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Fall 2011 Labor & Employment Breakfast

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A. Introduction

Included in these materials is a brief description of some of the most important recent legislative, administrative and case developments. We hope these materials, along with the PowerPoint presentation provided today, are helpful. We would be pleased to speak with you following today's presentation about any questions you may have concerning any of these issues.

B. The Resurgent NLRB

1. The NLRB's New Poster

On August 30, 2011, the National Labor Relations Board ("NLRB") published new rules that require virtually all private sector employers to post notices informing employees of their rights under the National Labor Relations Act—the federal law that protects employees who engage in union and other concerted activities. The labor law posters are required even in workplaces where there are currently no unions.

Although the NLRB initially set a November 14, 2011 deadline for the notice to be posted, it has postponed the deadline to January 31, 2012. Lawsuits have been filed by the U.S. Chamber of Commerce, the National Federation of Independent Business and the National Association of Manufacturers among others to challenge the poster requirement. The results of those lawsuits are still pending. Although the NLRB's stated reason for the postponement was to provide more time for education and outreach to employers, the postponement was likely due in part to those lawsuits.

The rules require employers to post the notice wherever notices to employees are typically posted, and it must also be published on the employer's intranet or Internet site if the employer customarily uses such media to communicate with employees about rules and policies. The posting requirement applies to all employers subject to the jurisdiction of the NLRB—thus, virtually all private sector employers except for agricultural employers, airlines and railroads.

If 20 percent or more of the employer's workforce is not proficient in English and speaks another language, the employer must post the notice in the language those employees speak. If the employer has two or more groups that speak different languages, the employer must either post the notices in each of those languages or, at the very least, post the notice in the language spoken by the largest number of employees and give other employees a copy of the notice in a language in which the employees are proficient.

The required notice, including those translated into other languages, are available at no cost from the NLRB's regional offices. The notices are also available for downloading directly from the NLRB's website, www.nlrb.gov. Employers may reproduce the official poster as long as they do not change the size, content, format, font or font size. The notice must be at least 11 x 17 inches in size.

Failure to comply with the new posting requirements will be considered an unfair labor practice and may also allow employees to file unfair labor practice charges after the normal six-month time limit has expired.

2. Recent Pro-Union NLRB Decisions

The NLRB recently issued a decision which blocks any challenge to a union's majority status for a "reasonable period of time" following an employer's voluntary recognition of the union based on a "card check." *Lamons Gasket Co.*, 357 N.L.R.B. No. 72, 2011 WL 3916075 (Aug. 26, 2011). A card check is an alternative to election procedures which allows an employer to recognize a union based on cards submitted by a majority of the members of a bargaining unit acknowledging their support of a union as their collective bargaining representative. The Board in *Lamons Gasket* concluded a "reasonable period of time" is no less than six months after the parties' first bargaining session and no more than a year.

The NLRB issued another decision holding that when a purchasing or acquiring company becomes a "successor" employer (i.e., a company that hires at least 51 percent of the seller's employees), there is an irrebutable presumption that the union representing the former company's employees will have majority support for a minimum of six months and a maximum of one year. *UGL-UNICCO Service Co.*, 357 N.L.R.B. No. 76, 2011 WL 3916076 (Aug. 26, 2011). The six-month period is measured from the date of the parties' first bargaining session. The successor employer must bargain with the union. However, it may reject the existing terms and conditions of the former employer's collective bargaining agreement, implement its own initial terms and conditions with the union and bargain with the union for a new collective bargaining agreement.

The NLRB also issued a decision which may make it easier for unions to organize smaller bargaining groups of employees. In *Specialty Healthcare*, 357 NLRB No. 83, 2011 WL 3916077 (Aug. 26, 2011), the Board held that an employer challenging a proposed bargaining unit on the grounds that it improperly excludes certain employees must prove that the excluded employees share "an overwhelming community of interest" with those in the proposed bargaining unit.

3. The NLRB's Proposed Rules for Quicker Union Elections

In June 2011, the NLRB proposed new rules for union representation elections. The proposed rules would require parties to hold a pre-election hearing within seven days of the filing of a petition, postpone certain challenges until after a union election, allow for electronic petition filing, and require employers to provide worker e-mail addresses and telephone numbers to organizers, among other things.

The proposed amendments will require the regional director to schedule pre-election hearings challenging eligibility and bargaining unit issues to begin within seven days after a hearing notice is served. The employer will be required to state its position concerning any election issues by the start of that hearing which will significantly reduce the amount of time an employer will have to mount a defense challenging the union's proposed bargaining unit or election procedures. The employer will be barred from later litigating any issues not contained in the employer's initial statement of position. Unless the issues raised by the employer affect 20 percent or more of the bargaining unit, the litigation of those disputes will be deferred until after the election. The parties will also be unable to seek review of an NLRB regional director's decision prior to the election.

Under current procedures, the NLRB attempts to hold representation elections within 42 days after a representation petition is filed. The proposed new procedures will shorten this time by deferring most eligibility and bargaining unit issues until after the election and eliminating the parties' ability to seek board review of a regional director's decisions before an election.

Under the proposed new rules, an employer will be required to provide a list of eligible voters to the union within two rather than seven days after an election is ordered by the regional director. The new rules also require employers to provide phone numbers and e-mail addresses, rather than just names and addresses.

The new rules will allow election petitions to be filed online electronically and will enable the NLRB to provide notices directly to employees by e-mail.

The NLRB's stated purpose for the proposed regulatory amendments is to reduce unnecessary litigation, streamline pre- and post-election procedures, and facilitate the use of electronic communications and document filing.

There has been much opposition to these proposed Rules. Republican members of Congress recently introduced the Workforce Democracy and Fairness Act in the U.S. House of Representatives, which is intended to counter the NLRB's proposed rules. The bill is expected to reach the House floor for a vote this winter.

C. Developments in Social Media

The NLRB issued a report in August 2011 which summarizes the recent key decisions regarding employees' use of social media. The NLRB has typically considered employee conduct protected when it is "engaged in, with, or on the authority of other employees, and not solely by and on behalf of" him or herself. The facts of each case must be analyzed to determine whether the "evidence demonstrates group activities." Activities that are "the logical outgrowth of concerns expressed by employees collectively" and efforts by employees to initiate group action or to bring group complaints to an employer's attention will generally be protected.

By contrast, conduct or communications that are simply personal gripes that do not suggest any intention to elicit comment from other employees or to speak in the interest of other employees will not be protected.

