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Employment Law Briefings

2004–2005

Spring 2005 Employment Law Update

Lynnwood, WA:	April 20, 2005
Tacoma, WA:	April 26, 2005
Seattle, WA:	April 27, 2005
Bellevue, WA:	April 28, 2005

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SPRING 2005 EMPLOYMENT LAW UPDATE

by

Michael T. Reynvaan and Laura M. Solis

I. REGULATORY DEVELOPMENTS

A. Federal

1. Department of Labor

The Veterans' Employment and Training Service—an agency of the U.S. Department of Labor—has issued proposed regulations to guide employers on compliance with the Uniformed Services Employment and Reemployment Rights Act (USERRA).

USERRA is a federal law requiring all U.S. employers to grant unpaid leave to, reemploy, and maintain certain benefits for employees who are members of or enlist in one of the uniformed services. USERRA also prohibits discrimination against members of the military and retaliation against them and anyone who helps them assert their rights under the Act. A brief summary of the proposed regulations follows:

- USERRA prohibits employers from discriminating against employees or job applicants because of their past or current military service or future military obligations. It is illegal to take adverse employment action against such employees if their military service is a *motivating factor* in the decision.
- USERRA generally requires employers to grant up to five years of unpaid leave to employees who are members of or join the military. Only days on which the employee is in active service are counted toward the five-year limit. There are other types of military service, such as regular National Guard and military reserve training, that do not count toward the five-year limit.
- Employers are not required to reemploy employees if: (1) the employee's discharge from military serve was less than honorable; (2) the employer's circumstances have so changed that reemployment is impossible or unreasonable; (3) reemploying the employee would impose an undue hardship on the employer; (4) the employee has no reasonable expectation that the job will continue indefinitely or for a

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significant period of time; or (5) in limited circumstances, the employee does not comply with USERRA's notice requirements.

- Employees must give reasonable notice that they are going to be absent from work for military service, unless advance notice is impossible or unreasonable under the circumstances. Also, employees whose military service is over must give their employers notice that they intend to return to work. The amount of notice required depends on how long they were absent because of military service. An employee's failure to comply with these deadlines does not necessarily entitle the employer to refuse to rehire him.

- In general, employers must return employees to the job they would have had if they had not taken any military leave. For example, if an employee comes due for promotion while on military leave, an employer must give him that promotion upon reemployment. This is commonly referred to as the "escalator" position. In addition, if an employee becomes disabled during military service, an employer must provide reasonable accommodations to allow him to perform the escalator position, an equivalent position, or the job that most closely approximates that equivalent position.

- Employees are entitled to continue their employer's health insurance coverage for 18 months. This requirement is practically identical to the requirements imposed by COBRA. But unlike COBRA, there is no exemption for small employers. In addition, when employees *return* from military service, they are entitled to health insurance benefits as if they had not taken any leave at all.

- Employees who take military leave cannot be required to forfeit any benefits they have accrued under their employer's retirement plan or to requalify for participation in the plan upon returning from leave. When an employee returns from military service, employers are required to "catch up" on all the contributions to the employee's pension plan that the employer would have made if the employee had not been absent on military leave. Employers must also allow returning employees to make up missed contributions over a period of up to five years, and must match those contributions as if they had been made during the employee's leave.

2. Department of Justice

On November 5, 2004, a cancer center employee became the first person in the United States to be sentenced for the wrongful disclosure of

individually identifiable health information (protected health information, or PHI) under the Health Information Privacy and Accountability Act's (HIPAA) health information privacy rule and enforcement provisions (42 U.S.C. §§ 1320d-6(a)(3) and 1320d-6(b)(3)). The employee used his access to confidential patient information to open credit cards in the name of a patient and go on a spending spree. The employee's conviction is particularly significant to employee benefits professionals because it is the first criminal enforcement action taken by the Department of Justice (DOJ) under the privacy rule. Furthermore, the conviction is notable because the employee was not a covered entity as defined in the privacy rule.

The privacy rule contains provisions on the use and disclosure of PHI by "covered entities," which are defined as (1) health care providers (such as hospitals and doctors), (2) health care clearinghouses (such as entities that receive PHI in one format and change it to a different format), or (3) health plans (such as employer-sponsored group health plans). The privacy rule defines PHI as health information that is identifiable to an individual and that is transmitted and maintained in any form or medium. PHI is "identifiable" if it (1) identifies an individual or (2) there is a reasonable basis to believe that the information can be used to identify the individual.

The privacy rule contains both civil and criminal penalties for violations of the permitted uses and disclosures of PHI. The Office for Civil Rights (OCR) of the U.S. Department of Health and Human Services is entrusted with enforcing the privacy rule's civil penalties. The OCR may assess civil penalties of $100 per violation, up to $25,000 per year, for each provision of the rule that is violated. The DOJ is entrusted with enforcing the privacy rule's criminal penalties, which vary according to the severity of the offense. They range from: (1) a fine of up to $50,000 and up to one year in prison for a knowing violation of the rule; (2) a fine of up to $100,000 and up to five years in prison for a violation of the rule that is committed under "false pretenses"; and (3) a fine of up to $250,000 and up to 10 years in prison for violation of the rule that was committed with the intent to sell, transfer, or use PHI for commercial advantage, personal gain, or malicious harm.

Since HIPAA's enactment, the OCR's position has been that the rule applies only to covered entities and *not* to their business associates or employees. The DOJ, however, has taken the position that the privacy rule's criminal penalties apply to employees of a covered entity and not just to the covered entities themselves. As a result, people who previously may not have been considered subject to the privacy rule's enforcement provisions are now suddenly exposed to potential liability.

An additional consequence is that covered entities may have additional exposure under the privacy rule based on their employees' actions. For example, the OCR could now use an employee's conviction for violating the rule as evidence that the covered entity's required training or procedures were not adequate. That exposure would increase dramatically if the covered entity knew or should have known of the employee's improper acts.

3. EEOC

The Equal Employment Opportunity Commission (EEOC) has devoted a substantial amount of time and energy to reaching and educating the nation's four million teen workers about their rights under the equal employment opportunity laws. The agency is also diligently pursuing and settling claims against employers that commit or tolerate discrimination against and harassment of teen workers.

(a) Youth@Work initiative

Last September, the EEOC announced that it was embarking on a national outreach and education campaign designed to prevent discrimination against teen workers. Dubbed the Youth@Work initiative, the program is intended to help young workers understand that they are entitled to the same legal protections as anyone else in the workplace and aims to teach young people what to do in the event they are subjected to workplace discrimination or harassment.

The agency's outreach efforts include a new website (www.youth.eeoc.gov) dedicated to educating young workers about their workplace rights and responsibilities and dozens of events for high school students and youth organizations. The Youth@Work website offers many tools to educate teen workers, including explanations and examples of the different types of job discrimination they may encounter and strategies they can use to prevent and, if necessary, respond to such discrimination.

Finally, the program looks to employers to take affirmative steps to prevent and proactively address harassment and discrimination against teens. Among other steps, the agency is looking to forge partnerships with business leaders, human resources groups, and industry trade associations (such as the National Restaurant Association) to explore the workplace trends and challenges affecting young workers.

(b) Increased enforcement efforts

The EEOC's efforts to address teen harassment and discrimination include pursuing companies that allow such discriminatory practices. In two of its highest-profile lawsuits to date, the EEOC recently sued McDonald's restaurants in Arizona and New Mexico for sexual harassment and/or retaliation against teenage employees. In addition, the agency has recently entered into substantial settlements of several other lawsuits involving harassment or discrimination against teen workers.

