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# LABOR AND EMPLOYMENT LAW YEAR IN REVIEW — 2011

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## **YEAR IN REVIEW – 2011**

### LABOR & EMPLOYMENT LAW

Labor and employment law developments are increasingly complex and challenging for human resource managers, executives, and attorneys in both the public and private sectors. To assist employers in understanding the evolution of critical issues, SEBRIS BUSTO JAMES is pleased to share with you a summary of key developments in our practice area.

“Year in Review – 2011” highlights trends and developments in major labor and employment areas, with a primary focus on decisions by the U.S. Supreme Court, the U.S. Court of Appeals for the Ninth Circuit here on the West Coast, Washington State appellate courts, and the National Labor Relations Board. Among the important subjects discussed are: retaliation claims, disability accommodation, FMLA leave, the impact of Washington’s Medical Use of Marijuana Act on employers, and the successor and voluntary recognition bars in collective bargaining.

Our law firm emphasizes preventive practices as a means of reducing the risk of costly and time-draining litigation. This summary of 2011 labor and employment law is not intended as legal advice for particular situations, but by tracking legal developments and new concerns will hopefully assist you in recognizing and addressing issues that may arise in the coming years.

Please feel free to direct any questions or comments to Jillian Barron at (425) 450-0111 or [jbarron@sebrusbusto.com](mailto:jbarron@sebrusbusto.com). Additionally, you are welcome to visit our website, [www.sebrusbusto.com](http://www.sebrusbusto.com), for more information or communications.

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## I. NOTABLE FEDERAL COURT DECISIONS

### Title VII – Retaliation Against Third Parties

#### 1. The Existing Legal Framework.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., forbids retaliation against an individual who has opposed any practice made unlawful by Title VII (“the opposition clause”) or has participated in a Title VII investigation or proceeding (“the participation clause”). Historically, to state a viable claim for Title VII retaliation, plaintiffs have had to establish that they engaged in protected activity under the opposition and/or participation clauses. Recently, however, in *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), the U.S. Supreme Court expanded the group of protected individuals and held that third parties may bring a Title VII retaliation claim based upon another person’s protected activity.

#### 2. Notable U.S. Supreme Court Decision.

Eric Thompson and his fiancé, Miriam Regalado, were both employees of North American Stainless (“NAS”). In early 2003, the EEOC notified NAS that Regalado had filed a sex discrimination charge. NAS terminated Thompson three weeks later. Believing NAS terminated him in retaliation for Regalado’s EEOC charge, Thompson sued NAS, alleging a Title VII violation. The district and appellate courts determined that Thompson did not have standing to bring his retaliation claim because he had not engaged in protected activity.

On review, the U.S. Supreme Court considered two issues: (1) whether an employer violates Title VII’s anti-retaliation provisions by terminating the fiancé of an employee who has complained of discrimination; and (2) whether the terminated fiancé may assert a Title VII claim on his own behalf. Addressing the first issue, the Court determined that, as alleged, Thompson’s termination constituted unlawful retaliation. The Court pointed to the broad language of Title VII’s anti-retaliation provision, which it has held prohibits any employer action that might dissuade a reasonable worker from making or supporting a discrimination charge. While declining to define a set class of relationships for which third-party retaliation is unlawful, the Court expressed the expectation that close family members “will almost always” fall within the protected group whereas “mere acquaintance[s] will almost never do so.” In any event, the Court found it “obvious” that a reasonable worker could be discouraged from filing a discrimination charge if she knew that her fiancé would be fired in response.

The Court next considered whether Title VII granted Thompson standing to bring a retaliation claim. Under Title VII, only a “person claiming to be aggrieved” has standing to sue. Rejecting a narrow reading of that phrase, the Court interpreted it to mean any plaintiff with an interest “arguably sought to be protected” by Title VII, and not simply the person who engaged in protected activity. Applying this so-called “zone of interests” test, the Court determined that Thompson’s interests were protected by Title VII. The Court reasoned that Title VII’s purpose is to protect employees from their employers’ unlawful actions. Accepting Thompson’s allegations as true, terminating *him* was the retaliatory act by which NAS punished *Regalado* for her

discrimination complaint. Under those circumstances, the Court held, Thompson was a “person aggrieved” with standing to bring a third-party retaliation claim. (The Court contrasted situations in which, for example, a shareholder claims the value of his stock decreased because the employer fired a valuable employee for discriminatory reasons—although arguably “aggrieved” by the discriminatory conduct, such a person does not have an interest protected by Title VII.)

### **3. The Impact/Significance of the Notable Decision.**

Through *Thompson*, the Supreme Court again makes clear that activities protected from retaliation under Title VII are to be viewed broadly. Third parties who are the subject/victim of an employer’s retaliatory action based on another person’s protected activity may now bring a retaliation claim if they fall within the “zone of interests” protected by Title VII. The exact scope of such third parties remains unclear. In effect, *Thompson* adds one more factor to be reviewed when taking adverse action against an employee: even if that individual has not engaged in protected activity such as complaining about discrimination, employers must now consider whether that individual shares a close relationship with another employee who did engage in such activity. Ignorance may be the best defense, however. If the employee’s supervisor and any other decision makers are not already aware of such a relationship, further investigation should probably be avoided—if the employer is not aware of a close relationship between the individual who engaged in protected activity and a third party, it should not be found to have retaliated against the third party when it takes adverse action against her or him.

Just as with first-party claims, understanding how to avoid third-party retaliation claims is the best defense. Employers should always be careful to ensure their decisions are based upon legitimate business reasons when taking adverse action against any employee.

## **Uniformed Services Employment and Reemployment Rights Act (“USERRA”) – “Cat’s Paw” Liability**

### **1. The Existing Legal Framework.**

The Uniformed Services Employment and Reemployment Rights Act (“USERRA”), like other federal anti-discrimination laws, forbids an employer from taking adverse employment action because of an individual’s protected status—in USERRA’s case, “membership” in a uniformed service. Also, as with a number of similar laws, USERRA provides that prohibited discrimination is established if the protected status is “a motivating factor” in the employer’s adverse action. In *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), the U.S. Supreme Court resolved conflicting lower-court views regarding “the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision” – so called “cat’s paw” liability.

## 2. Notable Supreme Court Decision.

Staub was employed as an angiography technician at Proctor Hospital. He was also a U.S. Army reservist. Staub's status as a reservist required him to attend drills one weekend per month and to train full time for two to three weeks each year. Both Staub's immediate supervisor, Janice Mulally, and her boss, Michael Korenchuk, were openly hostile to Staub's military service. For example, Mulally scheduled Staub for additional shifts so he could "pay back" Proctor for the time he spent at training. Korenchuk, for his part, referred to Staub's service as "a b[u]nch of smoking and joking and [a] waste of taxpayers['] money."

In January 2004, Mulally issued Staub a disciplinary memo for allegedly violating a workplace rule requiring him to stay in his work area when he was not working with a patient. The memo required Staub to report to Mulally or Korenchuk when he had no patients. In April 2004, one of Staub's co-workers complained to Proctor's Vice President of Human Resources, Linda Buck, and its Chief Operating Officer, Garrett McGowan, that Staub was frequently unavailable. McGowan directed Buck and Korenchuk to create a plan to resolve Staub's alleged unavailability. Before they could complete a plan, Korenchuk informed Buck that Staub had left his work area without first notifying Mulally or Korenchuk, in violation of the earlier memo. Buck reviewed Staub's personnel file and, without hearing Staub's side of the story, decided to fire him based on Korenchuk's accusation.

Staub filed a USERRA claim, alleging his termination was motivated by hostility to his military obligations. He contended that Mulally and Korenchuk were the hostile actors, and their actions influenced Buck's ultimate decision. A jury found in Staub's favor, but the Seventh Circuit reversed and granted Proctor judgment as a matter of law. The court held that for a cat's paw case to succeed, the biased non-decisionmaker must have exercised "singular influence" over the decisionmaker, such that the decision was the result of "blind reliance."

The Supreme Court reversed in turn. It declined to adopt Proctor's proposition that an "independent investigation" necessarily insulates the employer from cat's paw liability. Rather, the Court reasoned, "if the employer's investigation results in an adverse action *for reasons unrelated to the supervisor's original biased actions* . . . then the employer will not be liable" (emphasis added). (The Court noted it would be the employer's burden to establish that defense.) Conversely, if a so-called independent investigation takes the supervisor's biased information into account, and does not determine the adverse action is justified *wholly apart* from that information, then the supervisor's discriminatory bias may remain a motivating factor of the adverse action.

Focusing on USERRA's "motivating factor" language, and examining agency and tort theories of liability, the Court concluded that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." Applying this holding to Staub's case, the Court found there was evidence from which a jury could conclude both Mulally and Korenchuk intended for Staub to be fired when they issued the disciplinary memo and later reported he had violated it. Further, the evidence showed those actions by the supervisors were causal factors underlying Buck's decision

to terminate Staub. Accordingly, the Seventh Circuit had erred when it granted Proctor judgment as a matter of law.

### **3. The Impact/Significance of the Notable Decision.**

*Staub*'s holding is likely to extend beyond USERRA to similar “cat’s paw” cases under other federal anti-discrimination laws with similar “motivating factor” language. In particular, *Staub* will make it more difficult for employers to escape liability for actions of supervisors and managers that arguably result from discriminatory bias. Under *Staub*, an independent investigation by Human Resources or a high-level manager may be insufficient to establish a legitimate, nondiscriminatory business justification for an adverse employment decision if the discriminatory bias of a lower-level supervisor or manager contributes to the decision. To avoid such a result, when a manager is asked to make an adverse employment decision based, even in part, on discipline imposed or misconduct reported by a subordinate supervisor, the manager must obtain all relevant facts and independently determine that the adverse action is both warranted and free from discrimination.

## **Fair Labor Standards Act – Filing Prerequisite for Retaliation Claims**

### **1. The Existing Legal Framework.**

The Fair Labor Standards Act (“FLSA”) forbids employers from discharging or otherwise discriminating against an employee because the employee has “filed any complaint” alleging an FLSA violation. Federal Courts of Appeals have split as to whether this anti-retaliation provision protects oral as well as written complaints.

### **2. Notable U.S. Supreme Court Decision.**

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), the U.S. Supreme Court resolved the conflicting Circuit views. Kasten objected that his employer’s placement of time clocks—between the areas where workers donned and doffed protective gear and where they carried out their assigned tasks—prevented employees from being paid for compensable donning and doffing time under the FLSA.<sup>1</sup> After being discharged, Kasten filed suit alleging he was terminated in retaliation for his repeated oral complaints to his supervisors and other Saint-Gobain management about the location of the clocks. Concluding the FLSA’s anti-retaliation provision does not cover oral complaints, the district court granted Saint-Gobain summary judgment, and the Seventh Circuit Court of Appeals affirmed.

The Supreme Court reversed. While acknowledging that “filings” may more commonly be done in writing, it found that dictionary definitions, statutes, and court decisions contemplate or at least permit the “filing” of oral statements. The Court then determined that Congress intended the FLSA’s anti-retaliation provision to apply to oral complaints, because a contrary conclusion would undermine the Act’s basic objectives, as well as its enforcement scheme, in which employee complaints play a primary role. In addition, limiting the “filing” of complaints

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<sup>1</sup> In a separate case, the district court agreed the employer thus violated the FLSA.



to those in writing could prevent government use of hotlines, interviews, and other oral methods of receiving complaints.

At the same time, the Court agreed with Saint-Gobain that employers are entitled to fair notice that an employee is making a complaint that could serve as the basis for a later claim of retaliation. Further, the Court reasoned that “filing a complaint” contemplates some degree of formality. Accordingly, the Court held, to fall within the scope of the anti-retaliation provision, a complaint, whether oral or written, “must be sufficiently clear and detailed for a reasonable employer to understand it . . . as an assertion of rights protected by the [FLSA] and a call for their protection.”

Citing procedural grounds, the Court did not reach one of Saint-Gobain’s arguments—that the FLSA’s anti-retaliation provision applies only to complaints filed with the government, not those made solely to a private employer. However, the Court noted that such a limit would discourage desirable use of informal workplace grievance procedures that could result in employer compliance.

