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Ben Stafford is a counsel in the firm's Labor & Employment practice who focuses his practice on employment litigation and counseling with a focus on complex class action cases. Ben's areas of experience include proactive defense of individual discrimination, harassment, retaliation, and wage and hour claims arising from federal and state laws such as the Civil Rights Act, the Fair Labor Standards Act, the Americans with Disabilities Act, and the Washington Law Against Discrimination. Ben also has extensive experience defending all phases of wage-and-hour class action cases, including early strategic assessment, defeat of class certification, supervision of large scale electronic document review, oversight of expert witnesses and taking a case to trial.

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. LEGISLATIVE AND REGULATORY DEVELOPMENTS 1

A. Federal Developments 1

1. Affordable Care Act Update 1

a. Employer Shared Responsibility Provisions Coming Into Effect 1

b. Employer Reporting Requirements Under the ACA 2

c. Conflicting Federal Court of Appeals Decisions on ACA Exchange Subsidies 2

d. The Supreme Court's Hobby Lobby Decision and the Obama Administration's ACA Contraception Mandate Policies 4

2. EEOC Issues Pregnancy Discrimination Guidance for First Time in 30 Years 4

a. The Pregnancy Discrimination Act 5

b. The Americans with Disabilities Act's Application to Pregnant Individuals 6

3. Movement Toward Federal Private Right of Action for Trade Secrets Theft 6

B. State and Local Law Developments 7

1. Seattle City Council Approves $15 Minimum Wage 7

2. California Expands Penalties and Liability for Wage and Hour Violations 8

3. California Expands Paid Sick Leave 9

III. CASE LAW DEVELOPMENTS 10

A. 2013-2014 Supreme Court Decisions 10

1. *National Labor Relations Board v. Noel Canning* 10

2. *Harris v. Quinn* 13

3. *Lawson v. FMR* 14

4. *Fifth Third Bancorp v. Dudenhoeffer* 14

5. *Sandifer v. U.S. Steel Corp* 15

B. Upcoming Supreme Court Cases 15

1. *Integrity Staffing Solutions Inc. v. Busk et al.* 15

TABLE OF CONTENTS
(continued)

Page

2. *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores Inc* 16

C. Other Federal Decisions 17

1. Ninth Circuit Rules on Preemption in Trucker Break Case 17
2. Ninth Circuit Allows Statistical Sampling to Show Classwide Liability 18
3. Ninth Circuit Upheld Arbitration Agreements that Contained Provisions Requiring Employees to Waive Class Action Rights 20
4. Ninth Circuit Determines That Truck Drivers Are Not Independent Contractors 21
5. Ninth Circuit Says That California Private Attorney General Act Suits Are Not Federal Class Actions 22
6. Ninth Circuit Holds That Workers Can Choose Not to Use FMLA Leave 23
7. U.S. District Court for the Western District of Washington Denies Summary Judgment on ADA Claim Despite Employee's Ongoing Inability to Work 23

D. Washington Supreme Court Decisions 25

1. Employer Has Religious Accommodation Duty 25

E. Washington Court of Appeals Decisions 26

1. Contracting Party Liable for Retaliation 26
2. Expansion of Wrongful Discharge Claim 26

F. Other Significant State Decisions 27

1. California Court of Appeal Applies Expansive Definition of "Employee" in Class Action Wage Claims 27

I. INTRODUCTION

This has been an exciting year in Labor and Employment law with many interesting developments in and changes to the law. These materials provide a snapshot of some of the most importance changes throughout the year.

II. LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. Federal Developments

1. Affordable Care Act Update

a. Employer Shared Responsibility Provisions Coming Into Effect

The Employer Shared Responsibility Provisions of the Affordable Care Act (the “ACA"), which are also known as the “play-or-pay” provisions, 26 U.S.C. § 4980H, will begin coming into effect in January 2015. These provisions apply to employers with more than 50 employees that do not offer health coverage and have at least one full-time employee receiving a premium tax credit.[1] If an employer falls into this category, the employer will pay either $3,000 for each employee receiving a premium credit or $2,000 for each full-time employee excluding the first 30 employees, whichever is less.

These provisions were originally intended to become effective in January 2014 but have now been delayed and will come into effect in 2015-2016 as follows:

- The provision will apply to companies with 100 or more full-time employees starting in 2015. In 2015, these employers need to offer coverage to 70% of their full-time employees. From 2016 onward, the employer will need to offer coverage to 95% of their full-time employees.

- The provision will apply to companies with 50 to 99 full-time employees starting in 2016, if the employer provides an appropriate certification of eligibility for transition relief to the IRS. This certification can be submitted as part of the Affordable Care Act reporting requirements, described in Section I.A.1.b. This certification requires that the employer not reduce its workforce or employee hours so as to move from having 100 or more full-time employees to 99 or fewer, unless there are bona fide business reasons for doing so. The employer also cannot eliminate or significantly reduce health care coverage that it offered as of February 9, 2014.

- The provision does not apply to companies with fewer than 50 employees.

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[1] A premium tax credit is an advanceable and refundable tax credit that is intended to help low and moderate income individuals purchase insurance through a health insurance exchange established under the Affordable Care Act. To qualify for a premium tax credit, an individual must demonstrate, among other things, that he is not able to obtain affordable coverage through his employer’s plan, which requires showing that the required contribution to the individual’s premium is more than 9.5% of his household income. Revenue Procedure 2014-37.

Shared Responsibility for Employers Regarding Health Coverage, Final Rule, 79 Fed. Reg. 8544 (Feb. 12, 2014); U.S. Treasury Department, Fact Sheet, Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act (ACA) for 2015, http://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf (last visited Oct. 30, 2014).

b. Employer Reporting Requirements Under the ACA

In addition to the substantive responsibilities described above, beginning in 2015, employers must also comply with additional reporting requirements under the ACA. These requirements are set out in Internal Revenue Code Sections 6055 and 6056. 26 U.S.C. §§ 6055, 6056; Information Reporting of Minimum Essential Coverage, 79 Fed. Reg. 13220 (Mar. 10, 2014); Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans, 79 Fed. Reg. 13,231 (Mar. 10, 2014).

Section 6056, which was enacted by the ACA, generally applies to employers subject to the play-or-pay provision of the ACA. These employers must report certain information to the IRS, including details about healthcare coverage offered to full-time employees, and provide related information to employees to help them determine whether they are eligible for a premium tax credit. The reporting requirement is designed to help the IRS administer the play-or-pay provision. Employers will satisfy the reporting requirement if they file a return for each full-time employee using Form 1095-C and a transmittal form using Form 1094-C. Form 1094-C includes a section that will allow employers to certify that they are eligible for transition relief described in Section I.A.1.a.

Section 6055 concerns reporting requirements for providers of minimum essential health coverage. Section 6055 is designed mainly for health insurers, but it also applies to self-insured employers. Since most self-insured employers will also be subject to the requirements of Section 6056, they will be able to comply with both Section 6055 and 6056 by filing the forms required under Section 6056. Otherwise, companies subject to only Section 6055 will use Forms 1095-B and 1094-B. A company may be subject to only Section 6055 if it has fewer than 50 full-time employees but nonetheless provides minimum essential coverage to an individual. Health insurance issuers and plan sponsors of self-insured group health plan coverage may fall into this category. The executive department or agency of a governmental unit that provides coverage under a government-sponsored program is also required to report under Section 6055.

Both requirements become effective in 2015, meaning that employers will not need to file returns under this section until 2016. The IRS, however, encourages employers to voluntarily comply with the information reporting provisions for 2014 by filing the appropriate returns in 2015. IRS Notice 2013-45.

c. Conflicting Federal Court of Appeals Decisions on ACA Exchange Subsidies

While the ACA's provisions are rapidly coming into effect, aspects of the law remain subject to political and legal controversy. Of particular note, the future of the health care exchange subsidies is in question after two federal courts of appeals issued conflicting opinions regarding

whether the federal government could subsidize premiums for individuals in states using the federal health care exchanges rather than establishing their own state-based exchange.

As background, the Affordable Care Act allowed states to design and operate health care exchanges, so long as they met the statutory and regulatory standards set by the ACA. Each state had the option of creating a completely state-based exchange, defaulting to a federal exchange, or entering into a state partnership exchange with the federal government. 42 U.S.C. §§ 18031, 18041. Less than 20 states opted to build a fully state-based exchange. The ACA also established premium tax credits (also referred to as "subsidies") for qualified individuals enrolled in health plans through exchanges. 26 U.S.C. § 36B. The IRS has interpreted the statutory language as giving the federal government authority to offer subsidies for insurance purchased through *any* exchange—whether federal or state. 26 C.F.R. § 1.36B–2(a)(1).

The Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the Fourth Circuit both addressed whether the federal government could subsidize premiums for individuals in states that had defaulted to federal exchanges.