In short, the EEOC seems to be placing a higher burden on employers to prevent and respond to harassment of teen workers. Employers who employ young workers can make improvements to their harassment policies and procedures not only by studying the EEOC's outreach materials but also by studying the settlements the agency has entered into with other employers. Preventive measures could include:

- Conducting annual training on Title VII for employees with an emphasis on sexual harassment;
- Conducting extensive sexual harassment training for management personnel;
- Revising sexual harassment policies and procedures and distributing them to all employees;
- Posting a large laminated poster expressing the company's commitment to complying with—and explaining how employees can obtain more information about their rights under—federal antidiscrimination laws;
- Prominently posting an 800-number hot line for reporting harassment throughout the organization; and
- Diligently enforcing harassment and discrimination policies and responding promptly and effectively to complaints.

II. LEGISLATIVE DEVELOPMENTS

A. Proposed Legislation

The Democrat-controlled Washington Legislature is considering a number of bills to expand employee rights and benefits. A brief summary of the proposed legislation follows.

1. Paid Family Leave Insurance

Senate Bill 5069 would create a right to five weeks of compensation for employees taking family leave. The money would be paid by the state Department of Labor and Industries (L&I) and would be funded by a new payroll tax. The bill would also create a series of leave requirements in addition to those in existing state and federal family leave laws.

2. Wage and Hour Penalties

House Bill 1311, sponsored by L&I, would give the department the authority to assess administrative penalties for violations of the wage and hour laws. One proposal would allow penalties as great as *10 times the amount due for every day of the violation for each employee*. It would also impose penalties of $100 to $1,000 for recordkeeping violations, again *for each day.*

3. Accelerated Payment of Wages on Termination

House Bill 1311-S would also require employees' final paychecks to be given to them soon after they quit or are discharged, perhaps within hours. Currently, a terminated employee receives the final paycheck on the established payday.

4. Expanded Coverage of the Discrimination Laws

House Bill 1515 would expand the Washington Law Against Discrimination to protect "sexual orientation," including such undefined categories as "gender expression" and "gender identity." It would also enact a definition of "creed" that would embrace a wide variety of firmly held beliefs of a nonreligious nature.

5. Bullying in the Workplace

House Bill 1968 would define "workplace bullying" and would encourage employers to voluntarily enact policies to eliminate it. Included in the concept would be conduct such as "repeated infliction of verbal abuse such

as the use of derogatory remarks" and the "gratuitous . . . undermining of an employee's work performance." The bill calls for the funding of a study of workplace bullying and a report to the Legislature in December 2005.

6. "Pay or Play" Health Insurance

House Bill 1702 would require many employers that do not provide medical insurance for their employees to instead make contributions to provide coverage under the state medical plan. The bill as introduced would apply to employers that have 50 or more employees and would require that medical insurance be provided to all employees who have worked for three months. Failing to do so would require the employer to pay 85 percent of the basic health plan coverage under the state plan.

7. Outsourcing

Several legislators have introduced bills to control or require the disclosure of outsourcing arrangements whereby work is sent out of the country. One bill (House Bill 1725) would prohibit the outsourcing of work performed under a state contract while another (House Bill 1724) would require any company doing work for the state to make extensive disclosure of any outsourcing arrangements it had.

8. Ergonomic Requirements in Hospitals

House Bill 1672 would require hospitals to establish written programs and use equipment for patient handling to prevent musculoskeletal disorders. The requirements resemble the broader ergonomic regulations adopted several years ago by L&I, which were rescinded by a voter initiative.

III. DECISIONS OF INTEREST

A. Public Employees

1. Public Employees Have Only One Chance to Challenge the Issue of Wrongful Termination.

Public employees who are fully and fairly represented in an agency action are precluded from bringing the same issues in a separate court action. In *Christensen v. Grant County Hospital District No. 1*, 152 Wn.2d 299, 96 P.3d 957 (2004), plaintiff's union filed a complaint with the Washington Public Employment Relations Commission (PERC), the state agency responsible for resolving disputes between public employers and public unions, claiming that plaintiff was disciplined and fired because of his union activity. Plaintiff was represented at the hearing by a union lawyer,

who called witnesses on plaintiff's behalf, made an opening statement, cross-examined the employer's witnesses, offered exhibits, made objections, and otherwise vigorously represented plaintiff. When PERC affirmed an order dismissing the complaint, plaintiff filed a lawsuit, again alleging that he was fired because of his union activity.

The Washington Supreme Court held that collateral estoppel, or issue preclusion (the judicial principle that a party should get only one chance to litigate a particular issue), prevented plaintiff from litigating the question of why he was fired for the second time in superior court. The court rejected the notion that PERC had provided an inappropriate forum for resolving the question of why he was fired, or that plaintiff's representation by the union's attorney rather than his own affected the appropriateness of the outcome. The court concluded that plaintiff had a full and fair opportunity to litigate the relevant issue in the prior proceeding, and that collateral estoppel barred the relitigation of the issue of whether plaintiff was wrongfully discharged.

2. Free Speech: Matters of Public Concern

(a) Public employee's speech about the unlawful action of a government employee is a matter of public concern protected by the First Amendment.

In *Thomas v. City of Beaverton*, 379 F.3d 802 (9th Cir. 2004), plaintiff was a municipal court administrator who supported an African-American court clerk for promotion, despite strong resistance from plaintiff's supervisor. At about the same time, plaintiff's supervisor extended plaintiff's probationary period. Soon after, plaintiff was fired by her supervisor. Plaintiff sued the city, claiming that she had been discharged in retaliation for her support of the court clerk over her supervisor's resistance in violation of her constitutional right to free speech (a doctrine that protects the right of public employees to maintain their freedom of expression relating to "a matter of public concern") and Title VII's prohibition of retaliation for protected activity.

On plaintiff's appeal, the Ninth Circuit held that speech about the unlawful action of a government employee is a matter of public concern that merits protection by the First Amendment. Regarding her retaliation claim, the Ninth Circuit held that plaintiff had engaged in protected activity based on her support of the clerk. The court inferred a causal link between plaintiff's protected activity and

the adverse employment actions based exclusively on the timing of the adverse actions in relation to her support of the clerk.

(b) Public employee's engagement in activities injurious to his public employer's legitimate interests may not be protected by the First Amendment.

Although public employees have a right to speak on issues of public interest consistent with their First Amendment rights, activities injurious to their public employer's legitimate interests may not fall within the ambit of "matters of public concern." In *City of San Diego v. Roe*, 125 S. Ct. 521 (2004), a San Diego police officer, identified in the case as John Roe, was terminated for running an eBay website on which he sold videotapes showing himself engaging in sexually explicit acts while wearing a police uniform. He also sold police equipment and official San Diego Police Department (SDPD) uniforms on the website. After an internal investigation, the SDPD ordered Roe to cease his activities. When Roe continued to sell items, the SDPD commenced proceedings that resulted in his dismissal. Roe filed a federal lawsuit claiming that his termination violated his constitutional right to free speech. The trial court rejected Roe's claim, but the Ninth Circuit reversed, deciding that Roe's conduct could be protected because it was "not an internal work place grievance, took place while he was off duty and away from his employer's premises, and was unrelated to his employment."

The U.S. Supreme Court reversed the Ninth Circuit and reinstated the trial court's order dismissing the case. The Court concluded that "the SDPD demonstrated legitimate and substantial interests of its own that were compromised from his speech . . . . Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer." Because the SDPD had a legitimate interest in blocking that activity, the Supreme Court was required to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Thus, "Roe's expression does not qualify as a matter of public concern. . . . The speech in question was detrimental to the mission and functions of the employer."

3. Temporary Public Employees Who Are Treated Like Regular Public Employees May Have Constitutional Rights to Notice and a Hearing Before Being Discharged.

In *Jenkins v. County of Riverside*, 398 F.3d 1093 (9th Cir. 2005), a temporary public employee was deemed by the Ninth Circuit to be a *de facto* regular employee who had constitutional rights to notice and a hearing before her employment was terminated. Plaintiff was a temporary employee of Riverside County, California who was fired after approximately six years of employment.

