpose in establishing the sabbatical policy. As a result, the appellate court reversed the grant of summary judgment for the employer and sent the case back to the trial court.

Most employers understand that they must pay an employee all accrued and unused vacation at the employee's final rate of pay when the employment relationship ends. However, the court's opinion in *Advanced Micro Devices* serves as a reminder that the label placed on paid time off is not necessarily decisive.

What should employers do now?

- **Review current sabbatical program and related paid time off policies-** Employers should carefully examine any paid time off benefit or program to make sure they do not run afoul of Labor Code Section 227.3 and the California Supreme Court's opinion in *Suastez v. Plastic Dress-Up Co*. Consider modifying policy language to indicate that there are conditions on using the sabbatical for particular purposes, that the program is being offered as an incentive to retain long term, qualified employees, and that the employee is expected to return and perform services upon the sabbatical's conclusion.

The Workweek And Seventh Day Premiums: What Discretion Does An Employer Have?

Based on guidance from the California Division of Labor Standards Enforcement (DLSE), many employers have long believed that an employer has absolute discretion to designate the "workweek" that will be used to determine overtime compensation, particularly seventh day premiums. Labor Code Section 500 defines a "workweek" and "week" as any seven consecutive days starting with the same calendar day each week and clarifies that a "workweek" is a "fixed and regularly recurring" period of 168 hours, seven consecutive 24-hour periods. While the DLSE guidance has long advised that an employer has discretion to designate the "workweek," absent any designation, the DLSE will treat each workweek as starting at midnight on Sunday with Sunday as the first day of the workweek and Saturday as the last.

In April 2011, a California appeals court issued a decision in the matter of *Seymore v. Metson Marine, Inc.*, clarifying the limits that apply to an employer's discretion to designate a workweek. Metson Marine provides crew and vessel operations for emergency clean up of oil spills and other environmentally hazardous materials along the California coast. The nature of the work requires the vessels to be at sea for a period of time and consequently Metson crews work a 14-day rotation on board a ship, alternating with a 14-day rest period. Metson starts the 14-day work rotation at noon on Tuesday and ends the rotation at noon on Tuesday two weeks later. During the 14-day hitch, crew members work 12-hour daily shifts, except on the crew change day, when they work only six hours. Crew members sleep on board the ship and Metson designates 12 hours of every 24-hour shift as "off-duty" with 8 hours designated as "sleep time," three hours as meal times and one hour as free time.

Against this unusual backdrop, Metson designated the "workweek" as beginning at 12:00 am on Monday and ending at 11:59 p.m. the following Sunday. Using this workweek designation, Metson calculated that the crew members worked six days in the first workweek, seven days in the second workweek and two days in the third workweek. As a result, crew members were paid only a single seventh day premium at the end of the second workweek.

The plaintiff crew members argued that premium pay must be based on a "fixed and regular" schedule actually worked and that Metson should not be allowed to subvert the Labor Code Section 510 seventh day premium by designating an artificial workweek that did not correspond with the period actually worked. Under this theory, the crew members argued they were entitled to seventh day premiums on the seventh and fourteenth day of each 14-day rotation.

The court readily agreed with the plaintiff crew members and held that the plain intent of Labor Code Sections 500 and 510 was to provide premium pay for employees who are required to work a seventh consecutive day in a "fixed and regularly" occurring workweek. While the court conceded that an employer may "designate any workweek it wishes," the court concluded that the workweek the employer "selects and requires its employees to observe is the workweek [the employer] must use for the purpose of calculating employee compensation." The court specifically rejected Metson's reliance on any contrary DLSE guidance, reasoning that the DLSE did not intend to condone an

employer workweek designation that was different from its employees' actual workweek schedule and, in any event, DLSE guidance should be given no weight if it conflicts with the clear intent of the Labor Code.

What should employers do now?

- **Review workweek and workday designations to ensure consistency with employees' actual workweek-** Workweek and workday designations are a basic but important task for all employers. The court's opinion is a reminder to all employers that these designations should not be manipulated to avoid overtime requirements. While an employer has absolute discretion to establish its workweek, the workweek the employer requires its employees to observe is the same workweek the employer must use for purpose of calculating employee compensation.

The Near And Far Reach Of California Overtime Rules

Prior to June 2011, many employers operated under the assumption that the employment laws in force in an employee's state of residence, including laws governing wage and hour issues, govern the employment relationship. However, an important decision issued by the California Supreme Court last summer expanded the scope of California's laws governing overtime compensation to non-California resident employees that perform work in the state. As a result, when a non-California employee is required to perform services in California, that employee must be paid daily overtime for all overtime work performed in state.

The case *Sullivan v. Oracle Corporation* involved several Arizona and Colorado residents employed as instructors by Oracle, headquartered in California. Oracle paid the employees according to the dictates of the employees' home state in the case of the Colorado residents, and with respect to Arizona residents according to the Fair Labor Standards Act (a federal body of law that differs from California state law in significant ways, including overtime exemption classification analysis, daily overtime pay requirements, and meal and rest period entitlements). The employees filed suit alleging that they were entitled to overtime pay under California law, rather than the less generous Colorado regulations or the Fair Labor Standards Act on those occasions when they performed work in California.

In a case of first impression, the Supreme Court concluded that California overtime laws in fact apply to non-California resident employees who travel to and from California to perform services in the state. The court reasoned that California's state overtime laws, by their terms, apply to all employment in the state, without reference to the employee's place of residence, and explained that "[t]o exclude nonresidents from the overtime laws' protection would tend to defeat their purpose by encouraging employer to import unprotected workers from other states."

However, the decision left many questions unanswered. For example, the Supreme Court was quick to point out that the matter presented no issue concerning the applicability of any other provision of California wage law other than the provisions governing overtime compensation. Accordingly, California employers are currently left in the dark with

respect to California's rules regarding the contents of pay stubs, treatment of employees' vacation time, meal and rest period requirements, travel time, and overtime exemption parameters as applied to non-California resident employees.

What should employers do now?

- **Expressly confirm overtime and time reporting practices for non-resident employees sent to California to perform work-** The risk of misclassification is particularly high in two common scenarios: that of the former employee now working as a contractor, and that of the contractor who performs the same work as others who are classified as employees. In either of these relatively common scenarios, the risk of a misclassification is significant. Employers should identify personnel whose classification is most likely to be challenged and assess the means through which they might protect themselves.

- **Review travel time pay policies as they relate to non-California resident employees-** The *Sullivan* decision will likely trigger controversy concerning California law requiring employers to provide payment for travel time, presumably with respect to non-exempt, non-resident employees penetrating the California border. Accordingly, employers may consider promoting policies, addressing air travel in particular, that provide pay practices consistent with California law.