In *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014), the D.C. Circuit held that the federal government could not subsidize premiums for individuals in states that defaulted to federal exchanges but instead could *only* offer subsidies for premiums purchased on a state exchange. The court based its analysis on Section 36B of the Internal Revenue Code, which it found "[o]n its face . . . authorizes tax credits for insurance purchased on an Exchange established by one of the fifty states or the District of Columbia." *Id.* at 393. Although the IRS had interpreted Section 36B to authorize the subsidy for insurance purchased on an exchange established by the federal government, the court held "that the ACA unambiguously restricts the section 36B subsidy to insurance purchased on Exchanges 'established by the State'" and vacated the IRS's regulation. *Id.* at 394. In September, the court vacated its earlier judgment and granted a rehearing en banc. *Halbig v. Burwell*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014). Oral argument is scheduled for December 17, 2014, and a decision is not expected until Spring 2015.

Shortly after the D.C. Circuit issued its initial decision in *Halbig v. Burwell*, the Fourth Circuit reached the opposite conclusion in *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), and upheld the subsidies for federal exchanges. Whereas the D.C. Circuit found the statutory language plainly limited to subsidies for state exchanges only, the Fourth Circuit determined that the relevant statutory language was susceptible to multiple interpretations. Therefore, the court found, it was appropriate to defer to the IRS's reasonable interpretation of the statute.

If the en banc D.C. Circuit reaches the same conclusion in *Halbig*, and if such a decision is upheld, it could dramatically affect the operation of the ACA because the subsidies are integral to a number of its provisions. Of particular relevance to employers is the fact that play-or-pay provisions and associated penalties for employers are triggered by employees receiving subsidies when they purchase insurance on an exchange. If fewer employees receive subsidies, then fewer employers will be subject to penalties. This issue is far from being resolved and is worth following over the coming year or more as it winds its way through the courts.

d. The Supreme Court's Hobby Lobby Decision and the Obama Administration's ACA Contraception Mandate Policies

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014), the Supreme Court held 5-4 that the regulation imposing the ACA's contraception mandate "substantially burdens the exercise of religion" and violated the Religious Freedom Restoration Act of 1993 as it applied to closely held corporations. The U.S. Department of Health and Human Services regulations implementing the contraception mandate generally required nonexempt employers to provide coverage for all FDA-approved methods of contraception. Hobby Lobby objected to this requirement, arguing that covering certain forms of contraception under its insurance plan burdened the corporation's religious rights. The Court agreed with Hobby Lobby. While the *Hobby Lobby* decision received a great deal of press coverage, it is important to note that it applies only to *closely held* and not *public* corporations. The actual scope of the decision is therefore somewhat limited.

Following this decision, in August 2014, the Obama administration issued a proposed rule regarding the contraception mandate. Coverage of Certain Preventative Services Under the Affordable Care Act, 79 Fed. Reg. 51118 (Aug. 27, 2014). A final rule has not yet been issued. The administration stated that it would exempt from the mandate's scope only private companies, not publicly-traded ones. In addition, the administration sought guidance regarding how to define the types of employers that were exempted from the contraception mandate. The proposed rule also addressed issues raised by religious nonprofits that objected to being required to inform insurers of their religious objections to contraception. Some nonprofits had argued that this process made them complicit in activities with which they disagreed because once they notified the insurer, the onus shifted to the insurer to supply birth control. Under the proposed rule, the administration allowed religious nonprofits and exempted for-profits to notify the government of religious objections.

2. EEOC Issues Pregnancy Discrimination Guidance for First Time in 30 Years

On July 14, 2014, the Equal Employment Opportunity Commission ("EEOC") issued new guidance on pregnancy discrimination for the first time in more than 30 years. EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues, http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last visited Oct. 30, 2014). The guidance provides detailed compliance requirements for the Pregnancy Discrimination Act, the Americans with Disabilities Act, and other pregnancy and childbirth-related state and federal laws.

The guidance focuses on three main areas:

- When employer actions may constitute unlawful discrimination on the basis of pregnancy, childbirth, or related medical conditions in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k);

- The obligation of employers under the PDA to provide pregnant workers with equal access to employment benefits, including leave, light duty, and health benefits; and

- How Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12111-12117,.which was amended in 2008 to broaden the definition of disability, applies to individuals with pregnancy-related impairments.

The PDA and ADA apply to private employers, as well as state and local government employers, with 15 or more employees. Although this guidance is not law and may be disregarded by courts, it is helpful for employers to be aware of how the EEOC will interpret relevant statutes. The guidance also includes an extensive best-practices section that may be helpful to employers.

a. The Pregnancy Discrimination Act

The PDA prohibits employers from firing, refusing to hire, demoting, or taking any other adverse action against a woman if pregnancy, childbirth, or a related medical condition was a motivating factor for the adverse employment action. It also protects women from discrimination based on their ability or intention to become pregnant, with very limited exceptions if an employer can demonstrate that lack of childbearing capacity is a bona fide occupational qualification.

The guidance document also clarifies that the PDA protects employees from discrimination based on past pregnancies, an issue that might arise if an employee is terminated shortly after returning from pregnancy leave. The guidance also specifies that lactation is a medical condition related to pregnancy and that as a result an employer who does not allow reasonable lactation breaks may violate the PDA, as well as the Fair Labor Standards Act and state laws. Under the Fair Labor Standards Act, an employer must provide "a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." 29 U.S.C. § 207(r)(1)(A).

The PDA requires that pregnant women who are able and willing to work must be permitted to do so on the same conditions as other employees, and the guidance emphasizes that employers should not attempt to impose unsolicited leave or work modifications on pregnant workers. For example, the EEOC warns employers against precluding a pregnant woman from handling dangerous chemicals or moving heavy equipment.

On the other hand, the PDA requires that when an employee becomes unable to work for reasons related to pregnancy or childbirth, she must be given the same rights, leave privileges, and benefits as other employees with similar temporary disabilities and work restrictions. The guidance includes a controversial interpretation of this requirement, stating that even in the case of healthy pregnancies free of complications, employers must still provide accommodations equivalent to those provided to non-pregnant employees unable to perform their jobs. The result is that if an employer offers light duty or flexible scheduling to any worker, it is obligated to provide those benefits available to any pregnant worker who requests them, even if these benefits are not medically necessary for any reason beyond the pregnancy itself. In an example given by the EEOC, a pregnant worker who requests a light duty assignment with a 20-pound lifting restriction must be accommodated if a worker who is injured, is ill, or has a condition that would be a disability under the ADA would be accommodated.

The EEOC's interpretation of an employer's obligation to provide accommodations to pregnant workers will be reviewed by the Supreme Court this term in *Young v. United Parcel Service*, Docket Number 12-1226. The issue in *Young* is "Whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are 'similar in their ability or inability to work.'" Petition for a Writ of Certiorari at i, *Young v. United Parcel Service, Inc.*, 134 S. Ct. 2898, No. 12-1226, 2013 WL 1462041 (2014). The plaintiff in *Young* had a healthy, normal pregnancy and asked for an accommodation to reduce the lifting requirements of the job, which would allow her to work throughout her pregnancy. UPS denied the request and informed her that work modifications were available only to employees injured on the job, disabled as defined by the ADA, or without U.S. Department of Transportation certification. The district court dismissed the case in favor of UPS and the Fourth Circuit affirmed, reasoning that the policy was not discriminatory because it applied equally to pregnant and non-pregnant workers. *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013), cert. granted, 134 S. Ct. 2898 (2014). Oral argument will take place on December 3, 2014.

b. The Americans with Disabilities Act's Application to Pregnant Individuals

The ADA does not define pregnancy as a disability. Impairments related to pregnancy, however, may bring a pregnant individual under the ADA's protection. The guidance reminds employers that the 2008 amendments to the ADA, known as the ADA Amendments Act, expanded the definition of disability, making it easier for workers with complications related to pregnancy and childbirth to meet the definition of disability. Pregnancy-related impairments are a disability if they substantial limit, or limited, one or more major life activities such as walking, standing, lifting, or other major bodily functions. An impairment does not have to prevent or severely restrict performance of a major life activity in order to be considered substantially limiting. The guidance also serves as a reminder that the ADA prohibits adverse actions against employees regarded as having disabilities. Therefore, if an employer takes an adverse action against a pregnant worker because of an actual or perceived pregnancy-related impairment, the employer could be in violation of the ADA.

3. Movement Toward Federal Private Right of Action for Trade Secrets Theft

The U.S. House Judiciary Committee, in mid-September, ordered that the Trade Secrets Protection Act, H.R. 5233, 113th Cong. (2014), be sent to the full House for amendment by voice vote. The Trade Secrets Protection Act would create a federal private right of action for trade secrets theft under the Economic Espionage Act, which currently allows only criminal trade secrets cases under federal law. Presently, civil suits addressing trade secret misappropriation arise solely as a matter of state law. Many states, including Washington, have adopted versions of the Uniform Trade Secrets Act. *See* Chapter 19.108 RCW.