In considering plaintiff's claim that she should not have been dismissed without notice and a hearing, the Ninth Circuit found that it must answer the question of whether she was "qualified" for regular employment with the county. Critical to the court's decision were the established facts that the employee had repeatedly passed written civil service examinations, had been interviewed for positions because of her high scores, had worked in a "temporary" position but exceeded the hours limits for such positions, and had been given performance appraisals as if she were a probationary and then a regular employee. The court found that taken together, those facts indicated that she was indeed qualified for regular employment. As a *de facto* employee, plaintiff had constitutional rights to notice and a hearing before her employment was terminated.

B. Age Discrimination

1. U.S. Supreme Court Permits Disparate Impact Claims Under the ADEA.

The federal Age Discrimination in Employment Act of 1967 ("ADEA") has long been understood to forbid age-based "disparate treatment," meaning adverse employment decisions because of age. Courts have disagreed, however, about whether the ADEA also permits "disparate impact" claims based on employment policies or decisions that are *not motivated* by age, but that have a disproportionately adverse *impact* on older workers.

The United States Supreme Court recently decided that the ADEA does permit disparate impact claims. In *Smith v. City of Jackson, Mississippi*, 125 S. Ct. 1536 (2005), the Court held that older police officers could sue the City of Jackson, Mississippi because a revision to a compensation plan resulted in younger officers typically receiving larger pay increases than older officers as a percentage of their salaries. The City's purpose was, at least in part, to attract and retain qualified personnel by making starting salaries more competitive with salaries offered by other police forces in the

Southeast. All officers and dispatchers received pay increases. Because the City wanted *starting* salaries to be more competitive, less senior officers typically received larger pay increases as a *percentage* of their former salaries. Because seniority correlated roughly with age, younger officers tended to receive larger percentage pay increases than older officers.

The Court held that the officers could bring their disparate impact claims under the ADEA. Even so, the Court held that the specific compensation plan at issue did not violate the ADEA. The ADEA permits an employer "to take any action" otherwise prohibited by the law where differences in the effects of the action on younger and older employees are "based on reasonable factors other than age discrimination." The Court found that "the City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that [sic] of surrounding police forces was a decision based on a 'reasonable factor other than age' that responded to the City's legitimate goal of retaining police officers." Importantly, the Court acknowledged that "there may have been other reasonable ways for the City to achieve its goals," but held that the ADEA does not require employers to select a means of meeting their objectives that does not have a disparate impact on older workers.

C. Sex Discrimination

1. Remedial Action After Harassment Allegations Must Be "Prompt and Effective."

A prompt investigation by itself is insufficient to protect an employer from liability for coworker sexual harassment. Remedial action must be "reasonably calculated to prevent further harassment." In *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 98 P.3d 1264 (2004), plaintiff sued her employer claiming sexual harassment and retaliation in violation of the Washington Law Against Discrimination and discharge in violation of public policy based on her coworker's inappropriate sexual comments and gestures, including an incident in which he exposed himself to her. When plaintiff reported the incident, the employer immediately commenced an investigation and suspended the coworker for three days during the course of the investigation. After concluding that the company could not confirm plaintiff's claims, the employer transferred the coworker to a different shift and required him to attend three hours of sensitivity training.

The court of appeals ultimately determined that the employer's response to plaintiff's complaint was not "effective remedial action." The court held that a prompt investigation is not sufficient to protect an employer from liability. Instead, the employer must take "prompt corrective action that is

reasonably calculated to end the harassment." Critical to the court's decision was that the employer was aware that a number of other female employees had reported sexual harassment, had failed to act on plaintiff's request to transfer her and had failed to offer plaintiff counseling. The court said, "A remedy which simply transfers the sexual harasser to another shift or another location, without doing anything to prevent continued sexual harassment by the harasser, is legally insufficient under Washington law, as it does not stop the illegal conduct."

2. An Employer May Now Be Liable in a Hostile Environment Case for Acts Occurring More Than Three Years Before the Suit Was Filed.

An employee's hostile work environment claim can be based on conduct occurring before the three-year statute of limitations period if that conduct is part of the hostile work environment practice occurring within the limitations period. In *Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2004), while working as a corrections officer at Seattle's jail, plaintiff was subjected to sexually derogatory comments and name-calling by inmates, coworkers and supervisors, and was exposed to sexually explicit conduct and materials. After a period of time when plaintiff transferred to an all-female correctional facility, where she did not encounter discriminatory conduct, plaintiff was transferred to another corrections facility. There, she was again exposed to discriminatory conduct. Plaintiff filed a lawsuit against King County, alleging that the county had fostered a hostile work environment.

The trial court dismissed the claims based on acts occurring more than three years before plaintiff filed suit, the statute of limitations period for discrimination suits in Washington. The court found that the gap in the hostile work environment while plaintiff was assigned to the all-female facility was sufficient to prevent the application of the "continuing violation doctrine," which would have allowed plaintiff to base her hostile work environment claim on conduct occurring outside the statute of limitations period if there was a substantial relationship between the timely and untimely discriminatory conduct. The court of appeals reversed the trial court's dismissal of claims that were more than three years old by applying a standard established in a U.S. Supreme Court case, *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), where the Court ruled that if any act contributing to the hostile work environment was timely, a court could consider the entire time period of the hostile environment.

The Washington Supreme Court adopted *Morgan*'s analysis and rejected the "continuing violation doctrine" for cases filed under the state's discrimination law. The court ruled that discriminatory conduct that occurs

more than three years before the filing of a lawsuit can be considered by a court if it is part of the same unlawful employment practice as the discriminatory conduct within the three-year period. The court remanded the case back to the trial court to determine whether the acts about which she complained were part of the same hostile work environment practice and fell within the statutory three-year time period. The supreme court noted that a gap in the hostile work environment, such as the nearly year-long period that plaintiff was assigned to the all-female facility, by itself was not a reason to treat acts occurring before the gap as not part of the same unlawful employment practice as acts occurring after the gap.

3. Different Grooming and Appearance Standards for Male and Female Employees Can Be Set if the Burden of Compliance Is Roughly the Same for Both Sexes.

In *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004), the Ninth Circuit held that the employer's "Personal Best" policy, which required women to wear makeup while forbidding men from doing so, did not constitute sex discrimination. Plaintiff was a female bartender at Harrah's Casino in Reno, Nevada, who was fired for refusing to comply with the makeup requirement. Harrah's grooming standards required all beverage servers to be "well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform." Female beverage servers were required to wear stockings and colored nail polish, wear their hair "teased, curled, or styled," and worn down at all times, and wear "foundation/concealer and/or face powder, as well as blush and mascara . . . applied neatly in complimentary colors" and "[l]ip color . . . at all times." By contrast, the standard for male beverage serves prohibited wearing makeup or colored nail polish. Male employees, however, were instructed to keep their hands clean and fingernails neatly trimmed and to maintain short haircuts, not extending below the tops of their collars. Ponytails were forbidden.

The Ninth Circuit looked to its earlier decisions in which grooming standards had been challenged as discriminatory. In one case, the court denied a claim by male employees that a grooming standard permitting women to wear long hair while forbidding men from doing so discriminated against men. The court had concluded that because hair length was a "mutable" characteristic, the different requirements discriminated on the basis of appearance, not sex. In another case, the court struck down an employer's weight requirements, which placed a greater burden on women than on men. Following the guidance of those earlier decisions, the Ninth Circuit noted that plaintiff could not prevail because she had presented no solid evidence that the makeup requirement subjected

her to an "unequal burden" relative to her male counterparts. The court also disagreed with plaintiff's contention that the makeup requirement was based on sexual stereotypes of a type that had been held to violate Title VII.