- **Review exemption classifications of non-California resident employees-** Employers sending non-California domiciled employees to work in state should analyze whether "exempt" non-resident employees are properly classified under California law. Again, while the *Sullivan* decision does not directly address this issue, employers may want to proactively address potential controversy rather than wait for additional guidance from the court.

"Provide" Or "Ensure"? – Meal And Rest Period Uncertainty Will Soon Be Put To Rest (Pun Intended)

In the summer of 2008, the California Court of Appeal issued its opinion in *Brinker Restaurant Corp. v. Superior Court*. The decision resolved or clarified numerous issues concerning meal periods and rest breaks, particularly the question of whether employers are required to ensure that eligible non-exempt employees take meal periods, or whether they are required only to provide employees with the opportunity for meal periods. Unfortunately, the clarity created by the appellate court's decision did not last for long.

In October 2008, the California Supreme Court granted a Petition for Review in the *Brinker case*, declaring its intent to consider the issues and publish its own decision, which will supersede the appellate court's ruling. Once the Supreme Court granted review, the appellate court decision lost all force or effect. Since that time, and despite the lack of direction from the Supreme Court, many lower courts have issued opinions with respect to the "provide" vs. "ensure" controversy, with the majority of those decisions supporting the position that employers need only make meal and rest periods available to eligible employees.

Late last year, the Supreme Court moved one step closer to providing the much-anticipated clarity to California employers. On November 8, 2011, the high court received oral argument in the matter, and is expected to publish its written decision by mid-April 2012.

What should employers do now?

In anticipation of the court's guidance, employers may want to assume that the Supreme Court ruling will be less favorable than the lower court decision. If they do so, employers should take some or all of the following steps:

- **Make available a meal period of at least 30 minutes for non-exempt employees who work five or more hours on a given workday and ensure that they are actually relieved of all duties during the meal period-** Employers that merely assume employees are taking meal periods will be vulnerable to liability if the Supreme Court does not affirm the appellate court decision. Employers must also recognize that the focus of the meal period law is on whether the employee is relieved of duty, not on whether the employee eats a meal. As such, permitting an employee to eat while on duty generally does not fulfill the requirement to grant a meal period.

- **Maintain records that accurately reflect the times at which employees begin and end meal periods-** Employers should require non-exempt employees to record, on a daily basis, the times at which they begin and end their meal periods. Employers should not create such records themselves, and they should not permit employees to mark the same times on their time cards each day if actual meal times vary from day to day.

- **Consider asking employees to certify that rest breaks were available to them-** Employers are not required to maintain records reflecting the times during which employees took rest breaks, but having some documentation of their compliance with the law will be valuable if a dispute arises. For that reason, employers should consider asking employees to acknowledge in writing that rest breaks are available to them. Employers should also include appropriate discussion of meal periods and rest breaks in their employee handbooks.

Independent Contractor Issues

New IRS Program For Reclassification Of Independent Contractors

In September 2011, the IRS announced a new program designed to encourage employers to voluntarily reclassify those independent contractors who should be classified as employees. The IRS hopes to induce employers to make a voluntary reclassification by offering certain immunity for past practices through its Voluntary Classification Settlement Program (VCSP).

According to the Government Accountability Office, the federal government loses over two billion dollars in unpaid federal taxes annually because employers improperly classify some workers as independent contractors. The new VCSP initiative offers employers the opportunity to prospectively reclassify individuals as employees without being subject to an IRS audit or the standard administrative correction process. In addition, the VCSP initiative offers certain financial incentives for employers who participate. An employer who voluntarily reclassifies workers through the program will pay only 10% of the previous year's employment tax liability and will not have exposure to interest, penalties, back taxes or misclassification audits for previous years for the voluntarily reclassified workers. In order to obtain these benefits, the participating employer will sign an agreement with the IRS that extends the statute of limitations for IRS misclassification audits from three to six years and must fully pay the total amount of employment taxes due under the reclassification program at the same time the employer signs the agreement.

In order to be eligible for the VCSP, employers must have consistently treated the workers it wishes to reclassify as independent contractors for three previous years. In other words, the employer must show that it filed 1099s for each of the workers for prior years. If the worker has been employed less than three years, the employer must show 1099s for the entire period of employment until the employer's application to participate in the program.

The new IRS program is not available to employers currently under investigation by the Department of Labor or a state agency for worker misclassification. Neither is the program available to an employer currently being audited by the IRS or an employer currently contesting a worker classification issue with the IRS. Also, the IRS has not issued any guidance about how participation in the voluntary program will affect employers who subsequently face an audit by a state or local agency. In light of the recent agreement between the IRS, the Department of Labor and several states to share information on the topic of worker misclassification, this is a worrisome issue that needs resolution.

What should employers do now?

- **Review classification of contractors-** Improper classification of workers creates significant economic risk for employers from IRS audits, Department of Labor investigations and their state counterparts. The new Voluntary Classification Settlement Program may provide a good opportunity to correct past errors while minimizing exposure to back taxes, interest and penalties. The determination of worker classification can be complicated and employers should consult counsel with any questions or to assist in the classification of workers.

Misclassifying Workers As Independent Contractors: California Enacts New Penalties

As was anticipated, California Governor Edmund G. ("Jerry") Brown signed Senate Bill 459. SB 459 has been chaptered by California's Secretary of State as Chapter 706, Statutes of 2011. It will appear as Sections 226.8 and 2753 of the California Labor Code.

The costs and risks associated with erroneously classifying workers as independent contractors have risen dramatically since the passage of SB 459. SB 459 has three significant features that should worry employers in California.

- First, it is now unlawful for any person or employer to willfully misclassify an individual as an independent contractor or to charge that individual a fee or make any deductions from that individual's compensation that would be prohibited were that individual treated as an employee under the Labor Code. Because "willful" is defined with the relatively low standard of "voluntarily and knowingly," the law could potentially sweep up many employers who are simply erroneous in their classification of independent contractors.

- Second, the law now imposes penalties of $5,000 to $15,000 for each violation. Each deduction or fee wrongfully imposed on an individual misclassified as an independent contractor may give rise to a separate penalty. If either a court or the California Labor Workforce Development Agency determines that the employer has engaged in a pattern or practice of violations, the penalties are increased from $10,000 to $25,000 per violation.

- Finally, if an employer is found to have violated the law, the employer must post a notice informing all employees and the general public that it has committed a violation by misclassifying an employee. The notice must be posted for one year, must be signed by an officer of the company and must inform employees and the general public that the employer has changed its practices.

What should employers do now?

- **Review classification of all contractors-** With the passage of SB 459, more than ever this is the year for employers to review worker classification. Again, our attorneys can work with you to evaluate the classification of your workforce to ensure compliance with the law.