For example, the NLRB upheld an employer's discharge of an employee of a nonprofit residential facility who posted disparaging comments online about residents of the facility as she was communicating with friends rather than co-workers. Her posts were not directed to co-workers and none of her co-workers responded. She was simply posting about what was happening during her shift.

Similarly, the NLRB upheld the termination of a bartender after he posted negative comments about his employer's tipping and pay policies on Facebook. Although his posting concerned his wages, which is oftentimes protected subject matter, his posts were in response to a family member's question about how his previous evening went. His posting was not directed to any co-workers and none of his co-workers responded to his posting.

In contrast, a NLRB administrative law judge recently ordered a nonprofit organization called Hispanic United of Buffalo Inc. to rehire five employees who the organization terminated because of their Facebook postings. *Hispanics United of Buffalo Inc.*, 3-CA-27872, 2011 WL 3894520 (NLRB Sept. 2, 2011). One of the five employees posted a message on Facebook telling some of her co-workers that another co-worker had complained about their job performance: "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel." Other employees responded: "What the f… Try doing my job" and "[w]e don't have a life as is, What else can we do???". Their employer

then terminated them for what it deemed harassing and bullying conduct. The administrative law judge concluded this was protected speech about the employees' working conditions including staffing issues. The NLRB's general counsel also called the case a "textbook" example of an illegal firing, commenting that "the discussion was initiated by the one co-worker in an appeal to her co-workers for assistance." This was the first decision by an administrative law judge ruling on a Facebook case following a hearing.

Similarly, the NLRB concluded that an ambulance service violated the NLRA when it terminated an employee who posted negative comments about her supervisor on Facebook. The supervisor asked the employee to prepare an incident report concerning a customer's complaint about her work. The employee asked for a union representative while she prepared the report but the supervisor denied her request. After leaving work that day, the employee posted on Facebook a negative comment about her supervisor, including profane language. Some of her co-workers responded in support which caused her to make more negative comments about her supervisor. The board found this was protected activity because other employees were involved in the discussion and the comment was in response to the supervisor's refusal to provide her with a union representative. Her use of profanity did not render the communication unprotected. The board noted that it was not accompanied by any threats.

Employer policies that are overly broad and ban all communication by employees adverse to the company will also be held unenforceable as they do not allow employees to communicate with each other about the terms and conditions of their employment.

For example, the NLRB found invalid an employer's broad social media policy which prohibited employees from posting any disparaging remarks about the company and its managers and depicting the company in any way on the internet without the company's prior permission. The NLRB ruled in favor of an employee who was disciplined under this policy when he posted on the internet that his supervisor was a "crook" among other four-letter words and that his manager was "stupid, nobody liked him, and everyone talked about him behind his back."

D. Update on Medical Marijuana in the Workplace

Washington's Medical Use of Marijuana Act (MUMA), Chapter 69.51A RCW, provides medical marijuana users with a criminal defense to state drug prosecution. MUMA does not, however, prohibit an employer from discharging an employee for use of marijuana—even if such use is authorized by the statute—according to a June 2011 decision of the Washington Supreme Court. *Roe v. Teletech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736 (June 9, 2011).

Jane Roe (who filed her lawsuit under a pseudonym because medical marijuana use is illegal under federal law) suffered from debilitating migraine headaches and was not able to obtain relief from over-the-counter pain medications. In June 2006, Roe met with a doctor at The Hemp and Cannabis Foundation Medical Clinics in Bellevue. The doctor provided Roe with a document entitled "Documentation of Medical Authorization to Possess Marijuana for Medical Purposes in Washington State." After receiving this authorization, Roe began using medical marijuana in compliance with MUMA.

Four months later, TeleTech offered Roe a position as a customer service representative. TeleTech company policy requires all employees to pass a drug screen as a condition of employment. Roe received a copy of this policy. She disclosed her use of medical marijuana to TeleTech, took the drug test, and began work shortly thereafter. She continued using marijuana

during nonwork hours. Not surprisingly, her drug test came back positive. TeleTech terminated Roe's employment.

Roe sued in Washington state court, claiming that although MUMA doesn't address authorized off-duty use, MUMA does reflect the state's public policy, and thus indirectly protected her job. The Supreme Court disagreed. The court held that the statute itself says that it does not require accommodation of the use of marijuana in any place of employment. And, the statute's explicit statement against an obligation to accommodate *on*-site use doesn't require reading into MUMA an implicit obligation to accommodate *off*-site medical marijuana use.

Roe argued that MUMA expresses a broad public policy protecting a patient's "personal, individual decision" to use medical marijuana. The court determined that the statutory language and court decisions interpreting the statute simply don't support a public policy that would remove *all* impediments to authorized medical marijuana use. That marijuana use is illegal under federal law would also make it difficult to find a public policy exception to the at-will employment doctrine. As such, Roe's claim for wrongful discharge in violation of public policy failed.

Along the same lines, earlier this year the Governor signed into a law amendments to MUMA that address certain employment issues. 2011 Wash. Sess. Laws. Ch. 181 (effective July 22, 2011), states that nothing in MUMA "requires any accommodation of any on-site medical use of cannabis in any place of employment." The new law also says, "Employers may establish drug-free work policies. Nothing in [MUMA] requires an accommodation for the medical use of cannabis if an employer has a drug-free work place."

So far, so good from the perspective of employers who want to enforce zero tolerance policies relating to marijuana use. Note, however, that the *Roe* decision and MUMA say that nothing *in MUMA* requires accommodation of marijuana use. (The law says *on-site* marijuana use, but apparently also applies to off-site use if an employer has a drug-free work place.) Could another statute—such as the Washington Law Against Discrimination and its disability accommodation principles—require accommodation for medical marijuana users? Many experts think not, under current law. On the other hand, reports are that some state legislators are considering amending MUMA or other laws so that they *would* protect employees from discharge for off-site medical marijuana use, so employers will need to be alert for further developments.

E. Recent Washington Disability Cases

1. Court Explains Trial and Error Approach to Disability Accommodation

In the best-case disability accommodation situation, the medical evidence clearly identifies an accommodation that is both reasonable and effective in enabling the employee to do the essential functions of the job. But what happens when it's not clear what an effective accommodation looks like? What about when the employer tries an accommodation that doesn't work? In *Frisino v. Seattle School District No. 1*, 172 Wn.2d 1013 (Sept. 9, 2011), the Washington Court of Appeals examined the duties of employers and employees in these tough cases.

