Perkins Coie

Legal Counsel to Great Companies

The Employment Law Seminars

2007–2008

Fall 2007 Employment Law Update

Lynnwood
Wednesday, October 31, 2007
Embassy Suites Hotel
20610-44th Avenue West
Lynnwood, WA 98036

Tacoma
Thursday, November 1, 2007
Sheraton Hotel
1320 Broadway Plaza
Tacoma, WA 98402

Bellevue
Tuesday, November 6, 2007
The Bellevue Club
11200 SE 6th Street
Bellevue, WA 98004

Seattle
Wednesday, November 7, 2007
The Rainier Club
820 Fourth Avenue
Seattle, WA 98104

www.perkinscoie.com

ANCHORAGE BEIJING BELLEVUE BOISE CHICAGO DENVER LOS ANGELES
MENLO PARK OLYMPIA PHOENIX PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

Pacific Northwest Labor and
Employment Law Departments

Bellevue, Washington
10885 NE 4th Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400

Portland, Oregon
1120 NW Couch Street, Tenth Floor
Portland, OR 97209-4128
Phone: 503.727.2000

Seattle, Washington
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000

Our Presenters

Nancy Williams has been practicing in the area of labor and employment law for more than 25 years. She counsels employers and represents them in litigation on equal employment opportunity, discipline, and discharge, and a wide variety of other employment issues. Nancy is an active member in the American Bar Association and Washington Bar Association, especially in the labor and litigation areas. She is also a frequent speaker at events highlighting what employers should know when dealing with employment law. Nancy is a trustee of the King County Bar Association and a member and past chair of its Labor and Employment Law Section. Nancy is also the Office Managing Partner for Perkins Coie's Seattle office.

Javier Garcia is an associate in the firm's Labor & Employment practice. Javier has worked on cases involving race, age, disability, and sex discrimination; wage and hour matters; school district employment matters; noncompete agreements and trade secrets; employee handbooks; and counseling in employment matters and employment litigation under state and federal law. Javier also devotes a significant amount of time to pro bono work for the Northwest Immigrants Rights Project, representing indigent clients in immigration removal proceedings. Javier obtained his legal degree from Gonzaga School of Law where he served as Editor-in-Chief of the *Gonzaga Law Review*. He obtained his undergraduate degree from the University of Redlands.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

Employment Law Update

By Nancy Williams and Javier Garcia

I. LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. FEDERAL DEVELOPMENTS

1. "No-Match" Verification of Employment Eligibility

On August 15, 2007, the Department of Homeland Security ("DHS") issued a final rule, "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter," that requires action by employers when they receive a "no match" letter from the DHS or the Social Security Administration ("SSA"). Such letters provide notice of potentially invalid employee social security numbers or other identification documents. The letters advise employers that they may have hired undocumented workers and may risk civil and criminal penalties. The new regulations outline the specific "reasonable" steps employers should take if they receive a no-match letter. An employer's failure to respond to the letter via these specified "safe harbor" procedures may be used as evidence of the employer's constructive knowledge that it was employing unauthorized aliens.

Ignoring no-match communications can expose an employer to a multitude of penalties, *both civil and criminal*. These penalties can be severe, especially in the case of repeat violations, with fines reaching as high as $10,000 *per unauthorized employee* and/or a criminal sentence of up to six months in prison. To avoid potential liability under the new regulations, an employer should take the following reasonable steps upon receipt of any no-match communications:

1. Within **30 days** of receipt, check its own records for clerical errors.

2. If the problem is not resolved by examination of the employer's records, ask the employee to resolve the issue directly with the SSA within **90 days** of the employer's receipt of the letter.

3. If the employee cannot resolve the issue within 90 days, **reverify** within the next three days (according to **specific procedures** set out in the new regulations) the employee's authorization and identity. This process must be completed within **93 days** of the employer's receipt of the letter.

In addition to reverification of employee documents as described above, the employer must also contact the local DHS office within 30 days to address any questions raised by the letter.

Although the regulation became effective on September 14, 2007, a federal district court in California has enjoined the federal government from sending, until further notice, no-match letters that include the DHS's guidance threatening criminal and civil sanctions if employers fail

to follow the regulation's safe-harbor procedures. The details of the injunction are still being worked out, and an appeal by the federal government is expected.

2. Federal Minimum Wage Increase

The first increase in the federal minimum wage in ten years took effect July 24, 2007. The measure raises the federal minimum from the current $5.15 per hour to $5.85 initially, provides for additional 70-cent increases for the next two years, and caps the minimum wage at $7.25 in 2009. The subsequent increases will take effect on July 24 of each year.

B. WASHINGTON LEGISLATION

1. New Definition of Disability

The new definition of "disability" took effect on July 22, 2007. Disability is now statutorily defined as a "sensory, mental, or physical impairment that: (1) is medically cognizable or diagnosable; or (2) exists as a record or history; or (3) is perceived to exist whether or not it exists in fact." RCW 49.60.040(25)(a). The new legislation clarifies that a disability may be temporary or permanent, common or uncommon, and mitigated or unmitigated, and it need not limit the ability to work generally or at a particular job.

2. Employment Security Department Registration Requirements

The Washington Legislature recently enacted new registration requirements for employers subject to Washington's unemployment insurance system. The Washington Employment Security Department ("ESD"), which drafted the statute, says the registration requirement was added to help it police improper unemployment benefit claims by corporate officers and business owners and to enforce new personal liability rules for officers and owners of corporations and limited liability companies that go out of business. Many employers learned of the new law when they received a notice from ESD in September directing them to file "Corporate Structure Report" forms by September 30, 2007. Unfortunately, that notice and the statute have caused widespread confusion and concern. Indeed, ESD issued a press release denying that the notice is a hoax or identity theft scam.

The statute requires in pertinent part that "[r]egistration must include the names and social security numbers of the owners, partners, members or corporate officers of the business, as well as their mailing addresses and telephone numbers" and "percentage of stock ownership for each corporate officer, delineated by zero percent, less than ten percent, or ten percent or more." The statute also requires employers to periodically report changes to any and all of this information. The statute exempts corporations when "personal services [are] performed only by bona fide corporate officers," but provides no parallel exemption for limited liability companies. Compliance with this registration requirement is mandatory. The implications of the statutory language are potentially troublesome. In response to organizations soliciting input, ESD has promulgated a set of proposed rules designed to clarify some of the major ambiguities created by the new statutory language. ESD anticipates adopting the proposed rules in November and expects them to be effective as of January 1, 2008. Information on the proposed rules is available at http://fortress.wa.gov/esd/portal/unemployment/rulemaking/2007taxrates.htm.

ESD is not seeking registration information from noncorporate entities at this time, nor has it set a definitive date when registration for such entities will be required. ESD has stated

that its "target" date for noncorporate registration is the first quarter of 2008, in which case reports would not be due until April 30, 2008.

The ESD requirements also raise serious privacy concerns. In the era of lost laptops, owners, officers and partners are understandably concerned about providing sensitive information regarding their stock ownership and social security numbers.

ESD has confirmed that the current (and to date *exclusive*) penalty is $25 per violation (meaning $25 per failure to file a timely report). However, the ESD has also reiterated that there are many issues to be resolved regarding enforcement. Additional penalties may be proposed through agency rulemaking procedures. While current penalties appear low, ESD's enforcement approach is still undefined, and noncompliance could result in unforeseen adverse consequences, including, of course, adverse publicity, agency enforcement proceedings and possible complications.

You can find the full text of the new registration requirement in amended RCW 50.12.070(2)(a) (ESSB 5373 Section (1)) and a copy of the registration form at http://fortress.wa.gov/esd/portal/unemployment/benefits/forms/CorpOffcrInfo.pdf. The penalties for noncompliance are listed in RCW 50.12.220 (ESSB 5373 Section 3). Questions and answers from ESD related to the new statute can be found at http://fortress.wa.gov/esd/portal/unemployment/benefits/forms/corpoffcrqa.pdf. The ESD Press Release confirming that the new registration requirements are not a hoax is available at http://fortress.wa.gov/esd/portal/corporateofficerregistration.