### **3. The Impact/Significance of the Notable Decision.**

*Kasten* continues a trend of Supreme Court decisions easing the way for retaliation claims. Although the Court did not decide whether complaints made to employers, rather than governmental agencies, are covered by the FLSA’s anti-retaliation provision, its dicta on that issue, as well as its reasoning on protection for oral complaints, suggests that if squarely presented with the issue, the Court will find complaints to employers *are* protected. As a result, employers should not only take oral complaints about FLSA issues seriously, but must also ensure that any ensuing conduct toward the complainant that could be deemed retaliatory is firmly based on legitimate business reasons. Fortunately for employers, the Court identified a standard for distinguishing between “filing” an FLSA complaint and simply “letting off steam.” To “file” an oral complaint that will afford protection from retaliation, an employee must make a clear, detailed statement that a reasonable employer would understand is an assertion of the employee’s FLSA-protected rights.

## **Fair Labor Standards Act – Overtime Entitlement of Residential Home Employees**

### **1. The Existing Legal Framework.**

The FLSA, which sets national minimum wage and overtime requirements, applies to individual employees who are engaged in commerce or in the production of goods for commerce, or who are employed in an “enterprise” that is engaged in such activity. Originally, employees of non-profit organizations were understood not to be covered by these terms. Subsequently, the FLSA was amended to include within “enterprise” coverage, regardless of their non-profit status, businesses engaged in “the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution,” and certain schools for handicapped or gifted children. Employees of such institutions are protected by the FLSA’s minimum wage and overtime provisions. In *Probert v.*

*Family Centered Servs. of Alaska, Inc.*, 2011 U.S. App. LEXIS 12691 (9th Cir. 2011), the Ninth Circuit considered whether certain family homes are subject to the FLSA’s enterprise coverage.

## **2. Notable Ninth Circuit Decision.**

The Proberts worked as “house parents” at a home owned by Family Centered Services of Alaska (“FCSA”). Each FCSA home housed up to five severely emotionally disturbed children. While the children resided in the homes and participated in group therapy sessions conducted there by outside clinicians, they attended local public schools and received most of their medical and psychological treatment outside the homes.

The Proberts and other FCSA house parents brought suit, alleging FCSA had failed to pay them overtime under the FLSA. The trial court found the FCSA homes were covered “enterprises” under the FLSA because they were “institutions primarily engaged in the care of...the mentally ill.” The Ninth Circuit reversed, disagreeing with the trial court for two reasons.

First, the Ninth Circuit found that the homes were not primarily engaged in providing “care” as that term is used in the FLSA. Instead, the Court concluded, the homes provided a residence to the children but not the sort of “treatment” that would constitute “care” in this context. The Court made particular note of the fact the children received the bulk of their treatment *outside* of the home, and the house parents themselves were not licensed medical or social service professionals.

Second, the Court found the homes were not “institutions” within the meaning of the FLSA. In making this determination, the Court looked to the plain meaning of the term as well as the other institutions included in the statute, such as hospitals and schools. The Court concluded that such “institutions” are facilities staffed by professionals and provide comprehensive medical, psychological, or educational programs to a large population. The FCSA homes did not meet this definition.

## **3. The Impact/Significance of the Notable Decision.**

Although the decision in *Probert* is a narrow one based on the particular facts involved, it is an example of the detailed analysis required in determining whether employers who operate residential facilities are operating in compliance with the FLSA’s wage and hour provisions. In some cases, those provisions exempt facilities from payment of minimum wage and overtime requirements. In addition to the “enterprise” exception addressed in *Probert*, Washington and federal law each provide certain exemptions from overtime requirements when employees reside at their place of employment. To be sure they are complying with applicable law, but also getting the benefit of its exemptions, employers that operate group homes, or other facilities in which employees reside as well as work, should take care—advisably with the assistance of legal counsel—in analyzing whether their employees are entitled to minimum wage and overtime protections. Failure to comply with federal and/or state law in this area can subject employers to significant liability, potentially including double damages and attorney fees.

## **Computer Fraud and Abuse Act – Unauthorized Access to Confidential Information**

### **1. The Existing Legal Framework.**

The Computer Fraud and Abuse Act (“CFAA”) prohibits, in part, knowingly and intentionally accessing “a protected computer without authorization” or “exceed[ing] authorized access, and by means of such conduct further[ing] . . . fraud and obtain[ing] anything of value.” Violations of CFAA carry both civil and criminal penalties. Employers have attempted to argue, with mixed results, that employees who access information on an employer’s computer network for their own personal gain—such as by taking confidential information to start a competing business—exceed their authorized access to the employer’s network, thereby violating the CFAA.

In *LVRC Holdings, LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009), the Ninth Circuit held that as long as an employee has permission to access the employer’s computer for *some* purpose, then access is not “without authorization” for purposes of the CFAA, even if the employee uses the access contrary to the employer’s interests. The Court further held that, inasmuch as the employer in that case had not placed any restrictions on the employee’s use of the employer’s computer system, the employee did not “exceed” authorized access when he obtained documents from the system that he later used to compete with the employer.

### **2. Notable Ninth Circuit Decision.**

In *United States v. Nosal*, 642 F.3d 781 (9th Cir. 2011), the Ninth Circuit clarified the circumstances in which an employee *may* be held liable under the CFAA—criminally, and presumably civilly—for exceeding authorized access to an employer’s computer. Nosal was an executive at Korn/Ferry International, an executive search firm. Shortly after he left the firm, he engaged three Korn/Ferry employees to help him start a competing business. Those employees used their access to Korn/Ferry’s computer system to obtain for Nosal source lists, names, and contact information from a highly confidential and comprehensive database of executive candidates.

Nosal was indicted for aiding and abetting access to Korn/Ferry’s computer network in violation of the CFAA. Rejecting his arguments that *Brekka* insulated him from liability, the Ninth Circuit held that the plain language of the CFAA extends to instances where an “employee uses . . . authorized access ‘to obtain or alter information in the computer that the accesser is not entitled [*in that manner*] to obtain or alter.’” (Emphasis added.) Specifically, “as long as the employee has knowledge of the employer’s limitations [on authorized access], the employee ‘exceeds authorized access’ when the employee violates those limitations.” This rule applies whether the restrictions are on *access* to the computer or on *use of the information contained* in the computer.

The Court noted that unlike the employer in *Brekka*, Korn/Ferry had a computer policy that clearly controlled electronic access to its database in a number of ways: unique usernames and passwords; controlled physical access to the servers storing the database; agreements with all

employees restricting their use and disclosure of information from the database; placement of the phrase “Korn/Ferry Proprietary and Confidential” on every report generated from the database; and warnings that disciplinary action or criminal prosecution would result from unauthorized access to the database. These steps provided ample notice to Nosal’s accomplices that their actions were not authorized and could subject them to criminal liability.

Importantly for employees, the Ninth Circuit stated that the relevant section of the CFAA does not criminalize simple violation of an employer’s computer restrictions, such as use of work computers to access personal email accounts or check basketball scores. To be criminally liable, an employee must also have the intent to defraud, and further that fraud and gain something of value by accessing the computer system in excess of authorized use.

### **3. The Impact/Significance of the Notable Decision.**

While *Nosal* concerned a criminal indictment, its holding should extend to civil violations as well. It bears emphasizing that even under *Nosal*, the burden is *on the employer* to take appropriate steps to control access to sensitive information and to give employees appropriate notice of restrictions on their access to, and use of, such information. Employers should be mindful of the significant steps that Korn/Ferry took to protect its information. Reviewing and updating electronic resources policies, providing regular notice to employees about the limits of authorized use, using confidentiality agreements, and consistently enforcing agreements and restrictions are all necessary steps to protect confidential information from misuse. It is also a best practice to immediately terminate access to protected systems for departing employees and, where appropriate, to audit an employee’s use of those systems for evidence of misuse or misappropriation of confidential information.

## **False Claims Act – Confidentiality Agreements**

### **1. The Existing Legal Framework.**

The False Claims Act (“FCA”) imposes liability on those who defraud governmental programs. Violations of the FCA include (1) knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval, (2) knowingly making, using or causing to be made or used, a false record or statement material to a false or fraudulent claim, or (3) conspiring to commit a violation. To promote the exposure of fraud, the FCA has a *qui tam* provision that permits private persons (known as “relators”) to bring civil actions on behalf of the United States and claim a portion of any award recovered through the suit. To further encourage employees to expose fraud, an anti-retaliation provision in the FCA protects employees while they are collecting information about a possible fraud. Courts have often held that an employer’s confidentiality agreement is unenforceable to the extent it conflicts with the purpose of the FCA and prevents employees from disclosing information evidencing fraud.

## 2. Notable Ninth Circuit Decision.

In *Cafasso v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047 (9<sup>th</sup> Cir. 2011), the Ninth Circuit rejected, at least for the present, a former employee's argument that the Court should adopt a public policy exception to enforcement of confidentiality agreements that would allow employees to disclose confidential employer information in furtherance of an FCA action.

During her employment with General Dynamics, Cafasso discovered information that she believed to be evidence of fraud against the government. She reported her findings to her supervisor, but no action was taken. Sometime later, Cafasso's department was eliminated and her employment was terminated. After being told of her termination, but before leaving her employment, Cafasso copied almost eleven gigabytes of data from her employer's computers in anticipation of bringing a *qui tam* action under the FCA. Documents misappropriated included attorney-client privileged communications, trade secrets belonging to General Dynamics and other contractors, internal research and development information, sensitive government information, and at least one patent application that the Patent Office had placed under a secrecy order.

When General Dynamics discovered Cafasso had taken the internal documents, it brought suit in state court based on a confidentiality agreement she executed at the start of her employment, and obtained a temporary restraining order requiring return of the documents. Two days later, Cafasso filed a *qui tam* action in federal district court. After some legal wrangling, Cafasso's action proceeded in federal court, with General Dynamics filing a counterclaim alleging, among other things, that Cafasso's appropriation of its electronic files breached her confidentiality agreement with the company. The district court granted summary judgment in favor of General Dynamics on its counterclaim.

In Cafasso's appeal, she admitted the files she copied contained information covered by the confidentiality agreement. While not disputing that she violated the agreement, she urged the Ninth Circuit to adopt a public policy exception to enforcement of such contracts, which would allow employees to disclose confidential information in furtherance of an FCA claim. The Court declined to adopt such a public policy exception in Cafasso's case. In reaching its conclusion, the Ninth Circuit focused on the vast and indiscriminate scope and volume of the documents Cafasso had copied. Allowing a public policy exception in such circumstances, the Court reasoned, would effectively make all confidentiality agreements unenforceable as long as employees later filed FCA claims.

The Court nevertheless noted that there was some merit to Cafasso's proposal, and left the door open for future claims that removal and disclosure of documents covered by a confidentiality agreement is permitted when done in furtherance of an FCA claim. If it were to adopt such a public policy exception, the Court advised, those asserting protection would need to justify why removal of the particular documents they took was reasonably necessary to pursue their FCA claim.

### **3. The Impact/Significance of the Notable Decision.**

*Cafasso* makes clear that employees cannot flout confidentiality agreements with their employers by hiding behind the FCA while indiscriminately misappropriating volumes of confidential data. As both *Cafasso* and *Nosal* (above) make clear, to best protect themselves, employers should ensure that they have written confidentiality policies in place, as well as signed confidentiality agreements for all employees who have access to sensitive confidential information. While such policies and agreements may not shield employers from all abuse, they should help curb misappropriation of confidential information, and also serve as a basis for enjoining employees from inappropriately using any confidential information taken from the employer.

## **Family Medical Leave Act – Interference Claims**

### **1. The Existing Legal Framework.**

The Family Medical Leave Act (“FMLA”) provides eligible employees with up to 12 weeks of leave per year and, except in specified circumstances, guarantees reinstatement to the same or an equivalent position upon return from the leave. Employers are prohibited from: (1) discriminating or retaliating based on employees’ exercise of their FMLA rights; and (2) interfering with, restraining, or denying an employee’s rights to FMLA leave and reinstatement following leave. Courts have referred to alleged violation of these prohibitions, respectively, as “discrimination” or “retaliation” claims, and “interference” claims.