Denise Frisino, a teacher in the Seattle School District, developed respiratory sensitivity to environmental factors including, but possibly not limited to, molds and chemicals. In 2004, Frisino and the District agreed that she would transfer to a different school, but she experienced problems there, too. She began a leave of absence.

Various accommodations were proposed. They focused on ventilation and the presence of irritants (real or apparent). Some of the medical recommendations focused on mold; others were broader. Frisino's pulmonary specialist stated that she "needs to be in a clean environment away from irritants."

The District retained outside consultants to evaluate mold levels in the school, undertook various remediation measures, and then instructed Frisino to return to work. She refused, alleging that the workplace was still unhealthy for her. Extensive communication followed, during which at least one of Frisino's doctors recommended that the District transfer Frisino "to a known 'clean' environment and see how she responds." The District—whose consultants had reported that the school was only a danger to individuals with "the most severe forms of immunocompromise"—apparently concluded that none of its facilities would be "clean" enough. The District declined to transfer Frisino, and terminated her employment for failing to return to work.

Frisino sued for failure to accommodate and retaliation. The trial court dismissed her lawsuit, but the court of appeals reversed and sent the case back to the trial court.

Under Washington law, where multiple potential accommodations exist, the employer can provide the accommodation of its choosing, so long as the accommodation is effective in meeting the employee's needs. In Frisino's case, however, it wasn't clear that Frisino could have returned to work, even after the District's efforts. For example, wrote the court, although the District had focused on eliminating mold, other irritants could also trigger Frisino's respiratory symptoms.

The court's solution for cases like this one, where the employer can't readily conclude that a proposed accommodation would be effective, is for the parties to give the accommodation a try. If it doesn't work, the employer has two options. First, the employer can decide that it has done enough because every plausible alternative accommodation would impose an undue hardship on the employer—and then defend that decision in court. Second, the employer can propose something else, and give *that* accommodation a try. "The statute does not limit the employer to only one attempt at accommodation," wrote the court. Thus, in a lawsuit, the employer's final proposed accommodation is the proposal that will be examined for "effectiveness."

The burden is not, however, entirely on the employer. If the employer is willing to engage in a trial-and-error process to identify an effective accommodation, the employee has a duty to participate. That means, for example, that the employee has a duty to try out a proposed accommodation, at least where doing so would not endanger the employee. The employee also "has a duty to communicate to the employer whether the accommodation was effective." And that communication has to occur "while the employer still has an opportunity to make further attempts at accommodation."

In Frisino's case, trying out the proposed accommodation meant, at a minimum, returning to the workplace "to determine whether the substantially limiting symptoms were still triggered" despite the District's attempted clean-up. There was evidence that Frisino might have done that. This evidence, plus the absence of evidence that transferring Frisino again would have been an undue hardship for the District, was enough for the court of appeals to overturn the dismissal.

The most important lesson to take from *Frisino* is that a failed accommodation does *not* necessarily mean that the accommodation process has ended. That's not to say that the process is limitless. In fact, the court in *Frisino* left out the possibility that the trial and error

process itself might be an undue hardship on an employer. Employers should not, however, be too quick to declare the accommodation process a failure in any given case.

2. The Requirement That an Accommodation Must Be Medically Necessary

The Washington Supreme Court has long held that "[t]he concept of 'reasonable' accommodation is linked to necessity." *Doe v. Boeing Co.*, 121 Wn.2d 8, 21 (1993). In *Hill v. BCTI Income Fund-I*, where a plaintiff failed to present evidence that her asthmatic condition made a job transfer medically necessary, the court held that "Washington law does not require employers to provide disabled persons with medically *unnecessary* accommodations." 144 Wn.2d 144 Wn.2d 172, 193 (2001), *overruled on other grounds by, McClarty v. Totem Elec.,* 137 P.3d 844 (Wash. 2006).

The 2007 disability-related amendments to the WLAD, however, changed the nature of the "medical necessity" inquiry, as the court of appeals made clear in *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 29 (2010). The employee in *Johnson* had issues with his back. He asked for an accommodation under which he could use a handmade tool on the job. After evaluating the tool, the employer determined that it was unsafe, and denied the accommodation. Ultimately he was fired, and he sued.

One of the issues in *Johnson* was whether the employer had a duty to accommodate the employee at all. The employer argued that "an accommodation is required only when the employee has a disability that substantially limits job performance and the accommodation is medically necessary to enable the employee to perform the job." The court advised that was no longer the correct inquiry:

> Under the new statute, the question is not whether the accommodation was "medically necessary" in order for Johnson to do his job, such as hearing enhancements or a wheelchair might be. Instead, it is whether Johnson's impairment had a substantially limiting effect upon his ability to perform the job such that the accommodation was reasonably necessary, *or* doing the job without accommodation was likely to aggravate the impairment such that it became substantially limiting.

Id. at 30. There was evidence that the employee's use of the tool would have reduced his risk or reinjuring his back. Accordingly, the trial court should not have dismissed the employee's accommodation claims.

A similar analysis led to a different result in *Hale v. Wellpinit School District No. 49*, No. 28898-6-III, 2011 WL 2474511 (Wash. Ct. App. June 23, 2011) (unpublished op.). The employee, Hale, felt that his supervisors were aggravating his anxiety disorder and depression. His doctor agreed. When Hale quit, he said: "I am forced to resign in order to protect myself from further disability." His doctor agreed with this, too. The court of appeals also agreed—but found that these circumstances *defeated* Hale's disability accommodation claim.

The court emphasized that Hale did have a disability. His depression and anxiety disorder were medically cognizable and had actually been diagnosed. Unlike the federal ADA, a disability exists even if it does not substantially limit the employee in working or anything else.

To qualify an employee for accommodation, however, a disability must substantially limit the ability to perform the job, either actually or potentially, as described above. In Hale's case, he and his doctor said that his job was affecting his health, but not that his health was affecting his job. That is, Hale did not show that his depression and anxiety limited him in teaching classes or performing administrative tasks. And although there was evidence that his work environment might have aggravated his disabilities, there was no showing that the result would be a substantial limitation on Hale's ability to work. As a result, he was not entitled to accommodation.

3. Unprofessional Behavior Resulting From a Disability

Generally, an employee with a disability may be held to the same standards of conduct and performance as employees without disabilities. The EEOC has said that for years. But the Ninth U.S. Circuit Court of Appeals and the Washington Supreme Court have both held that when an employee's known disability *causes* an employee to behave unacceptably at work, firing the employee for the conduct is the same as firing an employee because of the disability. *Gambini v. Total Renal Care, Inc.*, 480 F.3d 950 (9th Cir.), *amended*, 486 F.3d 1087 (9th Cir. 2007); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138 (2004).