D. Race Discrimination

1. An Employee Can Use Statistical Evidence to Prove a Pattern and Practice of Discrimination.

The Ninth Circuit recently found that an employee who was trying to prove that his employer had engaged in a pattern and practice of discrimination could submit statistical evidence to a jury even though it did not prove discrimination. The court also held that testimony from other employees who felt the employer discriminated against them was admissible and relevant to the employee's discrimination claim. In *Obrey v. Johnson*, 400 F.3d 691 (9th Cir. 2005), a civilian employee of the U.S. Navy who was Asian-Pacific Islander filed a lawsuit under Title VII, alleging that the employer engaged in a pattern and practice of racial discrimination in granting promotions. The trial court excluded statistical evidence showing that Asian-Pacific Islanders were promoted less than Caucasians because the statistics did not account for differences in qualifications. The trial court also excluded the testimony of three Asian-Pacific Islander coworkers who believed the Navy had discriminated against them when it did not select them for supervisory positions.

On appeal, the Ninth Circuit held that although the employee could not prove his case with the statistical evidence alone, it was relevant to show whether the Navy had engaged in a pattern and practice of discrimination and the trial court should have allowed the jury to hear it. The court also ruled that the trial court should have allowed the coworker's testimony because it might have helped show whether the Navy had engaged in a pattern and practice of discrimination.

E. Disability Discrimination

1. An Employee May Bring a Retaliation Claim Against an Employer Even After Signing a Settlement Agreement Waiving His Claims.

A comprehensive settlement agreement may seem appealing as a way to dispose of the claims of a contentious employee. Employees may, however, bring claims based on events that happen after the settlement agreement is signed. In *Pardi v. Kaiser Foundation Hospitals*, 389 F.3d 840 (9th Cir. 2004), plaintiff, a licensed respiratory care practitioner, filed a number of union grievances and charges with the EEOC claiming that his

employer was not accommodating his medical condition. Plaintiff was fired after being placed on administrative leave pending an investigation into complaints from both physicians and patients about plaintiff during the same two-year period. Plaintiff filed a new grievance challenging his termination. Six months after plaintiff was fired, he and his union entered a comprehensive settlement agreement with the employer, in which the employer agreed to convert plaintiff's discharge to a resignation, and plaintiff agreed to release the employer from any claims based on events up to the date of the agreement. Before the settlement, the employer had reported plaintiff's termination to the state of California in compliance with a state law requiring employers of respiratory care practitioners to report suspensions and discharges for cause. After the settlement, the employer provided a state investigator who was looking into the report with materials reflecting the basis for plaintiff's termination and evidence of additional complaints about him, but did not provide records supporting plaintiff's side of the story, written complaints of harassment and failure to accommodate, or the settlement agreement.

Plaintiff eventually sued the employer, claiming, among other things, violation of the Americans with Disabilities Act (ADA) and breach of contract. The Ninth Circuit held that the settlement agreement was enforceable, and released plaintiff's claims based on events occurring before it was signed. However, claims based on the postagreement acts were not barred. The court held that Kaiser had breached the settlement agreement when it failed to change plaintiff's records to show a voluntary resignation. Based on Kaiser's failure to promptly correct the personnel records and provide the state investigator with favorable information about plaintiff, the court held that plaintiff sufficiently showed that Kaiser had retaliated against him for filing charges with the EEOC and pursuing union grievances.

F. Undocumented Workers

1. Debate Continues in the Ninth Circuit About Whether an Employer Can Inquire About the Immigration Status of an Employee Alleging Workplace Discrimination.

Earlier this year, the Ninth Court issued a decision barring an employer being sued for national origin discrimination from asking the individuals who filed the suit for information about their immigration status. The employer, NIBCO, Inc., sought a rehearing. That request was turned down in a recent order, but a heated dissenting opinion reveals that debate on the issue continues within the circuit.

Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004), *reh'gs denied*, 384 F.3d 822 (9th Cir. 2004), was filed by 23 women who had been fired because of their poor performance on an English test required by NIBCO, even though their jobs did not require English language proficiency. NIBCO needed information about the immigration status of the claimants because the plaintiffs would not be entitled to lost wages if they were not legally entitled to work at all in the United States. The Ninth Circuit affirmed a magistrate judge's protection order by concluding that the employer could not use the discovery process (i.e., the pretrial exchange of facts) to inquire regarding the immigration status of the employees because it would place an "undue burden" on the employees and could have a "chilling effect" on the pursuit of their workplace rights.

After the Ninth Circuit affirmed the order, NIBCO sought a rehearing. The most recent order in the case denied the request, but four judges vociferously dissented from the order. The dissenters found the ruling to run counter to immigration laws, which prohibit employment of undocumented workers. The dissent focused on a decision of the U.S. Supreme Court, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), that barred a back-pay award to illegal immigrants who had been fired by their employer in violation of their rights under the National Labor Relations Act (NLRA). Just as permitting an undocumented worker to get back pay under the NLRA would "unduly trench upon" federal immigration policy, the dissenting judges argued, so too would allowing such an award on a discrimination claim.

G. Hiring

1. Public Policy Exception to At-Will Employment Does Not Allow Employee to Lie About His Employment History.

Although employment in Washington is "at will" and employees can generally be terminated with or without cause, the exception to the rule is that an employer cannot terminate employees for reasons that violate "public policy." In a suit brought by a plaintiff against Alaska Airlines, *Boring v. Alaska Airlines, Inc.*, 123 Wn. App. 187, 97 P.3d 51 (2004), the court rejected a plaintiff's invocation of a federal statute to argue that he could affirmatively lie about his employment record. Plaintiff, a pilot for Mesa Air, was terminated for insubordination. After filing a grievance, plaintiff was reinstated and told that the incident was cleared from his records. In an application for employment that plaintiff later submitted to Alaska Airlines, plaintiff specifically denied having "ever been discharged for misconduct or unsatisfactory performance." He again failed to disclose the Mesa Air incident in an interview with Alaska Airlines. Under a federal

statute, the Pilot Records Improvement Act of 1996, Mesa Air Group was required to provide information regarding "any disciplinary action taken with respect to the individual that was not subsequently overturned during a five-year period preceding the employment application" in response to an airline's hiring inquiry. Mesa Air accordingly informed Alaska Airlines that plaintiff had not been subject to any disciplinary action that had not been subsequently overturned. Alaska Airlines hired plaintiff, but terminated his employment upon learning of the disciplinary action at Mesa Air.

The court of appeals rejected plaintiff's claim against Alaska Air that his termination was in violation of public policy. The court held that although Mesa Air may not have been required to disclose the information to Alaska Airlines, nothing in the federal statute precluded Alaska Airlines from asking for or Mesa Air from providing additional information about an applicant or prior disciplinary history. Moreover, the court concluded that nothing in the statute prevented an employer from seeking truthful additional information from an applicant or permitted an applicant to "lie or otherwise fail to reveal the information once it is requested."

H. Employer Retaliation

1. A Plaintiff Disciplined for Improper Use of Government Computers and Lying Is Still Battling His Claims in Court.

An employee who was caught accessing pornography on government computers and lying in an investigation and who has had his multiple claims dismissed by multiple tribunals is, some six years later, still dragging his employer through the federal court system. In *Coons v. Secretary of U.S. Dep't of Treasury*, 383 F.3d 879 (9th Cir. 2004), plaintiff was an IRS employee who made some internal agency disclosures regarding improper actions taken by IRS officials. In 1998, the IRS discovered that plaintiff was using his office computer to access pornographic materials. When confronted, plaintiff took sick leave, and eventually claimed that he could return to work only with the reasonable accommodation that he not have to travel excessively because of stress-related ailments. When the IRS reassigned plaintiff to a position that would not require excessive air travel, plaintiff filed a Whistleblower Protection Act complaint stating that his reassignment was a result of previous complaints he had made about improprieties at the IRS. That complaint was eventually dismissed. In August 1999, plaintiff was demoted following an investigation of his misuse of government computers. He appealed the demotion, but that appeal was also denied. Plaintiff then filed

a complaint alleging Whistleblower Protection Act violations and unlawful discrimination based on disability and age as well as retaliation.