### **2. Notable Ninth Circuit Decision.**

In *Sanders v. City of Newport*, 2011 U.S. App. LEXIS 5263 (9th Cir. March 17, 2011), the Ninth Circuit considered which party to an FMLA interference claim bears the burden of proof where the employer asserts it had a legitimate reason for not reinstating an employee to her former position following leave. Sanders was a utility billing clerk for the City of Newport, Oregon. After the City moved her office and switched to using a lower-grade billing paper, she began experiencing health problems. Her doctor diagnosed her as having multiple chemical sensitivity disorder triggered by her exposure to the lower-grade paper and poor air quality at her new work location. Sanders took FMLA leave to see if her health would improve with time away from those conditions.

The City required Sanders to present a “fitness-for-duty certificate” before it would return her to work following her leave. Her doctor provided a letter stating Sanders could return to work provided she avoided use of the low-grade paper. Although the City had stopped using the paper during Sanders’ leave, and she asserted her desire to return to work, the City terminated her employment, saying it could not accommodate her doctor’s restrictions or guarantee her a safe working environment given her chemical sensitivities. Sanders brought suit alleging, in part, that the City had interfered with her FLMA right to reinstatement. At trial, the district court instructed the jury that in order to establish this claim, Sanders had to prove the City denied her reinstatement “without reasonable cause.” The jury returned a verdict in the City’s favor.

Reversing the verdict, the Ninth Circuit held the instruction on Sanders' FMLA interference claim was erroneous, and likely had impact on the jury's decision. To establish a *prima facie* case on an FMLA interference claim, the Court stated, an employee need prove only that she was entitled to FMLA benefits, and her employer denied the benefits to which she was entitled. Unlike in a discrimination or retaliation claim, the employer's intent is irrelevant in determining liability for FMLA interference. Further, while FMLA regulations list specific factors that will excuse reinstatement—such as that the employee is unable to perform the essential functions of her/his position due to a medical condition—“reasonable cause” is not one of the listed factors. Based on the language of the regulations, the Court concluded that when an employer asserts it has a legitimate reason to deny reinstatement following FMLA leave, the employer bears the burden of proof on that issue, rather than the employee having to disprove it.

### **3. The Impact/Significance of the Notable Decision.**

*Sanders* is an important reminder that reinstatement following valid FMLA leave is an employee entitlement with only a few, specified exceptions. If an employer believes one of the exceptions applies, it should be sure it will be able to support that position if litigation ensues. Although *Sanders* does not address the issue, where the employer believes, in particular, that an employee cannot return to work because s/he is unable to perform the essential functions of the job, the employer should consider whether the employee might be entitled to additional, non-FMLA leave as a form of reasonable accommodation under the ADA or state disability law. Engaging in the interactive process and providing additional leave is likely to provide more information about whether the employee will be able to return to work in the long run, and thus will better support a termination decision, if that is the ultimate outcome.

## **Family Medical Leave Act – Sufficiency of Medical Certification**

### **1. The Existing Legal Framework.**

Under the FMLA, employees who meet certain eligibility requirements may qualify for up to 12 weeks of job-protected leave. To determine whether an employee qualifies for leave, an employer may require medical certification supporting the request. Such certification is sufficient if it states, among other things, “the appropriate medical facts within the knowledge of the [employee's] healthcare provider regarding the [employee's serious health] condition,” and need for leave. In *Lewis v. U.S.*, **641 F.3d 1174 (9th Cir. 2011)** the Ninth Circuit considered how much information is required to satisfy this element of the FMLA's certification standard.<sup>2</sup>

### **2. Notable Ninth Circuit Decision.**

Lewis was a director of a child development center on the Elmendorf Air Force Base. In 2006 she requested leave under the FMLA for post-traumatic stress disorder (“PTSD”). The Air

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<sup>2</sup> Although the Court in *Lewis* interpreted FMLA provisions and regulations that are specifically applicable to federal government employees, the same language is used in the statutory provisions and regulations applicable to other employees.

Force requested a medical certification to support her request and provided her with a standardized form to use. In response, Lewis provided a prescription and letter from her psychiatrist, along with the completed form. The form stated that Lewis had been diagnosed with PTSD and needed therapy, medical treatment, bed rest, two prescription medications, and 120 days off work. The Air Force advised Lewis that her certification was insufficient, but she refused to provide any additional documentation. When she nevertheless took time off, the Air Force labeled her absent without leave and removed her from employment. After an adverse administrative decision, Lewis sued under the FMLA.

The Ninth Circuit held that the Air Force's actions were lawful. Specifically, the Court found that Lewis' documentation "contain[ed] no explanation as to why Lewis was unable to perform her work duties and no discussion about whether additional treatments would be required for her condition." When she refused to provide more information, these deficiencies remained uncorrected and resulted in her failure to meet the FMLA's minimum requirements.

The Ninth Circuit rejected Lewis' argument that the Air Force should have asked for a second medical opinion, finding the "need for second or third opinions is triggered only when an employer 'has reason to doubt the validity' of the medical release." Here the Air Force questioned the *sufficiency*, not the *validity* of the certification.

### **3. The Impact/Significance of the Notable Decision.**

Although *Lewis* was a victory for the Air Force, it is also a good reminder to employers that FMLA certification is a tricky business. While employers are entitled to require provision of the information listed in the statute to certify leave requests, asking for more than that, or otherwise overstepping the FMLA's limitations (by having the employee's direct supervisor speak directly with the employee's doctor, for instance) can also land an employer in hot water. Employers should follow up to ensure they are getting accurate and complete information, but also be careful in taking adverse action against an employee who has requested leave.

## **Americans with Disabilities Act – "One-Strike" Drug-Testing Rules**

### **1. The Existing Legal Framework.**

Although current illegal drug use and addiction are not protected as disabilities under the Americans with Disabilities Act ("ADA"), the ADA does prohibit employment discrimination based on the fact a person previously used drugs, when the person has been rehabilitated and is no longer engaging in illegal drug use.

### **2. Notable Ninth Circuit Decision.**

In *Lopez v. Pacific Maritime Association*, 636 F.3d 1197, amended, 2011 U.S. App. LEXIS 19620 (9<sup>th</sup> Cir. 2011), the Court considered the validity of an employer's "one-strike" pre-employment drug-testing rule challenged by a rehabilitated drug user who years earlier failed a pre-employment drug screening. The Pacific Maritime Association represents the shipping



lines, stevedore companies, and terminal operators that run ports along the west coast of the United States. The Association enforces policies concerning the hiring of longshore workers at those ports. In response to several serious accidents and fatalities, the Association, with the support of the longshore workers' union, adopted a one-strike rule, which permanently eliminates from hiring consideration (at the time or in the future) any applicant who tests positive for drug or alcohol use during a pre-employment screening. The Association gives each applicant at least seven days' notice prior to the screening.

In 1997, Santiago Lopez applied for a longshoreman position at the port in Long Beach, California. Per the Association's policy, Lopez, who was addicted to drugs at the time, was given a standard drug screening. He tested positive for marijuana. The Association disqualified him from employment under its one-strike rule. In 2002, Lopez underwent drug and alcohol treatment, reportedly with success. In 2004, he reapplied for a longshoreman position. The Association rejected his application due to his prior disqualification.

Lopez sued the Association, raising both disparate treatment and disparate impact claims under the ADA. He alleged that: (1) the one-strike rule was facially discriminatory against recovering addicts because it eliminated all such individuals from hiring consideration; (2) the Association adopted the rule with the intent to exclude recovering addicts from its workforce; and (3) the rule disparately impacted recovering addicts.

On appeal, the Ninth Circuit affirmed the trial court's grant of summary judgment, finding the one-strike rule did not violate the ADA. First, the Court found that the rule did not single out recovering addicts, because it eliminated *all* candidates who tested positive for illegal drug use, whether because of an addiction or "because of an untimely decision to try drugs for the first time, recreationally, on the day before the test." Conversely, if a recovering addict was clean the day s/he took the test, s/he could successfully complete the screening. Thus the triggering event for the one-strike rule was a failed drug test, not an applicant's (former) addiction. Next the Court rejected Lopez's argument that the rule was adopted with the intent to exclude recovering addicts from the workforce. To the contrary, the Court found, the rule was adopted in response to serious safety concerns. Finally, the Court rejected Lopez's disparate impact claim, finding he had produced no evidence that the rule actually excluded recovering addicts disproportionately.

### **3. The Impact/Significance of the Notable Decision.**

*Lopez* supports an employer's right to permanently reject job applicants based on pre-employment drug screening.<sup>3</sup> Still, it remains critical to approach drug testing appropriately. Recovering addicts who are not currently using illegal drugs are protected under the ADA. As a result, while employers may screen for current illegal drug use, they should avoid inquiries into past use or treatment for abuse. In addition, government employers must limit testing to

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<sup>3</sup> The Court refused to consider Lopez's argument in a petition for rehearing that disparate impact claims under the ADA do not require statistical evidence and may be established where the employer uses "selection criteria that screen out or tend to screen out an individual with a disability or a class of [such individuals] unless . . . consistent with business necessity." Thus, there remains the possibility a one-strike rule will be found unlawful on that alternate ground in the future.

individuals whose job duties justify the intrusion into their privacy (such as employees who will perform safety-related functions), and employers of unionized workforces will need to abide by the terms of applicable collective bargaining agreements (or engage in bargaining before adopting a drug-screening program). Lastly, while not legally required to do so under the ADA or Washington law, employers may avoid risks by extending a conditional offer of employment *before* engaging in drug screening.

## **Worker Adjustment and Retraining Notification Act – “Voluntary Departures”**

### **1. The Existing Legal Framework.**

The Worker Adjustment and Retraining Notification (“WARN”) Act requires an employer planning a plant closing and/or mass layoff to give each “affected employee” 60 days’ written notice. “Affected employees” are those who may reasonably be expected to experience an “employment loss” as a result of the closure or layoff. The Act defines “employment loss” as an employment termination, other than discharges for cause, voluntary departures, and retirements. The notice requirement only applies if the plant shutdown or layoff results in an employment loss for 50 or more employees at any one location within 30 days.

### **2. Notable Ninth Circuit Decision.**

In *Collins v. Gee West Seattle LLC*, 631 F.3d 1001 (9th Cir. 2011), the Ninth Circuit considered whether employees who stop coming to work because they have been informed the business will be closing have “voluntarily departed” within the meaning of the WARN Act and thus are not entitled to the Act’s notice requirements. On September 26, 2007, Gee West Seattle LLC issued a written memorandum notifying employees that although it was “actively pursuing” the sale of its business, if a buyer was not found by October 7, 2007, the company would close its doors and terminate all but certain administrative employees. At the time of the announcement, Gee West employed approximately 150 workers. Following the announcement, employees began to stop reporting to work. By October 5, 2007, only 30 employees remained. Gee West ceased business that day, rather than on October 7 as originally announced, because there were too few employees to maintain its operations.

Gee West employees filed suit asserting that the company violated the WARN Act by failing to give them 60 days’ notice of the closure. In response, Gee West argued that: (1) the approximately 120 employees who stopped coming to work were “voluntary” departures because they left of their own free will before the plant closed; and, (2) given that there were only 30 remaining employees subject to “involuntary” termination at the time the business closed, the WARN Act was never implicated. Agreeing with Gee West, the district court granted summary judgment in its favor.

The Ninth Circuit reversed. The Court reasoned that Gee West’s view was inconsistent with the purposes of the WARN Act in that it would allow employers to avoid responsibility for failing to give proper notice based solely on the number of employees remaining at the time of closure, even though numerous employees may have left *because of* the impending shutdown. In

practical terms, however, an employee's departure because the business is about to close is a *consequence* of the shutdown and should be considered a loss of employment when determining whether a plant closure subject to the Act has occurred. On this basis, the Court held that employees who leave their job *because* the business is closing do not depart "voluntarily" within the meaning of the WARN Act, and are entitled to the Act's 60-day notice requirement. Further, unless there is evidence that employees stopped coming to work for reasons *other* than the shutdown, it cannot be presumed that they left voluntarily in such circumstances. The Court noted that its holding would not leave employers such as Gee West without some protection: to the extent providing 60 days' notice would preclude an employer from obtaining capital or the business necessary to continue its operations, the Act's "faltering business" exception allows the employer to provide only such notice of closure "as is practicable." The exception is an affirmative defense that must be raised and proven by the employer.