Supporters of the bill argue that it will increase harmonization, provide easier access to federal courts, and preserve evidence and prevent secrets from being disclosed through an ex parte seizure provision. The provision allows a court to issue an order allowing the seizure of property

"necessary to preserve evidence in a civil action brought [under the act] or to prevent the propagation or dissemination of the trade secret that is the subject of the action" based solely on an uncontested affidavit or complaint filed by a party. H.R. 5233 § 2(b)(2). Opponents argue that the ex parte seizure provisions could be abused for anti-competitive ends and note that no state law includes a similar provision.

The U.S. Senate Judiciary Committee debated a companion bill to the Trade Secrets Protection Act, called the Defend Trade Secrets Act, but has not taken further action. The Senate bill also contains ex parte seizure provisions.

It remains unclear whether the current Congress will pass federal trade secrets protection, but this development warrants observation. A federal cause of action may provide more consistent and assured trade secret protection.

B. State and Local Law Developments

1. Seattle City Council Approves $15 Minimum Wage

On June 3, 2014, Seattle Mayor Ed Murray signed legislation unanimously approved by the Seattle City Council that will raise Seattle's minimum wage to $15 per hour over the next several years, with the first increase scheduled for April 2015. Small employers (those with 500 or fewer employees) will be subject to the $15 minimum wage in seven years, while large employers will reach that level in three years if they do not provide health care benefits. Seattle Mun. Code § 14.19 (2014).

The first wage increase is required on April 1, 2015, and will depend upon the category of employer:

- Employers with more than 500 employees in the United States will be required to pay $11.00 per hour.
- Employers with more than 500 employees in the United States with medical benefits will be required to pay $11.00 per hour.
- Employers with 500 or fewer employees will be required to pay $10.00 per hour.
- Employers with 500 or fewer employees and with medical benefits or tips will be required to pay $11.00 per hour.

Following the April 2015 increase, each subsequent increase will occur on January 1. The chart below, available at http://murray.seattle.gov/minimumwage, provides additional detail regarding future increases.

MAYOR ED MURRAY

SCHEDULE OF WAGE INCREASES UNDER IIAC PROPOSAL

WASHINGTON STATE MINIMUM WAGE: 2.40%CPI ESTIMATED		PROPOSED SEATTLE MINIMUM WAGE (2.40% CPI ESTIMATED ONCE 15 PER HOUR IS REACHED)			
		EMPLOYERS> 500 EMPLOYEES		EMPLOYERS ≤ 500 EMPLOYEES	
		MINIMUM WAGE (SCHEDULE A)	MINIMUM WAGE W/ HEALTH CARE (SCHEDULE B)	GUARANTEED MINIMUM COMPENSATION (SCHEDULE C)	MINIMUM WAGE (SCHEDULE D)
YEAR	STATE WAGE	-	-	-	-
2015	$9.54	11.00	11.00	11.00	10.00
2016	$9.77	13.00	12.50	12.00	10.50
2017	$10.01	15.00	13.50	13.00	11.00
2018	$10.25	15.36	15.00	14.00	11.50
2019	$10.49	15.73	15.73	15.00	12.00
2020	$10.75	16.11	16.11	15.75	13.50
2021	$11.00	16.49	16.49	16.49	15.00
2022	$11.26	16.89	16.89	16.89	15.75
2023	$11.53	17.29	17.29	17.29	16.50
2024	$11.80	17.70	17.70	17.70	17.25
2025	$12.08	18.13	18.13	18.13	18.13
—	—				
2034	14.97				
2035	15.33				

For purposes of classifying the size of an employer, franchisees associated with a franchisor or network of franchisees that collectively employ more than 500 employees are considered Schedule 1 Employers, subject to a faster phase-in of the $15 per hour minimum wage. The International Franchise Association ("IFA") filed a lawsuit in the federal District Court for the Western District of Washington approximately a week after Mayor Murray signed the legislation. Dkt. No. C14-848RAJ (Jones, J.). The suit alleges that the minimum wage law violates numerous clauses of the Washington and United States Constitutions and sought injunctive relief. The IFA alleged that the law discriminates against small businesses that operate as franchises by treating them as large employers if the franchise network collectively employs more than 500 workers in the United States. The district court has not yet ruled on the motion for preliminary injunction.

2. California Expands Penalties and Liability for Wage and Hour Violations

In August 2014, California Gov. Jerry Brown, signed into law a bill that amends Section 1194.2 of California's Labor Code to allow workers more time to seek liquidated damages when pursing claims that an employer failed to pay minimum wage. A.B. 2074 (2014). California previously allowed workers to bring claims for liquidated damages in actions alleging that they were paid less than the minimum wage, but liquidated damages claims were arguably subject to the one-

year statute of limitations applicable for penalties rather than the three-year statute of limitations for the underlying claim. The change will allow employees to pursue liquidated damages at any time they are able to bring a claim that an employer failed to pay minimum wage. The employee may recover liquidated damages equal to the amount of wages unlawfully unpaid.

In October 2014, California Governor Jerry Brown signed into law a new labor code provision, Section 2810.3 of California's Labor Code, that will allow companies relying on labor provided by third-party contractors to be held jointly liable for wages owed to the contractor's workers or for failure to secure workers' compensation insurance for the contactor's workers. A.B. 1897 (2014). The provision applies to companies that use third parties as a source of workers "within the usual course of business." Employers with fewer than 25 workers are exempt, as are companies that use five or fewer subcontracted workers. The section also does not apply to employees exempt from overtime under administrative, executive, and professional exemptions. The new provision will be effective January 1, 2015. Companies using subcontracted workers are likely to be joined, and may be held jointly liable, in wage-and-hour lawsuits brought by their subcontractors' workers. Companies using subcontracted workers should consult with experienced counsel, consider whether and how to ensure subcontractors' compliance with labor laws, and update the indemnity, insurance, and termination provisions in their service agreements.

3. California Expands Paid Sick Leave

In September 2014, California Governor Jerry Brown signed into law the "Healthy Workplaces, Healthy Families Act of 2014," A.B. 1522 (2014), which entitles employees who work 30 or more days within a year of their start date to one hour of paid sick leave for every 30 hours they work. Under the Act, employers are required to provide employees up to three days of paid sick leave every year. Employees may begin using the accrued paid sick days on their 90th day of employment. The employee can use the time to care for himself or a family member, broadly defined. Accrued paid sick time, however, is not required to be paid out upon termination (unlike vacation time, which California does require to be paid out at termination).

Employers with policies that already provide three or more days of sick time or paid time off may be exempt from providing additional paid sick days, provided that the existing leave policy makes available the same amount of leave under the same conditions as the Act and the policy either is consistent with the accrual, carry over, and use requirements of the Act or provides at least three days of paid sick leave or paid time off each year. Importantly, even if an employer has an existing sick leave policy, it is still subject to the notice and record-keeping requirements of the Act.

Under the Act, employers must provide written information about the paid sick leave entitlement at hiring, display a poster notifying employees of their paid sick leave rights, and provide employees with written notice regarding the paid sick leave or paid time off available to them on the employee's wage statement or in a separate document on the employee's pay date. The employer must also retain records for three years documenting the hours work, paid sick leave accrued, and paid sick leave use for each employee.

The Act also prohibits discrimination or retaliation against employees for using sick days or for filing a complaint alleging a violation of the Act.

The Labor Commissioner will enforce the provisions of the Act and may award reinstatement, back pay, the payment of sick days unlawfully withheld, and the payment of an additional liquidated damages amount. The maximum aggregate penalty is $4,000.

The Act applies to nearly all employers and employees, with limited exceptions for some employees covered by collective bargaining agreements and some airline employees subject to federal laws.

These changes will go into effect on July 1, 2015.

III. CASE LAW DEVELOPMENTS

A. 2013-2014 Supreme Court Decisions

1. *National Labor Relations Board v. Noel Canning*

On June 26, 2014, in *National Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550 (2014), the Supreme Court held that President Obama lacked the power to appoint three members to the National Labor Relations Board (the "NLRB") during a Senate recess in January 2012. The decision is significant because it means that all decisions that the NLRB made between January 4, 2012, and August 5, 2013, have no legal effect, as it did not have a quorum during this period. This includes several significant employee-friendly decisions.

The case originated in a labor dispute. The NLRB held that Noel Canning, a soda distributor, unlawfully refused to reduce to writing and execute a collective-bargaining agreement with a labor union. The NLRB ordered Noel Canning to execute the agreement and make the employees whole for any losses they had suffered.

Noel Canning asked the Court of Appeals for the District of Columbia Circuit to set the NLRB's order aside. It argued that three of the five NLRB members were invalidly appointed and therefore the NLRB did not have the quorum of three necessary for it to act under 29 U.S.C. § 153(b), given Supreme Court precedent holding that in the absence of a lawfully appointed quorum the NLRB is unable to exercise its powers.

Prior to the January 2012 recess, the President had nominated three candidates for the NLRB, but Republicans did not allow those candidates to come up for a vote. During this time, the Senate remained in session through the use of pro forma meetings in an effort to stop the President from using the recess appointment power. During a three-day recess between pro forma sessions, the President appointed the three candidates to the Board, invoking his power under the Recess Appointments Clause.