California Supreme Court Limits Liability Of Those Who Retain Contractors For Injuries Sustained By Employees Of The Contractors

A recurring question in California has been whether those who retain contractors may be held liable for injuries sustained by individuals employed by the contractor. In 2011 the California Supreme Court brought much needed clarity to this issue. In *Seabright Insurance Company v. US Airways, Inc.*, the Court determined that a company cannot be held liable for injuries to an independent contractor's employee resulting from the company's failure to comply with Cal-OSHA regulations or statutes. The Court held that the duty to the employees is presumptively delegated to the independent contractor.

The injury at issue in *Seabright* occurred after US Airways retained a contractor to maintain conveyor belts at an airport. During the course of this work, an employee of the contractor was injured when one of his arms became caught in the moving parts of a conveyor belt. The plaintiff contended that the conveyor belt lacked a necessary safety guard; that US Airways had a duty under Cal-OSHA regulations to ensure that the conveyor belt was in proper working order; and that US Airways could not lawfully delegate that regulatory duty to the contractor. The trial court granted summary judgment in favor of US Airways based on the doctrine adopted in *Privette v. Superior Court* (1993). In *Privette*, the California Supreme Court limited the circumstances in which those who retain contractors may be held liable for injuries sustained by contractors' employees. The appellate court reversed, finding that U.S. Airways had nondelegable duties to ensure a safe workplace under Cal-OSHA and that there was a triable issue of fact as to whether their failure to perform this duty affirmatively contributed to the employee's injuries. The Supreme Court reversed and extended the *Privette* doctrine, holding that contractors' employees may generally not rely on duties imposed by Cal-OSHA regulations to avoid *Privette's* limitations on liability of those who hire independent contractors.

The Court held that the Cal-OSHA regulation governing conveyor belts imposed a duty on US Airways to protect *its own employees* from moving parts on the conveyor belt, but that the regulation did not preclude US Airways from delegating to the contractor the duty to comply with the regulation in order to prevent injury to *the contractor's employees*. The court determined that the right of delegation applied with particular force in this case because the contractor had sole control over the manner in which the maintenance work was performed.

In *Seabright*, the Court determined that an employer may delegate to the independent contractor its tort law duty to provide a safe workplace to the independent contractor's employees. Upon retention, such a duty is implicitly delegated to the independent contractor as a condition of their hiring.

This ruling provides companies who hire contractors with greater protections and makes it much harder for injured employees to assert claims for injuries outside of the workers compensation system. In keeping with recent trends, issues relating to disability and leaves of absence drew legislative, regulatory and judicial attention in 2011, with most (but not all) new developments favoring employees over employers.

Disability & Leaves of Absence

New Leaves Law Benefits Organ Donors And Bone Marrow Donors

California's lengthy list of employee leave laws grew still larger in 2011 when a new law regarding leaves of absence for organ donors and bone marrow donors became effective. Senate Bill 1304 requires certain employers to grant paid leaves of absence to organ donors and donors of bone marrow. Key provisions of the new law include the following:

- **Covered employers-** The new law applies to private sector employers with 15 or more employees.
- **Eligible employees-** Employees eligible to take leave pursuant to the new law include those who donate organs or bone marrow to another person; the law applies to both full-time and part-time employees without regard for their length of employment.
- **Duration of leave-** Organ donors may take up to 30 days of leave, while bone marrow donors may take up to five days of leave. Leave may be taken either in a continuous period or intermittently.
- **Continuation of group health insurance-** Employers must maintain group health insurance for employees during their leave of absence if the employee is enrolled in the insurance plan at the commencement of leave.
- **Certification requirements-** Employers may require employees seeking leave to provide written verification of their status as an organ donor or bone marrow donor.
- **Concurrent use of vacation or PTO-** If an employee has accrued vacation or Paid Time Off (PTO) available at the time he or she commences leave, the employer may require the employee to use such vacation or PTO concurrently with bone marrow donation leave, and may require the employee to use up to two weeks of vacation or PTO concurrently with organ donation leave. Leave taken pursuant to the new law cannot run concurrently with leave taken pursuant to the Family and Medical Leave Act or California Family Rights Act, however.
- **Reinstatement-** At the conclusion of leave, employers are obligated to reinstate employees to the positions they held when they began their leave of absence, or to an equivalent position.

What should employers do now?

- **Consider adopting a policy regarding organ and bone marrow donor leave-** Covered employers should consider adding policies regarding organ donation and bone marrow donation leave to their Employee Handbooks.

EEOC Publishes Final Regulations Implementing ADA Amendments Act

Congress passed the ADA Amendments Act (ADAAA) in 2008. Among other things, the ADAAA effectively expanded the definition of disability under federal law and directed the EEOC to adopt regulations to assist in implementing the law. The final EEOC regulations became effective on June 24, 2011.

Consistent with the ADAAA, the new regulations make it easier for employees to qualify for protection under the law. Current federal law defines a disability as (a) a physical or mental impairment that substantially limits one or more major life activities, or (b) a record or past history of such an impairment, or (c) being regarded as having a disability. The regulations confirm that determining whether an individual qualifies as disabled requires an individualized analysis, rather than mere reference to a diagnosis. The regulations also create a presumption that individuals suffering from certain conditions will qualify as disabled, however. Conditions which will generally give rise to a disability within the meaning of the ADAAA include blindness, mobility impairments requiring the use of a wheelchair, diabetes, cancer, HIV infection and a variety of mental disorders, among others.

The regulations also establish various rules of interpretation to be used in determining whether an individual is substantially limited in performing a major life activity. Key elements of the rules of interpretation include:

- **Lowering the bar on "substantial limitation"-** In the past, an impairment was not regarded as a "substantial limitation" unless it prevented an individual from engaging in, or severely or significantly restricted his or her engagement in, a major life activity. Impairments may now constitute "substantial limitations" without satisfying this standard, as long as the individual is substantially impaired relative to the general population. Moreover, decisions regarding the existence of substantial impairment must be made without regard for the ameliorative effects of mitigating measures (such as medication), except ordinary corrective lenses.

- **Loosening the definition of "major life activities"-** In addition to lessening the degree of impairment necessary to create a "substantial limitation," the regulations also expand the scope of the "major life activities" to include the operation of major bodily functions and organs, such as the immune system, sense organs, digestive system, neurological system, circulatory system and respiratory system.

- **Temporary impairments may amount to disabilities-** Episodic impairments, or impairments that are in remission, qualify as disabilities if, while active, they would substantially limit a major life activity.

- **Threshold for being "regarded as disabled" also lowered-** To prove that an employer regarded him or her as disabled, an individual now must prove only that the employer perceived him or her as disabled, and need not prove that the employer believed that the impairment substantially limited participation in a major life activity.