### **3. The Impact/Significance of the Notable Decision.**

*Collins* establishes that employees who leave a business *because* they have been informed the business is closing have not "voluntarily departed" and must be considered as part of the calculation of how many positions will be eliminated by the shutdown. Thus, when determining whether 60 days' notice must be given, employers should exclude from the number of employees expected to be terminated only those individuals expected to leave for reasons *unrelated* to the closing. If an employer is unsure whether the closure/layoffs will be necessary, and reasonably believes that giving notice of closure would result in a loss of workers that would hasten the business' decline or impair efforts for its sale, the employer must give notice as soon as practicable in order to take advantage of the "faltering business" defense.

## **First Amendment – The Petition Clause and Matters of Public Concern**

### **1. The Existing Legal Framework.**

The First Amendment to the U.S. Constitution includes two distinct clauses – the familiar "Free Speech Clause" and the perhaps less-well-known "Petition Clause." The Petition Clause protects "the right of the people . . . to petition the Government for a redress of grievances." Public employers may be familiar with employees who raise claims of retaliation for activity protected by the Free Speech Clause. In such cases, the employee must show that s/he was speaking as a citizen about a matter of public concern. Even if the employee's speech satisfies that requirement, the employee's free speech rights must then be balanced against the public employer's interest in promoting the efficiency of the public services it performs. In *Borough of Duryea v. Guarnieri*, 131 S.Ct. 2488 (2011), the U.S. Supreme Court considered whether the same test should apply to suits brought by employees under the Petition Clause.

### **2. Notable U.S. Supreme Court Decision.**

Guarnieri was the chief of police for the Borough of Duryea, Pennsylvania. When the Borough terminated his employment, Guarnieri filed a grievance challenging the decision. An arbitrator reinstated him. Prior to his return to work, the Borough's council issued Guarnieri a

series of written directives. The directives included, among other things, a prohibition on Guarnieri working overtime without prior approval and a reminder that he was to use his police car for official business only. In addition to filing a second grievance, Guarnieri filed a lawsuit alleging the directives were in retaliation for the earlier grievance over his termination and therefore violated the First Amendment's Petition Clause.

Reversing a Third Circuit decision affirming a jury verdict in Guarnieri's favor, the U.S. Supreme Court held that the same test applies to public employee claims under the Free Speech and Petition Clauses. In particular, for a public employee to succeed on a retaliation claim against her/his employer under the Petition Clause, the employee must show that the "petition" concerned a matter of public concern, and that the employee's First Amendment rights outweigh the government employer's interest in maintaining efficient and effective operations.

In reaching its conclusion, the Supreme Court noted that although the Free Speech and Petition Clauses are separate, they share a common purpose and effect. Of particular importance to the Court was the fact that Guarnieri could have similarly pursued his claim under the Free Speech Clause, alleging that he was retaliated against for the content (speech) of his grievance, rather than the form it took as a "petition." Had he done so, his claim would have been subject to the Free Speech public-concern test. The Court reasoned that applying differing standards to the two Clauses would open a loophole in First Amendment law that could embroil the judicial system in a "myriad of government decisionmaking," from "budget priorities" to "personnel decisions" that are taken in the wake of employee grievances, although not necessarily because of them. At the same time, the Court was persuaded that a number of federal anti-discrimination and other employment laws afford public employees sufficient protection from retaliation.

### **3. The Impact/Significance of the Notable Decision.**

*Guarnieri* reaffirms existing law in the Ninth Circuit, which already required public employees to show as part of any First Amendment claim that their protected conduct involved matters of public concern. Although the Supreme Court's decision thus does not change the legal landscape in Washington State, it is a good reminder to public employers to tread carefully when making decisions in response or even merely subsequent to public employee activities that may be protected by the First Amendment. Before taking adverse action against an employee who has engaged in First Amendment activity regarding matters that are arguably of public concern, a public employer should be prepared to defend its action based on legitimate, non-retaliatory grounds. Alternatively, or if the adverse action is *based* on the employee's protected activity, public employers need to be prepared to show that their interest in the efficient provision of services outweighed the employee's First Amendment rights. Before making that determination it is best to consult with counsel, as First Amendment law is a particularly complex and thorny area.

## **First Amendment – Requirements for Adverse Action Against Public Employees**

### **1. The Existing Legal Framework.**

Under the First Amendment to the U.S. Constitution, public employees who take action or speak out on matters of public concern enjoy some protection from resulting adverse action by their employer. That protection is not absolute, however. In *Pickering v. Board of Ed. of Township H.S. Dist. 205*, 391 U.S. 563 (1968), the U.S. Supreme Court held that in determining whether a public employer has run afoul of the First Amendment in disciplining or discharging an employee who has engaged in protected activity, courts must balance the interests of the employee as a citizen against the employer's interest in efficient operations. Under this rule, public employers are given significant latitude to discipline employees where their conduct actually disrupted or could reasonably be expected to disrupt the employer's operations.

### **2. Notable Ninth Circuit Decision.**

In *Nichols v. Dancer*, 2011 U.S. App. LEXIS 19006 (9th Cir. Sept. 15, 2011), the Court considered whether a public employer had produced sufficient evidence that there was a reasonable prediction of operational disruption, under the *Pickering* balancing test, to justify adverse treatment of an employee. Nichols worked for the Washoe County School District as an administrative assistant to the District's General Counsel, Jeffrey Blanck. Blanck and Nichols were also friends, who occasionally socialized outside the office. After a dispute developed between Blanck and the District Superintendent, Blanck was suspended while the District weighed how to proceed. Pending that decision, Nichols was transferred to the District's Human Resources office.

The District subsequently scheduled a public meeting to discuss, in part, Blanck's employment status. The day before the meeting, Nichols was informed she would be returned to her former position, regardless of what happened to Blanck. Nichols attended the District meeting, where she sat next to Blanck but did not speak with him. At the meeting, it was announced that Blanck was not being retained as General Counsel. The next day, Nichols was told she would not be returned to the General Counsel's office because she had attended the meeting and the District questioned her loyalty. She was given the choice of remaining in the HR Department, with her salary frozen, or taking early retirement. She opted to retire early and subsequently brought claims against the District for violating her First Amendment rights.

The District argued that Nichols' conduct was not related to a matter of public concern and, in any event, that her association with Blanck had the potential to disrupt the District's operations. Specifically, the District noted, if returned to the General Counsel's office Nichols would have had access to information about a wrongful termination suit Blanck had filed; the implication was that, given her relationship with Blanck, she could be expected to share the information with him.

On appeal, the Ninth Circuit found that Nichols' attendance at the District meeting touched on a matter of public concern. Further, while reaffirming that the *Pickering* test allows public employers "wide discretion and control over the management of their personnel and

internal affairs,” and that significant weight should be given to an employer’s reasonable judgments about the workplace, the Court held employers must provide *evidence* of likely disruption and cannot rely on mere speculation. In this case, the Court found “no evidence to suggest that Nichols’ association with Blanck actually disrupted the District’s operations,” “interfered with [her] job performance or negatively affected her relationships” with District employees. To the contrary, it appeared the District sanctioned Nichols solely because she attended the District meeting and sat next to Blanck. That conduct was insufficient to establish reasonable concern about her future loyalty, or that the District’s interests in workplace efficiency outweighed Nichols’ interest in associating with Blanck. The Ninth Circuit did not rule that Nichols’ rights *had* been violated, but simply that, given the lack of evidence to support the District’s position, summary judgment in its favor had been granted improperly. The Court remanded the case for further proceedings.

### **3. The Impact/Significance of the Notable Decision.**

The decision in Nichols confirms that while public employers enjoy significant discretion when it comes to employment decisions, their discretion still has its bounds. To avoid liability when they take action against employees *because of* conduct that is protected by the First Amendment, public employers must produce some *evidence* of actual or potential disruption to the employer’s operations. Speculation and unsupported general allegations about the potential for operational disruption will not overcome employees’ First Amendment rights.

## **Civil Rights Attorney’s Fees Awards Act – Partially Frivolous Cases**

### **1. The Existing Legal Framework.**

The Civil Rights Attorney’s Fees Awards Act authorizes a court to award reasonable attorneys’ fees to the prevailing party in certain civil rights cases. 42 U.S.C. § 1988. The U.S. Supreme Court has previously held that a defendant may also receive an award of attorneys’ fees if the plaintiff’s suit is frivolous.

### **2. Notable U.S. Supreme Court Decision.**

In *Fox v. Vice*, 131 S. Ct. 2205 (2011), the Court addressed the parameters for awarding a defendant attorneys’ fees when the plaintiff’s suit involves both frivolous and non-frivolous claims. The case arose out of an election in which Fox challenged incumbent Vice for the police chief position in Vinton, Louisiana. Fox won the election. He later filed a lawsuit in state court, asserting both state and federal claims based on Vice’s alleged use of “dirty tricks” in the campaign. The case was removed to federal court.

At the close of discovery, Vice filed a motion for summary judgment on Fox’s federal claims. Fox conceded those claims were not valid. The district court dismissed Fox’s federal claims and remanded the state claims, noting that any trial preparation, legal research, and discovery up to that time could be used by the parties in the state court proceedings. Vice requested that the federal court award attorneys’ fees for time spent defending against Fox’s

federal claims, including fees incurred during five depositions and extensive document review. In support, Vice submitted his attorneys' billing records showing the total time spent on the entire suit. The records did not distinguish between time spent on federal versus state law claims. The district court awarded Vice fees for all of his attorneys' time even though Fox's state law claims remained. The district court reasoned that the parties had focused on the frivolous federal claims, and all the claims were so interrelated that their defense entailed proof or denial of essentially the same facts. The Fifth Circuit affirmed.

On review, the Supreme Court adopted a "but for" test for instances in which a lawsuit includes both frivolous and non-frivolous claims. That is, a court may award a defendant only the portion of its fees it would not have incurred *but for* the frivolous claims. If the defendant would have incurred fees defending against *non-frivolous* claims in any event, for example by taking a deposition regarding the same factual issues, those fees may not be awarded. To hold otherwise, the Court reasoned, would give defendants a windfall, making them better off simply because a suit included frivolous claims. At the same time, the Court noted, any incremental costs caused by the presence of frivolous claims may be awarded to the defendant. The Court counseled against making the determination of fees into a second major litigation. It stated that trial courts need only do "rough justice" in making fee awards and should be given substantial deference on appeal. Still, inasmuch as the district court in this case did not delineate between the fees caused by the frivolous and non-frivolous claims, the Court vacated the decisions of the courts below and remanded for further proceedings.

### **3. The Impact/Significance of the Notable Decision.**

*Fox* confirms that a party may receive fees incurred in defending against frivolous claims, even where the case also involves one or more valid claims. In order to obtain an award, however, the defendant must submit documentation establishing the fees specifically attributable to the frivolous claims, and be able to show that those fees would not have been incurred to defend against the non-frivolous claims. Thus, defendants that believe some of the plaintiff's claims are frivolous should be sure their time records detail the work being done from the beginning, in order to be able to establish the costs that would not have been spent but for the frivolous claims.

### **Section 1981 Retaliation Claims – Statute of Limitations**

Like many federal statutes, Section 1981 of the Civil Rights Act of 1866 contains no express statute of limitations. Instead, federal courts typically have looked to "the most appropriate or analogous statute of limitations" under applicable state law to govern claims brought under Section 1981.

In *Johnson v. Lucent Technologies Inc.*, 2011 U.S. App. LEXIS 17520 (9<sup>th</sup> Cir. Aug. 4, 2011), the Ninth Circuit reversed a lower court's holding that the two-year statute of limitations for personal injury suits of the state where the suit was brought—in this case, California—applied to a Section 1981 retaliation claim. The Ninth Circuit relied on a federal four-year statute of limitations that applies to actions "arising under an Act of Congress enacted

after the date of the enactment of this section.” 28 U.S.C. § 1658 (a). Section 1658 was enacted on December 1, 1990. The Ninth Circuit reasoned that retaliation claims under Section 1981 were effectively ruled out by the U.S. Supreme Court’s decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), but were subsequently allowed by Congress’ enactment of the Civil Rights Act of 1991, Section 1981(b), which amended the key “make and enforce contracts” language in Section 1981 to include the “termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” Accordingly, the Ninth Circuit held, retaliation claims under Section 1981 now “arise under” Section 1981(b), an act of Congress that was enacted after December 1, 1990, and are thus subject to the federal “catchall” four-year statute of limitations.