On plaintiff's appeal, the Ninth Circuit concluded that plaintiff was not a disabled person covered by the ADA because his inability to travel extensively was not a major life activity that was substantially impaired. The court also held that plaintiff failed to prove retaliation because he showed no causal connection between his request for accommodation and his demotion. Moreover, the IRS presented other legitimate reasons for the demotion, including misuse of government computers to access sex-related sites and that the employee lied in subsequent investigations. Finally, the Ninth Circuit remanded the Whistleblower Protection Act claim because the trial court did not address that element of his claim.

2. School District Learns Costly Lesson on Non-Retaliation

If an employee has engaged in a protected activity, an employer needs to be satisfied that any discipline that follows soon after is both warranted and handled in the same manner as it would be for any other employee. An employer should avoid over-documentation or filling the employee's personnel file with recordings of minor incidents that would not be noticed for others. The following case illustrates this principle.

Plaintiff in *Lytle v. Carl*, 382 F.3d 978 (9th Cir. 2004), was an elementary school teacher. After she sent a letter to state senators criticizing a new school district program, the district told her she was being transferred to a different school. When she refused the transfer, she was fired. Plaintiff sued the district, claiming that she had been fired in retaliation for her exercise of her constitutional right to free speech. Following a trial, the jury awarded her $135,000 in damages, and the court reinstated her employment at her former elementary school.

Shortly after plaintiff returned to work, the district's assistant superintendent instructed the principal at plaintiff's school to supply him with all disciplinary actions and related documents regarding her. After an area superintendent reprimanded plaintiff in front of her class for going into another classroom to retrieve some materials, she was required to ask permission to go into any other teacher's classroom. Written summaries of plaintiff's meetings with her supervisors to discuss performance issues were placed in her personnel file, and a log of her daily activities was kept. In addition, district administrators failed to adequately investigate when she complained of harassment. When plaintiff sought two days of sick leave, the assistant superintendent personally investigated her request, required her to submit several physicians' notes, and eventually denied the leave.

Plaintiff filed a second lawsuit, complaining that the district had retaliated against her because she had exercised her constitutional rights to access to the courts in her earlier lawsuit. The Ninth Circuit upheld a jury's judgment in her favor, holding that the instigation of unwarranted discipline or a campaign of harassment and humiliation amounted to retaliation. In plaintiff's second lawsuit, the jury awarded her $75,000 in damages. She was also awarded attorneys' fees in the amount of $239,268. The Ninth Circuit also upheld that result.

3. The Ninth Circuit Allows Contractor to Pursue Retaliation Claim Against County.

In another lesson from the Ninth Circuit about the strength of the public policy against retaliation, a public-sector employer learned that it can be liable even to a contractor if it retaliates for protected activity. In *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917 (9th Cir. 2004), Curtis Stephens was formerly employed by Multnomah County in its weatherization program. The county fired Stephens in 1999 allegedly because he falsified weatherization audits. Stephens claimed that the charges against him had been fabricated by two Caucasian female employees, whom he believed were biased against him because of his age and race. To prove his claim, he elicited testimony from Robert Obrist, president and owner of Alpha Energy Savings, Inc., one of the contractors that performed weatherization work for the county. Additionally, Obrist submitted an affidavit in Stephens' federal race and age discrimination lawsuit, stating that Stephens' work was as good as that of anyone else in the county's weatherization department and that the two women who criticized him were biased and intent on getting him out of the department.

During approximately the next two years, Obrist's company received only two of more than 1,000 jobs awarded. Other contractors and county personnel indicated that the two women who had been accused by Stephens tampered with files, manipulated the department's computer database, and engaged in other schemes to keep work away from Obrist.

Obrist filed a federal lawsuit alleging that the county had retaliated against him and his company in violation of his First Amendment rights. The Ninth Circuit analyzed Obrist's First Amendment claim using the same basic approach followed in employee lawsuits. Obrist was required to show that (1) he had engaged in expressive conduct that addressed a matter of public concern, (2) government officials had taken adverse action against him, and (3) his expressive conduct was a substantial or motivating factor for the adverse actions. The court noted that statements given in judicial or administrative proceedings are a matter of public concern "if they bring to

light potential or actual discrimination, corruption, or other wrongful conduct by government agencies or officials." Because Obrist's testimony helped expose discrimination and other wrongdoing by county personnel, his speech was protected, even if he had personal motives (such as getting more business from the county).

I. Employee Rights

1. A Noncompetition Agreement Signed After an Employee Begins Work Must Be Supported by Additional Consideration to Be Enforceable.

If the employer wants to establish or modify its obligation to an employee after the employment relationship has begun, the employer must give the employee something of value or benefit as part of the transaction. In *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004), the plaintiff was an at-will employee subject to a three-year obligation not to compete in the custom printing business after his employment ended. After five years of employment, the employee signed a new agreement with the employer, under which he was to refrain from accepting employment with a competitor located within 75 miles of Tacoma for a period of three years. Plaintiff's employment continued to be terminable at will, and the employer did not provide him with any additional benefits in exchange for signing the new agreement.

The Washington Supreme Court decided that the second noncompetition agreement was unenforceable because it lacked consideration, ruling that if a noncompetition agreement is entered into after employment has begun, it will be enforced only if it is supported by additional consideration from the employer. That could be in the form of a wage increase, a promotion, a bonus, or a modification of the at-will relationship. The court rejected the employer's argument that the employee's continued employment, along with certain training he was given, provided the consideration that made his second noncompetition agreement enforceable. Because the employer had promised the employee nothing of benefit when he signed the new agreement, the second agreement was not enforceable, even if the noncompetition provision of the original agreement was.

J. Unemployment Compensation

1. Cab Drivers Are Employees, Not Independent Contractors, for Purposes of Unemployment Compensation.

In *Affordable Cabs, Inc. v. Dep't of Employment Security*, 124 Wn. App. 361, 101 P.3d 440 (2004), a case deciding whether an employer was

required to make unemployment contributions on behalf of one of its taxicab drivers, the court of appeals determined that a taxicab driver was a covered employee under the Employment Security Act. According to the court, the existence of an employment relationship under the statute depended first on whether "personal services" were being performed and second on whether the services were for wages or under any contract calling for such services. The court held that "personal services" were performed because the services in question were performed for the benefit of the alleged employer, whose business was to transport paying passengers. Although the taxicab driver was not paid a wage, he worked under a contract calling for personal services. Having met the two prongs of the applicable test, the driver would be deemed an employee unless exempt under the statute requiring unemployment contributions. The requirements for exemption were that (1) the individual was free from control or direction over the performance of the services; (2) the services were outside the usual course of business of the organization for which they were performed; and (3) the individual was customarily engaged in an independently established trade, occupation, or business of the same nature as the services provided. Since the cab company set fares and provided some of the driver's customers, the court concluded that the driver was not free from "control" by the cab company. Regarding the second requirement, the driver's duties were part and parcel of the company's usual business of transporting passengers for a fee. Finally, the court concluded that the driver was not engaged in his own independent business separate from that of the cab company, relying in particular on the driver's inability to continue the business if the relationship with the cab company was terminated.

2. A Truck Driver Who Loses His License Has Not Voluntarily Quit for Purposes of Unemployment Compensation.

Voluntarily quitting a job, with few exceptions, generally disqualifies a person from receiving unemployment benefits. A quit, however, is voluntary only if it is an affirmative, intentional decision by the employee. In *Bauer v. Employment Security Dep't*, No. 22458-9-III, 2005 WL 613683 (Wash. Ct. App. Mar. 17, 2005), a commercial truck driver lost his job after two serious traffic offenses during a three-year period while driving a commercial vehicle resulted in the suspension of his commercial driver's license.