Last year, a federal district court denied summary judgment on a disparate treatment claim where personality issues related to the employee's psychological conditions may have played a role in the employee's discharge. *Bacon v. T-Mobile USA, Inc.*, No. C09-5608RJB, 2010 WL 3340517 (W.D. Wash. 2010). The employee had been diagnosed with Asperger's Syndrome, among other things. There was evidence that the employer was concerned about the employee's unprofessional behavior, abrasiveness, insubordination and argumentative nature—all of which could have resulted from Asperger's Syndrome. The court held that this was enough to establish a prima facie case.

The next step in the burden shifting analysis is for the employer to articulate a legitimate, nondiscriminatory reason for its decision. The court said that it was "not unsympathetic" to the employer's plight in dealing with a disability that results in unprofessional behavior in the workplace, and pointed out that employers are not without defenses even in a *Gambini*-type case. Under Washington law, employers can still argue that the disability prevented "proper performance of the job" (even with accommodation). The ADA provides business necessity and direct threat defenses. The employer in *Bacon* did not assert these defenses, however. Accordingly, the employee's disparate treatment claim survived summary judgment.

4. Wrongful Discharge in Violation of Public Policy

The Washington Law Against Discrimination creates a statutory cause of action only against employers that employ eight or more persons. *Sedlacek v. Hillis*, 104 Wn. App. 1, 19 (2000), *aff'd in part, reversed in part on other grounds*, 142 Wn.2d 1024 (2001). In *Sedlacek*, however, the court of appeals noted that the Washington Supreme Court had declared that the WLAD "embodies a public policy of the 'highest priority,'" *id.* at 19 (quoting *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 521 (1993), and allowed plaintiff to pursue her claim of discriminatory discharge on the basis of disability against her former employer who had less than eight employees.

Plaintiffs now appear to be arguing that there is a public policy that entitles employees to take reasonable medical leave. In one case, for example, the plaintiff worked for a small city government—much too small to be covered by the FMLA or the Washington Family Leave Act

("WFLA"). He asserted, however, that his discharge from employment was based on his impending medical leave, and therefore violated public policy.

The trial court dismissed the public policy claim. On appeal, the employer argued that both the FMLA and WFLA expressly limit themselves to larger employers. The court of appeals, however, noted that the public policy of the WLAD applies to smaller employers, even if the statute itself does not. The court said that the same was true of the FMLA and WFLA. "Washington has a clear public policy under the FMLA and the WFLA entitling all employees to take reasonable medical leave." *Fischer v. City of Roslyn*, No. 29361-1-III, 2011 WL 2639931, at *6 (Wash. Ct. App. July 7, 2011). A federal district court reached essentially the same conclusion in *Nutter v. UPS Ground Freight*, No. CV-10-128-LRG, 2011 WL 2893612, at *5 (E.D. Wash. July 15, 2011).

Notably, the employees lost in both *Fischer* and *Nutter*. In *Fischer*, the employee failed to show that his intended leave of absence motivated his discharge. In *Nutter*, where the employee was entitled to WFLA protections because of the size of the employer and the length of time he had worked there, the employee could not assert a common-law public policy claim because WFLA provided him an adequate remedy. However, until the contours of this emerging cause of action become more clear, employers should exercise caution when disciplining or discharging employees for medical absences—even if the employee in question is not covered by the WLAD, WFLA or FMLA.

F. Seattle's Paid Sick Leave Ordinance

In September 2011, the Seattle City Council passed an ordinance (Council Bill No. 117216) requiring employers to provide paid "sick and safe" time off to employees who work in Seattle. Assuming it is not amended or voided through legal action, the ordinance will go into effect next year on September 1, 2012.

Key provisions of the ordinance, which may require policy changes for employees who work in Seattle, are summarized below. However, the ordinance is long and detailed. Legal advice is advisable to determine its impact on any given employer.

As used below, "Seattle time" refers to both sick and safe leave. Where it makes a difference, sick leave and safe leave are separately identified.

Which employees are covered?

Employees are covered if they "perform their work in Seattle." Employees who occasionally work in Seattle must work more than 240 hours in Seattle within a calendar year to be covered. Covered employees include "traditional employees, temporary workers, and part-time employees," but not participants in a work-study program. There are special rules for employees transferred out of Seattle and then back into Seattle and for employees who are rehired within seven months after separating from employment.

Which employers are covered?

All employers of covered employees are covered by some aspects of the ordinance (for example, the anti-retaliation provision), but employers of fewer than five employees need not provide Seattle time to their employees. For larger employers, some obligations will depend on where the employer fits in one of the following three "tiers":

- Tier One employer: between five and 49 full-time equivalent employees ("FTEs") on average per calendar week during the preceding calendar year.

- Tier Two employer: between 50 and 249 FTEs on average per calendar week during the preceding calendar year.

- Tier Three employer: 250 or more FTEs on average per calendar week during the preceding calendar year.

  Note: Tier placement is based on *full-time equivalents*, not the number of individual employees. "Full-time equivalent" refers to the number of hours worked for compensation that add up to one full-time employee. Full-time employee means either 40 hours a week ("an 8-hour day and a 5-day week") or "as full time is defined, in writing or in practice, by the employer." Thus, an employer who defines "full-time" as employees who work, say, at least 35 hours a week, may find itself in a different tier than a similar-sized employer who defines "full-time employees" as employees who work at least 40 hours per week.

All employees count when determining tier placement, including part-time employees, temporary or leased employees and employees who work outside of the city of Seattle.

Seasonal employers should note that the average headcount "during the preceding calendar year" is the average for weeks in which at least one employee worked for compensation. Weeks in which no employee worked do not reduce the average.

New employers in Tiers One and Two are not covered until 24 months after the hire date of their first employee (determined based on the average number of FTEs employed per calendar week during the first 90 calendar days following the hire date of the first employee).

What about temporary employees?

Temporary employees are covered by the ordinance and count toward the determination of FTEs employed. However, except for determining tier size, temporary employees supplied by "staffing agencies or similar entities" are considered employees of the agency, not the service recipient, unless a contractual agreement states otherwise.

When does an employee begin to accrue Seattle time?

Accrual of Seattle time begins at the commencement of employment. Current employees will begin accruing Seattle time as of the effective date of the ordinance (September 1, 2012).

How much Seattle time do employees accrue?

