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2016 Labor & Employment Law Workshop Agenda
Thursday, June 9, 2016

11:30 a.m.—12:00 p.m.	**Registration**
12:00 p.m.—1:00 p.m.	**Welcome and Introduction of Guest Speaker** Kevin J. Hamilton - Perkins Coie **Lunch with Guest Speaker** Todd Hinnen – Perkins Coie Dealing with Data Breaches 45 Minutes of General Credit
1:00 p.m.—1:05 p.m.	**Thank You and Overview of Afternoon** Emily Bushaw, Perkins Coie
1:05 p.m.—2:05 p.m.	**Spring Employment Law Update** Emily Bushaw, Perkins Coie Chelsea Petersen, Perkins Coie 60 Minutes of General Credit
2:05 p.m.—2:20 p.m.	**Break**
2:20 p.m.—3:20 p.m.	**Noncompete Agreements & Protecting Proprietary Information** James Sanders, Perkins Coie Julie Lucht, Perkins Coie 60 Minutes of General Credit
3:20 p.m.—4:20 p.m.	**Discipline & Discharge of Employees: Lessons from 35 Years** Nancy Williams, Perkins Coie 60 Minutes of General Credit
4:20 p.m.—4:30 p.m.	**Wrap-Up** Emily Bushaw, Perkins Coie

June 2016 Labor & Employment Seminar

Thursday, June 9, 2016
Westin Bellevue
600 Bellevue Way NE
Bellevue, WA 98007

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2016 Labor & Employment Law
Workshop Thursday, June 9, 2016
Biographies

Lunch Guest Speaker

TODD HINNEN, PARTNER

PERKINS COIE LLP

Todd Hinnen is a partner with the firm's Privacy & Security practice. He counsels clients and represents them in litigation regarding privacy, data security, compliance with law enforcement and national security issues. He works closely with the Department of Justice and the Intelligence Community.

Prior to joining Perkins Coie, Todd was the Acting Assistant Attorney General for National Security at the U.S. Department of Justice (DOJ). While in office, he led an office of 320 attorneys responsible for overseeing the DOJ's nationwide counterterrorism, counterespionage and export control programs. In that capacity, he represented the United States before the Foreign Intelligence Surveillance (FISA) Court and on the Committee on Foreign Investment in the United States (CFIUS); supervised oversight and compliance programs at law enforcement, intelligence and national security agencies; and testified before Congress on numerous occasions in both open and classified hearings.

Todd also served as Deputy Assistant Attorney General in the National Security Division in charge of the Division's Internet and cybersecurity, appellate, terrorist financing, and international outreach and capacity building practices. He previously served as Chief Counsel to then-Senator Joseph R. Biden, Jr. and Staff Director of the Senate Judiciary Committee's Subcommittee on Crime and Drugs. Todd counseled Senator Biden and assisted him in drafting legislation relating to the Internet, intellectual property, criminal justice policy and national security.

Todd also served under President George W. Bush as a Director in the National Security Council's Directorate for Combating Terrorism. He began his career in government as a prosecutor in DOJ's Computer Crime & Intellectual Property Section (CCIPS). During his tenure with CCIPS, Todd was the Rapporteur of the G8 Subgroup on High-Tech Crime and the head of the U.S. delegation to the Organization of American States Cybercrime Experts Group.

Presenters

JULIE LUCHT, PARTNER

PERKINS COIE LLP

Julie Lucht is a partner in the firm's Labor & Employment practice, focuses on employment litigation and counseling. She represents clients in all phases of is litigation in defense of numerous types of employment discrimination and other employment-related claims. She counsels and defends clients in connection with issues and claims arising under WLAD, Title VII, ADEA, ADA, FMLA, GINA, FLSA, WARN, NLRA, USERRA and related statutory and common law employment claims, as well as drafting employee handbooks, separation and termination agreements, equal employment opportunity policies, sexual harassment policies, employee leave policies, reasonable accommodation policies and employment contracts. She has served as temporary in-house counsel for a FORTUNE 100 company, handling a range of employment matters.