3. Veterans Protection From Discrimination

The WLAD was amended to add a prohibition against discrimination based on honorably discharged veteran or military status. Senate Bill 5123 was passed by the legislature and signed into law by the governor on April 21, 2007. The Washington State Human Rights Commission now will have jurisdiction over veteran and military status discrimination in employment, housing, and public accommodations. With more veterans returning from military service, we may see a rise in claims of discrimination based on veteran or military status.

4. Paid Family Medical Leave

After significant negotiating between the House and Senate, the Washington Legislature adopted legislation to provide limited paid family and medical leave (E2SSB 5659). The governor signed the bill into law on May 8, 2007 and the law becomes effective October 1, 2009. The new law requires the Washington State Department of Labor and Industries ("L&I") to establish and administer a family and medical leave insurance program. Eligible employees will be entitled to up to five weeks of paid family and medical leave benefits per year through the state program. The funding source for the program has not yet been defined.

5. New Restriction on Use of Credit Reports

On July 22, a new Washington law went into effect that imposes additional restrictions on employers that want to obtain credit reports on employees or job applicants. Unless the information is required by law, Washington law now prohibits obtaining a credit report for employment purposes unless it is "substantially job related" and only if the employer's reasons for using the information are disclosed in writing. The new law does not provide any guidance about when such information is "substantially job related."

The rules regarding employer use of credit and other consumer reports are a fairly complicated overlay of federal and state law. Both the federal Fair Credit Reporting Act ("FCRA") and the Washington State Fair Credit Reporting Act apply to "consumer reports"—reports obtained from a credit reporting agency. Consumer reports can contain information about an individual's personal and credit characteristics, as well as information concerning the person's character, general reputation, or lifestyle. A credit report is one kind of consumer report that generally focuses on the person's credit payment records.

There are additional limitations on the procurement of "investigative consumer reports"—reports in which information about the individual's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews of others. For those reports, you must specifically notify the individual that such a report may be made, and the disclosure must be made in writing and mailed or delivered to the individual no later than three days after the report is requested. The disclosure must notify the individual of his right to a complete and accurate disclosure of the nature and scope of the investigation requested. If he requests that additional disclosure, it must be made in writing and mailed or delivered no later than five days after receiving the request for the disclosure.

Credit reports contain extremely private information about individuals. Because of concerns about misuse, their use is strictly regulated. Specific notice and consent rules must always be followed when a credit report is generated. Also, you should request credit reports for employment purposes only when the information is substantially related to the job.

6. Washington Minimum Wage Increase

Washington's minimum wage will increase 14 cents to $8.07 an hour beginning January 1, 2008. L&I recalculates the state's minimum wage each year in September as required by Initiative 688, which requires that the state minimum wage be adjusted each year according to the change in the federal Consumer Price Index for Urban Wage Earners and Clerical Workers during the 12 months ending each August 31. Washington's minimum wage applies to workers in both agricultural and nonagricultural jobs, although 14- and 15-year-olds may be paid 85 percent of the adult minimum wage.

II. CASE LAW DEVELOPMENTS

A. WASHINGTON'S "DISABILITY" DEFINITION—Which Definition Applies?

Since the adoption of the new disability definition in Washington, federal and state courts have been inconsistent in deciding whether the statute applies retroactively.

1. Federal Courts

In *Delaplaine v. United Airlines*, No. C06-09892, 2007 WL 2821494 (W.D. Wash. Sept. 28, 2007), a federal district court in Western Washington issued an order providing further guidance on the definition of "disability" under the Washington Law Against Discrimination ("WLAD"). The parties disputed which definition of disability applied: the Americans With Disabilities Act ("ADA") definition the Washington Supreme Court adopted in *McClarty* or the amended WLAD definition adopted in response to *McClarty*, which took effect on July 22, 2007. *McClarty v. Totem Electric*, 157 Wn.2d 214. The district court rejected United's argument that the retroactivity clause of the WLAD violated the separation of powers doctrine. The court noted that a statute that clarifies, rather than alters, a current law does not operate retroactively even

when applied to transactions conducted before its enactment. Furthermore, the legislature was very careful in drafting the effective dates of the new definition to avoid contravening a judicial decision that authoritatively construes statutory language. Thus, cases arising between the date of the *McClarty* decision and July 22, 2007, are still governed by *McClarty.* The new definition applies to all other cases.

In *Varga v. Stanwood-Camano*, No. C06-178MJP, 2007 WL 2193740 (W.D. Wash. Jul. 27, 2007), the arguments over the retroactivity of the May amendments to the WLAD definition of disability also came to a head. The case involved disability claims under the WLAD by an employee of the Stanwood-Camano school district. The parties assumed that plaintiff Randall Varga might be unable to satisfy the ADA definition set forth in the *McClarty* decision. It therefore became important to know what definition of disability would apply to his claim, the more limited ADA/*McClarty* definition or the broader definition in the new and supposedly retroactive amendment to the WLAD. To settle the issue, the school district filed a request asking the court to clarify the applicable law. The court's order held that the May amendments could not be applied retroactively. According to the court, it is normally presumed that any legislative amendment is prospective only. In limited circumstances, it is possible for the legislature to enact retroactive amendments, but only where the amendments are "curative" or "remedial." Amendments that contravene a prior judicial interpretation of a law, however, are not curative or remedial. Rather, they effectively override prior judicial decisions, and that is permissible only in the future, not retroactively. Noting that the May amendments specifically state that the *McClarty* court "failed to recognize" the original, broader intent behind the WLAD, the *Varga* court concluded that the legislature was not amending the statute to add a remedy. Instead, the legislature was stating that the *McClarty* court was mistaken. Retroactive application of the amendments was therefore unconstitutional no matter what the legislature intended.

In *Breeden v. Kaiser Aluminum & Chemical Corp.*, No. CV-05-363-LRS, 2007 WL 1461290 (E.D. Wash. May 16, 2007), a federal court in the Eastern District of Washington held that the new definition applied retroactively. The court held that the new definition applies to all causes of action occurring before July 6, 2006 and causes of action occurring on or after the effective date of the new definition, July 22, 2007. Thus, the *McClarty* definition applies only to causes of action occurring between July 6, 2006 and July 22, 2007.

2. State Courts

In *Schlender v. United Parcel Service Co.*, No. 2005-02-05836-1 (Wash. Super. Ct. Sept. 14, 2007), the superior court requested briefing from the parties regarding the retroactive application of the "disability" definition recently adopted. The court held that the recently adopted definition of "disability" does not apply retroactively to events occurring prior to the effective date of the new law. Thus, acts and omissions occurring in the case prior to the effective date of the new law (July 22, 2007) were subject to the *McClarty* definition.

In *Hale v. Wellpinit School District,* No. 2006-2-00194-8 (Wash. Super. Ct. Aug. 27, 2007), the superior court refused to apply the new "disability" definition retroactively to the date of the *McClarty* decision because the recent statutory definition can only be prospectively applied. The court held that under the *McClarty* definition, the plaintiff failed to show that his condition substantially limited a major life activity, as required under the ADA definition of disability. The court refused to reconsider the previously dismissed claim because doing so would require retroactive application of the new definition and violate the separation of powers doctrine by contravening a prior judicial interpretation.