- Tier One or Tier Two employers: Employees accrue at least one hour of Seattle time for every 40 hours worked.

- Tier Three employers: Employees accrue at least one hour of Seattle time for every 30 hours worked.

  Note: Many employers determine sick leave accrual rates based on an employee's *anticipated* hours or "percent of FTE." For example, under an employer's policy, a "full-

time" employee might accrue one hour of paid time off per week. Seattle time, however, accrues based on hours "worked," not based on classifications or percent of FTE.

When can an employee begin to use accrued Seattle time?

Employees can use accrued Seattle time beginning on the 180th calendar day after the commencement of their employment.

How much Seattle time can employees use?

- Tier One employers can limit employees to using 40 hours in a calendar year.
- Tier Two employers can limit employees to using 56 hours in a calendar year.
- Tier Three employers can limit employees to using 72 hours in a calendar year.

  Note: This is a calendar-year system. If an employer uses a rolling 12-month calendar for Family and Medical Leave Act ("FMLA") leave, Seattle time might sometimes be available to an employee who has no available FMLA leave.

  Note: Employees who are exempt from overtime under the executive, administrative, professional and outside sales exemptions from the federal Fair Labor Standards Act are not entitled to accrue Seattle time for hours worked beyond a 40-hour workweek. Additionally, if the employee's "normal work in a work week" is less than 40 hours, Seattle time accrues based on the normal workweek. "Normal work in a work week" is often not tracked for exempt employees, and may well be different than "normally scheduled" hours or percent of FTE.

How much Seattle time can an employee carry over into the next calendar year?

Employees must be allowed to carry over at least some of their accrued unused Seattle time from one calendar year to the next:

- 40 hours in Tier One
- 56 hours in Tier Two
- 72 hours in Tier Three

What if an employer already has a paid leave policy?

Paid leave policies must provide at least as much leave as the Seattle ordinance requires. The leave must be available for all of the purposes for which Seattle time is available. If an employer has a "PTO" policy that combines sick and vacation time, the employer need not provide additional Seattle time if PTO can be used for the same purposes as Seattle time, accrues at the rates provided in the ordinance, and (1) for Tier One and Tier Two employers, can be used or carried over in the amounts specified in the ordinance, and (2) for Tier Three employers, at least 108 hours can be used within any calendar year and/or carried over into the next calendar year.

What circumstances entitle an employee to use Seattle sick time?

Employees can use sick time:

- For “an absence resulting from an employee’s mental or physical illness, injury or health condition; to accommodate the employee’s need for medical diagnosis care, aftercare or treatment of a mental or physical illness, injury or health condition; or an employee’s need for preventive medical care”; [or]

- “To allow the employee to provide care of a family member” with an illness, injury, need for medical treatment, etc.

- For sick time, “family member” is defined as in the Washington Family Care Act, RCW 49.12.265 and .903 (child, grandparent, parent, parent-in-law, spouse, registered domestic partner).

What circumstances entitle an employee to use Seattle safe time?

Employees can use safe time:

- “When the employee’s place of business has been closed by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material”;

- “To accommodate the employee’s need to care for a child whose school or place of care has been closed by order of a public official for such a reason”; or

- For domestic violence, sexual assault or stalking affecting the employee or the employee’s “family member,” as provided in Chapter 49.76 RCW.

  Note: The ordinance does not define “family member” for purposes of using safe leave. Probably, the intent was to define “family member” for purposes of Seattle safe leave as the term is defined in RCW 49.76.020(5) (“any individual whose relationship to the employee can be classified as a child, spouse, parent, parent-in-law, grandparent, or person with whom the employee has a dating relationship”).

What must the employee do to request Seattle time?

When possible, the request must include the expected duration of the absence. The employer may require the employee to comply with the employer’s usual and customary notice and procedural requirements for requesting leave, “provided that such requirements do not interfere with the purposes for which the leave is needed.”

- For foreseeable Seattle time, the request must be made at least 10 days in advance or as early as possible, unless the employer’s normal notice policy requires less notice. The employee has to make a reasonable effort to schedule the time off in a manner that does not unduly disrupt the employer’s operations. (This is an FMLA concept.)

- For unforeseeable Seattle time: “[t]he employee must provide notice as soon as is practicable and must generally comply with an employer’s reasonable normal notification policies and/or call-in procedures, provided that such requirements do not interfere with the purposes for which the leave is needed.” Presumably this last phrase equates to the FMLA’s “absent unusual circumstances,” but possibly it does not.

  Note: One section of the ordinance says that an employer may require compliance with its usual and customary notice and procedural requirements. Another section says that

employees must "generally" comply with the employer's "*reasonable* normal notification policies and/or call-in procedures," rather than "usual and customary notice and procedural requirements for absences and/or requesting leave." The implications of this discrepancy are unclear.

What documentation can an employer require from an employee who uses Seattle time?

Employers can require documentation of the need to use Seattle time only if the employee is absent for more than three consecutive days. For sick time, the employer cannot require that the documentation explain the nature of the illness.

<u>Note</u>: It is not clear whether this section attempts to prohibit employers from seeking the information that they are entitled to seek under the FMLA, Americans with Disabilities Act, Washington Law Against Discrimination or RCW Chapter 49.76.

<u>Note</u>: Unlike FMLA regulations, the Seattle ordinance makes no provision for seeking documentation supporting the need for Seattle time when there is a suspicious pattern of absences. For example, an absence every Friday all summer would not qualify as an absence of "more than three consecutive days." The ordinance appears to prohibit employers from requiring documentation confirming the need for such absences.

Who pays the cost of obtaining medical documentation?

The ordinance states: "For any employee who is not offered health insurance by the employer, the employer and the employee shall each pay half the cost of any out-of-pocket expense incurred by the employee" to obtain documentation. The expenses are limited to the costs of obtaining the documentation, including testing and transportation. "An employee who has declined to participate in the health insurance program . . . shall not be entitled to reimbursement for out-of-pocket expenses."

Can employers require employees to make up lost time by working additional shifts?

No. The employer and employee may mutually agree to extra hours or shifts. Special rules apply to eating and/or drinking establishments.

What pay must be provided for Seattle time?

Employees must be compensated for Seattle time "at the same hourly rate and with the same benefits, including health care benefits, as the employee would have earned during the time the paid leave is taken." However, compensation is not required for lost tips or commissions, and is only required "for hours that an employee is scheduled to have worked."

Must the employer pay out accrued unused Seattle time upon termination?

No, unless an employment agreement, policy or longstanding practice provides for payout.