Employers should recall that California's Fair Employment and Housing Act provides separate protection to individuals whose condition "limits" (as opposed to "substantially limits") one or more of their major life activities, and that the protections afforded by state law are in some respects broader than those created by federal law, even following adoption of the new ADAAA regulations. Although California's very broad disability discrimination laws will reduce the practical impact of the new regulations within the state, employers that operate outside of California should be sure to familiarize themselves thoroughly with the new regulations, since they will expand the obligations of such employers.

What should employers do now?

- **Ensure compliance with applicable California and federal laws regarding disability discrimination and accommodation when making personnel decisions that affect employees with a disability-** Most employers in California are subject to both the state Fair Employment and Housing Act and the federal Americans With Disabilities Act. Although the two laws are generally similar, some important differences between them do exist.

- **Apply the new regulations when facing ADA issues-** The ADAAA regulations became effective in 2011. Employers should familiarize themselves with the new regulations and be able to apply them properly when addressing issues to which they are applicable.

The Latest On The Interactive Process, Or When "Totally Disabled" Doesn't Mean "Totally Disabled"

California's Fair Employment and Housing Act not only prohibits covered employers from discriminating against employees on the basis of disability, it also requires them to "engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." Federal law creates a similar obligation. A new decision by the California Court of Appeal highlights the critical importance of the obligation to engage in the interactive process.

The purpose of the interactive process is to identify reasonable accommodations that may enable an employee to perform his or her job effectively. The crux of the employer's obligation is to participate in a dialogue cooperatively, and to seek and exchange relevant information openly, for the purpose of determining if a reasonable accommodation would enable an employee to perform his or her job at that time, or at a reasonable time in the future. Employers must also recognize that accommodations can take many forms (such as leaves of absence or extensions of leaves of absence, and modified duty), and that the rules regarding the interactive process apply whenever an employee requests any of the various forms of accommodation that may be possible.

When evaluating an employee's allegation that the employer has failed to engage in the interactive process, courts seek to identify the reason(s) for which communication between the employer and employee broke down, and will impose liability upon the employer if the company is deemed responsible for the breakdown. As a result, employers should rarely end a dialogue unilaterally, and should generally give employees an opportunity to provide additional information or comment before a tentative decision becomes final. The recent case of *Cuiellette v. City of Los Angeles* provides an unfortunate example of the consequences that an employer may suffer if it fails to comply with its obligations.

In *Cuiellette*, a police officer was injured on the job and deemed "100% disabled" by his employer's workers' compensation insurer. The employee's doctor certified the employee as able to work in a light duty capacity, however, and the employee sought to return to work in such a role, which was available at the time. At the recommendation of its workers' compensation administrator, the City of Los Angeles refused to permit Cuiellette to work in a light duty capacity because the insurer had deemed him totally disabled. Following extended litigation, the Court of Appeal found in favor of Cuiellette and the Court's holdings remind employers of several fundamental points:

- An employee deemed totally disabled for purposes of workers' compensation is not necessarily totally disabled within the meaning of the anti-discrimination laws, which apply different standards;

- Employers must evaluate an employee's ability to perform the essential functions of his or her job, with or without reasonable accommodation, regardless of the rating issued to the employee by a workers' compensation insurer; and

- When an employee requests a reassignment to another position as an accommodation, the employers should focus on whether the employee can perform the essential functions of the alternative position, rather than the employee's normal position.

What should employers do now?

- **Engage employees in a substantial dialogue before making decisions about accommodations-** In *Cuillette*, the employer chose to rely exclusively on the opinion of a doctor who examined the employee in connection with his workers' compensation claim, and refused to consider other facts, a decision that ultimately resulted in liability. Employers should consider all relevant information in making decisions about accommodations.

- **Document your participation in the interactive process-** In order to protect themselves from potential claims, employers should not only comply with their obligations, but should utilize carefully drafted letters and memoranda to confirm that they have done so. Since cases focused on the interactive process and reasonable accommodation are particularly likely to involve disputes about "who said what to whom and when," documentation is even more critical than normal. Employers are well-advised to work with counsel to craft documentation which can be used to demonstrate compliance with the law in the event a dispute arises.

Court Confirms Reinstatement Rights Under CFRA Expire After 12 Weeks Of Leave, But Employers Should Proceed With Caution

Both the Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) require covered employers to grant leaves of absence of up to 12 weeks to eligible employees, and both laws generally require the employer to reinstate the employee to her job, or to a comparable position, at the conclusion of her leave of absence. A decision from the California Court of Appeal in the summer of 2011 serves as a reminder that employees' right to reinstatement, while strong, is not unlimited.

In *Rogers v. County of Los Angeles*, a personnel officer took a leave of absence because she was suffering from a condition that prevented her from working. Approximately one month after she commenced her leave of absence, the County decided to transfer her to another position, one regarded as a demotion by several other employees. The County did not inform Rogers of its decision at that time, however. Instead, it waited until she returned from her leave of absence, which extended to 19 weeks, beyond the 12 weeks authorized by the CFRA. Like her colleagues, Rogers regarded her new position as a demotion and sued the County, contending that it had violated the CFRA by transferring her to a lesser position before the expiration of her 12 weeks of CFRA leave. A jury returned a verdict in favor of Rogers, but the Court of Appeals reversed the decision, holding that her right to reinstatement expired after 12 weeks, regardless of whether the transfer decision was made before she had exhausted her CFRA leave rights.

Although the County prevailed on appeal, the result may well have differed had Rogers been able to return to work before her CFRA leave rights expired. Employers are generally well-advised not to transfer an employee to another position during CFRA leave unless the position in question is undeniably comparable to the position she held at the commencement of leave.

What should employers do now?

- **Critically assess the similarity of the jobs when considering reinstatement to a comparable position, rather than the employee's prior position-** In Rogers, the job to which the employee was transferred offered the same compensation and benefits as her former position, but the duties and responsibilities of the new position were viewed as less significant than those of the former position. Had the employee been able to return to work within 12 weeks, she may have been able to win her case by proving that the County did not reinstate her to a comparable position. Whenever considering reinstating an employee to a position other than the one she held at the start of her leave of absence, employers should be sure to evaluate all aspects of the job, not just compensation and benefits.

- **Take into consideration that the obligation to provide reasonable accommodation does not expire after 12 weeks-** Employers should also remember that they remain obligated to provide reasonable accommodation to employees even after FMLA and/or CFRA rights have expired. In some cases, reasonable accommodation may consist of reinstating an employee to his or her former job even after a leave extending beyond 12 weeks.