B. EMPLOYEE PRIVACY

1. Waiver of Claims Arising Out of Background Investigation Enforced

In *Nilsson v. City of Mesa,* No. 05-15627, 2007 WL 2669788 (9th Cir., Sept. 13, 2007), the Ninth Circuit analyzed the waiver of claims arising out of background investigations included in employment application forms. Christine Nilsson wanted to be a police officer for the City of Mesa, Arizona. She filled out an application and signed an agreement to "waive all [her] legal rights and causes of action to the extent that the Mesa, Arizona, Police Department investigation (for purposes of evaluating [her] suitability or application for employment) . . . violate[d] or infringe[d] upon . . . [her] legal rights and causes of action." Eventually, Nilsson disclosed that she had left the Tempe PD as part of a settlement of a matter filed with the Equal Employment Opportunity Commission. The Hiring Board extended a provisional offer of employment, contingent on Nilsson's successful completion of a physical aptitude test, medical examination, and psychological evaluation. She passed the physical and medical hurdles. But the psychologist who evaluated Nilsson recommended that she not be hired, citing her stubbornness, edginess, and impulsivity. As a result, the offer of employment was withdrawn. Nilsson filed a charge of discrimination with the EEOC, claiming that the Mesa PD had violated her rights under the ADA and Title VII of the Civil Rights Act of 1964. She followed her charge with a federal lawsuit. The City of Mesa persuaded the trial court that the claims should be thrown out because of the waiver Nilsson had signed in connection with her application for employment. Nilsson appealed, urging that she should be excused from the effects of the waiver, claiming that she had not understood it. However, Nilsson had a college-level education and the application stated clearly in bold capital letters: "READ CAREFULLY BEFORE SIGNING—IF NOT UNDERSTOOD, SEEK COMPETENT LEGAL ADVICE." Thus, the court concluded that Nilsson could not assert any claims based on the background investigation.

To proceed on her Title VII retaliation claim, Nilsson had to show some evidence of a causal link between her protected activity (i.e., her earlier filing of a charge against the Tempe PD) and the withdrawal of the employment offer by the Mesa PD. The City of Mesa argued that it had a legitimate, nonretaliatory reason for withdrawing its offer, namely, the recommendations of the psychologist who had evaluated her. Nilsson had no evidence that the psychologist's recommendation was not truly the deciding factor. Dismissal of Nilsson's claims was affirmed.

It is not uncommon for employers to be wary of applicants with a history of past employment claims. Remember, however, that you may not hold applicants' earlier protected activity against them in connection with their candidacy for a job with your organization.

C. FIRST AMENDMENT

1. Pro-Union Speech Protected by First Amendment

John Gavello was hired in March 2003 by the Transportation Security Administration ("TSA") to work as a baggage screener at the Oakland International Airport. When the TSA was created, Congress expressly denied collective bargaining rights for screeners. Despite these conditions, Gavello was an outspoken supporter of the American Federation of Government Employees ("AFGE"). Gavello received a warning for conducting union activity on the job, followed by an administrative leave for failure to cooperate with an investigation into his activity. In February 2004, Gavello mailed a "second step grievance" to a TSA official, requesting copies of written procedures on baggage inspection. He also sent a copy of the letter to AFGE legal counsel. Less than a week later, the TSA fired Gavello because of his disclosure of sensitive

security information to an unauthorized party, AFGE's legal counsel. Gavello and AFGE sued, claiming that Gavello had been fired for pro-union speech protected by the First Amendment and that the union had also been harmed by the action. The TSA asked the trial court to throw out the lawsuit because Gavello was a probationary employee with no right to challenge his firing. Gavello and the AFGE appealed. The Ninth Circuit recognized that Gavello, as a probationary employee, had no administrative avenue to challenge his dismissal. Reviewing Supreme Court and other authority, however, the court concluded that public employees should be permitted to pursue constitutional claims if they lost their jobs because of constitutionally protected speech. In Gavello's case, this meant that he should be permitted to proceed in court with his constitutional claims. Congress had not expressly barred his right to do so. AFGE was also permitted to pursue its claim. Even though it could not represent TSA screeners, the union had an interest in speech supportive of organizational rights. The case was returned to the trial court for further proceedings. *American Federation of Government Employees Local 1 v. Stone*, No. 05-15206, 2007 WL 2482144 (9th Cir., Sept. 5, 2007).

2. First Amendment Protects Police Officer's Pornographic Website, but Not His Job

Ronald Dible, a police officer in the City of Chandler, Arizona, was fired after information surfaced about the sexually explicit website he was involved with in his off-duty hours. The website featured explicit photographs and videos filmed by Dible, featuring his wife. The purpose of the website was not social or political commentary, but simply to make money. Rumors of the website eventually circulated with the general public. An investigation led the City to conclude that Dible's participation in the sexually explicit website was having a negative impact on the department. He was fired and filed a lawsuit, alleging that his website activity was protected by the First Amendment. A trial court threw out Dible's claim, and he appealed. The Ninth Circuit made short shrift of Dible's constitutional claim. Although public employees do not give up their First Amendment rights when they take on their jobs, their interests in free speech are balanced against the interests of the mission of their employer. Here, Dible's activities provided the public with no information about any other subject of public concern. The interest of the police department in having officers who behave with a high level of propriety was undermined by Dible's "sleazy activities." The City did not violate his free speech rights when it discharged him. As the court concluded, Dible may have the constitutional right to run his sex-oriented business, but he has no constitutional right to be a policeman for the City at the same time. *Dible v. City of Chandler*, No. 05-16577, 2007 WL 2482147 (9th Cir. Sept. 5, 2007).

D. WAGE AND HOUR

1. Security Installation Technician's Drive Time From Home to First Jobsite Is Compensable Under the Washington Minimum Wage Act

In *Stevens v. Brink's Home Security, Inc.*, No. 79815-0, 2007 WL 3025831 (Wash. Oct. 18, 2007), a class comprising 69 installation and service technicians filed suit against Brink's Home Security alleging violations of the Washington Minimum Wage Act ("MWA") based on Brink's failure to pay technicians for time they spent driving company trucks from their homes to the first job site and back from the last job site. The technicians installed and serviced home security systems, and Brink's supplied technicians with pickup trucks bearing the company logo. The trucks were configured to carry the necessary tools. Brink's compensated technicians for drive time from jobsite to jobsite; however, for time spent driving to the first site, Brink's offered technicians a choice between two programs. Technicians could drive their personal cars to the Brink's office and pick up the Brink's truck and be compensated for the drive from the Brink's

office to the first job site and back to the office at the end of the day. Alternatively, technicians could keep the Brink's trucks at their home and drive them directly to and from the first and last jobsites without stopping at the Brink's office – otherwise known as the home dispatch program ("HDP"). Technicians participating in the HDP program received their daily assignments through voice mail or handheld computers. The technicians filed a class action suit in superior court alleging Brink's violated the MWA by failing to pay technicians for all drive time under HDP. The trial court granted judgment in the technicians' favor, ruling that the time technicians spent driving company-issued trucks from home to the first jobsite and from the last jobsite back home was work time under the MWA. The court also awarded prejudgment interest, back pay damages, and attorneys' fees. On appeal, the Washington Supreme Court affirmed the trial court's judgment in plaintiffs' favor. First, the court analyzed whether the drive time constituted "hours worked" within the meaning of the MWA—"hours worked" means all hours an employee is required or authorized to be "on duty" on the "employer's premises" or at a "prescribed work place." The court evaluated the extent to which Brink's restricted technicians' personal activities and controlled their drive time to determine whether they were "on duty." Here, Brink's company policy strictly limited technicians' use of the trucks to "company business only," and technicians could not carry non-Brink's employees as passengers. Additionally, technicians were required to obey the law, park correctly, and not carry alcohol. Thus, unlike ordinary commuters, technicians could not engage in personal activities while driving the trucks. Technicians were "on duty" during the drive—supervisors had the power to redirect technicians while en route to other job sites. In ruling that the trucks were the technicians' "prescribed work place," the court held that driving the trucks was also an integral part of the technicians' work – trucks were used to reach customers, carry necessary tools, and fill out paperwork. Additionally, as with work premises, technicians were required to keep the trucks clean, organized, and safe. Accordingly, technicians were entitled to compensation under the MWA for the driving time.