On the truck driver's appeal from his denial of unemployment benefits, the court of appeals rejected the view that his termination of employment should be viewed as a "constructive voluntary quit." In the truck driver's case, the court recognized that he had lost his commercial driver's

license—and thus his job—because of his own actions. But unemployment benefits are allowed even in cases of voluntary quits if the employee has good reason for quitting. The cases that were used to justify the denial of benefits were different, the court noted, in that all the employees involved lost their jobs because of their freely chosen acts. The truck driver did not want to lose his job even though his own traffic infractions were the cause. Thus, the court held that he was eligible to receive unemployment benefits.

3. An Employee Who Is Terminated as a Result of Alcoholism Cannot Raise Alcoholism as a Defense to His Disqualification of Unemployment Benefits for Misconduct.

Washington law provides that alcoholism is not a defense to a disqualification of unemployment benefits due to employee misconduct. The Washington Court of Appeals recently upheld the constitutionality of this law in *Stephens v. Employment Security Dep't*, 123 Wn. App. 894, 98 P.3d 1284 (2004). In that case, plaintiff was terminated by his employer for repeated leaves of absence for alcohol treatment and for violating a "Last Chance Memorandum," which warned plaintiff that use of drugs or alcohol or absence from work for further alcohol treatment would lead to his termination. The Employment Security Department denied plaintiff's application for unemployment benefits based on plaintiff's violation of the last chance memorandum and the Washington statute. Plaintiff argued that the Legislature had no valid reason for distinguishing between alcoholism and other diseases that might afford a defense against a discharge for misconduct.

The court of appeals held that plaintiff's knowing violation of the last-chance memorandum was a proper basis for denying him unemployment benefits. The court noted that federal law does not protect employees whose current use of alcohol or drugs prevents them from performing the duties of a job or presents a threat to the property or safety of others. Therefore, the Legislature could rationally have drawn a distinction between alcoholism and other diseases on the grounds that alcoholics may be partially responsible for triggering their disease by drinking.

K. Employer Liability

1. An Employer Who Provides a Car Allowance May Be Liable for Traffic Accidents Caused by an Employee.

Generally, an employer is not liable for its employee's acts when the employee is going to or coming from his employer's place of business. That "going and coming rule," however, has its own exception. When the

employer furnishes a vehicle to the employee as an incident of the employment relationship, the "going and coming rule" does not apply. In *Michael v. Laponsey*, 123 Wn. App. 873, 99 P.3d 1254 (2004), an employer was found liable for damages caused by its employee under the doctrine of respondeat superior (which details the responsibilities of a principal for acts of an agent—in this case, the employee) when the employee was involved in a traffic accident while driving his car to work. The employee received a $400 monthly car allowance and was expected to use his car in performing his duties.

The court relied on the exception to the "going and coming rule" to decide this case. In such instances, the transportation is for the mutual benefit of employer and employee, and "employment" begins when the worker enters the vehicle transporting him to the work site. The court rejected the argument that a car allowance should be treated differently from providing a company car. It was irrelevant whether the employer chose to provide a car or merely a car allowance since in either case the employer derived a benefit.

2. Procedural Defenses Cleared for Award of Equitable Relief to Offset Adverse Tax Consequences in Discrimination Suits Under the WLAD.

In *Blaney v. International Association of Machinists & Aerospace Workers, District No. 160*, 151 Wn.2d 203 (2004), the Washington Supreme Court held that the Washington Law Against Discrimination (WLAD) authorized trial courts to award equitable relief to offset the federal income tax consequences of a judgment and attorneys' fees award on behalf of a prevailing employee in a discrimination lawsuit. In *Hirata v. Evergreen State Limited Partnership No. 5*, 124 Wn. App. 631, 103 P.3d 812 (2004), the court of appeals cleared away a number of procedural defenses challenging a suing employee's right to claim an offset for adverse tax consequences. The employer claimed a number of technical defects on appeal following the trial court's decision to award an offset against it for adverse tax consequences to two successful employees in a discrimination lawsuit. The court of appeals held that the offset did not need to be specifically pleaded as special damages or brought within 10 days after entry of judgment, was not waived when first raised after entry of the attorneys' fees, and did not entitle the employer to a jury trial because it was an equitable remedy.

3. Attorneys May Be Rewarded for Taking on High-Risk Employment Discrimination Cases.

One major risk in litigating employment discrimination claims is that the employer that loses the case—or part of it—is liable for the employee's attorneys' fees, an amount that often far exceeds the compensatory damages awarded to the employee. In a recent case, *Pham v. City of Seattle*, 124 Wn. App. 716, 103 P.3d 827 (2004), the court of appeals ordered that the attorneys' fees be increased to give the employees' attorney more than his hourly rate times the number of hours expended to account for the risk that the attorney might recover nothing at all, even when the risk was due to the employees' difficulty in articulating the nature of their claims and the paucity of compelling relevant evidence of discrimination.

In that case, plaintiffs sued their employer for national origin and race discrimination. After five years of battle in state and federal courts, a $550,000 verdict was entered on the employees' disparate treatment claims. In addition, the employees were awarded approximately $300,000 in attorneys' fees. Generally, if the attorney's compensation is contingent on the client's success, the court may consider the necessity of adjusting the figure to account for the risk factor. The employees argued that the high-risk nature of their case mandated that a multiplier be applied in calculating the fee award. On appeal of the trial court's failure to grant a contingency adjustment, the appellate court reversed, pointing out that the purpose of free-shifting under the WLAD is "to enable [the] vigorous enforcement of modern civil rights litigation," in recognition of the fact that "lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk." In addition, the court ruled that the employees were entitled to supplemental damages for the adverse tax consequences of their award for emotional distress, in keeping with the "make whole" policy of damages awarded under the WLAD.

4. A Company Can Violate Safety Laws Without Exposing Its Own Employees to Safety Hazards.

Employers should ensure that they are in compliance with the occupational safety and health regulations, not only to protect their own employees but also to avoid the possibility of being held responsible for injuries to nonemployees. In *Martinez Melgoza & Assocs., Inc. v. Dep't of Labor & Industries*, 106 P.3d 776 (Wash. Ct. App. 2005), the court of appeals affirmed a citation and penalties issued by L&I under the Washington Industrial Safety and Health Act (WISHA) even though none of the company's own employees were exposed to hazards. The company was retained as a consultant on an asbestos abatement project for a large

remodel of the passenger terminal at the Seattle-Tacoma Airport. As a result of an inspection, L&I accused the company of several willful and serious violations of the WISHA regulations, and assessed thousands of dollars in fines. The company appealed the assessment of fines, arguing that it was not an "employer" subject to citation because it was merely a consultant with limited duties and none of its employees were exposed to any hazards.

The court rejected the company's argument and adopted the "multi-employer worksite doctrine" developed under the corresponding federal Occupational Safety and Health Act. That doctrine provides that an employer that controls or creates a work site safety hazard can be liable even if the employees exposed to the hazard are those of another employer. Here, even though the company did not design the project, hire or fire contractors, or negotiate change orders, the court concluded that, in actual practice, the consultant exercised sufficient control over the work site and instructed the contractors on what to do, and thus could be cited for the hazards it created.

L. Labor Law

1. Joint Employees May Not Be Included in the Same Bargaining Unit Without the Consent of the Joint Employers.

The National Labor Relations Board (Board) has reversed itself in a controversial ruling that involves the issue of whether employees who are jointly employed by an employer and a staffing agency must be included in the same collective bargaining unit as regular employees. In *H.S. Care L.L.C.*, Case 29-RC-10101, 2004 WL 2681621 (N.L.R.B. Nov. 19, 2004), the Board held that joint employees may not be included in the same bargaining unit without the consent of both joint employers. The case involved a petition by employees of a long-term residential care facility to certify a collective bargaining unit that included employees provided by a staffing agency as well as the home's regular employees. The care facility argued that their joint employees should not be allowed to form a collective bargaining unit with its regular employees. The Board's decision overturned its 2000 decision in *M.B. Sturgis*, where it had ruled that employees provided to an employer by a staffing agency who had "a community of interests" with the employer's regular employees could be included in the same bargaining unit without the consent of either employer. The Board now returns to the position that a collective bargaining unit that includes both regular employees and joint employees of a staffing agency is a "multiemployer unit" under the NLRA, which is permissible only with the consent of both employers.