The Court of Appeals for the District of Columbia Circuit found that the President did not have the power to make the appointments under the Recess Appointments Clause, concluding that the Clause's words "the recess of the Senate" do not include recesses *within* a formal congressional session but only recesses *between* formal congressional sessions. The court of appeals also held

that the Clause's phrase "vacancies that may happen during the recess" applied only to vacancies that came into existence *during* the recess. For both these reasons, the court of appeals determined that the President's three appointments were invalid. The Supreme Court reached the same conclusion, but on different bases.

The Supreme Court began its opinion by making two "background observations." The first was that the Recess Appointments Clause provides a secondary, not primary, method for appointing officers of the United States. The second was that historical practice was a significant consideration for the Court in its interpretation of the Clause, and the Court observed that Presidents have made recess appointments since the founding.

After these initial observations, the Court then answered three questions:

1. Whether the words "recess of the Senate" refers to breaks between formal sessions of Congress only or whether it also applied to breaks during those sessions. The Court concluded that the words applied to both types of recess. In addition, the Court observed that recesses three days or less were not long enough to invoke the Clause and that recesses between three and ten days are presumptively too short to allow a president to invoke the Clause.

2. Whether the words "vacancies that may happen" referred only to vacancies that first came into existence during a recess or whether the words also included vacancies that arose prior to a recess. The Court concluded that the Clause applied to both types of vacancies.

3. The third question concerned the effect of the length of the recess and whether pro forma sessions should be included in calculating the length of the recess. The Court concluded that pro forma sessions must be considered in determining the length of the recess because the Senate, under its own rules, retained the capacity to conduct Senate business during that time.

Based on its answer to the three questions, the Court concluded that the President's appointments to the NLRB were invalid. The Court observed that when the appointments took place, the Senate was in a three-day recess between pro forma sessions, which was too short to allow appointments to be made under the Recess Appointments Clause. Therefore, the President lacked the power to make the three appointments at issue, and they were invalid.

On August 4, 2014, a press release issued by the NLRB stated that on July 18, 2014, the lawfully appointed NLRB "unanimously ratified all administrative, personnel, and procurement matters taken by the Board from January 4, 2012 to August 5, 2013," the date on which the NLRB regained a valid quorum. The decisions included "appointment of various Regional Directors, Administrative Law Judges, and restructurings of regional and headquarters offices." The regional directors who were newly ratified then ratified their own actions during the relevant time period.

Despite the NLRB's ratification of previous administrative and personnel matters, the reverberations of the *Noel Canning* decision will be felt for some time. From January 4, 2012, to August 5, 2013, when the NLRB did not have a valid quorum, it is estimated that the NLRB issued over 300 published decisions and approximately 400 unpublished decisions. A number of these decisions were controversial and modified or overruled past NLRB precedent.

On July 9, 2014, NLRB General Counsel Richard Griffin provided some insight into the activities of the NLRB in the wake of the *Noel Canning* decision. He noted that there were 98 cases in the federal courts of appeals involving the invalid recess appointees. Forty-three of those cases were "no record" cases, meaning that the NLRB had not yet filed a record in court. In those cases, under the National Labor Relations Act, the NLRB was able to set aside the orders and file motions to dismiss, which meant that employers prevailed in those cases.

The lawfully appointed NLRB also has set aside orders by the unlawfully appointed Board. From the practice to date, it appears that the NLRB will reconsider decisions on request and sua sponte. A number of notable decisions are currently staged for new decisions by the lawfully appointed Board.

Controversial decisions by the unlawfully appointed NLRB include:

- *Albertson's, LLC*, 359 NLRB No. 147 (July 2, 2013). In *Albertson's*, the NLRB expressly overruled decades of Board precedent. During a union organizing campaign, employers may violate Section 8(a)(1), 29 U.S.C. § 158, of the National Labor Relations Act (NLRA) by soliciting grievances from employees. Previous Board decisions found that the NLRA was not violated if the employee did not express complaints or demands in response to the employer's solicitation. The Board overruled *Wm. T. Burnett & Co.*, 273 NLRB 1084 (1984), "to the extent *Burnett* holds that the solicitation of grievances cannot be found unlawful if the solicited employee fails to raise a grievance in response to the solicitation." *Albertson's*, 359 NLRB No. 147, at *2. The Board concluded that the solicitation of grievances, regardless of whether an employee responded, was coercive because it raised an inference that the employer was promising to remedy the grievances. The *Albertson's* decision was set aside as a result of *Noel Canning*, but a subsequent NLRB decision by the lawfully appointed Board subsequently accepted and incorporated by reference the earlier decision. *Albertson's, LLC*, 361 NLRB No. 71 (Oct. 24, 2014).

- *American Baptist Homes of West*, 359 NLRB No. 46 (Dec. 15, 2012). In *American Baptist*, the unlawfully appointed NLRB overruled a previous decision—*Anheuser-Busch*, 237 NLRB 982 (1978)—that had exempted from union requests for information witness statements obtained in confidence during employer investigations leading to disciplinary action. This decision was vacated, and the lawfully appointed Board has not reconsidered the issue.

- *Banner Health System*, 358 NLRB No. 93 (July 30, 2012). In *Banner*, the employer had asked employees who had made a complaint not to discuss the matter with coworkers while the employers' investigation was ongoing. The NLRB held that "[t]o justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 [29 U.S.C. § 157] rights." *Id.* at *2. The Board went on to conclude that the employer's "generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights." *Id.* To date, the lawfully appointed NLRB has not issued a published decision approving *Banner Health*.

As these decisions and subsequent Board actions demonstrate, *Noel Canning* created great uncertainty regarding decisions issued by the unlawfully appointed Board. Employers should continue to monitor developments relating to decisions issued between January 4, 2012, and August 5, 2013.

2. *Harris v. Quinn*

In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Supreme Court held, 5-4, that the First Amendment prohibits a state from compelling personal care providers to subsidize speech on matters of public concern by a union they do not wish to join or support. While the actual scope of the opinion is narrow, it may plant the seeds for further decisions narrowing protections for unions for public employees.

The case was brought by "personal assistants" ("PAs") in the Illinois Home Services Program, which allows Medicaid recipients to hire a PA to provide homecare services. The Medicare recipients control most aspects of the employment relationship with the PAs, and the state's main role is to provide compensation. The state's status as an employer was created by executive order and codified by the legislature to allow the PAs to join a labor union and engage in collective bargaining under Illinois's Public Labor Relations Act. Under this scheme SEIU Healthcare Illinois & Indiana was designated as the exclusive union representative and entered into collective bargaining agreements with the state that contained an agency fee provision requiring all bargaining unit members who did not wish to join the union to pay a union fee for certain activities, including those related to the collective bargaining process. A group of PAs brought a class action claiming that the Public Labor Relations Act violated the First Amendment to the extent that it authorized the agency fee.

The district court dismissed the claims, and the Seventh Circuit affirmed in part and reversed in part. The Seventh Circuit concluded that the PAs were state employees under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, the Court upheld the maintenance of a union shop in a public workplace and held that employees who were not members of the union could be required to pay dues for contract administration, collective bargaining, and grievance adjustment purposes. *Abood* is thus viewed as central to the existence of unions for public employees.

Harris was viewed as presenting the Supreme Court with a vehicle it might use to overturn *Abood*. In the end, however, the Court instead determined that because of the *Abood* case's "questionable foundations" and because the PAs were not full-fledged public employees, *Abood* did not apply. Instead, the Court applied generally applicable First Amendment standards, meaning that the agency fee provision must serve a compelling state interest that could not be achieved through means that were significantly less restrictive to associational freedoms. The Court found that none of the interests furthered by the agency fee provision were sufficient.

While the Supreme Court declined to use *Harris* as a vehicle to overrule *Abood*, some commentators view *Harris* as inviting a second case that *would* allow the Supreme Court to do so. The four dissenting justices, in an opinion by Justice Kagan, criticized the majority for "gratuitous dicta critiquing *Abood*'s foundation" and defended *Abood* as "deeply entrenched" as "the foundation for not tens or hundreds, but thousands of contracts between unions and

governments across the nation." To date, there are no published opinions in which state or local government workers have challenged *Abood*'s vitality following *Harris*, but it is likely there will be in the coming years.

3. *Lawson v. FMR*

In *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014), the Supreme Court held that Sarbanes-Oxley whistleblower protection extended to employees of private contractors and subcontractors serving public companies.

The Sarbanes-Oxley Act of 2002 was enacted after numerous corporate and accounting scandals. Its purpose is to improve the accuracy and reliability of corporate disclosures in order to prevent scandals like those that affected Enron, WorldCom, and other companies. Title VII of the Act provides protection to whistleblowers in publicly traded companies. 18 U.S.C. § 1514A.

The plaintiffs in *Lawson* were employees of a private company that contracted to advise and manage mutual funds. They alleged that their employer retaliated against them after they reported fraud related to the mutual funds, which were public. The Court examined the text of the provision, the structure of the anti-retaliation provision, legislative antecedents, and statutory purpose before concluding that employees of contractors and subcontractors serving public companies were protected by the anti-retaliation provision of Sarbanes-Oxley.