2. Release of Wage Claims Does Not Bar Employee Suit

The United States Department of Labor is charged with supervising settlement of wage claims under the Fair Labor Standards Act ("FLSA"). A recent case decided by the Ninth Circuit presented claims of an employee who had accepted such a settlement, then sued for more. The case was brought by David Dent, a former employee of MC Communications. In March 2004, Dent had accepted a settlement supervised by the Labor Department under which he received overtime compensation owed to him. He signed a standard form in which he acknowledged receipt of pay "for the period beginning with the workweek ending 5-04-02 through the workweek ending 10-11-03." The form Dent signed also contained the following provision:

> Your acceptance of back wages due under the Fair Labor Standards Act means that you have given up any right you may have to bring suit for such back wages under Section 16(b) of that Act. . . . Generally, a 2-year statute of limitations applies to the recovery of back wages. Do not sign this receipt unless you have actually received payment of the back wages due.

Approximately five months after signing off on the settlement, Dent filed his lawsuit for unpaid overtime wages for the period before April 28, 2002. He relied on the provision of the FLSA that allows actions for wage claims going back three years if violations are alleged to be willful. MC Communications argued to the trial court that Dent's earlier release had waived any and all wage claims that he might have under the FLSA. The trial court agreed and dismissed the claim. On appeal, the question presented was whether Dent's acceptance of wages and

release of claims for a specified period barred his action for wages outside the defined period. The court found that the FLSA did not clearly bar other claims following a supervised settlement. The Labor Department was free to limit its review to a specific period, and a settlement for that period did not mean employees could not pursue their statutory claims outside the defined period. The court held that Dent's settlement was limited to the specified time frame and that he could proceed with wage claims not within that period. *Dent v. Cox Communications Las Vegas, Inc.*, No. 05-15455. 2007 WL 2580754 (9th Cir. Sept. 10, 2007).

If you find yourself in discussions with the Labor Department about a settlement of claims, look closely at the wording of the releases to be signed by workers who receive payments. Be certain that the scope of the release is broad enough to eliminate all further liability.

E. UNION ISSUES

1. Employer's Actions Warranted Bargaining Order

Once a union is certified as the bargaining representative for a group of employees, the employer may not give promotions and pay increases to members of the bargaining unit without talking to the union about it. In December 1997, the National Labor Relations Board ("NLRB") certified the East Bay Automotive Council and its local affiliates as the union representing 16 workers employed by M&M Automotive Group, Inc. In 1998, M&M's owners met with representatives of the union to work out the terms of a collective bargaining agreement and reached tentative agreements, but they did not finalize a contract. During negotiations, M&M changed job titles for and gave raises to several employees in the bargaining unit without any notice to the union. In 1999, M&M received a petition signed by 11 of the 16 employees who were part of the bargaining unit stating that the signers no longer supported the union. Six of the signers had been recipients of the enhanced job titles and wage increases. M&M advised the union that it had objective evidence of a lack of support for union representation and that it would no longer negotiate with the union. M&M then declined to respond to an information request from the union, and the union filed an unfair labor practice charge. An initial administrative hearing resulted in a ruling that the employer had failed in its bargaining obligations by giving promotions and wage increases without informing the union. However, according to the ruling, M&M's violation had not affected the views of the bargaining unit members, and it had been justified in refusing to further bargain with the union. The Administrative Law Judge's conclusions were rejected by a three-member NLRB panel who found that M&M's unilateral raises and promotions were unlawful and had tainted the views of the employees. The appropriate penalty was an order requiring the employer to engage once again in bargaining with the union. On appeal, the Ninth Circuit gave deference to the NLRB on all issues. It found that the loss of employee support for the union was brought about by the actions of M&M, whose wrongs must be remedied. The court ordered enforcement of the NLRB's action. *East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007).

If you are a private employer, keep in mind that federal labor law imposes rules on how you may communicate with and change terms and conditions of employment for your employees if they are actually represented by a union or a union is making overtures to represent them. In either circumstance, it is a very good idea to seek counsel if a union is in the picture and you are thinking about promising or providing some enhancement to working conditions.

2. Ninth Circuit Nixes Union Play to Arbitrate Nonunion Dispute

Parties to collective bargaining agreements typically prescribe arbitration as the method for resolving their disputes. Recently, a California-based union attempted to require arbitration of disputes on a nonunion construction project because a unionized Texas company had agreed to a standard provision that the terms of its bargaining agreement would apply to work performed on projects over which it exercised control. B&B Glass, Inc., is a Texas corporation with a unionized workforce. B&B Glass, Incorporated, is a nonunion company headquartered in Arizona. The Arizona company ("BBAZ") was formed first and, at the time of the lawsuit, 25% of the company was owned by Bryan Buckholz, son of the founders, and 75% by three other owners. Buckholz started the Texas company ("BBTX") in 1998 and then sold his entire interest to the same three individuals who own 75% of BBAZ. In 2002, BBTX signed a collective bargaining agreement with Texas-based Painters and Glaziers Local Union No. 53. BBTX agreed that the terms would apply to its work in other geographic areas and could be enforced by the local unions in those other areas. The agreement also contained a provision designed to prevent BBTX from acting directly or indirectly as a nonunion contractor. The provision said that the agreement would apply to construction work where BBTX "through its . . . owners . . . exercises directly or indirectly . . . management control." This type of provision is called a "*Manganaro*" clause. Approximately a year after BBTX entered the agreement with Local 53, BBAZ began work on a construction job in Santa Clara County, California. The job was nonunion, but Local 1621—the northern California counterpart of Local 53—said that the *Manganaro* clause in the BBTX bargaining agreement meant that the terms of the agreement applied to the BBAZ job in California. Local 1621 took the position that because the owners of BBTX also owned 75% of BBAZ, they therefore controlled the California work. That meant, the union argued, that BBAZ should comply on the Santa Clara County job with the terms that Local 1621 had bargained for construction work in that area. BBAZ declined, and Local 1621 went to federal court in an attempt to require BBTX to arbitrate the issue. BBTX appeared in court only to say that it had nothing to do with the Santa Clara County job and should not be ordered to submit to arbitration of any disputes there. Even though the owners of BBTX also own 75% of BBAZ, that did not mean that BBTX in any sense controlled work on BBAZ's project in Santa Clara County. The trial court agreed and threw out the case. On appeal, the court evaluated the case in light of the history of so-called *Manganaro* clauses. In the case for which such provisions were named, the NLRB determined that common ownership would trigger application of the provision only if the owners of the company that signed the bargaining agreement "performed and exercised control over the work" in question. In this case, the evidence presented by BBTX established its lack of control over BBAZ and its operations. Dismissal of the case was affirmed. *District Council No. 16 of the International Union of Painters & Allied Trades, Glaziers, Architectural Metal & Glass Workers, Local 1621, v. B&B Glass, Inc.*, 498 F.3d 926 (9th Cir. 2007).

If you are a union employer, think carefully about proposed provisions that the union claims are "standard" for your industry.

3. Washington Court Refuses to Reinstate Police Officer Under Arbitration Award

In *Kitsap County Deputy Sheriff's Guild v. Kitsap County,* 165 P.3d 1266 (Wash. Ct. App. 2007), the sheriff's office fired Deputy LaFrance for untruthfulness and erratic behavior—the deputy had 29 documented conduct violations. The sheriff's office denied the union's grievance on behalf of the deputy, and the grievance proceeded to arbitration. The arbitrator found that the discipline was too severe for an employee suffering from serious mental health problems

and reinstated the deputy conditioned on his passing psychological and fitness-for-duty exams. The arbitrator denied the county's request for reconsideration. A few months later, Deputy LaFrance was deemed physically and mentally fit to return to duty and was assigned to field training. Shortly thereafter, however, he was removed because the sheriff concluded that LaFrance was not fit for duty due to *Brady* concerns—if called to testify, the prosecutor would be obligated to disclose LaFrance's history of untruthfulness to defense counsel. The union filed suit to enforce the arbitration award and also asserted claims under the FLSA and the MWA. The trial court dismissed the case and LaFrance appealed. On appeal, the county argued that the arbitrator offended public policy by reinstating LaFrance, despite finding he was guilty of untruthfulness. The court of appeals agreed. LaFrance's reinstatement violated several public policies regarding a police officer's duties to the public.