Employer Arbitration Agreements & Class Action

The Developing Law Regarding Employer Arbitration Agreements

At the state court level in California, the battle over when arbitration agreements in the employment context will be enforced has continued. Over a decade ago, in *Armendariz v. Foundation Health Psychcare Services* (2000), the California Supreme Court articulated its view of when an arbitration agreement in the employment context is subject to challenge for procedural and substantive unconscionability. The *Armendariz* opinion has been repeatedly interpreted by lower courts to set aside employer-employee arbitration agreements in California.

This year, the United States Supreme Court issued a decision in *AT&T Mobility v. Concepcion* which has been widely heralded by management commentators as a potential tool for defending arbitration agreements against challenge under the *Armendariz* standards. In *Concepcion*, the Supreme Court confirmed that under the Federal Arbitration Act 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 have argued that the reasoning of the *Concepcion* opinion will be the death knell for the California Supreme Court's analysis in *Armendariz* that requires arbitration agreements in the employment context to pass a strict test for unconscionability. Whether the Supreme Court's opinion in *Concepcion* will actually turn the tide in favor of arbitration agreements in California remains to be seen. 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.

The United States Supreme Court has already used the *Concepcion* opinion to direct the California Supreme Court to reconsider its decision in *Moreno v. Sonic-Calabasas*. In *Sonic-Calabasas*, the California Supreme Court concluded that an arbitration agreement which required an employee to waive his or her right to a hearing before the labor commissioner regarding unpaid wages was unconscionable and contrary to public policy. The employer petitioned the United States Supreme Court for a writ of certiorari following the *Concepcion* decision and the Supreme Court granted the writ, vacated the judgment and remanded the case to the California Supreme Court for reconsideration in light of its opinion in *Concepcion*. This action by the United States Supreme Court certainly could indicate an expansive view of the reasoning in *Concepcion* and the applicability of the Federal Arbitration Act to employment arbitration issues at the state court level. However, the California Supreme Court could reaffirm its decision finding the arbitration agreement unconscionable using reasoning that does not conflict with *Concepcion*.

At least one state appeals court in California has rejected the notion that the Federal Arbitration Act and the *Concepcion* opinion has broad applicability in California. In *Brown v. Ralphs Grocery Company*, the appeals court

rejected the notion that the Federal Arbitration Act applied to representative actions under the California Private Attorney Generals Act ("PAGA") and instead concluded that the employee's waiver of a right to pursue a representative action by virtue of signing an arbitration agreement was unconscionable under state law and unenforceable.

What should employers do now?

- **Consult with legal counsel to determine whether your arbitration agreement satisfies current interpretations of California and federal law**- In this review, consider the following: (1) Having the arbitration clauses initialed by employees; (2) Allowing an opt-out period immediately after signing; (3) Formatting the arbitration clause in bold print and large font; (4) Removing any language that suggests the employee is prohibited from negotiating with you; and (5) Ensuring the arbitration clause is bilateral in terms.

The *Dukes v. Wal-Mart* Decision – Class Certification In Discrimination Cases

Over the last decade, employers – particularly larger employers – have experienced a growing trend of class action lawsuits alleging either employment discrimination or wage and hour violations. Class action lawsuits quickly become exceedingly expensive for the employer to defend and plaintiffs' lawyers count on the heavy defense cost to create an incentive to settle rather than to defend the litigation.

The largest employment discrimination class action lawsuit in history was filed against Wal-Mart by a class of current and former female employees who alleged that Wal-Mart had a uniform corporate culture that permitted bias against women to infect the discretionary decision-making process of managers. The plaintiffs in *Dukes v. Wal-Mart* sought to certify a nationwide class of approximately 1.5 million current and former female employees of Wal-Mart. The *Dukes* plaintiffs contended that all female employees in the class were the subject of sex discrimination based on Wal-Mart's delegation of pay and promotion practices to the discretion of local managers, who, according to the plaintiffs' statistical evidence, disproportionately exercised their discretion against female employees and in favor of male employees.

In a much anticipated opinion this year, the United States Supreme Court reversed the Ninth Circuit's Court of Appeals grant of class certification for the *Dukes* plaintiffs. The Supreme Court emphasized the requirement that any discrimination plaintiffs seeking class certification must show that "there are questions of law or fact common to the class." The Supreme Court squarely rejected the argument that discretionary decision making by local management combined with statistical proof of disparity is enough to satisfy the common issues requirement. As the Supreme Court observed, the *Dukes* plaintiffs sought to challenge literally millions of employment decisions at once by virtue of their class certification but offered no "glue" holding together the alleged reasons for those millions of decisions. As a result, the proposed *Wal-Mart* class failed to meet the most basic threshold for class certification – the concept that the class claims must depend upon a common contention that is capable of class wide resolution. As the Supreme Court

pointedly noted, proving discrimination in one local manager's exercise of discretion does nothing to demonstrate discrimination in a different local manager's exercise of discretion.

For those employers facing the possibility of class wide discrimination claims, the *Dukes v. Wal-Mart* opinion offers an effective tool for combating class certification. The opinion is less helpful in combating wage and hour class actions as those class actions often involve a policy or practice, such as how meal breaks are administered or whether a specific category of employees is exempt from overtime, which do involve common questions of fact or law capable of class-wide resolution.

Discrimination, Harassment, & Retaliation Laws

United States Supreme Court Decides That The Anti-Retaliation Provision Of The Fair Labor Standards Act Protects Oral Complaints

The Fair Labor Standards Act (FLSA) prescribes regulatory standards for wage payment practices and prohibits employers from retaliating or discriminating against an employee because the employee has "filed any complaint" about allegedly illegal activity. Although all courts have agreed that the filing of written complaints constitutes activity protected by the federal statute, until recently the lower courts have disagreed on whether FLSA retaliation claims must be based on written complaints, or whether verbal complaints suffice.

On March 22, 2011, the United States Supreme Court finally settled this disagreement in its decision in *Kasten v. Saint-Gobain Performance Plastics* by holding that the FLSA prohibits employers from retaliating against employees who "file" either an oral or a written complaint that the employer is violating the FLSA.

In the lawsuit, an employee claimed that he orally complained to company management that the time clocks in the plant where he worked were located between the place where employees put on their work-related protective gear and where they were assigned to perform their work tasks. According to the employee, the placement of the time clocks prevented employees from receiving full credit for the time they spent putting on and taking off their work gear in violation of the "donning and doffing" provisions of the FLSA. The employee alleged that after he complained, the company retaliated against him by terminating his employment and thereby violated the FLSA's anti-retaliation provision.