The reach of *Lawson* will be determined in future litigation. For the time being, private employers contracting with public entities should exercise greater caution in responding to employee complaints that could be viewed as falling under the whistleblower protections of Sarbanes-Oxley. In particular, employers should exercise caution when making any adverse employment decisions following an employee complaint that involves corporate disclosures or accountability.

4. *Fifth Third Bancorp v. Dudenhoeffer*

In *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), the Supreme Court rejected a rule that had previously been accepted by a number of courts of appeal—that fiduciaries of employee stock ownership plans ("ESOPs") are entitled to a "presumption of prudence" in connection with their decisions to buy or hold an employer's stock.

The Employee Retirement Income Security Act of 1974 ("ERISA") requires that fiduciaries of pension plans act prudently in managing the plan's assets. 29 U.S.C. § 1104(a)(1)(b). Most ERISA fiduciaries are subject to the "prudent man standard of care," which requires the fiduciary to discharge his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1). ESOPs are a type of pension plan in which the primary investment is in the stock of the company employing the plan participants. Until *Dudenhoeffer*, ESOP fiduciaries were subject to a "defense-friendly standard"—the "presumption of prudence"—that required "that the plaintiff make a showing that would not be required in an ordinary duty-of-prudence case, such as that the employer was on the brink of collapse." *Dudenhoeffer*, 134 S. Ct. at 2463. This standard made it harder for plaintiffs to show that plan fiduciaries had violated their duties under ERISA.

The Supreme Court held that fiduciaries of ESOPs are subject to the same duty of prudence that applies to ERISA fiduciaries in general. Although the Supreme Court rejected the presumption of prudence, it reminded lower courts that ERISA stock-drop cases should be given an exacting review on motions to dismiss. Commentators expect an increase in new stock-drop cases in the short term as a result of this ruling but do not expect significant long-term effects.

5. *Sandifer v. U.S. Steel Corp.*

In *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014), the Supreme Court held that under the terms of a collective bargaining agreement (CBA), time spent by employees putting on and taking off their mandatory protective gear is not compensable under the Fair Labor Standards Act ("FLSA").

The unionized employees were required to put on certain protective gear before starting their shift. The terms of the CBA provided that "time spent in changing clothes . . . at the beginning or end of each workday" was not compensable. Former and current hourly workers filed a putative class action seeking back pay for the time spent putting on and taking off protective gear. The trial court granted summary judgment on the issue, holding that time spent putting on and taking off protective gear constituted "changing clothes" under the CBA and was not compensable. The Seventh Circuit affirmed, as did the Supreme Court.

In a non-union setting, a court must engage in a fact-specific analysis to determine whether putting on and taking off certain items is compensable. This depends on such factors as the nature of the gear in question, the time it takes to put on and remove the gear, and so on. By contrast, in a union setting, employees may bargain away their right to compensation for such time. The key question for the Court to answer was whether putting on and taking off protective gear was "changing clothes" within the meaning of the CBA. The Court focused on the standard use of the term and concluded that "clothes" encompasses items designed and used to cover the body and are commonly regarded as articles of dress, which encompassed most of the protective gear the workers wore.

This decision will make it harder for unionized employees to recover damages under the time spend putting on and taking off protective gear if "changing clothes" is excluded under the terms of the CBA or if the parties' custom or practice excludes such compensation. *Sandifer* is, however, far from the last word on this issue. Wage and hour class actions continue to be filed asserting that employees are entitled to compensation for activities that occur before or after the start of an employee's scheduled shift, such as donning and doffing gear, passing through security lines, or logging into and out of the employer's computer system. The *Integrity Staffing Solutions Inc. v. Busk* case described below is one example.

B. Upcoming Supreme Court Cases

1. *Integrity Staffing Solutions Inc. v. Busk et al.*

Plaintiffs in *Busk*, Docket Number 13-433, are former hourly employees of Integrity Staffing Solutions, Inc., a company that provides warehouse space and staffing to companies like Amazon.com. Plaintiffs alleged that Integrity violated federal and state laws by refusing to compensate them for passing through a mandatory security clearance at the end of each shift that

could take up to 25 minutes. The district court granted Integrity's motion to dismiss and held that time spent in the security clearance process was not compensable under the FLSA. The Ninth Circuit reversed the district court's dismissal.

The FLSA, as amended by the Portal-to-Portal Act of 1947, does not usually require compensation for activities that are "preliminary" or "postliminary" to the "principal activity or activities" that the employee "is employed to perform." 29 U.S.C. § 254(a). If, however, the activities are "integral and indispensable" to an employee's principal activities, they are compensable. *Steiner v. Mitchell*, 350 U.S. 247, 332 (1956). The question in *Busk*, therefore, was whether the time necessary to clear security at the end of the day was "integral and indispensable" to the employees' actual duties.

Because the case was decided on a motion to dismiss, the court was required to accept all of the employees' allegations as true for purposes of deciding the motion. The Ninth Circuit concluded, accepting plaintiffs' allegations as true, that the security clearances were necessary to the employees' primary work and were done for their employer's benefit because their purpose was to prevent employee theft.

The Supreme Court heard argument in early October 2014. Cases like *Busk* are significant because of the substantial, potential exposure employers face if the case is certified as a class action. If a large group of employees can recover for a small amount of compensable time each day—which will likely include unpaid overtime—damages can be very large and the pressure to settle short of trial overwhelming. It would be a significant win for employers to be able to eliminate some of these kinds of claims at the outset of a lawsuit.

2. *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores Inc.*

In *EEOC v. Abercrombie & Fitch*, Docket Number 14-86, the U.S. Supreme Court will decide "whether an employer can be liable under Title VII for refusing to hire an applicant or discharging an employee based on a 'religious observance and practice' only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee." Petition for a Writ of Certiorari at I, *EEOC v. Abercrombie & Fitch*, __ S. Ct. __, No. 14-86, 2014 WL 3702553 (2014).

The EEOC claimed that Abercrombie violated Title VII by failing to provide a reasonable religious accommodation for a prospective employee, Samantha Elauf. Abercrombie requires its employees to comply with its "Look Policy," which requires sales-floor employees, called "Models," to dress in the type of clothing Abercrombie sells in its stores. The Look Policy also forbid employees from wearing black clothing and "caps," although the policy did not define what a "cap" is, Abercrombie instructed its employees not to make assumptions about interviewees and not to ask applicants about their religion. Store managers were instructed to contact their supervisor or the company's human resources department if questions about the Look Policy or a request for a deviation from the policy arose during the interview.

Elauf interviewed for a position as a "Model" at an Abercrombie store while wearing Abercrombie clothing and a black hijab. During the interview, the store manager described some of the dress requirements for employees, but did not inform Elauf that she would not be able to wear her hijab if she was hired. The topic of the hijab did not come up during the interview, and Elauf never informed the store manager that she was a Muslim, wore the hijab for religious reasons, or would need an accommodation to allow her to wear the hijab under Abercrombie's policy. Although the store manager's assessment was that she would recommend hiring Elauf, she consulted with her district manager regarding whether Elauf could wear a hijab. The district manager told the store manager that Elauf shouldn't be hired because she wore a headscarf. Elauf was not hired and later learned that the reason was her hijab.

The district court granted summary judgment in favor of the EEOC and denied summary judgment in favor of Abercrombie & Fitch. The Tenth Circuit reversed, granting summary judgment in favor of Abercrombie. The Tenth Circuit reasoned that there was no genuine dispute of material fact regarding what the court considered the "key point: Ms. Elauf never informed Abercrombie prior to its hiring decision that her practice of wearing a hijab was based on her religious beliefs (and because she felt religiously obligated to wear it) that she would need an accommodation for the practice, because of a conflict between it and Abercrombie's clothing policy." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1116 (10th Cir. 2013), *cert. granted*, No. 13A1139, 2014 WL 3702553 (U.S. Oct. 2, 2014).

The Supreme Court is therefore expected to decide how much knowledge employers need to have about applicants' religious beliefs before the duty to offer an accommodation arises. Is it enough that the employer *should* have realized an accommodation might be necessary? Or is some actual notice from the applicant of the need for accommodation required?

C. Other Federal Decisions

1. Ninth Circuit Rules on Preemption in Trucker Break Case

In *Dilts v. Penske Logistics, LLC*, 12-55705, 2014 WL 4401243 (9th Cir. Sept. 8, 2014), the Ninth Circuit held that California's meal and rest break laws were not preempted by the Federal Aviation Administration Authorization Act ("FAAAA").

Plaintiffs, representing a certified class of 349 deliver drivers and installers, brought an action alleging that defendants, which are motor carriers, routinely violated California's meal and rest break laws. Defendants moved for summary judgment, arguing that state meal and rest break laws as applied to motor carriers were preempted under the FAAAA, which provides: "States may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1)."