## **Federal Arbitration Act – Class Action Arbitration**

### **1. The Existing Legal Framework.**

The Federal Arbitration Act (“FAA”), 9 U.S.C. § 2, applies in both federal and state courts to facilitate private dispute resolution through arbitration. The U.S. Supreme Court has stated that the FAA requires courts to place arbitration agreements on an equal footing with other contracts and enforce them according to their terms. The FAA permits courts to find arbitration agreements unenforceable based on garden-variety contract defenses such as fraud, duress, or unconscionability. However, the Court has excluded from the latter rule defenses that apply only to arbitration or because an arbitration agreement is at issue; such defenses are preempted by the FAA. The Court recently applied this principle to reject California law holding waivers of class-wide arbitration in certain consumer contracts unconscionable and therefore unenforceable. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The case has potential significance in the employment context.

### **2. Notable U.S. Supreme Court Decision.**

Vincent and Liza Concepcion purchased AT&T cell phone service advertised to include “free” cell phones. The Concepcions entered into a cell phone service contract with AT&T, which provided for arbitration of all disputes solely in the Concepcions’ individual capacity and not as part of class-wide arbitration. The Concepcions were not charged for their phones, but they were charged \$30.22 in state sales tax based on the phones’ retail value. They filed a complaint against AT&T in federal district court, which was consolidated with a class action alleging that the company engaged in false advertising and fraud by charging sales tax on phones advertised as “free.”

AT&T moved to compel individual arbitration with the Concepcions under the terms of their contract. In opposition, the Concepcions asserted that the contract’s ban on class-wide arbitration was unenforceable under California law.

In a 5-4 decision, the Supreme Court held that California law holding class-arbitration waivers unconscionable is preempted by federal law because the California rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in



enacting the FAA. In reaching its decision, the Court noted several ways in which class arbitration, if not voluntarily chosen by the parties, would be inconsistent with the FAA. Perhaps most important in the Court's view, class arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." In sum, the Court's decision requires California courts to enforce arbitration agreements as written (except when viable defenses are present), even if the agreement requires that consumer complaints be arbitrated individually.

### **3. The Impact/Significance of the Notable Decision.**

Although *Concepcion* required enforcement of an arbitration contract in the consumer context, its reasoning is likely to apply equally to agreements to arbitrate employment disputes. That is, the Supreme Court would probably hold that the FAA preempts any state law that treats as unconscionable and unenforceable agreements waiving the right to class arbitration of employment-related disputes. That is good news for employers, as class arbitration, like class litigation, is far more costly and time consuming than defending an individual action. In the wake of *Concepcion*, employers that enter arbitration agreements with their employees should consider including class-action waivers. (Inserting a waiver in an existing agreement would likely require providing some kind of consideration, such as a bonus.) Employers without arbitration programs may wish to consider adopting them as a means to manage the risks associated with wage-and-hour and employment-discrimination class actions.

Note that in May 2011, Rep. Henry Johnson (D-Ga.) introduced the Arbitration Fairness Act of 2011, H.R. 1873. The legislation aims to exempt consumer, civil rights, and employment disputes from the scope of the FAA. Although it has not been passed to date, such legislation could eventually overturn the decision in *Concepcion*.

## **II. NOTABLE WASHINGTON STATE COURT DECISIONS**

### **Washington Law Against Discrimination – Employer's Duty to Accommodate Disabilities**

#### **1. The Existing Legal Framework.**

Washington's Law Against Discrimination ("WLAD"), RCW 49.60, prohibits discrimination based on a number of protected factors, including sensory, mental, and physical disabilities. Failure to reasonably accommodate a disability is considered a form of disability discrimination. In 2007, the Washington legislature amended the WLAD to adopt a statutory definition of "disability." RCW 49.60.040(7). Under the new provision, an employee qualifies for reasonable accommodation if the employer has notice of the employee's impairment and either: (1) the employee's impairment substantially limits his or her ability to perform the job; or (2) medical documentation establishes "a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect." Two recent cases discuss the parameters of employers' duty to accommodate disabled employees following adoption of the new disability provision.

## 2. Notable Washington Court of Appeals Decision.

Prior to adoption of the new disability provision Washington courts had held that, to be legally required, accommodation of a disability must be *medically necessary*. In ***Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 244 P.3d 438 (2010)**, Division I of the Court of Appeals reexamined that requirement in light of the new definition of disability. Bruce Johnson worked as a tanker truck driver for Chevron U.S.A., Inc. Between July 2000 and April 2005, he took medical leave for back injuries on several occasions. In late 2003, Johnson was introduced to a hand tool used by ConocoPhillips drivers for lifting hoses. Johnson believed the tool alleviated some of his back pain and requested that he be allowed to use it. His doctor stated the tool was not “medically necessary,” but would likely benefit Johnson and make his job easier. Without determining whether the tool was an appropriate accommodation for Johnson, in particular, Chevron concluded that use of the tool could injure healthy workers and forbade its use by any of its drivers, including Johnson. In 2005, after Johnson sustained another back injury, medical examiners determined he could no longer work as a tanker truck driver and permanently restricted him to sedentary to light-medium duty. When he did not locate a satisfactory position within the company, Johnson left Chevron. From 2007 to 2009, he was employed as a tanker product delivery driver with other companies, where he was allowed to use the hand tool. He did not experience any further injuries.

Johnson sued Chevron for, among other things, failure to accommodate his disability by allowing him to use the hand tool as he requested. The trial court granted summary judgment on that claim.

On appeal, Chevron asserted that it satisfied its duty to accommodate by giving Johnson time off as ordered by his doctors. Chevron also argued that the hand tool was not “medically necessary” and therefore was not required as an accommodation. The Court of Appeals disagreed. The Court reasoned that under the new statutory definition of disability, “medical necessity” is no longer the sole basis for a right to accommodation. Instead, by the statute’s terms, *either* the impairment must have a substantially limiting effect on the employee’s ability to perform the job, such that accommodation is *reasonably* necessary, *or* there must be medical documentation that doing the job without accommodation is likely to aggravate the impairment so that it becomes substantially limiting. The Court concluded there was sufficient evidence for a jury to find at least one of those elements was satisfied. Accordingly, the case was remanded for trial.

## 3. The Impact/Significance of the Notable Decision.

*Johnson* expands the circumstances in which employers may be held responsible for accommodating their employees’ physical and mental impairments. According to *Johnson*, Washington’s new statutory definition of “disability” eliminated the requirement of proof of medical necessity when an employee’s impairment currently substantially limits his or her ability to do the job. Although the exact scope of this holding is not yet clear, the case suggests that employers must consider any reasonable accommodation requested by a disabled employee that could assist the employee in performing his or her job, regardless of whether the requested accommodation is technically “medically necessary.” *Johnson* also indicates that in considering

whether an accommodation is reasonable, employers should focus on the impact of accommodating the *individual* employee involved, not on the potential impact of providing the accommodation to all employees in the workforce. Importantly, *Johnson* does not appear to question employers' right to reject accommodations that would create an undue hardship.

#### **4. Notable Washington Court of Appeals Decision.**

In *Frisino v. Seattle School District*, 160 Wn. App. 765, 249 P.3d 1044 (2011), the Washington Court of Appeals addressed how far a Washington employer must go to attempt to provide reasonable accommodation to a disabled employee. Frisino, a teacher for the Seattle School District, reportedly began to experience adverse respiratory symptoms during the 1999-2000 school year. The District attempted multiple accommodations, including providing an air filter, assigning custodians to mop Frisino's classroom floor twice a week, and moving her to a different classroom. In 2004, Frisino was diagnosed with respiratory sensitivity to molds, chemicals, and other environmental toxins. Upon her doctor's recommendation that she be placed in a "clean environment," Frisino was transferred to Nathan Hale High School ("Hale"). There she found that her new classroom had visible mold and blackened ceiling tiles. Frisino's principal recommended that she move to a portable classroom, but she declined.

Both a private firm and the Seattle/King County Department of Health investigated and found there was no active mold growth, and the mold concentrations inside Hale were lower than those found outdoors. Even so, the District decided to "encapsulate" areas where visible mold was detected. During this process, Frisino requested an accommodation in the form of a move to another classroom, but she rejected the two options offered by the District. After leaving work complaining of respiratory distress, she requested that she be allowed to take time off until the conditions at Hale were corrected.

While Frisino was on leave, the District brought in yet another party, an industrial hygiene and toxicology consultant, to investigate. Although the consultant declared the environment was safe for most students and only a danger to those with the "most severe forms of immunocompromise," in December 2004 the District undertook partial remediation to remove visible mold. In January 2005, the District notified Frisino that she should return to work, but she refused. Upon undergoing an independent medical examination, she was diagnosed with a mental illness that causes fixation on dust, chemical exposure, and/or fumes/odors in the workplace. While the medical examiner recommended Frisino be provided a work space with good ventilation, no evidence of odors or strong chemical smells, and no animal dander or dust, he also said the condition was not work-related, and he recommended she return to work and continue to meet with a psychiatrist or psychologist. Over the next several months, Frisino contended there was still mold at Hale, and she requested to be placed in a different building, one that was newer, had good ventilation, was free of fragrances, and had no extreme temperature changes. Her doctor recommended that she be transferred to a site that was mold free, and a known "clean" environment. In April 2005, the District notified Frisino it could not grant her request to transfer from Hale. In June, the District terminated her employment based on her failure to return to her position.

Frisino sued the District, alleging it had violated the WLAD by failing to provide her with a reasonable accommodation. On appeal, Division I reversed the trial court's grant of summary judgment on that claim. The Court reaffirmed longstanding case law that an employer is not required to reassign an employee to a position that is already occupied, create a new position, or eliminate or reassign essential job functions. Further, it stated that where there are multiple modes of accommodation available, *the employer, not the employee*, is entitled to select the mode. However, where the initial method of accommodation is not effective, the employer must continue to try other methods until it finds one that is effective, or ultimately must assert that any remaining available modes of accommodation would constitute an undue hardship. The Court noted the importance of the interactive process in such situations. In Frisino's case, because it was not clear whether she ever returned to Hale to see if she could in fact work in the remediated environment, or whether there were other possible accommodations available to the District that would not create undue hardship, the Court remanded the case for trial.

## **5. The Impact/Significance of the Notable Decision.**

*Frisino* involved a situation in which an employer went to great lengths to accommodate an employee, but still was found potentially liable for not going far enough. The case's message is that an employer must attempt to provide an accommodation that *effectively* removes barriers preventing an employee from performing his or her job, and must try and try again to do so, if necessary, until either an accommodation *is* effective or any other possible accommodations would cause undue hardship. At the same time, an employee has a duty to communicate with his/her employer as to whether an accommodation is effective. *Frisino* suggests that where there is no simple, objective standard to measure whether an accommodation is effective—such as where an employee's condition requires a restriction on lifting a specific amount of weight—the employer must accept the *employee's subjective* view that an accommodation is not effective, and continue the interactive process. Fortunately for employers, *Frisino* also indicates that a string of unsuccessful attempts at accommodation will not give rise to liability as long as the employer engages in the interactive process in good faith and ultimately provides an effective accommodation or demonstrates that doing so would create undue hardship.

## **Washington's Medical Use of Marijuana Act – Application to Employment Decisions**

### **1. The Existing Legal Framework.**

In 1998, Washington voters approved the Medical Use of Marijuana Act ("MUMA"). MUMA provides a defense from criminal prosecution for physicians who prescribe and patients who use prescribed medical marijuana. As originally drafted, MUMA contained only one reference to its application in the employment context: "Nothing in this chapter requires any accommodation of any medical marijuana use in any place of employment . . . ." In 2007, the Washington legislature amended MUMA, which now states that nothing in the law requires "accommodation of any *on-site* medical use of marijuana in any place of employment . . . ." (Emphasis added.) The legislature's amendment opened the door to a claim that MUMA was intended to require accommodation of *off-site* use of medical marijuana, at least as long as the

use does not negatively impact an employee's job performance—that was the gist of the plaintiff's argument heard recently by Washington's Supreme Court.