The employer successfully argued before the lower courts that in order to "file" a complaint and thereby invoke the FLSA's anti-retaliation provision, an employee must submit the complaint in writing. The United States Supreme Court, however, disagreed and determined that the statutory phrase "filed any complaint" includes oral, as well as written, complaints. Although the Court recognized that the statutory language itself does not provide a conclusive answer, it reasoned that interpreting the statute to encompass only written complaints would undermine the FLSA's basic objective, which is to prohibit "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." Because enforcement of the FLSA relies upon complaints from employees, the effectiveness of the statute rests on the strength of the anti-retaliation provision to calm complaining employees' fear of retaliation by their employers. The effectiveness of the enforcement scheme, however, would be significantly weakened if employees who find it difficult to reduce their complaints to writing, particularly the illiterate, less educated, and overworked employees who are in most need of the FLSA's protections, were left unprotected.

The Court also determined that the phrase "filed any complaint" infers some degree of formality to ensure that the employer has fair notice that the employee made a complaint that could subject the employer to a later claim of retaliation under the FLSA. The Court therefore clarified that to invoke the FLSA's protections, the complaint must be "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."

The Court's ruling in *Kasten* significantly expands the potential for retaliation lawsuits against employers and will likely further increase the growing popularity of such claims, the basic elements of which can be relatively easy for an employee to prove.

What should employers do now?

- **Increase awareness of complaint resolution procedures-** Employers should consider including an expanded discussion of retaliation and protected activity in their anti-discrimination and harassment training.

- **Proceed with caution before making any personnel decisions adverse to an employee who has engaged in arguably protected activity-** Employers should proceed with extreme caution when making a personnel decision about an employee who has complained of discrimination or harassment, or engaged in other protected activity. In many cases, employers will be wise not to permit a supervisor accused of discrimination or harassment to make employment decisions regarding the complaining employee without involvement by other members of management.

California Court Of Appeal Rules That "Me Too" Evidence Is Admissible In Sexual Harassment Cases

In employment discrimination and harassment cases, employers correctly fear the introduction at trial of what is commonly referred to as "me too" evidence. "Me too" evidence typically consists of a parade of employees or former employees who testify about their own experience of allegedly discriminatory acts at the hands of the defendant employer. It is essentially "character evidence" through which the plaintiff seeks to prove that the employer is "bad" and therefore should be punished. The risk to the employer that is presented by the admission of "me too" evidence is that the jury will be unfairly influenced by this testimony and will not focus on what actually happened to the plaintiff in the case before them. The unstated inference of "me too" evidence is that if it happened to others, it must have happened to the plaintiff. An additional risk is the creation of an evidentiary burden in which the defense must address the plaintiff's allegations of discriminatory treatment, and it must also respond to the allegations of each of the "me too" witnesses, thereby creating mini-trials within the plaintiff's case.

Defense lawyers regularly seek to exclude "me too" evidence in discrimination and harassment cases, arguing that any probative value is far outweighed by the confusion and unfair prejudicial effect created by such evidence. Previously,

courts have accepted this argument and excluded "me too" evidence at trial. In August of 2011, however, the California Court of Appeal for the Fifth Appellate District concluded in *Pantoja v. Anton, et al*. that "me too evidence" was indeed admissible and that the trial court abused its discretion in excluding the evidence at trial.

Pantoja was a legal secretary for Thomas Anton and his law firm. She alleged that Anton sexually harassed her during her employment and ultimately fired her for discriminatory reasons based on her race and gender. Anton denied all of Pantoja's allegations of discrimination and harassment. He also testified that he was highly knowledgeable about equal employment opportunity (EEO) law and that he conducted sexual harassment training for other employers.

The trial court ruled that Pantoja could offer evidence about Anton's allegedly discriminatory and harassing behavior only if the behavior occurred during the period that Pantoja was employed by Anton's law firm or if Pantoja knew about it while she was employed there such that it could have affected her experience of the work environment. Accordingly, the court excluded evidence from a variety of current and former employees that not only impeached Anton's denials of sexual harassment as well as gender and race discrimination, but also tended to support Pantoja's testimony that Anton tended to engage in bouts of extreme profanity and name calling as well as unwanted touching of female employees. The jury ultimately returned a verdict in favor of the employer.

The Court of Appeal reversed the jury verdict and concluded that the trial court had abused its discretion in excluding the "me too" evidence offered by Pantoja's counsel to prove Anton's discriminatory motive or intent. It concluded that the "me too" evidence was admissible to show discriminatory intent and to impeach Anton's own credibility as a witness in light of his denials of any harassing or discriminatory behavior.

The admission of "me too" evidence at trial creates a significant risk that jurors may be unduly influenced to judge the employer by its prior "bad acts," regardless of their impact on the plaintiff's present work environment and therefore the merits of the case.

What should employers do now?

- **Implement an appropriate complaint reporting procedure-** Employers should consider implementing an appropriate complaint reporting procedure. This would not only allow employers to become aware of complaints by its employees and to give them an opportunity to take any necessary corrective action promptly, but it also serves as one piece of a defense to a lawsuit alleging unlawful discrimination or harassment.

- **Increased awareness of the importance of regular training regarding equal employment laws-** The *Pantoja* opinion serves as a good reminder of the importance of regular training regarding equal employment opportunity laws, including sexual harassment laws.

Employers May Be Liable For Retaliatory Conduct Against An Employee Who Lacks A Viable Claim for Sexual Harassment

There is a discernible difference in the employment law context between a "hostile work environment" and a work environment that is hostile. The law is not concerned with protecting employees from the latter situation in which there exists merely rude, obnoxious, and unprofessional behavior; rather, the law prohibits only that conduct which rises to the level of a "hostile work environment." A "hostile work environment" claim requires an employee to prove that he or she was subjected to harassment; the harassment complained of was based on sex; and the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create a hostile work environment. The law also protects an employee who complains of a hostile work environment from retaliatory conduct by the employer as long as the employee can prove that he or she engaged in "protected activity"; the employer subjected the employee to an adverse employment action; and that a causal link exists between the adverse employment action and the employee's activity.

In 2011, both a California and a federal court considered whether an employee may have a claim against an employer for retaliatory conduct in the absence of a legally viable claim for sexual harassment. Both courts answered in the affirmative.

In *Kelley v. The Conco Companies*, a California appellate court determined that although the alleged misconduct of which the plaintiff employee complained did not rise to the level of sexual harassment actionable under the Fair Employment and Housing Act (FEHA), the employer could nonetheless be held liable for retaliating against that employee where the company knew or should have known of the retaliatory conduct and failed to take reasonable steps to end it. During the first week of Patrick Kelley's employment as an apprentice ironworker at one of the largest concrete construction companies in California, Kelley alleged that he was subjected to a barrage of sexually explicit comments and gestures by his male supervisor and male coworkers. For example, the supervisor allegedly told Kelley he had a "nice ass" and said he wanted to sodomize Kelley, while a coworker told Kelley that he was going to force Kelley to perform oral sex on the supervisor. After Kelley complained to management and the supervisor apologized, Kelley's coworkers began calling Kelley derogatory names, such as "bitch," "faggot" and a "snitch" for complaining.