The Ninth Circuit observed that "even if state laws increase or change a motor carrier's operating costs, broad laws applying to hundreds of different industries with no other forbidden connection with prices, routes, and services—that is, those that do not directly or indirectly mandate, prohibit, or otherwise regulate certain prices, routes, or services—are not preempted by the FAAAA." *Dilts*, 2014 WL 4401243, at *7 (internal quotation marks, alterations, and citation omitted). The court noted that with respect to California's meal and rest break laws, the question

of preemption was not a close case because they "plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended to preempt. They do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly." *Id.*

The *Dilts* case is significant because violation of California's meal and rest break laws can give rise to substantial damages and penalties. Over the last decade, meal and rest break requirements have been a significant source of class action lawsuits in California. The *Dilts* case removes one potential argument that motor carriers had for attempting to avoid these kinds of claims.

2. Ninth Circuit Allows Statistical Sampling to Show Classwide Liability

In *Jimenez v. Allstate Insurance Co.*, 765 F.3d 1161, 1162 (9th Cir. 2014), the Ninth Circuit upheld a district court's grant of class certification and approved the use of statistical sampling to demonstrate classwide liability. The decision is significant because while courts have sometimes been willing to accept statistical evidence to prove *damages* in appropriate class action cases, they have generally rejected efforts to use such evidence to prove *liability*. *Jimenez* may make it easier to certify cases as class actions, including in Washington.

The district court had certified a class of approximately 800 Allstate claims adjusters in California. The type and quantity of work and the amount and quality of interaction with managers varied for the claims adjusters depending on a variety of factors, including the type of claims work the adjuster did and the office in which the adjuster worked. In 2005, Allstate moved the California-based claims adjuster from salaried, exempt positions to hourly status. Both before and after this change, it was common for claims adjusters to work more than eight hours per day or 40 hours per week. The manager of each local office could file a timekeeping exception, which happened when a claims adjuster requested overtime or early leave. The managers did not adjust time based on claims adjusters' work habits or phone records, and a set compensation for each budget for each office limited the amount of overtime a manager could approve.

The class action suit alleged a number of state law violations, including, inter alia, that Allstate violated the California Labor Code by not paying for overtime and by failing to pay timely wages upon termination. The suit also alleged that Allstate had engaged in unfair competition in violation of the California Business and Professions Code. The district court certified the class with respect to these claims. It found that Jiminez had presented sufficient evidence to establish three common questions under Federal Rule of Civil Procedure 23(a)(2):

(1) whether class members generally worked overtime without receiving compensation as a result of Defendant's unofficial policy of discouraging reporting of such overtime, Defendant's failure to reduce class members' workload after the reclassification, and Defendant's policy of treating their pay as salaries for which overtime was an "exception";

(2) whether Defendant knew or should have known that class members did so; and

(3) whether Defendant stood idly by without compensating class members for such overtime.

To certify a case as a class action, the court must determine that the plaintiff can prove the defendant's liability as to all class members using common evidence, and thus that the issues common to the entire class will predominate over any remaining individual issues unique to particular class members.

Plaintiffs' expert had "offer[ed] expert opinions about the feasibility of making class-wide determinations of liability and damages by using statistical sampling and class member survey data derived from random sampling." *Jimenez v. Allstate Ins. Co.*, No. LA CV10-08486 JAK (FFMx), 2012 WL 1366052, at *13 (C.D. Cal. Apr. 18, 2012), *aff'd* (Sept. 3, 2014). The expert further "testifie[d] about the specific nature of the questions that could be posed to a representative sample of the class members, including: (i) whether, how often, and for how much time per day and per week the putative class members performed off-the-clock work in excess of eight hours per day or 40 hours per week; (ii) what experiences the putative class members had at work that contributed to their performing work off the clock; and (iii) questions to be used to assess survey accuracy." *Id.*

Allstate raised two challenges to the district court's class certification order. *Jimenez*, 765 F.3d at 1164.

First, Allstate argued that the common questions would not resolve class-wide liability issues and therefore the district court's order did not comply with Rule 23. Second, Allstate argued that the district court's approval of the use of statistical modeling violated its due process rights and conflicted with the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), which precludes a class action plaintiff from litigating the case as a "trial by formula" that does not allow the defendant to present affirmative defenses to the individual claims of class members.

As to Allstate's first argument, the Ninth Circuit agreed with the district court's determination that the three common questions had the capacity to resolve issues central to the validity of the claims. The Ninth Circuit observed that "[t]he close connection between the common questions noted by the district court and the legal test it must apply to determine whether plaintiffs can make out an off-the-clock claim under California law mean that these are precisely the kind of common questions that Rule 23(a)(2) and *Dukes* require." *Jimenez*, 765 F.3d at 1166.

Regarding Allstate's second argument, the Ninth Circuit noted that the problems identified by the Supreme Court in *Dukes* and *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), which was not addressed by the parties, were not present in the district court's certification because *Dukes* had specifically looked to the affirmative defenses in Title VII suits and *Comcast* addressed a damages methodology that could not produce a classwide result. The Ninth Circuit observed that "[s]ince *Dukes* and *Comcast* were issued, circuit courts including this one have consistently held that statistical sampling and representative testimony are acceptable ways to determine liability so long as the use of these techniques is not expanded into the realm of damages." *Jim* at 1167. The Ninth Circuit surveyed courts of appeals' decisions in which classes were certified as to liability and determined that these cases were compelling and consistent with its own decision in *Leyva v. Medline Industries*, Inc., 716 F.3d 510 (9th Cir. 2013), which noted that individualized damages issues are present in nearly all wage-and-hour class actions and that fact alone cannot defeat class certification.

The Ninth Circuit noted that the district court bifurcated the liability and damages proceedings, had been careful to protect Allstate's ability to raise individualized defenses at the damages stage, and rejected the use of representative testimony and sampling at the damages phase. In addition, the Ninth Circuit observed that "the district court carefully analyzed the specific statistical methods proposed by plaintiffs," striking some expert testimony it found to be without empirical support and ensuring that the statistical analysis it did accept conformed to the legal questions.

3. Ninth Circuit Upheld Arbitration Agreements that Contained Provisions Requiring Employees to Waive Class Action Rights

In *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014), and *Davis v. Nordstrom, Inc.*, 755 F.3d 1089 (9th Cir. 2014), the Ninth Circuit upheld arbitration agreements used by Bloomingdale's and Nordstrom that required employees to waive their rights to bring class actions alleging employment law violations.

The plaintiff in *Johnmohammadi* filed a class action in a California state court seeking to recover unpaid overtime wages from Bloomingdale's. Bloomingdale's removed the action to federal court under the Class Action Fairness Act of 2005, then moved to compel arbitration under the Federal Arbitration Act. The district court granted the motion to compel and dismissed the case without prejudice. When the plaintiff was hired by Bloomingdale's, she received documents regarding its dispute resolution program that informed her that she agreed to resolve all employment-related disputes through arbitration unless she returned an opt-out form within 30 days. The plaintiff did not return the form and thereby became bound by the arbitration agreement. The plaintiff argued that filing the class action on behalf of herself and other employees is one of the "other concerted activities" protected by two federal laws—the Norris-LaGuardia Act and the NLRA. The Ninth Circuit found it unnecessary to reach that question because "[t]o prevail, [the plaintiff] must still show that Bloomingdale's interfered with, restrained, or coerced her in the exercise of her right to file a class action." *Johnmohammadi*, 755 F.3d at 1075. The court found that Bloomingdale's had not done any of those things because the plaintiff was fully informed about her dispute resolution options and chose not to opt out of arbitration without of any threats of termination or retaliation by Bloomingdale's. Nor had Bloomingdales interfered with or restrained the plaintiff's right to file a class action; it had simply given her a choice to opt out of arbitration or not.

The plaintiff in *Davis* filed a purported class action and Nordstrom, relying on the arbitration policy in its employee handbook, sought to compel the plaintiff to submit to arbitration. The district court held that the plaintiff and Nordstrom had not entered into a valid arbitration agreement as to the revision Nordstrom had implemented during the plaintiff's employment. The Nordstrom employee handbook contained two provisions regarding arbitration; one explained in which circumstances employees would be required to arbitrate their disputes with Nordstrom and the other required Nordstrom to provide employees 30 days' notice of any substantive changes to the arbitration provision. In July and August 2011, Nordstrom revised the policy to require employees to arbitrate almost all claims individually and to preclude employees from filing most class action lawsuits. Nordstrom sent all employees, including the plaintiff, notice of the change in arbitration policy in June 2011. The Ninth Circuit found that this notice, and the fact that Nordstrom had not sought to enforce the arbitration provision in the 30-day

notice period satisfied the minimum requirements of California law. The plaintiff also argued that the arbitration provision was unconscionable, but the Ninth Circuit declined to address the issue because the district court had not reached it.

Arbitration agreements have both pros and cons. If your organization is considering adopting an arbitration program for employment disputes, be sure to get sound legal advice. Or, if you already have such a program, you may want to make sure it passes muster under the recent Ninth Circuit decisions described above.