Does the ordinance require notice and posting?

Yes. Employers must inform employees of their rights under the ordinance. The ordinance specifies the information that must be provided. The Seattle Office for Civil Rights is directed to create and make available a poster and a model notice.

In addition, every time that an employer pays wages to an employee, the employer must state in writing the current amount of Seattle time that the employee has available.

Does the ordinance impose recordkeeping requirements?

Yes. Employers must retain for two years records documenting hours worked and Seattle time taken. Existing recordkeeping systems need not be modified, as long as records reasonably indicate hours that an employee worked *in Seattle*, the amount of accrued Seattle time and the amount of Seattle time taken.

Employers must maintain in confidence information that an employee or someone on behalf of an employee provides in support of the employee's request for Seattle time, including "the fact . . . that the employee has requested or obtained leave under [the ordinance], and any written or oral statement, documentation, record or corroborating evidence provided by the employee." The documentation must be maintained separate from ordinary personnel files. Disclosure is allowed only if requested or consented to by the employee, ordered by a court or administrative agency or otherwise required by law.

Can employers retaliate against employees for using Seattle time?

Of course not. The ordinance prohibits *anyone* from interfering with or restraining or denying "the exercise of, or the attempt to exercise, any right protected under" the ordinance, and prohibits retaliation for protected activity, including opposing perceived violations of the ordinance, participating in investigations of alleged violations and informing other employees of their potential rights regarding Seattle time.

Can Seattle time be counted as an absence for attendance purposes?

An absence control policy cannot count Seattle time as an absence that may lead to or result in discipline or any other adverse action against the employee.

Can employees waive the protections of the ordinance?

Only in a bona fide collective bargaining agreement. Individual waivers are prohibited.

G. Class Action Update

1. Class Action Waivers after *AT&T v. Concepcion*

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court affirmed its previous holding that a party cannot be compelled to arbitrate class claims where an arbitration agreement does not expressly provide for class arbitration. 131 S. Ct. 1740 (Apr. 27, 2011). The Court also held that provisions in an arbitration agreement prohibiting class arbitration (so-called "class waivers") may be enforceable under certain circumstances, particularly in agreements that provide consumer-friendly arbitration procedures. In so doing, the court reversed the California Supreme Court's decision in *Discover Bank v. Superior Court*, which held that class waivers are unconscionable and unenforceable. 36 Cal. 4th 148 (2005). The Court held that state laws or doctrines such as California's bar against class waivers, which serve as an obstacle to the enforcement of arbitration provisions, are preempted by the Federal Arbitration Act which strongly favors the enforcement of arbitration agreements. Thus, following *Concepcion*, employers may, in certain circumstances, include provisions in their arbitration agreements

which require employees to arbitrate their claims and to do so on an individual rather than class basis only.

Concepcion caused many to wonder whether class waivers would signal the end of class actions if employers could simply require all of their employees to sign arbitration agreements with class waivers. However, the cases applying *Concepcion* demonstrate that the impact of the Court's decision is likely to be much more limited. The following patterns have emerged from these post-*Concepcion* cases.

- Where an arbitration agreement is not invalid under one of the classic defenses (such as fraud in the inducement, duress, incomplete agreement, etc.), provides adequate procedures for a plaintiff to vindicate his or her rights, and does not render it economically impractical for a plaintiff to pursue a claim, the courts will typically enforce the class waiver. *See, e.g.*, *D'Antuono v. Serv. Road Corp*., No. 3:11 CV33(MRK), 2011 WL 2222313 (D. Conn. May 25, 2011) (enforcing class action waiver where the plaintiffs did not show that they were likely to incur prohibitively high costs in enforcing their rights under the FLSA in individual arbitration; the out-of-pocket expense for each plaintiff was only $175 and their potential individual recovery was at least $20,000); *Dauod v. Ameriprise Financial Services, Inc*., Case No. 8:10-cv-00302 (C.D. Cal. Oct. 12, 2011) (unpublished opinion) (enforcing class action waiver in a former Ameriprise financial adviser's arbitration agreement, dismissing the plaintiff's putative wage and hour class action and ordering plaintiff to pursue her wage and hour claims in arbitration on an individual basis; according to the court, the Supreme Court's ruling in *Concepcion* "applies equally to a labor class action").

- Even when an arbitration agreement does not expressly provide for class arbitration, an arbitrator may read such a provision into the agreement. For example, when an arbitration agreement refers to the arbitration rules of the American Arbitration Association or another arbitration organization which provides for class arbitration, the arbitrator may read this provision into the agreement. *See, e.g.*, *Jock v. Sterling Jewelers Inc*., 646 F.3d 113 (2d Cir. July 2, 2011) (affirming arbitrator's decision that class arbitration was permissible where the arbitration agreement did not expressly prohibit it); *Guida v. Home Sav. of Am. Inc*., No. 11-CV-00009-JFB ARL, 2011 WL 2550467 (E.D.N.Y. June 28, 2011) (holding it was for the arbitrator to decide whether arbitration agreement allowed for class arbitration and noting that the agreement referred to the AAA rules which provided for class arbitration).

- Where a federal or state statute allows aggregate actions or requires claims to be filed on behalf of a group, the class waiver will likely not be enforced. *See, e.g.*, *Brown v. Ralphs Grocery Co*., 197 Cal. App. 4th 489 (July 12, 2011) (holding *Concepcion* did not apply the California Private Attorneys General Act); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Cir. 6950(LBS)(JLF), 2011 WL 2671813 (S.D.N.Y. July 7, 2011) (holding class waivers not enforceable where claim arises under Title VII's pattern or practice provisions which must be pursued on a class basis).

2. Nationwide Class Actions After *Wal-Mart v. Dukes*

On June 20, 2011, the United States Supreme Court issued its long-awaited opinion in the *Wal-Mart Stores, Inc. v. Dukes* case. 131 S. Ct. 2541, 546 U.S. __ (June 20, 2011). The case was brought by Betty Dukes and five other former Wal-Mart employees who worked in 13 of Wal-Mart's 3,400 stores. Plaintiffs claimed that the company discriminated against female

employees in violation of Title VII of the Civil Rights Act of 1964 and sought to represent a class consisting of all of the approximately 1.5 million female Wal-Mart employees employed at the end of 1998. The district court certified the case for class treatment and the Ninth Circuit Court of Appeals affirmed. The Supreme Court reversed, however, holding that the proposed class claims lacked the required commonality to proceed as a class. Specifically, the Court held that:

- Plaintiffs cannot recover damages, such as back pay, in class lawsuits brought under the more lenient class certification standards applicable to claims for injunctive relief where the monetary claims are not merely incidental to the injunctive relief.