F. PROCEDURAL BARS TO SUIT

1. Ninth Circuit Clarifies Deadline for Filing When Receipt Date of Notice Is Uncertain

A recent ruling of the Ninth Circuit Court of Appeals explains how the 90-day period to file a Title VII violation suit will be calculated after receipt of a right-to-sue notice from the EEOC. Martha Payan began working for Aramark Management Services L.P. in 2002, and less than a year later, she was discharged. She promptly filed a charge of discrimination with the EEOC, claiming to have been subjected to sex discrimination and retaliation. On September 26, 2003, the EEOC dismissed the charge and issued a right-to-sue letter informing Payan that she had 90 days from receipt to pursue her claim in federal court. She filed a lawsuit on January 2, 2004, 98 days from the date on the letter. Aramark immediately asked the trial court to dismiss Payan's lawsuit on the grounds that she had failed to file it within the permitted timeframe. She argued that the EEOC letter "could have been delayed." The trial court rejected Payan's position, ruling that the lawsuit should be dismissed as untimely. On appeal, the Ninth Circuit noted that the 90-day period for filing a lawsuit begins to run when an EEOC right-to-sue notice arrives at the claimant's address. When receipt of the notice is acknowledged but the actual receipt date is unknown, the court decided that it is best to have a fixed rule to start the time period for filing. The court said that the calculation would begin with the presumption that the EEOC actually sent out the notice on the stated date—in this case, September 26, 2003. Although other courts had adopted presumed delivery periods of five or seven days, the Ninth Circuit found that the majority—along with the U.S. Supreme Court—had accepted three days for delivery as reasonable. Under the rule, the assumed receipt date for Payan's right-to-sue notice was September 29, 2003. Because Payan had presented no competent evidence to rebut operation of the rule, her lawsuit was filed too late. The Ninth Circuit upheld dismissal of her lawsuit as untimely. *Payan v. Aramark Management Services L.P.*, 495 F.3d 1119 (9th Cir. 2007).

2. Ninth Circuit Excuses Technical Defect, Permits Age Claims to Proceed

In a recent case brought by federal Border Patrol agents, the Ninth Circuit Court of Appeals showed that it is willing to forgive a technical breach of the requirements to permit a case to proceed on its merits. Alfredo Chavez, Carlos Teran, and Donald Evans were employed as Border Patrol agents. After Rowdy Adams was named Agent in Charge of the station, Chavez, Teran, and Evans claim that they were each denied promotions because of their age. The agents initially addressed the issue through a procedure available to federal employees with the EEOC. The EEOC eventually issued each of them a "Rights Memorandum"—similar to the "right-to-sue" notice provided to private sector claimants—

advising them of their right to file a civil action. Federal employees at that point have two alternatives: They may pursue a formal charge with the EEOC, await the outcome of the agency investigation, and then file a lawsuit if need be. Or they may bypass the administrative process entirely and go straight to court. The Rights Memoranda advised them that the bypass option required them to give notice to the EEOC within 180 days of the alleged discriminatory action of their *intent* to file suit and then wait at least 30 days to initiate their action in court. The plaintiffs sent a notice to the EEOC on May 23, 2001, indicating an intent to proceed with a civil action. Then, nine days after the notice of intent, they filed their civil action in federal district court. The Border Patrol challenged the lawsuit, urging that the claimants' lawsuit was fatally flawed because of their failure to wait a full 30 days after filing the intent notices. The trial court agreed and threw the case out. On appeal, the Ninth Circuit noted that a decision of the U.S. Supreme Court had specifically addressed the requirements for federal employees, and the decision indicated that the 180-day period for filing in court would be satisfied so long as the *intent* notice was filed with the EEOC within that period, followed by court filing 30 or more days after. This ruling suggested that courts had a degree of latitude in determining compliance with the timelines for filing suit. Similarly, in a private sector Title VII case, the Supreme Court had announced that the time limits for filing suit in discrimination cases might be adjusted for equitable reasons. In light of this guidance, the court concluded that the agents should not be barred from pursuing their discrimination claims simply because they had failed to wait a full 30 days to file after giving the EEOC notice of their intent to sue. Applying that principle to the case at hand, the court concluded that there was no reason not to let the border agents' case proceed because the Border Patrol had not been prejudiced by the premature case filing. The Ninth Circuit sent the case back to the trial court to permit the claims to go forward. *Forester v. Chertoff*, No. 05-16517, 2007 WL 2429374 (9th Cir. Aug. 29, 2007).

3. Ninth Circuit Nixes "Second Bite at the Apple"

The Ninth Circuit Court of Appeals recently upheld the principle that bars relitigating a claim once it already has been decided. In 2001, Avril Adams applied for a position as a food and drug inspector with the California Department of Health Services ("CDHS"). Adams received a job offer conditioned upon her successful completion of a background investigation, including medical and psychological background evaluations. After passing the psychological and medical evaluations, Adams objected to being subjected to a background investigation. Ultimately, the CDHS declined to hire Adams as an inspector because of questions about her suitability as a peace officer. Unhappy at the rejection, Adams then filed a federal lawsuit asserting violations of the ADA, retaliation in violation of her civil rights, denial of due process, and other claims. Adams tried to raise new state-law claims and add as defendants the investigator who conducted her background check and four more CDHS employees, but the court denied her request as untimely. Adams then took her original claims to trial and lost. Adams decided to try for a "second bite at the apple" and filed a new lawsuit in federal court based on the claims the court would not permit her to add to her first complaint. The trial court threw the new case out because it duplicated the issues that had already been tried. On appeal, the Ninth Circuit stated that individuals have no right to maintain two separate lawsuits involving the same subject matter in the same court and against the same defendants. Despite Adams' characterization of her claims under different theories the second time around, the subject of both lawsuits was her application for employment with the CDHS and its withdrawal of the conditional job offer it had extended. Adams had a full and fair opportunity to litigate her claims the first time around. *Adams v. State of California Dept. of Health Services*, 487 F.3d (9th Cir. 2007).

G. DISCRIMINATION AND RETALIATION

1. Divided Supreme Court Finds No Continuing Violation in Pay-Bias Claim

The U.S. Supreme Court handed employers a victory in the sex discrimination case of Lilly Ledbetter, a former manager at a Goodyear Tire & Rubber plant. She started out earning the same as her male counterparts, but in 1998, as she neared retirement, she learned that throughout her career, she had earned anywhere from $559 to $1,509 a month less. She sued the company under Title VII, charging sex discrimination and saying she should be able to recover what she would have earned throughout her career had it not been for Goodyear's bias. Goodyear argued that it paid Ledbetter less based on her performance. Besides, she could only recover 180 days' worth of damages because of Title VII's 180-day statute of limitations. Ledbetter responded by saying pay discrimination—like hostile workplace discrimination—occurs repeatedly. An earlier Supreme Court decision made an exception to the 180-day limitation on damages for hostile workplace claims, and she argued that this should be the standard in pay discrimination cases as well. The high court, in a 5-4 decision, rejected Ledbetter's reasoning. The majority opinion held that companies make compensation decisions at distinct, separate times, much as they make hiring and firing decisions. An analogy to a hostile workplace situation does not hold up. With pay, there is usually an annual salary review and then a series of paychecks based on that single decision, unlike the collection of actions that create a hostile workplace. The dissenting justices agreed with Ledbetter that her claim should be treated as a hostile workplace claim. In most workplaces, salary information is a highly guarded secret, the dissenters wrote. It's unfair to limit workers to six months of damages when they learn that, through no fault of their own, they have been shortchanged for years.

This case gives you an assurance that you will not have to defend pay discrimination claims that stem from decisions made years, even decades, earlier. The opinion places great emphasis on quickly resolving workplace disputes, sending a clear signal to employees to be diligent about workplace rights. Consequently, you may expect to receive more equity-type questions from employees, both on pay and in other areas.