4. Ninth Circuit Determines That Truck Drivers Are Not Independent Contractors

In *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014), the Ninth Circuit held that FedEx Ground drivers were employees, not independent contractors. The decision means that these drivers are entitled to various benefits that they were not provided because they were classified as independent contractors.

Named plaintiffs represented a class of approximately 2,300 individuals who were full-time delivery drivers for FedEx in California during a period of seven years. FedEx's operating agreements with the delivery drivers characterized them as independent contractors and included statements asserting that "the manner and means of reaching these results" were within the discretion of the driver and that "no officer, agent, or employee of FedEx . . . shall have the authority to direct [the driver] as to the manner or means employed." *Id.* at 984. The Ninth Circuit analyzed the relationship between FedEx and the drivers under California's right-to-control test: "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." *Id.* at 988 (internal quotation marks and citation omitted). The court also looked to indicia used by California courts under this test. The Ninth Circuit concluded that the operating agreements granted FedEx "a broad right to control the manner in which its drivers perform their work." *Id.* at 997. Because this most important factor in the right-to-control test strongly favored employee status, and the other factors did not strongly weigh one way or the other, the Ninth Circuit held that the drivers were employees as a matter of law under California's right-to-control test.

The Ninth Circuit's decision is far from the only litigation FedEx Ground has faced on this point. In 2009, the Court of Appeals for the District of Columbia Circuit ruled that a class of FedEx drivers were independent contractors. In 2010, a federal district court in Indiana was charged with coordinating 28 certified class actions brought by drivers in dozens of states and sided with FedEx Ground, throwing out state law claims. The Ninth Circuit reversed the Indiana court's decision in *Alexander*. The Court of Appeals for the Seventh Circuit is reviewing the Indiana court's ruling in other cases and certified questions to the Kansas Supreme Court, which determined that the drivers were employees. The NLRB, in the same week that the Kansas Supreme Court answered the certified question, also rejected FedEx Ground's claim that its drivers are independent contractors and found that FedEx had violated the law by not bargaining with a group of them.

These decisions underscore the importance of understanding whether a worker is an employee or independent contractor under the applicable law. Simply labeling a worker an "independent

contractor" may save money in the short-term, but the consequences of getting the label wrong can have serious financial consequences.

5. Ninth Circuit Says That California Private Attorney General Act Suits Are Not Federal Class Actions

In *Baumann v. Chase Investment Services*, 747 F.3d 1117 (9th Cir. 2014), cert. filed, 83 U.S.L.W. 3126 (Sept. 3, 2014), the Ninth Circuit addressed the question: Do federal courts have subject matter jurisdiction over suits brought under the California Labor Code Private Attorneys General Act of 2004 ("PAGA") under the Class Action Fairness Act of 2005 ("CAFA")? The Ninth Circuit held that federal courts do not have original jurisdiction.

PAGA authorizes employees to act as private attorneys general and recover civil penalties from their employers for violations of the California Labor Code. PAGA can cause employers headaches because PAGA claims do not need to be certified as class actions, meaning it is easier for plaintiffs to pursue PAGA claims and use them as a tool to try to force settlement.

The plaintiff sued Chase under PAGA in California superior court. Chase sought to remove the suit to federal court, invoking both diversity jurisdiction under § 1332(a) and CAFA jurisdiction under § 1332(d)(2). The district court found diversity jurisdiction, denied the plaintiff's motion to remand, and certified the order, from which the Ninth Circuit permitted an appeal to be taken.

The Ninth Circuit found that the PAGA action met certain CAFA requirements—that the action involved statutory violations suffered by more than 100 members, there was minimal diversity, and the aggregated statutory penalties sought exceeded $5,000,000. Therefore, the only question the Ninth Circuit addressed was whether the action was a "class action," and specifically, because the suit had not been filed under Federal Rule of Civil Procedure 23, whether the suit was filed under a state statute or rule of judicial procedure similar to Rule 23 that authorizes a class action. The Ninth Circuit noted that the complaint did not invoke the California class action statute, and that the California Supreme Court had held that PAGA actions are not class actions under state law, although this precedent did not end the inquiry. The Ninth Circuit went on to address whether PAGA was "similar to" Rule 23 either because it closely resembled the federal rule or because it was like the federal rule in substance. The Ninth Circuit found that PAGA was not similar to Rule 23 because of a number of differences, including notice and opt-out requirements; whether a court would inquire into whether the named plaintiff and attorney were adequate representatives; whether there were numerosity, commonality, and typicality requirements; the finality of judgments; and the nature of penalties. The Ninth Circuit observed that "PAGA plaintiffs are private attorneys general who . . . bring claims on behalf of the state agency. . . . Because an identical suit brought by the state agency itself would plainly not qualify as a CAFA class action, no different result should obtain when a private attorney general is the nominal plaintiff." *Id.* at 1123 (citation omitted). For these reasons, the Ninth Circuit determined that Rule 23 and PAGA "are more dissimilar than alike." *Id.* at 1124.

6. Ninth Circuit Holds That Workers Can Choose Not to Use FMLA Leave

The plaintiff in *Escriba v. Foster Poultry Farms*, 743 F.3d 1236 (9th Cir. 2014), filed suit under the Family and Medical Leave Act ("FMLA") and its California equivalent after being terminated for failing to comply with the company's "three day no-show, no-call rule." The dispositive issue in the case was whether the plaintiff had provided sufficient notice of her intent to take FMLA leave. The Ninth Circuit looked to the FMLA and regulations, and observed that the regulations require that once an employee states a desire to take leave for an FMLA-qualifying reason, the employer is expected to obtain additional information. Under Ninth Circuit precedent, the employer should inquire further to determine whether the employee was seeking FMLA leave, which the court noted "strongly suggest[ed] that there are circumstances in which an employee might seek time off but intend not to exercise his or her rights under the FMLA." *Id.* at 1244. The court "conclude[d] that an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection." *Id.* The Ninth Circuit found that substantial evidence existed to support the jury's verdict for the employer, pointing to the plaintiff's decision to request leave from her supervisor rather than the human resources department, who in the past had handled her requests for FMLA leave, and the plaintiff responding "no" twice when she was asked if she needed additional time beyond her initial two-week request.

The effect of this decision on employers is not entirely clear. There is a question as to whether an employee in an FMLA-qualifying situation may state that she wants to exhaust her other leave options before taking FMLA leave. If other policies limit the use of vacation time and other time off, it still may be possible for an employer to limit the use of time off. The employer's analysis can be complicated by the fact that an employee may not communicate clearly the reasons she is taking time off. In situations where FMLA leave may be implicated, the employer should seek to clarify whether the employee wants to use FMLA leave or not.

7. U.S. District Court for the Western District of Washington Denies Summary Judgment on ADA Claim Despite Employee's Ongoing Inability to Work

In *Casteel v. Charter Communications, Inc.*, No. C13-552- RJB, 2014 WL 5421258 (W.D. Wash. Oct. 23, 2014), Judge Bryan denied Charter's motion for summary judgment on Casteel's action for failure to accommodate under the Americans with Disabilities Act, despite the undisputed fact that Casteel had been unable to work since July 2009.

Charter Communications hired Mary Casteel for the position of Retention Specialist in September 2007. This role required her to answer telephone calls, provide customer service, answer questions, process orders, and track and report the success of her retention efforts. Employees in this role were expected to maintain consistent attendance and the Employee Handbook stated that "'[a]bsenteeism, tardiness, and early departures place a burden on other employees, on Charter's business operations, and ultimately on our customers.'" *Id.* at *2 (quoting Charter Employee Handbook).

Charter's leave of absence policy allowed one 30-day unpaid personal leave beyond the amount permitted under the FMLA, although such a leave was not guaranteed, and allowed for a discretionary additional leave of 30 days. Charter did not guarantee continued employment after an extended leave and noted that personal leaves of absence may not be granted for more than 60 days in a 12-month period.

In November 2008, Casteel fell ill and ultimately was diagnosed with cancer in July 2009. In the intervening period, Casteel requested leave and the ability not to work overtime, which Charter granted. In July 2009, Casteel requested a one-month medical leave, despite the fact that her medical provider stated that her condition had a probable duration of six months. Charter granted an initial 30-day personal leave of absence through mid-August 2009. Casteel was unable to return to work at that time. A few days after her expected date of return, Casteel's doctor wrote a note saying that she would not be able to return to work until mid-September 2009. Charter granted a second 30-day leave, but Casteel was not able to return to work at its end.

In mid-September 2009, after exhausting the two 30-day leaves granted by Charter beyond FMLA leave, Casteel provided another doctor's note stating that she could return to work in February 2010. Charter's HR manager contacted Casteel to ask if there were any accommodation that could be provided to her to allow her to return to work. Casteel stated that there were no accommodations that would allow her to return to work before February 2010. Charter then sent Casteel a notice of termination of employment.

Charter moved for summary judgment on Casteel's ADA claim. Charter argued that Casteel was not entitled to protection under the ADA because she was not a qualified individual able to perform the essential functions of the job, which Casteel was required to show in order to make a prima facie case under the ADA. Charter further argued that the only accommodation possible was an indefinite leave of absence, which is not a reasonable accommodation as a matter of law.