2. A Collective Bargaining Agreement That Requires Employers to Pay Full-Time Union Representative Does Not Violate Federal Labor Law.

A collective bargaining agreement (CBA) that requires an employer to pay salary and benefits to a chief shop steward does not violate the Labor-Management Relations Act (LMRA) or NLRA. In *IAM, Local Lodge 964 v. B.F. Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046 (9th Cir. 2004), under the employer's agreement with the union, an employee/chief shop steward continued to draw full salary and benefits. The employee's job duties were exclusively the handling of union grievance issues. When the employee was denied overtime work, he took the matter to arbitration and won. The employer asked the court to declare that the provision of the CBA requiring payments to the employee was invalid because it violated provisions of federal law prohibiting employer payments "to any representative of any of his employees."

On the employer's appeal, the Ninth Circuit found that the payments to the employee violated the LMRA's proscription against corporate payments to a union representative, but that the payments fell within LMRA's exception as permissible wages paid for services by the plaintiff. The court concluded that the chief shop steward's job resolving grievances and enforcing the CBA was work that served the interests of the company in the peaceful resolution of disputes between labor and management. Accordingly, the court ruled that the payments to the employee were "attributable to his service to" the employer. Critical to the court's decision was that (1) the employee had a long-standing relationship with the company; (2) the company controlled his workweek; and (3) he reported to company personnel for approval of overtime, sick leave, and vacation; (4) he did not receive his work assignments from the union or make frequent reports to the union; and (5) he worked from an office on the floor of the shop under the direct supervision and control of the company.

3. Chief of Police Has the Right to Be Represented by a Union.

Union issues relating to public entities, such as cities and counties, are regulated by state law. In Washington, disputes are resolved by the PERC. Unlike federal law, state law does not exclude supervisors from collective bargaining. Rather, public-sector supervisors have the right to be represented by a union. The only pertinent exception is for an employee "whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to . . . the executive head or body of the applicable bargaining unit."

In *City of Lynden v. Public Employment Relations Commission*, No. 52113-6-I, 2005 WL 91659 (Wash. Ct. App. Jan. 18, 2005), an unpublished opinion, the court of appeals ruled that a chief of police and two lieutenants reporting to him could be represented in the same collective bargaining unit. The city objected to the police chief being represented by a union and argued that he was a "confidential employee" meeting the exception language quoted above. The city lost, first before PERC and then in the Washington Court of Appeals. The court upheld PERC's finding that the chief did not have significant decisionmaking authority in labor relations or personnel matters and therefore was properly included in the bargaining unit.

M. Wage and Hour Law

1. Veterinarians Are Exempt From the Overtime Requirements of the Fair Labor Standards Act.

In *Clark v. United Emergency Animal Clinic, Inc.*, 390 F.3d 1124 (9th 2004), several veterinarians at an animal clinic typically worked shifts of 12 hours or more at a time. They did not receive salaries, nor were they paid by the hour. Instead, they got a monthly check representing a flat "per shift" amount multiplied by the number of shifts they worked that month. Plaintiffs filed lawsuits in which they claimed that the Fair Labor Standards Act (FLSA) required that they be paid overtime for hours worked over 40 in a week. They had not been paid on a "salary basis," which is a requirement for most of the "white collar" exemptions recognized by the FLSA. The trial court disagreed, and dismissed their lawsuit. The Ninth Circuit agreed with the trial court, holding that plaintiffs fell within the exception to the salary basis requirement for "physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners."

2. L&I's "Prevailing Wage" Rule Does Not Apply to Drivers Who Deliver Materials to a Job Site.

The prevailing wage typically is the cost of wages and employee benefits paid by the largest union contractors in the area. The law requires even nonunion contractors and smaller contractors to pay amounts equivalent to those wages and benefits to employees who perform services under a contract with a public agency to construct public works or to provide maintenance services for public buildings.

A major exception to the state requirement applies to drivers who simply deliver materials to a job site and do not do any other work on the site. In *SilverStreak, Inc. v. Washington State Dep't of Labor & Industries*, 104 P.3d 699 (Wash. Ct. App. 2005), a case arising out of work on the new third runway at the Seattle-Tacoma Airport, the court of appeals held that dump truck drivers who delivered fill material to the construction site and dumped it directly on the embankment being filled were not entitled to the prevailing wage when the dumping was coordinated so that the fill material was immediately deposited in place without the need for any other on-site handling.

On the contractor's appeal of L&I's ruling that the drivers were entitled to be paid the higher prevailing wage, the court of appeals upheld the contractor's position, pointing out that all the drivers did was deposit the material on-site; they did not spread, level, or roll the material. The court rejected L&I's argument that the dumping and spreading work was so well coordinated that there was no need to employ additional workers to transport the material within the job site. According to the court, such efficiencies were irrelevant to interpreting whether the work in question was subject to the prevailing wage requirements.

N. Arbitration

Arbitration agreements are favored, and courts will generally enforce them to the extent that they are not unconscionable. Procedural unconscionability is the lack of meaningful choice, considering all the circumstances surrounding the transaction, including how the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in a maze of fine print. Substantive unconscionability, on the other hand, means that a clause or term in the contract is extremely one-sided or overly harsh.

1. Enforceability of an Arbitration Agreement Is Determined as of the Time the Agreement Is Entered.

The determination of whether an arbitration agreement is unenforceable as unconscionable is made as of the time the agreement was entered, not at the time a party seeks enforcement. In *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254 (9th Cir. 2005), an employee was required to sign a dispute resolution agreement, in which he agreed to arbitrate any dispute arising out of his employment in accordance with his employer's rules and procedures. The procedures then in effect permitted the employer to amend its rules annually. In 1998, the employer required disputes to be handled in accordance with the rules in effect at the time the request for arbitration was

submitted. When the employee was terminated in November 1998, he filed a lawsuit in federal court alleging discrimination in violation of both Washington and federal law. The case was sent back to the trial court to determine whether the arbitration agreements would hold up under Washington state law. Even though the employee had been fired more than four years earlier, the employer asserted that new rules, enacted in 2003 to address concerns that had been raised by courts considering arbitration agreements, should apply to his claim.

On the employer's appeal, the Ninth Circuit declined to enforce the arbitration agreement, ruling that the determination of whether an agreement will be struck down as unconscionable is made as of the time the agreement was entered. The court rejected enforcement of the modification provision because it enabled the employer to change the rules of the game almost at will. Thus the 2003 agreement did not apply to the employee's dispute. The court identified a number of reasons not to enforce the arbitration agreement in effect during plaintiff's employment. The first was that it was a "one-sided" agreement because employees had to arbitrate their disputes against the employer, but the employer was not obligated to arbitrate its claims against employees. Other defects in the agreement included the requirement that costs and fees for arbitration be borne in part by the employee, a one-year statute of limitations, a prohibition on class actions, and the employer's unilateral right to terminate or modify the agreement. The court rejected the employer's proposal to simply edit out the offensive terms while still enforcing plaintiff's underlying obligation to arbitrate his dispute.

2. Unconscionable Portions of an Arbitration Agreement May Be Eliminated, Leaving the Remainder of the Agreement Enforceable.