- A class action should not be certified absent a showing of "commonality." In other words, the plaintiffs must show that common issues will predominate. To satisfy this burden, plaintiffs must produce substantial evidence of unlawful policies; a showing that an employer allows managers to have subjective discretion in making employment decisions is not enough. Also, it is not enough for putative class representatives to merely pose a common question, such as "Is that an unlawful employment practice?" Instead, plaintiffs seeking such class treatment must show a "common contention . . . capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

It was anticipated that the Court's decision in *Dukes* would make it more difficult for plaintiffs to pursue large class actions against employers. As the below-described cases demonstrate, the results have been mixed and *Dukes* certainly does not signal the end of class actions. What is more likely is that plaintiffs' attorneys will file smaller, narrower class actions.

In October 2011, a New York federal court certified a class of up to 600 employees in a prevailing wage class action despite *Dukes*. *Ramos v. SimplexGrinnell LP*, No. 07-CV-981 (SMG), 2011 WL 4710814 (E.D.N.Y. Oct. 4, 2011). The plaintiffs alleged the defendant routinely failed to record time employees worked on public projects and to pay the prevailing wage for that work. The court noted that unlike *Dukes*, there was little discretion or subjective judgment involved in determining whether each employee was paid the prevailing wage.

However, the District Court for the Western District of Washington refused to certify a class of ITT Corp. employees who alleged their employer failed to pay benefits and compensation promised to them. *Lee v. ITT Corp.*, 275 F.R.D. 318 (W.D. Wash. June 27, 2011). The plaintiffs had sought certification of their claims under the rules for both monetary and injunctive relief. Citing *Dukes*, the court held that "claims for monetary relief may not be certified under [the more lenient rule for injunctive relief] where the monetary relief is not [merely] incidental to the injunctive . . . relief." The primary claims were for monetary relief and the plaintiffs failed to show that common issues would predominate since they arose under the laws of both Washington and Kuwait, which varied significantly.

In contrast, a federal judge in New York rejected the motion to decertify filed by the Fire Department of New York based on *Dukes*. *United States v. City of New York*, No. 07-CV-2067(NGG)(RLM), 2011 WL 2680474 (E.D.N.Y. July 8, 2011). The plaintiffs alleged that the Fire Department had discriminatory hiring policies which had a disparate impact on African American and Hispanic firefighter applicants. The city argued that the plaintiffs' class seeking monetary relief should be decertified because it was not merely incidental to the plaintiffs' claim for injunctive relief, should not have been certified under the more lenient standard and did not meet the more rigorous standard for monetary relief. The court disagreed, however, finding that

common issues would predominate with respect to the firefighters' disparate impact and pattern-or-practice claims.

In July 2011, a California federal judge relying on *Dukes* decertified a class of Dollar Tree Stores, Inc. managers who alleged they were misclassified as exempt from the overtime requirements. *Cruz v. Dollar Tree Stores, Inc.*, No. 07-2050 SC-07-4012 SC, 2011 WL 2682967 (N.D. Cal. July 7, 2011). Quoting *Dukes*, the court held that the "plaintiffs failed to provide common proof to serve as the 'glue' that would allow a classwide determination of how class members spent their time," which is the key issue in the case.

The District Court for South Carolina also denied certification to a class of employees seeking overtime citing to *Dukes*. *MacGregor v. Farmers Ins. Exchange*, No. 07-15838, 2011 WL 2981466 (D.S.C. July 22, 2011). The court noted that *Dukes* cautions against certification where company policy is contrary to the plaintiffs' allegations and the plaintiffs rely on the individual failure of their supervisors to comply with company policy. The court held individual factual issues would predominate.

In September 2011, the Ninth Circuit Court of Appeals sent a gender discrimination class action against Costco Wholesale Corp. back to the lower court to reevaluate if the class was properly certified in light of *Dukes*. *Ellis v. Costco Wholesale Corp.*, 2011 WL 4336668 (9th Cir. Sept. 16, 2011). The plaintiffs allege Costco failed to promote hundreds of female employees to senior staff and management positions nationwide. One of Costco's experts testified that any gender disparities that existed were confined to two regions. The Ninth Circuit held the lower court failed to adequately consider this evidence and "failed to resolve th[ese] critical factual disputes centering around the national versus regional nature of the alleged discrimination."

In October 2011, a New York federal judge certified a class of 1,500 store managers alleging that Family Dollar Stores misclassified them as exempt from overtime wage requirements and failed to pay them overtime. *Youngblood v. Family Dollar Stores, Inc.*, No. 09Cir 3176(RMB), 2011 WL 4597555 (S.D.N.Y. Oct. 4, 2011). Family Dollar Stores argued that Dukes required denial of class certification. The court, disagreed, however, explaining that unlike Dukes where there was no official policy that led to the alleged gender discrimination, Family Dollar has a blanket policy that all store managers are exempt from overtime. The court further noted that the fact that Family Dollar makes such a blanket determination is evidence that the differences in the store manager position at the various store locations were not material to whether the job is exempt from overtime requirements. Thus, common issues would predominate and certification was appropriate.

More recently, the U.S. Supreme Court vacated the Ninth Circuit's decision upholding a $7.7 million award to San Francisco and Los Angeles employees who claimed they were required to work overtime without pay, and denied meal breaks and itemized pay stubs. The Supreme Court remanded the decision in *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743 (9th Cir. 2010), "for further consideration in light of *Wal-Mart Stores, Inc. v. Dukes*." *Chinese Daily News, Inc. v. Wang*, No. 10-1202, 2011 WL 4529967, at *1 (U.S. Oct. 3, 2011). The Supreme Court did not provide any further analysis of the *Wang* decision. However, the Court's decision is a signal that it considers the *Dukes* decision to apply to wage and hour class actions as well as discrimination class actions.

H. Computer Fraud and Abuse Act

The Computer Fraud Abuse Act ("CFAA") provides civil relief to those whose electronically stored information has been improperly used, damaged or disclosed. 18 U.S.C. § 1030(g). The CFAA also makes it a federal crime to access a computer without authorization or exceed authorized access from a protected computer. The CFAA:

- Prohibits knowingly accessing a "protected computer" either "without authorization" or in a manner that "exceeds authorized access" and obtaining "anything of value" beyond mere use of the computer. 18 U.S.C. § 1030(a)(4).