## **2. Notable Washington Supreme Court Decision.**

In *Roe v. TeleTech Customer Care Management*, 171 Wn.2d 736, 257 P.3d 586 (2011), Jane Roe (who used a pseudonym because marijuana use remains illegal under federal law) sued TeleTech for terminating her employment after she failed a drug test required by TeleTech's substance abuse policy. Roe, whose doctor prescribed marijuana for her in accordance with MUMA, alleged that her marijuana use was "protected" by the statute and that she had been wrongfully terminated in violation of public policy and MUMA. The trial court granted summary judgment in favor of TeleTech, however, and the Court of Appeals for Division II affirmed.

In an 8-1 decision, the Washington Supreme Court ruled that MUMA does not protect medical marijuana users from discharge based on their marijuana use. The Court found that MUMA neither provides a cause of action nor creates a public policy that would support a claim for wrongful discharge by an employee who is terminated for using medical marijuana. Rather, based on its language and history, the Court reasoned, MUMA merely provides an affirmative defense to state *criminal* prosecutions of qualified medical marijuana users.

Roe did not argue that her discharge constituted disability discrimination or a failure to accommodate her use of what was, in effect, a prescribed medication—marijuana. Nevertheless, the Court indicated that such claims would be similarly unavailing. The Court noted that marijuana is illegal under federal law, and it expressed reluctance to conclude employers are required to allow employees to engage in illegal activity. In fact, the Court pointed out, the Washington Human Rights Commission has acknowledged that allowing employees to violate federal law by using medical marijuana is not required as a reasonable accommodation of a disability.

## **3. The Impact/Significance of the Notable Decision.**

*TeleTech* provides much-needed clarity concerning employers' rights and obligations with regard to medical marijuana use by job applicants and employees. Under *TeleTech*, employers with drug testing and use policies that call for rejection of job applicants and discharge of employees who test positive for drug use may lawfully apply their policies to individuals who use prescribed medical marijuana. Although *Teletech* addressed a situation where the employer's policy resulted in discharge, the case's reasoning almost certainly permits lesser disciplinary actions based on medical marijuana use—for example, warnings that further use will result in discipline up to and including discharge. Employers should keep in mind, though, that the medical conditions *underlying* an employee's use of medical marijuana may well constitute disabilities that warrant accommodation and are protected against discrimination. Thus, any discipline imposed for medical marijuana use should be supported by and consistent with the employer's policies regarding drug use, so as to avoid any appearance that impacted employees are being targeted based on their disabilities.

## **Washington Industrial Welfare Act – Meal and Rest Breaks**

### **1. The Existing Legal Framework.**

Under the Washington Industrial Welfare Act (“IWA”), RCW 49.12, employees are entitled to an unpaid 30-minute meal period for every five hours of work and a paid 10-minute rest break for every four hours of work. During such breaks, employees must be relieved of work responsibilities and allowed time to eat and generally engage in personal pursuits. Both public and private employers, including non-profits, must comply with these meal and rest break regulations. For good cause, the Department of Labor and Industries may grant a variance to employers who need to change meal and rest break times due to the nature of the work.

### **2. Notable Washington Court of Appeals Decision.**

In *Pellino v. Brink’s Inc.*, No. 65077-7-I, 2011 Wash. App. LEXIS 2541 (Div. I 2011), a class of Brink’s messengers and armored truck drivers brought suit alleging that they did not receive meal or rest breaks as required under the IWA. Brink’s personnel policies required employees to actively “be alert” and “look alert” at all times, including during meal and rest breaks. Further, Brink’s prohibited all personal activities while en route, except eating, drinking, and smoking in the truck.

Brink’s asserted that due to the nature of its business, its employees must continually and vigilantly secure the armored trucks and their contents. Although not provided specified time for meal and rest breaks, employees purportedly could take breaks as delivery schedules permitted. Brink’s argued that it met its obligations under Washington wage and hour law because it paid the drivers for all time on duty, including during their meal and rest breaks.

The trial court entered judgment in favor of the class members for over \$2 million in back pay, prejudgment interest, attorney fees, and costs. In affirming the judgment, the Court of Appeals adopted the view of the Washington Department of Labor and Industries that even when the employer pays for the meal period, and even though the breaks may be interrupted, employees must be given two 10-minute rest periods and a total of 30 minutes to eat and relax without doing any active work. Requiring employees to remain on call during rest breaks or the meal period may meet this requirement if employees can rest, eat, or attend to personal matters. If an employee must perform work during a break, however, that time does not count toward the required break period, which must continue until the full amount of rest time has been allowed. Further, a series of 10 intermittent, one-minute breaks does not provide sufficient respite from duty to satisfy the requirement of a 10-minute rest period. In Brink’s case, the requirement that employees remain vigilant and perform additional duties while on their routes meant the class members were *always* engaged in work activities, even while technically on break. As a result, the class members were deprived of any meaningful break from mental and physical exertion and had no opportunity for personal relaxation or activities, in violation of the IWA, which protects employees from conditions of labor that have “a pernicious effect on their health.”

### **3. The Impact/Significance of the Notable Decision.**

*Brink's* is an important reminder that it is each employer's responsibility to ensure that employees receive the meal and rest breaks to which they are entitled under the IWA. It is not sufficient to say that employees are free to take those breaks when they have time, while also imposing work requirements that do not permit employees to take breaks in a way that permits a meaningful respite from work activities. To avoid the risk of class action lawsuits and liability for significant back pay awards, as well as attorney fees and costs, Washington employers should have policies that clearly provide for meal and rest breaks, and should monitor work activities to be sure employees are in fact able to take their breaks.

## **Electronic Signatures and Opt-Out Agreements in the Employment Context**

### **1. The Existing Legal Framework.**

In our electronic age, some employers require only an employee's electronic signature on employment-related documents, including policy acknowledgements and employment agreements. Until recently, Washington court decisions have not discussed the enforceability of electronic signatures in the employment context. The Washington Court of Appeals' opinion in *Neuson v. Macy's Dept. Stores*, 160 Wn. App. 786, 249 P.3d 1054 (2011) gives employers reason to be cautious about relying on the enforceability of electronic signatures, as well as opt-out methods of obtaining employee agreement to procedures such as arbitration.

### **2. Notable Washington Court of Appeals Decision.**

Anjelia Neuson worked for Macy's Department Store in Silverdale and later in Spokane, Washington. After injuring herself at work, she filed a workers' compensation claim, took medical leave, and later returned to work with restrictions. Her employment was ultimately terminated. She filed suit against Macy's asserting claims of retaliation, disability discrimination, and wrongful discharge.

Macy's moved to compel arbitration pursuant to a program it had implemented to resolve employment-related disputes. The program initially utilized informal dispute resolution and culminated in binding arbitration. To avoid being bound to arbitrate employment disputes, an employee was required to affirmatively opt out of the arbitration component of the program. Macy's procedure was to give employees a one-page "Arbitration Election Form" allowing them to opt out of arbitration within 30 days of receiving the form. Employees who did not return the form were viewed as having agreed to arbitration.

Macy's alleged that when Neuson was working in its Silverdale store, she was sent the arbitration-election form by mail but failed to return it. In addition, when she began working at the Spokane store, she electronically signed an acknowledgment that she received the election form and understood she could decline to arbitrate disputes, but she did not return the form to show she wished to opt out. Thus, Macy's contended, Neuson had effectively agreed to

arbitration. For her part, Neuson denied receiving the election form in the mail or electronically, and she denied signing electronically for receipt of the election form.

The appellate court concluded that although Macy's established a presumption of having mailed Neuson the election form when she worked in Silverdale, her denial of its receipt and the fact she lived at three different addresses while in Silverdale were sufficient to raise a question whether she actually received the form, and therefore whether she could be held to have agreed to arbitration. Similarly, the court found Neuson's electronic signature by itself did not sufficiently establish that she received the election form. In particular, the court reasoned, the information making up Neuson's electronic signature—a string of numbers consisting of her Social Security number, birth date, and zip code—could have been available to other people. Because of these uncertainties, the court sent the case back to the lower court for a trial on whether Neuson and Macy's had agreed to arbitration.

### **3. The Impact/Significance of the Notable Decision.**

*Neuson* does not categorically reject the enforceability of electronic signatures and opt-out employment-related agreements. Nevertheless the decision illustrates the weaknesses inherent in those mechanisms for establishing employee acknowledgment or consent. Whereas an employee's handwritten signature affirmatively agreeing to a policy such as arbitration will generally be considered binding, reliance on an employee's *lack of response* to notice of a policy to establish *agreement* with the policy is dependent on proof that notice was given and can be challenged in a variety of ways. Electronic signatures based on commonly available information about an employee are also open to dispute. As a result, employers may want to "play it safe" by obtaining traditional signatures for key provisions, such as arbitration, noncompetition, and employment agreements. At the very least, employers that wish to rely on electronic signatures should develop safeguards, such as additional security protocols and encryption, in order to reliably authenticate an e-signature as belonging to a specific employee.

## **Washington Labor Law – Limits on Public Employees' Rights**

### **1. The Existing Legal Framework.**

In *Johnnie's Poultry Co.*, 146 N.L.R.B. 770, 775 (1964), the National Labor Relations Board established warnings that employers must give before interviewing employees in preparation for the employer's defense against an unfair labor practices complaint. Before any such interview, the employer must inform the employee: (1) the purpose of the questioning; (2) that no reprisal will take place regardless of whether or not the employee participates in the questioning; and (3) that participation in the interview is voluntary. An employer's failure to deliver such warnings, of itself, constitutes an unfair labor practice.

### **2. Notable Washington Court of Appeals Decision.**

In *City of Seattle v. PERC (Int'l Ass'n of Fire Fighters, Local 2898)*, 160 Wn. App. 382, 249 P.3d 650 (2011), the Washington Court of Appeals considered whether Washington



public employers must comply with *Johnnie's Poultry* requirements when interviewing union members in preparation for a disciplinary grievance arbitration. The dispute arose after the International Association of Fire Fighters, Local 2898 ("Union"), filed a grievance disputing disciplinary action taken against a Battalion Chief. In preparation for the grievance arbitration, the City interviewed Union members (other than the grievant) about their knowledge of the facts leading to the dispute. The Union objected to the interviews, asserting that the City could not question bargaining unit members without pre-arranging the interviews through the Union.

The Union filed an unfair labor practices complaint with the Public Employment Relations Commission ("PERC"), alleging employer interference with employee rights in violation of Washington law, RCW 41.56. PERC affirmed the hearing examiner's dismissal of the complaint because the Union failed to show the interviews were coercive. However, PERC also decided the rights identified in *Johnnie's Poultry* applied to the employees. The City appealed PERC's decision to Superior Court, and the Union then appealed that court's decision in favor of the City.

The Washington Court of Appeals upheld the Superior Court's reversal of PERC's decision regarding application of *Johnnie's Poultry* rights. The appellate court identified two conditions that must be met before a Washington public employer must administer *Johnnie's Poultry* warnings. First, the interview must concern a protected, union-related activity. Second, the questioning must occur in preparation for an employer's defense against an unfair labor practices complaint. Neither condition was met in this case. Although *pursuit* of a grievance is a protected right, in this case the individuals interviewed were not pursuing a grievance themselves but were simply asked to provide information about facts underlying *another* employee's grievance. Thus the individuals interviewed were not exercising protected rights. Nor were the interviews done in preparation for an unfair labor practices complaint. Accordingly, the City was not required to issue *Johnnie's Poultry* warnings before it interviewed the Union employees.

### **3. The Impact/Significance of the Notable Decision.**

*International Association of Fire Fighters* is good news for Washington public employers. The case clarifies that *Johnnie's Poultry* warnings need only be given where interviews will: (1) concern protected, union-related activity, and (2) be conducted to prepare for defense of an unfair labor practices charge. Before initiating interviews of employees in preparation to defend against an unfair labor practices charge, public employers may wish to consult legal counsel to determine whether the questioning could be considered to involve protected, union-related activity such that *Johnnie's Poultry* warnings must be given.