2. Supreme Court to Rule on "Rubber Stamp" Case

The justices heard arguments in April on *BCI Coca-Cola Bottling Co. of Los Angeles v. Equal Employment Opportunity Commission*, 127 S. Ct. 1931 (2007), a case that could increase employers' potential liability and perhaps make it harder to take adverse actions against employees. The case deals with whether employers can be held liable when a higher-level manager makes a bias-free adverse employment decision based on allegedly biased input from a subordinate. At the center of the case is BCI regional HR manager Pat Edgar's decision to fire Stephen Peters, a five-year employee who is African American. Edgar acted on information from Peters' boss, a Hispanic sales manager named Cesar Grado, and she examined Peters' personnel file beforehand. She had never heard of—much less met—Peters and didn't know his race. But there was evidence that Grado had a history of bias against African Americans. Shortly after Peters' firing in September 2001, he filed a charge with the EEOC, which investigated and felt strongly enough about his case to sue on his behalf. The district court threw out Peters' case before trial, saying that while the EEOC had met its initial burden of showing that his firing was discriminatory, the company effectively rebutted the claim by showing a legitimate business reason for firing him—insubordination. The EEOC appealed to the Tenth Circuit.

Federal courts have recognized that a company can be held liable for discriminatory employment decisions when the decisionmaker didn't act out of bias but reached a discriminatory result by rubber-stamping the decision of someone else who did discriminate. But there is a whole range of ways, short of rubber-stamping a decision, in which the official decisionmaker can use allegedly biased input from a subordinate. Currently, the federal judicial circuits are divided on the issue. The Fourth Circuit maintains that the subordinate employee must be the actual decisionmaker or be principally responsible for the firing. Other circuits would hold the decisionmaker liable if the subordinate had leverage or exerted influence over him. In BCI's case, the Tenth Circuit took a middle approach. It ruled that to hold an employer liable for a subordinate's bias, the wronged employee would have to show that the biased subordinate's discriminatory reports, recommendation or other actions caused the adverse employment action. However, an independent investigation defeats the causal link between the subordinate's allegations and the employment decision. Merely asking the employee for his side of the story may be enough to defeat an inference of discrimination. "Employers therefore have a powerful incentive to hear both sides of the story before taking an adverse employment action against a member of a protected class." In this case, the HR manager and the decisionmaker examined the personnel file of the to-be-fired employee but did not inquire about the facts of the case. The district court ruled that checking the personnel file was a sufficient investigation, but the appeals court strongly disagreed, largely because it did not shed light on the dispute that ended up getting the worker fired. It remains to be seen whether the Supreme Court follows the Tenth Circuit's reasoning. In the meantime, it can't hurt to step back and get the employee's side of the story before making any decisions on termination.

3. Ninth Circuit Permits Sexual Harassment Claim to Proceed to Trial

Eileen Craig was the Tucson branch manager of The Mahoney Group. In 2003, she reported to Leon Byrd, the company's interim president. Craig claimed that Byrd repeatedly made sexually inappropriate comments to her. On August 8, 2003, Byrd invited Craig to meet him at a restaurant for drinks after work to discuss work matters. At the restaurant, Craig excused herself to go to the restroom. Byrd followed and approached Craig, grabbed her arms and kissed her. Craig did not report the incident. Byrd continued to call Craig and invite her for drinks. She repeatedly responded with an emphatic "no." A few days later, Byrd apologized to Craig, but later said that he did not think that he could work with her anymore. Three weeks after the incident at the restaurant, Craig reported Byrd's conduct to the company. Immediately, the company instructed Byrd to stay away from Craig and redirected her reporting relationship to another executive. The company's outside counsel was called in to conduct an investigation. The investigation resulted in recommendations that Byrd receive a severe reprimand and that Byrd be required to attend sexual harassment sensitivity training. Following the investigation, Craig was reassigned to Byrd. She claims that he retaliated by ignoring her, failing to respond to email messages, and providing work information to her belatedly. Craig eventually resigned and filed a lawsuit in federal court, claiming sex discrimination in violation of Title VII. The company persuaded the trial court to dismiss the case, and Craig appealed. On appeal, the Ninth Circuit began its review by delineating the two distinct types of sexual harassment: (1) quid pro quo—occurs when a supervisor conditions a favorable decision on the employee's cooperation with sexual advances; and (2) "hostile environment"—occurs when an employee is subjected to unwelcome conduct of a sexual nature that is so severe and pervasive that it alters the conditions of the work environment. The court found that there was insufficient evidence to establish a quid pro quo violation. The analysis of the hostile environment claim led to a different result. The court found that the allegations about Byrd's conduct easily established that Craig had been subjected to verbal or physical conduct of a sexual nature and that the conduct was unwelcome. Furthermore, his repeated comments and propositions over a period

of months could interfere with the work environment for a reasonable woman. The Mahoney Group claimed that, even if Byrd's offensive conduct was pervasive, the company should be relieved of liability because Craig had not taken steps that were available to correct the situation—Craig reported her concerns to the company 19 days after the restaurant incident. The court said Craig's delay did not absolve The Mahoney Group of responsibility. Accordingly, the Ninth Circuit reversed the trial court dismissal. *Craig v. M&O Agencies, Inc.*, 496 F.3d 1047 (9th Cir. 2007).

Going forward, be sure that your company has a clear and effective procedure for employees to let you know if they have concerns about unwelcome conduct. If you become aware of potentially offensive conduct and are not sure how it is being perceived, be proactive. The more you do to weed out unwanted behavior that could amount to unlawful harassment, the better position you will be in to avoid—or to defend against—a claim of violation.

4. Ninth Circuit Sends "Reverse" Religious Discrimination Claim to Trial

Lynn Noyes worked for ten years as a software developer in the computer software and multimedia department of Kelly Services, Inc., a staffing firm. She was laid off in 2004, approximately three years after she had been denied a promotion to the position of software development manager. The promotion went instead to Joep Jilesen, who—like the selecting manager, William Heinz—was a member of a religious group called the Fellowship of Friends. Noyes claimed that she was better qualified for the job but was passed over because she was not a member of the Fellowship. Evidence in the case showed that of 35 full-time Kelly Services employees before the layoffs, 13 were Fellowship members. Five of 11 full-time hires from 1998 through 2001 were members, and the plaintiff claimed that two out of three more recent hires were members. Kelly Services defended its selection of Jilesen for promotion on the grounds that the decision was based on a consensus of three managers, only one of whom—Heinz, the decisionmaker—was a member of the Fellowship. The trial court found that evidence overcame the plaintiff's claim since she had not presented evidence that religious discrimination was behind the promotion. After her claim was dismissed, she appealed. The Ninth Circuit noted that the plaintiff was entitled to a trial if she presented either direct evidence of the employer's discriminatory motive or evidence that indirectly undermined the reasons presented by the employer. In evaluating the evidence, the Ninth Circuit said that the plaintiff had shown the basic elements of a discrimination claim: (1) membership in a protected class; (2) satisfactory job performance; (3) an adverse employment action; and (4) more favorable treatment of a similarly situated employee. Here, the plaintiff presented evidence of a recognition of perceived favoritism toward Fellowship members, preferential treatment of Jilesen as reflected in his higher salary, her own allegedly superior qualifications for the promotion, and Heinz's tainting of the promotion process. That cast enough doubt about the real reason she was denied the promotion to entitle her to go to trial on her religious discrimination claim. *Noyes v. Kelly Services*, 488 F.3d 1163 (9th Cir. 2007).

This decision clarifies the Ninth Circuit's view on how much—and what kind of—evidence is enough to permit a discrimination claim to go to trial. Unfortunately, the court indicated that an employee may be able to force a trial merely by raising questions about the legitimacy of the reasons an employer gives for its decision, even without any evidence of a discriminatory motive.