- Prohibits causing a computer to transmit a "program, information, code or command" that "intentionally causes damage without authorization" to a "protected computer." 18 U.S.C. § 1030(a)(5)(A).

- Prohibits intentionally accessing a "protected computer without authorization" and either causing both "damage" and a "loss," or recklessly causing damage. 18 U.S.C. § 1030(a)(5)(A)-(B).

The Ninth Circuit Court of Appeals recently clarified in *United States v. Nosal*, 642 F.3d 781 (9th Cir. 2011)), that the CFAA covers employee misappropriation of trade secrets when an employee acts with fraudulent intent and accesses an employer's computer system in excess of the employee's authorization and in violation of the employer's computer use restrictions and policies. The court reinstated five CFAA counts in a criminal indictment against the defendant, a former managing director of executive search firm Kerry/Ferry International in a criminal case. Nosal allegedly conspired to steal trade secrets from Kerry/Ferry to help start his own company. Federal prosecutors claimed Nosal engaged three former employees to help him start his own firm and those employees accessed the firm's system to obtain source lists and names and contact information from the firm's database. Nosal argued the CFAA was intended to apply to hackers who improperly gained access to a computer system from outside the company. The court disagreed, however, concluding that the CFAA applies to an employee who misappropriates his or her employer's trade secrets by exceeding authorized access. The court reinstated the charges and remanded the case to be prosecuted before the U.S. District Court. However, the Ninth Circuit recently agreed to rehear the case en banc so employers should tuned for future developments. 2011 WL 5109831 (9th Cir. Oct. 27, 2011).

I. Agencies Looking for Employees Misclassified as Independent Contractors

The U.S. Department of Labor ("DOL") issued a press release on September 19, 2011 announcing that it had, in partnership with the Internal Revenue Service ("IRS"), signed memoranda of understanding (MOUs) with agencies or officials in 11 states (Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah, and Washington, Hawaii, Illinois, and Montana, and New York).

These agreements are part of the DOL's increased efforts to investigate and fine employers who misclassify employees as independent contractors and are part of the DOL's Misclassification Initiative. The Misclassification Initiative was launched under the auspices of Vice President Biden's Middle Class Task Force with the goal of preventing, detecting and remedying employee misclassification. According to the press release, the MOUs will enable the DOL to share information and coordinate law enforcement with the IRS and participating states "in order to level the playing field for law-abiding employers and ensure that employees

receive the protections to which they are entitled under federal and state law." According to some estimates, one in ten "independent contractors" should be classified as an employee.

The DOL has recently filed several successful lawsuits on behalf of misclassified workers. For example, following an investigation, the DOL recently obtained a judgment in Illinois against International Detective & Protective Services Ltd. awarding a group of private security guards misclassified as independent contractors $205,000 in unpaid compensation and liquidated damages. *Department of Labor v. International Detective & Protective Services Ltd.*, No. 09 C 4998 (N.D. Ill. 2011). The DOL also obtained a successful judgment in a lawsuit filed in Dayton, Ohio against Cascom Inc. on behalf of 260 installers. *Department of Labor v. Cascom, Inc.*, 3:09-cv-00257 (S.D. Ohio (2011)). The District Court held that Cascom, which provided residential cable television, Internet and telephone installation services for Time Warner in the Dayton area, should have paid its installers as employees rather than independent contractors. The damages hearing is set for late November; however, the DOL is seeking $1.6 million in back wages and liquidated damages.

The IRS is also currently auditing 3,000 employers nationwide in an attempt to identify employers who improperly classify employees as independent contractors.

The DOL and IRS refer to slightly different standards to determine whether a worker is properly classified as an independent contractor. Under the Fair Labor Standards Act, the DOL looks to the following factors:

1. The extent to which the services rendered are an integral part of the employer's business.
2. The permanency of the relationship.
3. The amount of the contractor's investment in facilities and equipment.
4. The nature and degree of control by the employer.
5. The contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the independent contractor.
7. The degree of independent business organization and operation.

The IRS looks at the degree of control and independence the worker has related to the following three categories:

1. Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
2. Financial: Are the business aspects of the worker's job controlled by the payer? (This includes things like how the worker is paid, whether expenses are reimbursed, who provides tools and supplies, etc.).
3. Type of Relationship: Are there written contracts or employment benefits (*i.e.* pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

J. A Reminder Regarding Invention Assignment Agreements

In June 2001, the U.S. Supreme Court decided a case involving employers' rights to inventions created by employees. The Court ruled in *Board of Trustees of Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, 131 S. Ct. 2188 (June 6, 2011), that a federal law known as the Bayh-Dole Act does not automatically give federal contractors the rights to inventions resulting from research funded by the federal government. Under the ruling, an

individual researcher can deprive a federal contractor of the ownership of federally funded inventions by unilaterally transferring his or her interests to a third party. The possible implications of the decision, however, go beyond federal contractors.

The case involved a Stanford University researcher. The researcher was one of the inventors of a family of HIV diagnostic patents that were assigned to Stanford. The researcher had signed Stanford's employee inventions agreement, in which he agreed to assign to Stanford all of his rights in inventions resulting from his work at Stanford. In 1989, however, the researcher's supervisor arranged for him to conduct research at Cetus Corporation. The researcher signed Cetus's Visitor's Confidentiality Agreement, which stated that the researcher "will assign and do[es] hereby assign" to Cetus his rights in "ideas, inventions and improvements" made "as a consequence of [his] access" to Cetus. Roche later purchased the relevant part of Cetus's business. A dispute arose in 2005 as to the ownership of the patents that resulted from the researcher's work.

On appeal to the U.S. Supreme Court, Stanford asserted that, when an invention is conceived or first reduced to practice with the support of federal funds, the Bayh-Dole Act vests the title to those inventions in the inventor's employer – the federal contractor, in this case Stanford. The Court rejected Stanford's assertion, stating that since 1790, U.S. patent law has operated on the premise that the rights in an invention belong to the inventor, and the Bayh-Dole Act does not alter that premise.

What's the take away for employers? The contracts at issue in this case were signed over twenty years ago. So, first, know what other agreements your employees have signed or are signing (i.e., visitor agreements at other companies that may contain inventions assignment clauses). Second, make sure your employees have made a present assignment of inventions, not a mere agreement to assign. The court of appeals in this case held that the language in Stanford's agreement was an agreement to assign in the future. In contrast, the "hereby do assign" language in Cetus's Visitor's Confidentiality Agreement was a "present assignment" that trumped the Stanford contract's agreement to assign in the future.