## **III. NOTABLE NATIONAL LABOR RELATIONS BOARD DECISIONS / RULES**

### **National Labor Relations Board – New Posting Requirement**

On August 31, 2011, the National Labor Relations Board ("NLRB") published a new rule requiring most private employers to post a notice describing employee rights under the National Labor Relations Act ("NLRA"). Although the new posting requirement was set to take effect

November 14, 2011, the effective date has been delayed until January 31, 2012, due to two lawsuits challenging the validity of the new rule, and the judge hearing one of the cases has suggested the effective date be pushed back further to allow for full review.

### **1. Summary of the Rule.**

The notice generally informs employees that they have the following rights:

- The right to organize and join a union;
- The right to bargain collectively;
- The right to discuss terms and conditions of employment with coworkers or a union;
- The right to strike or picket; and
- The right to refrain from engaging in union or other protected concerted activities.

The notice further contains information on how to contact the NLRB if employees believe their rights have been violated and lists a number of unlawful activities by both employers and unions.

### **2. Application and Compliance.**

The new posting requirement applies to all employers covered by the NLRA, whether or not they have a unionized workforce. The NLRA applies to most private employers with annual revenue inflow or outflow of at least \$50,000. The posting requirement does not apply to very small employers who have only a minimal impact on interstate commerce. (Complete jurisdictional standards are summarized in the rule.) The rule also applies to federal contractors, who are already required by the U.S. Department of Labor to post a similar notice.<sup>4</sup>

Employers can download the notice from the NLRB's website ([www.nlr.gov](http://www.nlr.gov)) or the NLRB will provide copies of the notice upon request at no cost to the employer. A translated version of the notice may be required if a significant portion of the workforce is not proficient in English. Employers should post the notice in a conspicuous place, including all places where other notifications of workplace rights and employer rules and policies are posted. Employers must also post the notice on Internet/Intranet sites if personnel rules and policies are customarily posted there. Failure to post the notice may be treated as an unfair labor practice under the NLRA, and may toll the statute of limitations for filing an unfair labor practice charge.

### **3. Legal Challenges to the Rule.**

The lawsuits opposing the new posting rule assert that requiring employers to post notices about union organizing rights is "forced speech" in violation of the First Amendment. Given that the outcome of the lawsuits is uncertain, we recommend complying with the posting rule (once it become effective) as these cases progress through the courts.

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<sup>4</sup> A contractor will be regarded as complying with the Board's posting rule if it posts the Department of Labor's notice.

## **National Labor Relations Act – Appropriate Bargaining Units**

### **1. The Existing Legal Framework.**

In determining whether a petitioned-for bargaining unit is appropriate, the NLRB normally looks to whether the employees in the proposed bargaining unit share a “community of interests.” For the healthcare sector, Congress amended the NLRA to require more comprehensive bargaining units for facilities such as acute care hospitals, ostensibly to prevent a proliferation of bargaining units that could lead to a greater number of work stoppages. The NLRB has traditionally examined the scope of appropriate bargaining units in other healthcare settings, such as nursing homes, under similar principles. In *Specialty Healthcare and Rehabilitation Center of Mobile*, 356 NLRB 56 (Aug. 26, 2011) the NLRB announced that it would no longer apply what it considered to be obsolete principles from NLRB decisions concerning nursing home bargaining units, and would instead apply the traditional community-of-interests test.

### **2. Notable NLRB Decision.**

Specialty Healthcare operated a nursing home facility, which included 53 certified nursing assistants (“CNAs”) as well as 33 other nonsupervisory, service-oriented staff including resident activity assistants, social services assistants, and cooks. The United Steelworkers union petitioned to represent a bargaining unit comprised of only the 53 CNAs. The employer contested the petitioned-for bargaining unit, arguing instead that under prior NLRB rulings the appropriate unit included the 33 other service and maintenance employees in addition to the 53 CNAs.

The NLRB rejected application of its prior precedent as outdated and instead applied a traditional community-of-interests analysis. Under that analysis it found that the CNAs clearly comprised an appropriate unit because they shared a strong community of interest due to their similar “training, certification, supervision, uniforms, pay rates, work assignments, shifts and work areas.” The NLRB also found relevant that the employees themselves had chosen to be organized separately.

The NLRB went on to hold that where “employees of a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classification, departments, functions, work locations, skills, or similar factors), and the [NLRB] finds that the employees in the group share a community of interest after considering the traditional criteria, the [NLRB] will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.” On the particular facts before the NLRB, it found that Specialty Healthcare had not made this heightened showing with respect to the 33 other employees it wished to include in the unit. Indeed, the evidence suggested those employees were distinct from, not similar to, the proposed unit of CNAs.

### **3. The Impact/Significance of the Notable Decision.**

Although Specialty Healthcare involves a nursing home facility, the NLRB's decision concerns broad application of the community-of-interest test. The NLRB's ruling invites smaller organizational efforts with employees who share a close-knit community of interests. Indeed, the NLRB was clear that a unit determination will not be inappropriate because the unit is small or because other employees share some interests with the proposed unit. Instead, employers bear a heightened burden to demonstrate an overwhelming community of interest if they wish to include within a proposed bargaining unit other employees who may share similar interests with the unit of employees as petitioned.

## **National Labor Relations Act – Successor Bar Doctrine**

### **1. The Existing Legal Framework.**

Labor law recognizes a number of “bars” to the ability of employees, employers, and other unions to file decertification or election petitions under certain conditions. The NLRB discarded one such bar – the “successor bar” – in 2002. Under that rule, when a successor employer acted in accordance with its legal obligations to recognize an incumbent union, the union was entitled to represent the employees in collective bargaining with the new employer for a reasonable period of time, without challenge to its representative status. In *UGL-UNICCO Service Co.*, 357 NLRB 76 (Aug. 26, 2011), the NLRB reinstated a modified version of the successor bar.

### **2. Notable NLRB Decision.**

UGL-UNICCO Service Company (“UGL”) was a successor employer and maintenance contractor at various locations throughout Massachusetts. UGL assumed the operations of Building Technologies, Inc., several of whose employees were represented by the Firemen and Oilers Union. Following the acquisition, the Area Trades Council sought to represent some of the employees in question. The NLRB Regional Director ordered an election based on the NLRB's prior decision revoking the successor bar doctrine.

Even in the absence of the successor bar doctrine, a new employer is a successor to the old for purposes of labor law when there is “substantial continuity between the predecessor and successor businesses and when a majority of the new company's employees had been employed by the predecessor. Under those circumstances, the new employer is required to recognize and bargain with the incumbent union, but is not required to adopt the existing collective bargaining agreement. Except in situations where it is “perfectly clear” that the successor intends to retain all of the prior employees, it can unilaterally set the initial terms and conditions of employment without first bargaining with the union.

A successor bar adds to the established principals outlined above, by creating a conclusive presumption of majority support for the union for a defined period of time, preventing any challenges to the union's status, whether by an employer's unilateral withdrawal of

recognition from the union or by a petition filed with the NLRB by the employer, by employees, or by a rival union. The NLRB concluded that such a bar was needed in successor relationships in order to give the existing bargaining relationship a fair chance to succeed in a setting where everything the employees and union have achieved can be swept away by the new employer.

In reinstating the successor bar, the NLRB went on to define the reasonable period of time during which the presumption of majority support applies. Specifically, in situations where the successor employer adopts the existing terms and conditions of employment as the starting point for bargaining, the presumption lasts for a period of six months from the date of the parties' first negotiations. In situations where the employer unilaterally sets such terms and conditions, however, the period lasts between six months and one year, depending on several factors including: (1) the complexity of the issues being negotiated; (2) the amount of time since bargaining commenced and the number of sessions; (3) the progress of negotiations; and (4) whether the parties are at an impasse. The burden is on the party seeking to invoke the successor bar to prove that a reasonable period of time has *not* elapsed.

The NLRB also defined a reasonable period in circumstances where the successor bar, when combined with the contract bar, might interfere with employee rights to choose their representative. The NLRB held that where (1) a first contract is reached by the successor employer and incumbent union within a reasonable period of time, and (2) there was no opportunity to file a petition during the final year of the predecessor contract by operation of the contract bar, then the contract bar applicable to election petitions is a maximum of two years instead of three.

### **3. The Impact/Significance of the Notable Decision.**

The obligations of companies who acquire union-represented operations are difficult to navigate, especially for employers without prior union experience. Reinstatement of the successor bar doctrine will make it more difficult for employers to resist assuming preexisting bargaining relationships. Employers should therefore be mindful of the existence and terms of such relationships as a part of any mergers or acquisitions they undertake, and should carefully consider the impact such relationships may have on their existing or new operations.

## **National Labor Relations Act – Voluntary Recognition Bar Doctrine**

### **1. The Existing Legal Framework.**

Labor law recognizes a number of “bars” to the ability of employees, employers, and other unions to file decertification or election petitions under certain conditions. One such bar is the “voluntary recognition,” bar which prevents the processing of an election petition for a reasonable period of time following an employer’s voluntary recognition of a union based on a showing of uncoerced majority support for the union. The NLRB modified this 41-year-old doctrine in *Dana Corp.*, 351 NLRB 434 (2007) to provide a 45-day window during which a 30% minority of employees could petition for decertification of the union, and further required that employers post a notice advising employees of their right to seek decertification. In *Lamons*

*Gasket Company*, 357 NLRB 72 (Aug. 26, 2011), the NLRB reversed *Dana* and rejected the need for the 45-day window period and the posting requirement.

## **2. Notable NLRB Decision.**

Lamons Gasket Company (“Lamons”) and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union (the “Union”) entered an agreement setting out the conditions under which Lamons would voluntarily recognize the Union as the representative of its employees at several facilities. After the Union made the necessary showing of majority uncoerced support, Lamons posted the notice required by the NLRB concerning the 45-day window period for filing a decertification petition. One employee filed such a petition on behalf of himself and on a showing of interest of at least 30% of the employees to withdraw recognition. An NLRB Regional Director directed that an election be held, and the Union filed a request for review.

The NLRB, reviewing the Director’s order, found that neither the history nor policy underlying the voluntary recognition bar supported the modifications announced in *Dana*. Specifically, the NLRB found that in the four years since *Dana*, employees decertified a voluntarily recognized union in only 1.2% of the cases in which *Dana* notices were requested; suggesting that the concerns underpinning *Dana* - that card signings by employees did not truly reflect the employees’ choice for union recognition - were unsupported. The NLRB also found that the notice-posting requirement called into question the NLRB’s neutrality because in no other context did the NLRB require notices to advise employees of the right to change their mind.

The NLRB ultimately reinstated the voluntary recognition bar as it existed prior to *Dana*, with one notable exception. The NLRB specifically defined the reasonable period of time during which the voluntary recognition bar would apply to be a period of not less than six months and no more than one year from the parties’ first bargaining session. The factors determining whether a reasonable period of time has elapsed include: (1) the complexity of the issues being negotiated; (2) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (3) the progress of bargaining; and (4) whether the parties are at an impasse. The burden is on the General Counsel to demonstrate that additional bargaining is required.

## **3. The Impact/Significance of the Notable Decision.**

The NLRB’s reversal of the 45-day window for decertification following voluntary recognition removes one method of resisting union organizing. It is, however, a return to a simpler regime for voluntary recognition and does provide concrete guidance on the reasonable period during which the voluntary recognition bar will apply.

## **National Labor Relations Act – Mandatory Subjects of Bargaining**

### **1. The Existing Legal Framework.**

As a general matter under labor law, work rules that affect the terms and conditions of employment or that can be enforced through discipline are considered mandatory subjects of bargaining. As a result, prior to enacting such work rules, employers with represented workforces must give the union notice of the proposed rule and an opportunity to bargain over the substance of the rule. In *Peerless Publications*, 283 NLRB 334 (1987), the NLRB adopted a rule allowing employers to unilaterally enact work rules that would otherwise be subject to mandatory bargaining, where such rules went to the “core purpose” of the employer’s business. In *Virginia Mason Hospital*, 357 NLRB 53 (Aug. 23, 2011), the NLRB sharply limited application of the rule announced in *Peerless*.

### **2. Notable NLRB Decision.**

Virginia Mason, an acute care hospital, initially decided to amend its “Fitness for Duty” policy to require all 600 of its registered nurses to be immunized against the flu. Following a grievance from the nurse’s union, an arbitrator blocked the Hospital’s ability to enact the rule. The Hospital subsequently informed the union that it was considering a flu prevention policy that would require nurses who decline to be immunized against the flu to either wear surgical masks at work or take antiviral medications as a condition of their continued employment. The Hospital ultimately enacted such a rule, without bargaining with the union.