The Court of Appeal found that the supervisor's sexual overtures and physical threats were insufficient by themselves to give rise to a "hostile work environment" claim under FEHA in the absence of any evidence that the supervisor was motivated by a sexual desire or interest in Kelley. Without such evidence, the court concluded that Kelley could not prove the comments and threats were made "because of sex." The court explained that "workplace harassment, even harassment between men and women, is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations." The critical issue determined by the court is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Nonetheless, the court held that the employer could be held liable for retaliation in violation of the FEHA. The court reasoned that Kelley's complaint to management about what he reasonably perceived as sexual harassment was protected activity. The retaliatory harassment by Kelley's coworkers was an adverse employment action for which the employer could be liable under the FEHA if the company knew or should have known of the retaliatory conduct and either participated in or encouraged the conduct or failed to take reasonable steps to end the retaliation.

A similar conclusion was reached by the Ninth Circuit Court of Appeals in *Dawson v. Entek International*. Shane Dawson, a gay man, worked as a temporary production line worker on a line that rolled up battery separators. Dawson alleged that his male coworkers made derogatory comments about his sexual orientation, such as calling him "Tinker Bell" and a "fag." Because of the stress and work deterioration he experienced from the derogatory comments, Dawson took a day off from work and notified the company of his absence by calling the general phone number and asking the person who answered the phone to let his supervisor know he was taking the day off. When Dawson returned to work the next day, he complained of the derogatory comments to the company's human resources department. Two days later, the company terminated Dawson's employment, purportedly because he failed to call properly before missing work.

The Ninth Circuit rejected Dawson's claim of a hostile work environment based on sex, reasoning that there was no evidence presented that Dawson was verbally harassed because of his gender, such as for appearing non-masculine or not fitting the male stereotype. The court did, however, find that Dawson could state a claim for a hostile work environment based on his sexual orientation because the company was put on notice of the misconduct when Dawson complained to human resources and there was evidence that the company ignored his complaint.

Significantly, before even reaching the question of whether there existed a hostile work environment in the first instance, the Ninth Circuit found that there was sufficient evidence of that the company retaliated against Dawson in violation of Title VII after Dawson complained to human resources about what he perceived as a hostile work environment based on sex and sexual orientation. In particular, the court determined that the timing of Dawson's discharge in relation to his complaint was sufficient to raise "indirect evidence that undermines the credibility of [the company's] articulated reasons" for the discharge.

With these new court decisions finding that an employer may be liable for retaliatory conduct even in the absence of a viable claim for sexual harassment, employers face uncertainty in this area of the law for at least two reasons. First, a complaint by an employee about hostile working conditions that may not rise to the level of a "hostile work environment," may still subject the employer to a risk of liability for alleged retaliatory conduct that follows the complaint. Second, the holdings by these courts that sexual harassment must be motivated by sexual desire or interest are contrary to prior case law holding that "there is no requirement that the motive behind sexual harassment must be sexual in nature." See, e.g., *Singleton v. United States Gypsum Co.* (2006) 140 Cal. App. 4th 1547, 1564.

What should employers do now?

- **Implement zero tolerance harassment and retaliation policies**- Employers should consider implementing a zero tolerance harassment policy that is not dependent on whether the alleged perpetrator had any sexual desire toward the target of the harassing conduct. Implementing a zero tolerance retaliation policy without regard to whether the misconduct complained about actually constitutes a hostile work environment under the law is also another point for consideration by employers.

National Labor Relations Act

A Primer On The National Labor Relations Act For Private Sector Non-Union Employers

Non-Union Employers

The National Labor Relations Act (NLRA) was enacted in 1935 as part of FDR's New Deal to address the unsettled labor relations issues of the Great Depression era. Since its inception, and apparently by design, the National Labor Relations Board (NLRB) has been a uniquely political federal agency. Members of the NLRB are appointed by the President, with the advice and consent of Congress, and serve five year terms. Based on tradition, the NLRB is composed of two members of the Democratic Party, two members of the Republican Party, and one member who belongs to the same political party as the President. The President also selects which Board Member will serve as the Chairman of the NLRB who controls the agenda of the agency. Needless-to-say, as the composition of the NLRB changes over time, it is not uncommon for the opinions of the NLRB to change from pro-union to pro-employer and back again.

Applicability of the NLRA

The NLRA was adopted to regulate the labor relations of private sector employers engaged in interstate commerce. Some employers think that unless their employees are unionized the NLRA does not apply to them; however, there are many aspects of the NLRA that apply to non-union employers. The NLRB has adopted jurisdictional regulations to determine when employers are sufficiently engaged in interstate commerce to be subject to the NLRA. There are different rules for different industries but generally the NLRA will apply if an employer purchases materials through interstate commerce or produces goods or services that are put into interstate commerce worth at least $50,000. For all but the smallest and most localized employers the NLRA will regulate some aspects of their business.

Section 7 Rights

The federal law rights of private sector employees to form unions, bargain collectively, and engage in concerted activities are commonly referred to as "Section 7" rights, after the section number in the original act:

> 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.

29 U.S.C. Section 157 (emphasis added). Violations of Section 7 Rights are unfair labor practices which are investigated by NLRB agents and prosecuted by NLRB attorneys before administrative law judges and in the federal courts. The NLRB has broad authority to remedy violations of the NLRA.

Concerted Activities

Commonly thought of as strikes during labor disputes, concerted activities as protected by the NLRA encompass much more than that. Any time employees meet or act collectively for "mutual aid or protection" concerning the terms and conditions of employment, they may be exercising their Section 7 rights and acquire a protected status. Employees need not be attempting to form a union to receive this protection but could be protesting, in concert, disciplinary actions, changes in wages or benefits, or safety concerns. Depending on the circumstances, simply disciplining an employee for airing a complaint about working conditions may be insufficient for the NLRB to find an unfair labor practice. However, if a group of employees are terminated for protesting a change in working conditions, the NLRB may very well find that the employer had violated the NLRA.

NLRB Guidelines Concerning Social Media Cases

Facebook, Twitter, and other forms of social media have become an unremarkable and pervasive means of communication. Although thought of as the technology equivalent of conversations around the water cooler, social media postings by employees have a much greater potential for harm to employers. The internet's ability to exponentially multiply messages, the inability to effectively control or correct damaging or false information, and the virtual permanence of on-line postings mean that employee use of social media is a legitimate source of employer concern.