CHELSEA PETERSEN, PARTNER

PERKINS COIE LLP

Chelsea Petersen is a partner who focuses her practice on employment litigation who focuses her practice on complex class action cases. Chelsea’s areas of experience include proactive defense of discrimination and wage and hour class action cases for clients such as Boeing, OfficeMax and Les Schwab Tire Centers. She has substantial experience in all phases of class action cases, including early strategic assessment, defeat of class certification, supervision of large-scale electronic document review, oversight of expert witnesses and taking a case to trial. She regularly defends employers against individual discrimination, harassment, retaliation and wage and hour claims. Representative clients include Microsoft, Starbucks and Comcast.

JAMES SANDERS, PARTNER

PERKINS COIE LLP

James Sanders is a Partner in the firm’s Labor & Employment practice. James's practice covers all types of legal disputes that arise between employees and employers, including employment discrimination, whistleblower, trade secret, non-competition, employee raiding, wage-and-hour and employment class action disputes. Over his career, James has obtained dozens of defense verdicts, judgments and arbitration awards on behalf of Perkins Coie clients. An experienced first-chair trial attorney, he is frequently engaged to take over as a matter approaches trial.

James also has an active counseling practice, especially in the high-technology sector, having assisted clients such as Microsoft, AT&T Mobility, Cardiac Science, T-Mobile, CenturyLink, and Boeing with executive negotiations, employee IP disputes and other complex employment issues.

Presenters (cont.)

NANCY WILLIAMS, PARTNER

PERKINS COIE LLP

Nancy Williams is a Partner who has counseled and represented employers in the areas of labor and employment law for nearly 35 years. Her areas of experience include litigation, equal employment opportunity, discipline and discharge, and a wide variety of other employment issues. For the past several years, Nancy has been named a Senior Statesman by Chambers USA in recognition of her practice transition and long-term dedication to clients.

Nancy served as managing partner of the firm's Seattle office and as chair of the Labor & Employment practice. She has been an active contributor and leader in civic, cultural and professional organizations, including the American Bar Association and Washington State Bar Association. She served as a trustee for the King County Bar Association and is currently an active participant in its Labor and Employment Law Section.

Pro bono work and volunteerism are mainstays of Nancy's career. Her recent pro bono involvement includes Court Appointed Special Advocate for Children (CASA) cases and Deferred Action for Childhood Arrivals (DACA) immigration matters. She is also a former board member of the Seattle Repertory Theatre and an alumna of the Peace Corps, in which she served in Colombia. As Nancy winds down her practice, she continues exploring opportunities to further her pro bono and community volunteer efforts.

EMILY BUSHAW, ASSOCIATE

PERKINS COIE LLP

Emily Bushaw, an associate in the firm's Labor and Employment practice, focuses on employment litigation, arbitration and counseling. Emily's extensive experience includes defense of discrimination, harassment, retaliation claims and wage-and-hour class action cases. She also provides counseling to clients regarding human resources issues, discipline and discharge, employee handbooks and policies, wage-and-hour law, employee classification issues, and arbitration and separation agreements. Emily regularly conducts workplace investigations and assists in the resolution of pre-litigation harassment, discrimination, and retaliation charges before the Washington Human Rights Commission and the Equal Employment Opportunity Commission (EEOC).

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2016 Spring Law Employment Update

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I. INTRODUCTION

This has been an exciting year already in labor and employment law, with many interesting developments. These materials provide a snapshot of some of the most important changes so far in 2016.

II. LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. Federal Developments

1. DOL Issues Final Overtime Exempt Rule

On May 18, 2016, the U.S. Department of Labor (DOL) announced the publication of its long-awaited new final rule, which significantly revises existing overtime regulations to narrow the scope of overtime "exemptions." Under the new rule, most workers who earn less than $47,476 a year (just over double the current threshold amount of $23,660) must be paid overtime unless they otherwise qualify as exempt under the Fair Labor Standards Act (FLSA). And that threshold amount will now automatically increase every three years, beginning in 2020. The new rule goes into effect on December 1, 2016. *See* Wage & Hour Div., U.S. Dep't of Labor, Fact Sheet: Final Rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative, and Professional Employees (May 2016), https://www.dol.gov/WHD/overtime/final2016/overtime-factsheet.htm.

Misclassification of employees as exempt and the resulting failure to pay overtime serve as the basis for one of the fastest-growing areas of litigation in the country. The DOL estimates that the new rule will require the reclassification of at least four million workers within the first year after implementation. The final rule is broadly similar to the Notice of Proposed Rulemaking that the DOL announced last year, although the DOL has made some changes to its original proposal. This is the first update to the overtime regulations since 2004.

Background on the FLSA and Overtime Exemptions

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at one and one-half times the regular rate of pay for all hours worked over 40 hours in a workweek. However, section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and section 13(a)(17) also exempt certain computer employees. A more relaxed version of these exemptions currently applies to certain "highly-compensated" individuals (those paid total annual compensation of at least $100,000).

To be treated as exempt, most employees must satisfy both a "duties" test and a "salary basis" test: the employee must (1) have a "primary" job duty that qualifies for an exemption and (2) be paid on a salary basis at not less than specified minimum amounts summarized below. The final rule affects only the second prong, the "salary basis" test. The DOL considered making revisions

to the "duties" test but chose not to do so. The following sections highlight the most significant changes in the new rule.

Salary Requirement Increase

Currently, the salary basis test requires (with certain exceptions) that exempt employees receive at least $455 in guaranteed salary per week. This amount translates to an annual salary of $23,660. The final rule increases the weekly salary requirement to an amount equal to the 40th percentile of earnings for full-time salaried workers in the lowest-wage census region, which currently is the South. This amounts to $913 per week, or $47,476 annually, for a full-year worker.

The DOL is also changing the minimum salary necessary for a worker to qualify for the relaxed test applicable to "highly-compensated" workers. The new rule raises the total annual compensation requirement for highly compensated employees to $134,004. This is the annual equivalent of the 90th percentile of full-time salaried workers nationally.

Certain Incentive Payments Can Now Count Toward the Minimum Salary

Under existing law, employers could count only an employee's actual salary toward the standard salary level test. An employer could *not* count other forms of compensation, such as bonuses or commissions. The final rule changes this. Under the final rule, up to 10 percent of the salary amount can be satisfied by the payment of nondiscretionary bonuses, incentives and commissions that are paid quarterly or more frequently.

This new rule does not impact highly compensated employees; employers could (and still can) count such an employee's *total* compensation toward the minimum salary threshold.

Automatic Salary Test Increase

For the first time, the final rule provides for *automatic* increases to the minimum salary requirements. Every three years, beginning January 1, 2020, the standard threshold will be raised to the 40th percentile of full-time salaried workers in the lowest-wage census region, which the DOL estimates will be $51,168 in 2020. The automatic update will apply to highly compensated employees as well. Every three years, the highly compensated employee threshold will increase to the 90th percentile of full-time salaried workers nationally, which the DOL estimates will be $147,524 in 2020. The DOL will post new salary levels 150 days in advance of their effective date, with the first such posting on August 1, 2019.

Practical Implications

The changes to the minimum salary requirement will result in extending overtime protections to millions of workers who were historically exempt. Employers must carefully review classifications for their workforce to determine what changes must or should be made in response to the final rule.