The district court ruled against Charter, writing that "[q]uestions of fact remain as to whether Casteel was a 'qualified individual,' whether she could have performed the essential functions of a Retention Specialist (or another position for which she was otherwise qualified at Charter) with the accommodation of a medical leave of absence, whether that accommodation would have been reasonable, and whether it would have posed an undue hardship on Charter." *Id.* at *7.

The court reasoned that "[d]espite missing two prior return-to-work dates, the February 4, 2010, date is evidence, at least at the time of the termination of her employment, that an accommodation existed at which time Casteel would be able to return to work." *Id.* at *5. The court focused on the facts at the time of termination and rejected Charter's argument that Casteel had not been able to work since termination, emphasizing that Charter did not attempt to clarify whether the February 2010 return date was speculative at the time of termination. The court also noted that the ADA places the burden on employers to show that an accommodation would be an undue hardship and that Charter could not simply rely on its maximum leave policy to terminate employment without considering whether a reasonable accommodation would be appropriate.

This places a significant burden on employers to show that accommodation of an employee's leave would be an undue hardship, even in cases in which an employee is not able to work *at all*

for extended periods of time. Prior to terminating employment in such circumstances, employers may want to document the hardship the company would suffer by granting such an extended leave.

D. Washington Supreme Court Decisions

1. Employer Has Religious Accommodation Duty

In *Kumar v. Gate Gourmet Inc.*, 325 P.3d 193 (Wash. 2014), the Washington State Supreme Court held, 5-4, that the Washington Law Against Discrimination ("WLAD") requires employers to reasonably accommodate religious practices although WLAD does not include such a mandate.

Gate Gourmet is a company that provides meals on planes and trains. The company prohibits employees who prepare this food from bringing their own lunch to work or leaving the worksite to obtain food. Four employees brought a class action alleging that the meal policy forced them to either work without eating or to eat food that violated their religious beliefs. The employees alleged that Gate Gourmet failed to accommodate their religious and moral beliefs in violation of WLAD and that the meal policy had a disparate impact on employees who adhered to certain religious beliefs. The trial court dismissed the suit, and the Washington Supreme Court granted direct review.

The Washington Supreme Court was sharply divided in reversing the dismissal of the employees' suit. The court held that Washington law requires employers to accommodate employees' religious practices even though the WLAD does not include this mandate. To reach this conclusion, the court noted that Washington courts look to Title VII of the Civil Rights Act of 1964, which requires employers to reasonably accommodate employees' religious practices, to guide their interpretation of the WLAD. The court noted that the rationale for Title VII and the WLAD is the same, that it had previously held that the WLAD includes an implied prohibition on facially neutral policies that have a disparate impact, and that courts in other jurisdiction had found that "recognizing an implied disparate impact claim goes hand in hand with recognizing an implied religious accommodation claim in statutes that prohibit religious discrimination." *Id.* at 202. The court therefore held that the WLAD recognizes a claim for failing to reasonably accommodate an employee's religious practices.

The court adopted a burden shifting scheme for this new claim. First, an employee must allege 1) that he has a bona fide religious belief and practicing that belief conflicts with his job duties; 2) that he informed his employer of his belief and the conflict; and 3) that the employer responded by subjecting him to actual or threatened discriminatory treatment. The employer can then show either than it offered a reasonable accommodation to the employee or that such an accommodation would present an undue hardship.

This case expands the potential liability for employers beyond what is actionable under Title VII. Washington law provides a longer statute of limitations—three years from the alleged act—and the WLAD applies to employers with eight or more employees while Title VII applies to employers with 15 or more employees.

E. Washington Court of Appeals Decisions

1. Contracting Party Liable for Retaliation

In *Currier v. Northland Services, Inc.*, 332 P.3d 1006 (Wash. Ct. App. 2014), the Washington Court of Appeals, Division 1, addressed a company's liability for retaliation against an independent contractor. The plaintiff worked as an independent contractor for the defendant, and he complained to the defendant about other independent contractors' racist and sexist remarks. Two days later, the defendant terminated his contract, which allowed either party to terminate the agreement with 30 days' notice or upon default. The plaintiff sued, alleging retaliation under the WLAD.

The defendant argued that the plaintiff was not an employee under the WLAD and that other independent contractors' comments could not be imputed to it. The court rejected both arguments. The court observed that the Washington Legislature intended the WLAD to be construed liberally, that the "employee" requirement applied only to actions by the Washington State Human Rights Commission. Therefore, the WLAD protected independent contractors from retaliation. The court also held that the fact that the racist and sexist remarks were made by an independent contractor did not shield the defendant from liability. The plaintiff simply needed to show a reasonable belief that the conduct he complained about was covered by the WLAD, and the defendant would be liable for its retaliatory conduct. The court emphasized that the basis for the defendant's liability was not the independent contractor's remarks, but its own retaliatory conduct.

2. Expansion of Wrongful Discharge Claim

In *Becker v. Community Health Systems, Inc.*, 332 P.3d 1085 (Wash. Ct. App. 2014), the Washington Court of Appeals, Division 3, expanded the circumstances under which a claim for wrongful discharge in violation of public policy was actionable.

Community Health Systems ("CHS") hired Gregg Becker as the CFO of a new business acquisition called Rockwood. Becker projected that Rockwood would suffer a $12-million operating loss in 2012 and claimed that CHS and Rockwood demanded that he revise his projection to $4 million, the losses that Rockwood previously told investors and creditors it would sustain that year. Becker refused and stated that he would be forced to resign if CHS and Rockwood continued with what he called their fraudulent behavior. CHS and Rockwood accepted his resignation the next day.

Becker sued, alleging wrongful discharge in violation of public policy. Such a claim required Becker to establish four elements: 1) that there was a clear public policy; 2) that discouraging his conduct would jeopardize the public policy; 3) that the public policy-linked conduct caused his discharge; and 4) that the employer was unable to offer an overriding justification for his discharge. Traditionally, public policy claims have been seen as a narrow exception to the Washington Law Against Discrimination and other statutory requirements. The defendants argued that Becker could not establish that discouraging his conduct would jeopardize the public policy. The court reasoned, however, that despite many criminal and civil statutes promoting

honest corporate financial reporting, Becker's refusal to alter his projection was the only adequate means of promoting the public policy.

A few years ago, Washington courts were taking a very skeptical approach to public policy claims. For example, in *Cudney v. ALSCO, Inc.*, 259 P.3d 244 (Wash. 2011), the Washington Supreme Court found that existing laws against drunk driving adequately protected the state's public policy discouraging such conduct, even though these laws did not protect an employee who claimed he was fired for reporting that a manager drove a company vehicle during business hours while intoxicated. *Id.* at 245. *Becker* shows that, even after *Cudney*, these claims are alive and well.

F. Other Significant State Decisions

1. California Court of Appeal Applies Expansive Definition of "Employee" in Class Action Wage Claims

In *Dynamex Operations West, Inc. v. Superior Court*, No. B249546, 2014 WL 5173038 (Cal. Ct. App. Oct. 15, 2014), the California Court of Appeal, Second District, found that the trial court correctly allowed plaintiffs—courier and delivery service drivers—to rely on the Industrial Welfare Commission Wage Order No. 9 ("Wage Order 9") definition of "employees" in support of their class action wage claims. For those claims not within the scope of the wage order, the court held that the common law test for employee status, found in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989), applied.

The Industrial Welfare Commission, the state agency empowered to regulate wages, hours, and working conditions through wage orders governing specific industries and occupations, issued Wage Order 9, which generally covers workers employed in the transportation industry. Industrial Welfare Commission Order No. 9-2001, Regulating Wages, Hours and Working Conditions in the Transportation Industry, http://www.dir.ca.gov/IWC/IWCArticle9.pdf (last visited Oct. 31, 2014). Wage Order 9 defined an employer as any person "who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, and working conditions of any person." In *Martinez v. Combs*, 49 Cal. 4th 35, 64 (2010), the California Supreme Court held that "to employ" meant: "(a) to exercise control over the wages, hours or working conditions *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship."

The common law *Borello* test, looks to the service recipient/putative employer's "right to control" the manner and means by which the independent contractor/putative employee accomplishes the desired result. Courts also look to additional secondary factors under this test. *See Sotelo v. MediaNews Grp., Inc.*, 207 Cal. App. 4th 639, 656-67 (2012).

The court held that for the claims within the scope of Wage Order 9, the trial court properly applied the *Martinez* test to all claims that fell within the scope of Wage Order 9, but that claims not covered by the wage order—in this case, claims for reimbursement for rental or purchase of personal vehicles used to perform delivery services—should be analyzed under the *Borello* test.

This case makes it riskier for employers to use independent contractors in California. For claims covered by a wage order, workers who may have been classified as independent contractors

under the common law test may instead be found to be employees under the applicable wage order and therefore entitled to assert wage claims under a wage order.