5. Race, Retaliation Claims Must Go to Trial, Despite Claimant's Misconduct

Patricia Heisser Metoyer, an African American woman, was hired in 1998 to administer affirmative action initiatives of the Screen Actors Guild, Inc. ("SAG"). Soon after she went to work at SAG, Metoyer was approached by various minority employees who had complaints of racial discrimination. When she relayed the complaints to senior managers, she claims that she was met with blatantly racist comments. In late 2000, a temporary SAG employee brought forward a suspicious-looking invoice and check request she had found in Metoyer's box. By spring 2001, investigators learned that Metoyer had improperly ordered payments from the SAG grant funds to two of her current employees. Metoyer was eventually fired and filed a lawsuit, claiming that she had been fired due to race discrimination and retaliation for her role in advancing complaints of discrimination. SAG asked the trial court to dismiss the lawsuit based on undisputed evidence about Metoyer's misuse of grant funds. The trial court granted SAG's motion, and Metoyer appealed. On appeal, SAG asked the Ninth Circuit to accept the same theory that had been persuasive to the trial court. The appeals court did not accept that approach. Title VII of the Civil Rights Act of 1964 was amended in 1991 to recognize that in situations where an employer takes action based on both valid and discriminatory purposes (i.e., "mixed motives"), the employer is not excused from any consequences. If a claimant can show that discrimination had at least partially motivated an adverse action, she may proceed with her claim. The court held that Metoyer had presented enough evidence of discriminatory animus on the part of SAG executives to proceed with her claim that she was fired because of race discrimination and retaliation. Metoyer's evidence was enough to entitle her to go to trial, even if her misconduct would bar her from obtaining certain damages. The trial court's dismissal was reversed. *Metoyer v. Chassman*, No. 04-56179, 2007 WL 2781909 (9th Cir. Sept. 26, 2007).

To avoid the possibility of a similar situation, your managers need to understand how important it is to avoid making any comment that might be interpreted as reflecting a discriminatory bias. Even an employee who deserves to be fired for legitimate reasons has a right not to be subjected to racist sentiments. Work to ensure that your workplace does not accept comments or conduct that could be interpreted to suggest improper bias.

6. Court Upholds Retaliation Claim, Reverses Constructive Discharge

Retaliation claims are dangerous because—whether or not there has been any unlawful discrimination—the target of a discrimination complaint is not likely to take it well. That is one of the lessons from a case recently considered by the Ninth Circuit. James Poland was hired by the U.S. Customs Service in 1974. In 1991, he accepted the position of resident agent in charge of the Customs Service's Portland, Oregon, office. Poland reported to his Denver-based supervisor, Gary Hillberry. Hillberry said that Poland was "too old" for career advancement and that Portland had a bunch of "old farts" who needed to "get with the times." Poland filed an internal age discrimination complaint against Hillberry. A month later, he lodged a second complaint, this time reporting that Hillberry had retaliated for the initial complaint. Poland applied for promotions in other geographic locations, all of which were denied. An assistant of Hillberry added 23 notes criticizing Poland's conduct in the two years after the complaints. In the spring of 1999, Hillberry requested an administrative inquiry into Poland's performance at the Portland office. At the end of the inquiry, the investigative panel accepted the witnesses' testimony and decided that Poland was ineffective as a manager. The Customs Service Disciplinary Review Board reviewed the conclusions and recommended that he be reassigned to a nonsupervisory position elsewhere. Five months after another transfer, Poland elected to take early retirement. After retiring, Poland filed suit claiming discrimination, retaliation for his

internal complaint, and constructive discharge. At a nonjury trial, the trial judge rejected the age discrimination claim but found in Poland's favor on his claims for retaliation and constructive discharge. The judge awarded him nearly $340,000 in damages. The Customs Service appealed. On appeal, the Ninth Circuit held that a retaliatory motive would be imputed to an employer if the biased employee (in this case, Hillberry) influenced or was involved in the decisionmaking process. Hillberry had submitted to the panel a lengthy memo outlining Poland's alleged malfeasance and his assistant's notes on Poland's performance. All of that persuaded the court that the inquiry had not been independent and that the panel's recommendations had been affected by Hillberry's input. Poland's claim for retaliation was affirmed. Even so, the court said, Poland had not established that he had been constructively discharged, i.e., that his working conditions had become so intolerable that a reasonable person in his position would have felt compelled to resign. The court wished to avoid a decision that might encourage employees to leave their jobs. In Poland's situation, the transfer was not so intolerable that it forced his resignation. Accordingly, the court overturned the damages award based on the claimed constructive discharge and sent Poland's retaliation claim back to the trial court. *Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007).

7. Washington Court of Appeals Sends Discrimination and Retaliation Claims to Trial

Mark Davis, an African American, was hired as a salesman for West One in February 2005 and fired later that year. Davis alleged that during the course of his employment, he experienced racially charged comments in the workplace. Davis complained about the comments to human resources, but no disciplinary action was taken. Davis was later honored as employee of the month, entitling him to drive any vehicle on the lot for a month. The honor also entitled him to have his picture in the paper; however, due to an "error," another salesman was pictured. As employee of the month, Davis chose to drive a BMW and began using it on a Saturday. The next day, his supervisor told him that the BMW needed to be returned for service. Davis believed this was not true and that the car had already been serviced so he drove the car home. When Davis returned to work, he was discharged. Davis brought suit under the Washington Law Against Discrimination alleging a hostile work environment, disparate treatment, and retaliatory discharge. West One convinced the court to dismiss Davis's complaint. On appeal, the court of appeals stated that in order to establish a case of hostile work environment, Davis was required to show that he suffered harassment: (1) was unwelcome; (2) was because he was a member of a protected class; (3) that affected the terms and conditions of his employment; and (4) was imputable to the employer. The court found that Davis satisfied the first and second elements. To determine if the employer's conduct was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment, the court looked at the totality of the circumstances. To impute harassment to the employer, Davis was required to show that West One knew or should have known of the comments and failed to take reasonable corrective action to end the harassment. Because there were numerous factual issues surrounding Davis's hostile work environment claim, the court of appeals reversed the superior court's dismissal. As to Davis's disparate treatment claim, the court of appeals noted that to establish racial discrimination based on disparate treatment, an employee must show that the employee belongs to a protected class; and that the employer treated the employee less favorably than similarly situated, nonprotected employees who do substantially the same work. Here, Davis presented evidence that when he was honored as employee of the month, he did not get his picture in the newspaper unlike other employees. Second, Davis was not allowed to drive the car of his choice, unlike other employees of the month in the past. Lastly, Davis claimed that he was held to higher standards than other employees. Based on these facts and conflicting evidence, the court of appeals held

that dismissal was not appropriate. In analyzing the retaliation claim, the court stated that in order to establish a retaliatory discharge, Davis was required to show: (1) he engaged in protected activities; (2) an adverse employment action was taken against him; and (3) retaliation was a substantial motive behind the adverse employment action. The court of appeals held that it was unclear whether retaliation was the substantial motive behind Davis's termination and remanded the case to the trial court. *Davis v. West One Automotive Group,* 166 P.3d 807 (Wash. App. 2007).

H. WORKER ADJUSTMENT AND RETRAINING NOTIFICATION (WARN) ACT

Construction Workers From Various Jobsites Not Entitled to WARN Notices

The Worker Adjustment and Retraining Notification ("WARN") Act requires 60-day notices for mass layoffs for a prescribed minimum number of employees at a single job site. The Ninth Circuit Court of Appeals recently considered WARN Act claims on behalf of workers who had lost their jobs at a number of scattered construction sites and concluded that WARN requirements did not apply. Northern Line Layers, Inc. ("NLL") was a company that specialized in construction of telecommunications facilities. The company was headquartered in Billings, Montana, where it had just over 30 employees. Its remaining 162 employees worked at construction sites in seven different states. In March 2003, 58 construction workers from various NLL job sites were laid off without receiving a WARN notice. The laid-off workers brought a lawsuit, claiming that they should have received WARN notices at least 60 days before they lost their jobs. They claimed that NLL's Billings headquarters should be deemed the worksite for all of them, since that was where the company's management and payroll functions were conducted. NLL disagreed, pointing out that affected workers were scattered among widely separated job sites. Following the trial court's dismissal of their claims, the workers appealed. To qualify as a mass layoff that requires WARN notices, the job action must cause job loss for at least 50 full-time employees at a single site and at least 33% of the employees at that site. The NLL workers argued on appeal that the company's Billings headquarters should be deemed the single site of employment for all of them. But the workers' argument was undercut by the fact that they performed work for local construction managers at construction sites hundreds of miles distant from both the headquarters and other NLL sites. The court concluded that Billings was not "home base" for the affected workers. Thus, its 2003 layoffs did not fall within the WARN Act's definition of a mass layoff. *Bader v. Northern Line Layers, Inc.*, No. 05-36012, 2007 WL 2581110 (9th Cir. Sept. 10, 2007).