Most obviously, employers must determine whether any employees currently treated as exempt will fall below the new salary threshold. Employers should take particular care to evaluate the

total compensation package for such employees to determine whether they currently receive other forms of incentive pay that can be counted toward the minimum salary threshold. Employers should also determine whether they can and should alter the form of incentive pay so that it can used for this purpose, e.g., making discretionary bonuses nondiscretionary or paying nondiscretionary bonuses on a quarterly, rather than annual, basis.

But employers should also take advantage of the longer-than-expected implementation period provided by the DOL to review the classification of their workforce more deeply—and should consider doing so as part of a privileged review done by or under the direction of counsel. Although the final rule affects only the quantitative salary basis test and not the qualitative duties test, employers should not treat compliance with the new rule as a mere math exercise. The final rule has cast a bright spotlight on the issue of which workers are and can be treated as exempt. This is likely to prompt increased misclassification lawsuits brought by employees who meet the new salary threshold but perform a mix of exempt and nonexempt tasks, raising questions under the existing duties test. Employers should consult with their wage-and-hour counsel to determine the best way to review positions that are currently treated as exempt to determine whether those positions are affected by the changes.

The full text of the final rule is available at https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-11754.pdf.

2. EEOC Implements New Procedures for Releasing Respondent Position Statements to Charging Parties

For the first time, the Equal Employment Opportunity Commission (EEOC) has issued nationwide procedures for releasing respondent position statements and guidance on effective position statements. These procedures, along with the EEOC's Digital Charge system, make important changes in some jurisdictions, while formalizing the existing practices in others.

Effective January 1, 2016, the EEOC's new procedures provide that employer position statements and nonconfidential attachments will now, upon request, be released to the charging party, who will then have 20 days to respond to the position statement. These procedures apply to all EEOC requests for position statements made to Respondents on or after January 1, 2016. *See* Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Implements Nationwide Procedures for Releasing Respondent Position Statements and Obtaining Responses from Charging Parties, http://www.eeoc.gov/eeoc/newsroom/release/position_statement_procedures.cfm.

Although many employers are already protective of information provided to the EEOC, given that the charging party may obtain a copy of the position statement using a Freedom of Information Act request, this new policy will likely make it easier and faster for a charging party to obtain a copy. Employers, however, will not be provided a copy of the charging party's response during the investigation.

Help in Protecting Confidential Information

In a newly released resource guide (Effective Position Statements, http://www.eeoc.gov/employers/position_statements.cfm), the EEOC instructs employers on

how to protect the confidential medical and business information they are relying on in their response to a charge of discrimination. According to the EEOC, employers should refer to but not identify confidential information in their position statement. Instead, employers should provide information they do not want disclosed to a charging party in one of three separately labeled attachments—"Sensitive Medical Information," "Confidential Commercial or Financial Information," or "Trade Secret Information"—along with an explanation justifying the confidential nature of the information. Medical information about the charging party shall not be deemed sensitive or confidential medical information in relation to the investigation.

The EEOC will review the designated attachments, and if it disagrees with the employer's assessment, it will release the information to the charging party. The agency has included a list of the types of information it considers confidential in its resource guide and has made it clear that it will not accept "blanket or unsupported assertions of confidentiality."

The respondent should put the following information into separate attachments and designate them as follows:

- Sensitive medical information (except for the charging party's medical information).
- Social Security numbers.
- Confidential commercial or confidential financial information.
- Trade secrets information.
- Nonrelevant personally identifiable information of witnesses, comparators or third parties, for example, Social Security numbers, dates of birth in non-age cases, home addresses, personal phone numbers, personal email addresses, etc.
- Any reference to charges filed against the respondent by other charging parties.

Charging Party's Response

The new procedures provide that the charging party's response will not be given to the respondent during the investigation. Instead, the EEOC will release the first formal document received from the charging party (the charge), and the first formal document received from the respondent (the position statement). Note that under the EEOC's new procedures, if during the course of the investigation the EEOC determines that it needs additional evidence from the respondent, including information to address the charging party's rebuttal to the position statement, the investigator will contact the respondent.