The union filed an unfair labor practice charge over the new work rule, claiming that the Hospital had a duty to bargain with the union over the rule prior to its enactment. The Hospital argued that under the NLRB’s *Peerless* decision there was no such duty, because the rule was aimed at the Hospital’s core purpose – protecting patient health.

The NLRB rejected the Hospital’s arguments under *Peerless*, finding that the “core purpose” exception to mandatory bargaining should be sharply limited, lest it swallow the rule. The NLRB also found that the exception recognized in *Peerless* was limited by the “unique circumstances” present in that decision. There, a newspaper enacted a code of ethics that, in part, shielded editorial control from outside influence – a concern squarely within the First Amendment’s zone of protection. The Board noted the limitations on the *Peerless* rule had been consistently recognized by the NLRB in subsequent decisions applying (and for the most part rejecting application of) the exception. The NLRB, therefore, rejected application of the exception to the Hospital’s proposed flu prevention rule and found that the rule could be subject to mandatory bargaining. (The Hospital raised other defenses to the refusal-to-bargain charge, which the Administrative Law Judge did not address, so the case was remanded for further consideration.)

### **3. The Impact/Significance of the Notable Decision.**

The NLRB’s decision substantially limits an employer’s ability to unilaterally alter or enact workplace rules that affect the terms and conditions of employment or that are enforced

through discipline. Employers who operate in union environments should carefully consider whether to give the union notice and an opportunity to bargain before enacting or amending workplace rules. Failure to do so could subject an employer to an unfair labor practices charge.

## **National Labor Relations Act – Discipline for Violation of Overbroad Rule**

### **1. The Existing Legal Framework.**

Employers can run afoul of the NLRA by maintaining overbroad workplace rules that potentially inhibit or “chill” employees from engaging in protected concerted activity such as solicitation for a union and discussion of terms and conditions of employment. The NLRB has long held that discipline imposed pursuant to an overbroad rule is also unlawful—the so-called *Double Eagle* rule. In *Continental Group, Inc.*, 357 N.L.R.B. 39 (Aug. 11, 2011) the NLRB clarified and restricted the scope of the *Double Eagle* rule.

### **2. Notable NLRB Decision.**

Continental is a condominium property management company. It provided front-desk staff for the Sunset Harbor Condominium. One of Continental’s policies prohibited employees from coming onto the premises when not on duty, except to pick up their paycheck or if directed by management. A Continental employee who worked at Sunset Harbor was experiencing some personal problems. He was warned and then resigned in lieu of being reassigned after he violated the no-loitering policy by sleeping on the Sunset Harbor premises, living out of his car in the parking lot, and discussing his personal problems with residents.

The NLRB agreed that Continental’s rule was overbroad in that it potentially prohibited employees from engaging in protected concerted activity on the premises while off duty. Nevertheless, the NLRB reasoned, the *Double Eagle* rule was not implicated, and Continental did not violate the NLRA when it disciplined the employee for his conduct, because the conduct was neither protected concerted activity nor similar to such activity.

The Board explained that the *Double Eagle* rule continues to apply where an employee is disciplined under an overbroad rule for: (1) engaging in protected conduct; or (2) engaging in conduct that implicates protected concerted activity, such as seeking higher wages though not in concert with other employees. Even in such cases, however, employers can avoid liability by establishing that the disciplined employee’s conduct “actually interfered with the employee’s own work or that of other employees or otherwise interfered with the employer’s operations,” and “the interference, rather than the violation of the rule, was the reason for the discipline.” It is the *employer’s* burden to establish this affirmative defense, not only by asserting it, but also by demonstrating that the interference with operations or production was the actual reason for the discipline, and not simply the employee’s violation of the overbroad rule.



### **3. The Impact/Significance of the Notable Decision.**

Coming from the current NLRB, which is highly protective of employees, *Continental Group* is a surprisingly favorable decision for employers. While it reaffirms the necessity for employers to avoid overbroad employment policies that could chill employees from engaging in protected concerted activity, the decision modifies the prior automatic invalidity, under *Double Eagle*, of discipline imposed pursuant to such overbroad policies. At the same time, the decision makes clear that, to avoid liability for discipline imposed based on a potentially overbroad policy, employers should focus not on violation of the policy, per se, but rather on the unacceptable nature of the employee's conduct. Employers can best prevent the potential for this issue arising at all by regularly revisiting the wording of workplace policies to ensure compliance with the NLRA. In addition, in situations where employees' conduct may be considered protected concerted activity, employers should be especially careful in imposing discipline based on the conduct's violation of what may be an overbroad policy.

## **National Labor Relations Board – Secondary Banning**

### **1. The Existing Legal Framework.**

Under the NLRA, a union may not “threaten, coerce, or restrain” a secondary employer to induce them to stop doing business with an employer with which the union has a primary labor dispute (the “primary employer”). The NLRB and federal courts have held that “picketing” a secondary employer to induce it to boycott the primary employer is coercive, and therefore unlawful. However, stationary “handbilling” (passing out literature) outside the secondary employer's premises with that same objective is not coercive and is protected activity. To be unlawful, picketing a secondary employer must have some kind of “confrontational” aspect. Courts have found that even some extreme forms of protest were not coercive, because they did not physically or verbally interfere with the coming and going of patrons of the secondary employer.

### **2. Notable NLRB Decision.**

In *Galencare Inc. d/b/a Brandon Reg'l Med. Ctr.*, 356 N.L.R.B. 162 (May 26, 2011), the Board found that a Sheet Metal Workers local union (“Union”) did not violate the NLRA's prohibition against secondary boycotts by stationing a 16-foot tall rat balloon and a member holding a leaflet in front of a hospital. The Union stationed the balloon in order to persuade the institution to stop doing business with non-union firms performing construction work at the hospital. The Board determined that the Union's rat balloon did not constitute unlawful picketing or coercion under the NLRA and dismissed the unfair labor practice charge.

### **3. The Impact/Significance of the Notable Decision.**

Last year, in *Carpenters and Joiners of America, Local 1506*, 355 N.L.R.B. No. 159 (Aug. 27, 2010), the Board held that placing inflammatory (but stationary) banners outside a secondary employer workplace does not violate the NLRA. The decision in *Galencare Inc.*

similarly allows unions to apply pressure to secondary employers through use of symbolic speech and may result in more neutral-business involvement in labor disputes.

### **The National Labor Relations Board and Employer Social Media Policies**

Over the past year, the NLRB has taken a particular interest in employer regulation of employee use of social media. Indeed, in April 2011, the Office of the General Counsel issued a memorandum directing that all cases involving employer rules prohibiting employees from engaging in protected activity on social media be referred to the General Counsel's office for advice. The NLRB issued another memorandum in August 2011, summarizing those cases it had examined in the prior year involving social media.

The number of cases the NLRB has examined that involve social media are too numerous to individually summarize here, though details concerning those cases can be found in the NLRB's August 2011 memorandum. Many of the cases the NLRB has pursued have been resolved through individual settlements, and thus provide little guidance to employers going forward. That said, the NLRB's recent activity has been primarily in two areas: (1) employer social media policies; and (2) cases involving discipline for employee use of social media. The NLRB's activities in these areas have yielded some guidance, which is discussed below.

#### **1. Employer Policies.**

Employer policies regulating social media can run afoul of the NLRA in two ways. First, in an existing union setting, employers may have a duty to bargain with the union before implementing a social media policy. Second, employer social media policies (in union and non-union settings alike) may be overbroad under the NLRA if they infringe on an employee's ability to engage in protected concerted activity.

The NLRB's General Counsel has taken the position in several cases that an employer has a duty to bargain with the union before implementing a social media policy. This position is in line with well-settled labor law principles that employers must give the union notice and an opportunity to bargain over workplace rules that affect the terms and conditions of employment or that can be enforced through workplace discipline. Employers with represented workforces should therefore carefully consider whether and when to involve the union in developing a social media policy.

Union and non-union employers alike cannot lawfully prohibit employees from engaging in protected concerted activities. In a string of recent cases, the NLRB has examined employer social media policies to determine whether they infringe on, or chill, an employee's ability to engage in such activities. The employer policies at issue in those cases varied considerably, but the NLRB's noted concerns with the various policies provides some guidance. For instance, context is important. In one advice memorandum, the NLRB noted that a statement prohibiting employees from disparaging senior management could chill protected activity. However, because that statement was found in a comprehensive social media policy the NLRB found no reasonable employee could have read the policy to chill his or her rights. On the other hand,

employer policies were found overbroad where they prohibited solicitation during non-work time or restricted discussion of wages, corrective actions and discharge of co-workers, or employer investigations. Even policies that prohibited “carrying of tales, gossip, and discussion regarding company business or employees” or disparaging of the company or its executives have been singled out as potentially overbroad. Employers may be able to overcome some of these concerns by including statements in their social media policies that the policies themselves are not meant to limit their employees’ ability to engage in lawfully protected concerted activities.

## **2. Discipline Based on Employee Use of Social Media.**

The NLRB has also taken an interest in cases alleging that an employer discharged or otherwise improperly took action against one or more employees due to their social media activities. The NLRB has been primarily concerned with whether employees were disciplined for posting comments that involve protected activity, as well as whether employers have unlawfully threatened, interrogated, or conducted surveillance of employees regarding social media activities.

The NLRB has now reviewed at least six cases in which it concluded that the postings at issue were not protected concerted activity under the NLRA either because the postings were not directed at workplace concerns or because the postings were not directed at or made on behalf of other employees and thus were not concerted activity. Such cases included:

- An employee who made Facebook postings suggesting that health care workers in an acute care facility might “withhold care if they were personally offended by the patients.”
- A newspaper reporter whose “tweets” included one in which he said: “You stay homicidal, Tucson, See Star Net for the bloody deets.”
- A bartender who complained to his stepsister on Facebook that he had been working at the same bar for five years without a raise, that he wasn’t receiving tips despite serving food, and referring to the bar’s customers as “rednecks.”
- A recovery specialist at a mental health facility who called her workplace “spooky” and included comments about a current patient at the facility in a Facebook conversation with a friend. Notably, a former patient of the facility who was herself friends with the employee reported the postings to the employer.
- A Walmart employee who engaged in an expletive-filled rant on Facebook following an interaction with his Assistant Manager.

In other cases, however, the NLRB has found that employees had engaged in protected concerted activity when using social media. For example, in one case employees were disciplined after making Facebook postings about not receiving their paychecks on time.

There is, however, a substantial gray area in between the patently derogatory unprotected comments and the clearly protected. For example, an employee was discharged from his job as a car salesman after posting complaints about the quality of food served at a sales event. The

NLRB complaint characterized the posting as being about “concerns about [the employer’s] handling of an event which could impact” the earnings of salespeople. The employer, on the other hand, responded that the discharge was not for postings related to the event, but for derogatory postings concerning an auto accident that occurred during a test drive that cast the dealership in a bad light. The NLRB found that the employee’s comments about the sales event were protected, but his comments about the auto accident were not.

In addition to cases regarding discipline and discharge, the NLRB has also examined the extent to which employers have unlawfully threatened employees by warning them to be careful in their use of social networking – which the NLRB ultimately found not to be coercive. Employers have also been alleged to have unlawfully interrogated employees about the identity of employees who have engaged in internet discussions about subjects protected by the NLRA. In other cases the NLRB has questioned whether the employer engaged in unlawful surveillance related to employee social media postings. For instance, the NLRB concluded that an employer had not violated the NLRA when it received copies of postings between employees and the union president, unsolicited, from co-workers, and where it notified employees and the union president that it had received such postings.

This developing body of law suggests that there are many potential traps for unwary employers in monitoring employee use of social media, and in disciplining employees for perceived misuse of social media. Unfortunately, the NLRB has given little concrete guidance in this area. As more cases are reviewed by the General Counsel’s office, a clearer indication will likely emerge regarding the NLRB’s position on employer social media policies and the bounds of employee conduct online that will remain protected by the NLRA. Until then, employers should tread carefully in this area.