If you see layoffs on the horizon, check the WARN rules well in advance to find out whether you will need to give notice.

I. ALTERNATIVE DISPUTE RESOLUTION

Court Nixes "Unconscionable" Agreement to Arbitrate

Many employers like the concept of entering into agreements with employees to arbitrate disputes that may arise in the employment relationship, but, in the Ninth Circuit Court, there are many examples of such agreements being held unenforceable. For example, in *Davis v. O'Melveny & Myers,* an international law firm based in Los Angeles decided to adopt a new dispute resolution program ("DRP") for resolving employment-related disputes. The final step in the DRP process was final and binding arbitration. The firm announced the DRP to employees through interoffice mail and information on its intranet site. Jacqueline Davis worked for the firm from June 1999 until July 14, 2003. Approximately six months after her employment ended, she

filed a lawsuit in federal court claiming that the firm had failed to pay overtime owed under the FLSA. Such claims were within the disputes subject to the DRP. The firm asked the trial court to dismiss her action and compel arbitration through the procedures required by the DRP. The trial court granted the request. On appeal, the Ninth Circuit noted that the Federal Arbitration Act authorizes parties to agree to arbitration as a means of resolving their future disputes. The court also noted that state law contract principles govern the enforceability of arbitration agreements. Under California law, the DRP would not be enforceable if it was found to be "procedurally and substantively unconscionable." The Ninth Circuit framed the first issue by asking whether the DRP had been imposed on employees as a condition of employment. Here, because the employees had no meaningful opportunity to opt out of the DRP, it was procedurally unconscionable. The court also looked at whether the DRP limited the substantive rights that otherwise would be available in court. The DRP's provisions required employees to give the firm notice of any claim within one year, required confidentiality on disputes addressed through the program, reserved to the firm the right to go to court over attorney-client privilege issues, and prevented both the firm and employees from pursuing claims in an administrative forum. The Ninth Circuit concluded that the DRP was also substantively unconscionable. Therefore, the trial court's order requiring arbitration was reversed. *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007).

Before you decide to adopt an arbitration agreement, consider this case and other similar rulings from the Ninth Circuit. If you want to institute a plan featuring binding arbitration, be prepared for challenges and get solid legal counsel.

J. AGRICULTURAL WORKERS

Growers Liable for Violating Worker Protection Laws

On July 11, 2007, the U.S. District Court for the Eastern District of Washington decided a case that may have unanticipated and costly consequences for agricultural entities that use farm labor contractors to obtain the services of agricultural workers. In this case, employees filed a class action against farm labor contractor Global Horizons. The district court found two Washington state growers jointly and severally liable for Global's violations of the Farm Labor Contractors Act ("FLCA") and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). Under the FLCA, farm labor contractors are required to disclose to workers information about the terms and conditions of their employment on a form provided by the state. The AWPA and the FLCA also prohibit farm labor contractors or agricultural employers from knowingly providing migrant agricultural workers with information that is false or misleading about the terms and conditions of employment. The AWPA prohibits agricultural employers from violating working arrangements without justification, and the FLCA requires labor contractors to comply with all valid agreements and contracts. Both the AWPA and the FLCA contain provisions requiring agricultural employers and farm labor contractors to pay compensation to employees when due and provide an itemized written statement containing specific pay information. The district court found that in the course of providing agricultural labor to the growers, Global had failed to give adequate disclosures to workers about the terms and conditions of their employment, provided false and misleading information to workers about their employment, violated the terms of work agreements, failed to pay wages when due, and failed to provide workers with adequate written pay statements. The district court held that the growers were jointly and severally liable for Global's AWPA violations because of the number of oversights and the control growers exercised over the employees' day-to-day work. In addition, the district court also found an additional basis of joint and liability for Global's AWPA recruitment violations on the grounds that Global was an agent for the growers. The district

court also held that the growers were jointly and severally liable for Global's violations of the FLCA because they had not investigated whether Global was a licensed farm labor contractor and had continued to use the company's services even after discovering that it was unlicensed. *Perez-Farias v. Global Horizons, Inc*, No. CV-05-3061-AAM, 2007 WL 2041973 (E.D. Wash. July 11, 2007).

The court's decision illustrates that agricultural entities, such as growers, may be held responsible for their farm labor contractors' employees even when they do not directly employ those individuals. Users of farm labor contractor services who directly oversee the terms and conditions of employment should be sure that their contractors know and comply with the applicable laws, including the provisions of the AWPA and the FLCA.

K. WORKPLACE SAFETY

General Contractors Must Ensure That All Employees, Including Subcontractor Employees, Use Required Safety Measures

In *J.E. Dunn Northwest, Inc. v. State Department of Labor & Industries,* 139 Wn. App. 35 (2007), the court of appeals reviewed citations for safety violations surrounding J.E. Dunn employees and subcontractor employees. The citations were the result of an investigation sparked by the death of a subcontractor employee who fell down an unguarded ventilation shaft. The citations were issued pursuant WISHA safety regulations that require employers to ensure that employees exposed to fall hazards have a fall protection system in place. J.E. Dunn appealed the violations to the court of appeals. On appeal, with regard to its own employees, J.E. Dunn argued that L&I failed to establish the WISHA violations and that its affirmative defense—unpreventable employee misconduct—was not considered. The court rejected the affirmative defense and found that the violations were supported by substantial evidence—employees testified that they worked without fall protection equipment and were also observed without fall protection equipment by an L&I inspector. As to subcontractor employee violations, J.E. Dunn argued that the burden of disproving the violations was wrongfully placed on the employer. The court agreed. L&I bears the burden of proving that the requirements of WISHA regulations were not met. Here, L&I had the burden of proving that J.E. Dunn failed to maintain a safe working environment. Accordingly, the court of appeals remanded the issue to have the burden properly imposed on L&I.

L. TRADE SECRETS

Employer Held Vicariously Liable for Future Employees'Trade Secret Misappropriation

Mary Thola employed chiropractor Alta Mahan at her clinic. After Mahan decided she was not interested in buying Thola's practice, she agreed to future employment with Henschell Chiropractic, owned by Martin Henschell. Henschell agreed to pay Mahan a salary, plus a bonus for each new client she added to the clinic. Mahan continued to work for Thola for a few months and appropriated Thola's confidential client list. Mahan then successfully used the list to urge clients to transfer to Henschell. Thola sued Mahan, Henschell, his wife, and Henschell Chiropractic for violating the Uniform Trade Secrets Act ("UTSA"), breach of duty of loyalty, and tortious interference with a business expectancy. A jury found Mahan personally liable under all claims and Henschell vicariously liable for Mahan's UTSA violation and tortious interference with business expectancy and awarded $117,712 in damages. Based on the UTSA and the jury's finding that Mahan acted willfully and maliciously, the court doubled the damages amount and

awarded Thola attorneys' fees and costs. On appeal, Henschell argued that he could not be vicariously liable for Mahan's acts before she became an employee and that the UTSA preempts the common law claims. The court of appeals held the future employer vicariously liable for knowingly benefiting from the future employee's tortious conduct. Additionally, the UTSA did not preempt Thola's tortious interference and unjust enrichment claims. However, because the trial court failed to instruct the jury that Thola could not rely on acts that constitute trade secret misappropriation to support other causes of action, the court reversed the entire award and remanded for a new trial. Mahan filed for bankruptcy and was not a party to the appeal. *Thola v. Henschell,* 164 P.3d 524 (Wash. Ct. App. 2007).