The NLRB caused a stir in early 2011 when it issued a complaint against a non-union ambulance company that terminated an employee for disparaging a supervisor in a series of Facebook postings. According to the reasoning of the NLRB, the employee was enlisting the support of co-workers during these Facebook postings such that it constituted collective action for mutual aid or protection. Also of particular concern to the NLRB was the employer's policy restricting on-line comments about the company that was so broad it potentially prohibited protected conduct.

This NLRB case was settled before being adjudicated but on August 18, 2011, the NLRB General Counsel's Office issued a report discussing several of the social media cases it investigated to that point in time. The standards concerning when on-line conduct rises to the level of collective action for mutual aid or protection are still developing. **Two key themes seem to be emerging, however. The first theme is that on-line postings will not be considered** collective action if the employee comments relate exclusively to the employee's own problem which is not shared by

other employees. In other words, if the posting is only a personal gripe that does not solicit assistance from co-workers and has no connection to the greater good of other employees, then it will likely not be considered collective action. The second theme involves employer policies that unduly restrict on-line employee communications. Policies that prohibit employees from disclosing in social media forums legitimate company trade secrets are permissible; preventing employees from on-line discussions of working conditions will likely be considered overbroad and a violation of the NLRA.

NLRA Rights Poster

Following the regulatory process, the NLRB proposed a rule that would require all employers covered by the NLRA to post a notice informing employees of their rights to unionize. This unprecedented requirement was originally to become effective in November 2011 but after three lawsuits were filed against the NLRB contending that it lacked the legal authority to issue this directive, the effective date was delayed to January 31, 2012. The basis for these lawsuits is that for all other federally required workplace posters (such as the federal wage and hour and equal employment opportunity posters) the posting requirement was created by Congress, not the regulatory agency. Congress did not include in the NLRA a posting requirement. Employers are advised to follow the news to determine whether the posting rule is overturned or enforced.

Micro Bargaining Units

Traditionally, the NLRB has followed certain standards in the healthcare industry concerning the composition of bargaining units. These standards were to assure that the members of the bargaining unit share a community of interest and do not result in a proliferation of the number of bargaining units. On August 26, 2011, the NLRB by-passed these standards and allowed a union election in a small group of certified nurse assistants, a "micro-unit," rather than the traditional unit of all non-professional service and maintenance employees. *Specialty Healthcare and Rehabilitation Center,* 357 NLRB No. 83. Such micro-units make it easier for unions to organize but create the potential of a proliferation of bargaining units for employers. Shortly after the NLRB's decision, a bill called the Workforce Democracy and Fairness Act (H.R. 3094) was introduced in the United State House of Representatives to overturn the bargaining unit criteria used by the NLRB in *Specialty Healthcare.* The future of H.R. 3094 is uncertain but worth watching.

Shortened Time Frame For Elections

One of the primary union objectives in the ill-fated Employee Free Choice Act was to shorten the time frame between the union's filing of a representation petition and the holding of the NLRB conducted election. Conventional wisdom suggests that quicker elections favor unions. Again using the regulatory process, the NLRB has proposed regulations to accomplish what the defeated Employee Free Choice Act would not. The NLRB is slated to vote on these proposed regulations on November 30, 2011, just as this Update is going to the printer. These rules could affect all employers.

Property Access

Many employers beleive that they have an unfettered right to exclude individuals from their employer's property. However, if the employer is a retail operation or located in a shopping center, their rights to exclude union members distributing handbills may be restricted. In *New York New York Hotel and Casino* the NLRB allowed union members with a dispute against the contractor operating the restaurants to distribute handbills on hotel property, even though those distributing the handbills were not employees of the hotel and did not have a dispute with the hotel's owners. Before calling the police to remove union members distributing handbills on your property, you should contact labor counsel to determine whether that action may violate the NLRA.

Banners and Inflatable Rats

The NLRB has traditionally distinguished between picketing—a group of people with picket signs patrolling back and forth in **front of a targeted location—and handbilling—distribution of flyers to interested members of the public. Picketing** is considered more coercive while handbilling is accorded greater First Amendment protection. Ever creative unions **wanted to find more effective ways of getting their message out. The NLRB has now approved two new methods, finding them not to be unduly coercive and therefore protected by the First Amendment. The first method is the use of a large stationary banner on which the union's message is written. The banners can be fifty to one hundred feet long and require a dozen or more union members to hold it.** *In Carpenters Local 15006*, 355 NLRB No. 159 (2010), the NLRB found that such a large banner at a workplace of a secondary employer (usually a contractor or vendor of the primary employer with whom the union has a dispute) was not coercive even though picketing in that location would have been prohibited.

Unions have long enjoyed disparaging employers with whom they have disputes by referring to them as "rats." Now, **the NLRB has allowed unions to use large inflatable rat balloons, even in front of hospitals (which are very sensitive** to claims of unsanitary conditions).

Calling the rat balloons "symbolic speech" and not coercive, the NLRB majority wrote: "we perceive nothing in the location, size or features of the balloon that were likely to frighten those entering the hospital, disturb patients or their families, or otherwise interfere with the business of the hospital." *Sheet Metal Workers Local 15*, 356 NLRB No. 159 (May 26, 2011). The dissenting Board Member called the tactic "unmistakably confrontational and coercive."

Fate of NLRB

Currently, the NLRB has two Democratic Board Members and one Republican Member. However, the lone Republican Member threatened to resign to prevent the vote on November 30, 2011 on proposed changes to Board-conducted election and the term of one of the Democratic Board Members, a controversial recess appointment (an appointment by the President while Congress is in recess, usually because Senate would not have approved

the nomination), is due to expire on December 31, 2011. With only one or two members remaining, the Supreme Court ruled in *New Process Steel, L.P. v. NLRB* (2010) that the NLRB would be unable to issue any decisions or regulations. Senate Republicans have vowed to block any appointments to the NLRB and with the Congress continuously in session under Republican House leadership, recess appointments may not be possible. That does not mean that union elections and unfair labor practice hearings will no longer happen. It does mean that uncertainty and confusion about national labor relations policy could become commonplace. Stay tuned—this is better than reality TV.

What should employers do now?

- Become aware of how the NLRA may affect your business operations.
- Exercise caution when disciplining employees for on-line communications or when "acting in concert" with other employees.
- Review/update policies restricting employee use of social media.
- Follow news media reports concerning the outcome of the NLRB rule requiring posters of NLRA rights.
- Express your opinion about proposed NLRB regulations to your United States Senator and Representative.
- Review the application of NLRB rules concerning union access to employer property.
- Make sure that you do not do anything that warrants a giant inflatable rat outside your business's front door.

Conclusion

We hope that this summary assists you in understanding some of the recent developments that will affect employers in 2012. 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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