An arbitration agreement found to be unconscionable may not always be thrown out entirely. In *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004), the court held that the unconscionable portions of an arbitration agreement could be eliminated, leaving the remainder of the agreement enforceable. The arbitration agreement included in the company's offer of employment had the following elements: (1) the employee agreed to have all claims and disputes resolved through arbitration (2) the employee waived all rights to punitive damages, (3) the employee would pay one-half of the arbitrator's fee, (4) the arbitrator had the authority to award attorneys' fees to the prevailing party, and (5) if either party tried to bypass the arbitration agreement and the other party successfully got the matter moved to arbitration, the initiating party would pay the other party the costs and expenses incurred to get the case moved to arbitration. Finally, the agreement contained a "severability"

clause stating that if any provision in the agreement was unenforceable, the remainder of the agreement would not be affected.

On appeal, the Washington Supreme Court failed to find the agreement procedurally unconscionable because the employer gave the employee a reasonable period of time to analyze the agreement and raise any concerns or questions she might have had and the important terms of the agreement were not hidden in a "maze of fine print." On the employee's claim that certain provisions of the agreement were substantively unconscionable, the court stated that if the employee made an adequate showing that the fee-splitting agreement would make arbitration prohibitively expensive for her, such a provision could be unenforceable. The court also found that the confidentiality provision was substantively unconscionable because it was entirely one-sided, benefiting only the employer and hampering the employee's ability to prove a pattern of discrimination or take advantage of findings in prior arbitrations. The court concluded that the punitive damages provision was unconscionable because it "blatantly and excessively favors the employer in that it allows the employer alone access to a significant legal recourse." The court agreed with the employer that it should simply eliminate the unconscionable provisions and enforce the remainder of the agreement. The fact that the agreement had an express provision to that effect was helpful.

In *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004), the court took the same approach on severability even though the arbitration agreement did not contain any language to that effect. In that case, the employee asserted that because of his limited English, he did not understand what he was signing, that the arbitration agreement was presented in a "take it or leave it" fashion, and that he was not given time to consider or ask questions about it. The court remanded the case back to the lower court for further fact-finding to determine whether the employee knowingly and voluntarily agreed to arbitration.

The court found three provisions to be substantively unconscionable: (1) an arbitration fee-splitting provision whereby the employee had to pay one-half of the arbitrator's fees and other arbitration expenses (the court ruled that if the employee could establish that the cost of arbitration would prohibit him from vindicating his claims, the provision would be unconscionable unless the employer presented contrary offsetting evidence or offered to pay those fees and costs); (2) a provision stating that each party would bear its own costs and attorneys' fees (that provision was unconscionable because it was one-sided and overly harsh, effectively undermining the employee's right to attorneys' fees under the Washington Law Against Discrimination); and (3) a provision in the arbitration

agreement that required claims to be filed within 180 days as opposed to three years under state law, thereby giving the employer an unfair advantage.

3. Federal Law Trumps State Statute on Arbitrator Ethics.

The early landmark decisions on an employer's ability to force employment disputes into arbitration arose in the securities industry, where certain employees have long been required to agree to arbitration as a condition for obtaining registration as a securities dealer. Arbitration was prescribed by rules of the National Association of Securities Dealers (NASD) as part of a system of industry self-regulation approved by the Securities and Exchange Commission (SEC).

In 2002, California adopted ethics rules for neutral arbitrators that differed from the NASD standards. In a dispute over which rules would prevail, the Ninth Circuit recently held that federal law prevails and that California may not apply its ethics requirements to NASD arbitrators. In *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119 (9th Cir. 2005), Scott Grunwald was an employee of Credit Suisse First Boston until his employment was terminated. Rather than arbitrate the issue of his dismissal through the NASD, Grunwald filed a demand for arbitration through the American Arbitration Association (AAA).

The federal court agreed to block the AAA proceeding because Grunwald, as a registered securities dealer, was bound to submit his dispute to an NASD-appointed arbitration panel. In the interim, however, California's Judicial Council had adopted heightened disclosure and disqualification standards for neutral arbitrators. Under the new California rules, a neutral arbitrator who failed to make a required disclosure automatically would be disqualified upon notice by a party. In contrast, the NASD rules allowed, but did not require, disqualification of an arbitrator who did not make a disclosure that she should have. California also prescribed a far more extensive and detailed list of mandatory disclosures than those mandated by the NASD.

The NASD decided that it would permit arbitrations within California if the parties expressly waived the California ethics requirements for arbitrators. Grunwald claimed that the NASD was trying to coerce him to give up rights under state law and asked the court to modify or dissolve its order that he could not proceed either through AAA arbitration or with a civil action in state court. The trial court said no. In affirming the trial court's denial of Grunwald's case, the Ninth Circuit considered whether California could impose its new ethics rules on NASD arbitrations. The court held

that the long history under federal securities laws of deference to the rules adopted by "self-regulatory organizations" within the securities industries took precedence over California's interest in imposing its own arbitration rules. Federal law delegated to the NASD the power to set its own legal requirements for industry members. Where the state's standards conflicted with those of the NASD, federal law trumped state law. Otherwise, a patchwork of inconsistent state regulations could interfere with the regulatory authority the SEC had granted.

O. Workers' Compensation

1. "Deliberate Intention" Exception to Immunity for On-the-Job Injuries

Generally speaking, employees are not permitted to sue their employer for on-the-job injuries; remedies for such injuries are limited to those provided by the workers' compensation laws. There is, however, an exception to that "immunity" for injuries caused by the "deliberate intention" of the employer. In 1995, the Washington Supreme Court issued a decision that expanded the intentional injury exception to include situations where the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

In *Valencia v. Reardan-Edwall School District No. 1*, 104 P.3d 734 (Wash. Ct. App. 2005), a maintenance employee of a school district was injured when a lifting device he was using collapsed. Allegedly, the risk manager had informed the school district that the lifting device was dangerous. The employee argued that those facts came within the exception as expanded by the supreme court. The court of appeals rejected the employee's argument because the evidence did not demonstrate that the school district had "actual knowledge" that "an injury was certain to occur" and "willfully disregarded that knowledge." Thus, the employer's actions were not equivalent to an intentional assault, and the employee's injuries were the result of an accident for which he could not sue his employer.

P. Bankruptcy

1. An Employee Is Barred From Bringing a Workplace Injury Claim He Did Not Disclose in Bankruptcy Proceedings.

Failure to disclose an employment-related claim in bankruptcy bars the individual from later pursuing his claim. In *Cunningham v. Reliable Concrete Pumping, Inc.*, 108 P.3d 147 (Wash. Ct. App. 2005), Richard Cunningham suffered a workplace injury in September 1997. In November

1999, Reliable Concrete Pumping, Inc. sued him to collect payment for building materials and supplies. He counterclaimed against Reliable (which had not been his employer) based on his 1997 injury. In May 2000, Cunningham filed for bankruptcy. On the bankruptcy paperwork he was required to fill out, he did not reveal his personal injury claim against Reliable. The bankruptcy court determined that there were no assets available to satisfy Cunningham's creditors and discharged his debts.

The trial court later dismissed Cunningham's claims against Reliable because he had failed to disclose his personal injury claim, any proceeds from which might otherwise have been available to pay some or all of his debts. On appeal by Cunningham, the court of appeals reached the same result as the trial court based on the doctrine of "judicial estoppel." Under that doctrine, the court does not allow a party to gain an advantage by making a claim in one judicial forum that is at odds with his position in an earlier proceeding. Cunningham clearly was aware of his claim against Reliable at the time he filed his bankruptcy petition. The court held that even though Cunningham had asked the bankruptcy court to reopen his case so that he could remedy the nondisclosure, the bankruptcy court had already discharged his debts, which would not be changed by reopening the proceedings. In response to Cunningham's argument that his misrepresentation in the bankruptcy claim had been inadvertent, the court concluded that judicial estoppel did not require a showing of wrongful intent.