Digital Charge Processing System

The EEOC implemented these new procedures in conjunction with the rollout of its new digital charge processing system. On January 1, 2016, all EEOC field offices began using the agency's respondent portal to communicate and exchange documentation with employers during an investigation. When filing a position statement with the portal, respondents should upload the position statement and attachments into the respondent portal using the "+ Upload Documents"

button. Specifically, they should select the "Position Statement" Document Type and click the "Save Upload" button to send the position statement and attachments to the EEOC. Once the position statement has been submitted, you will not be able to retract it via the portal.

3. DOL Issues Guidance on Joint Employers Under the FLSA and MSPA

In January 2016, the DOL released guidance detailing when workers are considered jointly employed by two or more employers. *See* Wage & Hour Div., U.S. Dep't of Labor, Administrator's Interpretation No. 2016-1(Jan. 20, 2016) (hereinafter "AI"). David Weil, administrator of the DOL's Wage and Hour Division (WHD), emphasized in his announcement of the new guidance that under federal wage laws, "it is possible for a worker to be jointly employed by two or more employers who are both responsible, simultaneously, for compliance." Whether an employee has more than one employer is important in determining employees' rights and employers' obligations under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). As a result of the new guidance, employers sharing employees or using third-party management companies, independent contractors, staffing agencies, or other labor providers may have more responsibility than previously thought.

What Qualifies as Joint Employment?

In conjunction with the Administrator's Interpretation on joint employment under the FLSA and the MSPA, the DOL released fact sheets that explain that joint employment exists when an employee is employed by two or more employers such that they "are responsible, both individually and jointly, to the employee for compliance with a statute." Dep't of Labor, Fact Sheet #35, https://www.dol.gov/whd/regs/compliance/whdfs35.htm. Both the FLSA and MSPA share the same broad definition of employment, which includes "to suffer or permit to work." 29 U.S.C. § 203(e)(1) (FLSA); *see* 29 C.F.R. § 500.20(h)(2)-(3) (the terms "employer" and "employee" under the MSPA are also given their meaning as found in the FLSA).

The DOL outlines two likely scenarios for joint employment:

> (1) *Horizontal joint employment*: Where the employee has two or more technically separate but related or associated employers; or
>
> (2) *Vertical joint employment*: Where one employer provides labor to another employer and the workers are economically dependent on both employers.

Horizontal Joint Employment

In the first scenario, joint employment exists when two or more employers benefit from an employee's work and the employers are sufficiently associated with each other. The focus of that type of joint employment is the degree of association between the employers and is sometimes called "horizontal" joint employment. AI at 7 (citing 29 C.F.R. § 791.20); Fact Sheet Fact Sheet #35.

The Administrator's Interpretation details some facts to consider in determining whether horizontal joint employment exists:

- Who owns or operates the possible joint employers (i.e., does one employer own part or all of the other or do they have any common owners)?
- Do the employers have any overlapping officers, directors, executives or managers?
- Do the employers share control over operations (e.g., hiring, firing, payroll, advertising, and overhead costs)?
- Are the operations intermingled (e.g., is there one administrative operation for both employers, or does the same person schedule and pay the employees regardless of which employer they work for)?
- Does one employer supervise the work of the other?
- Do the employers share supervisory authority for the employees?
- Do the employers treat the employees as a pool of employees available to both of them?
- Do the employers share clients or customers?
- Are there agreements between the employers?

AI at 8. The Administrator's Interpretation also provides the following examples:

> **Example:** An employee is employed at two locations of the same restaurant brand. The two locations are operated by separate legal entities (Employers A and B). The same individual is the majority owner of both Employer A and Employer B. The managers at each restaurant share the employee between the locations and jointly coordinate the scheduling of the employee's hours. The two employers use the same payroll processor to pay the employee, and they share supervisory authority over the employee. These facts are indicative of joint employment between *Employers A and B.*
>
> In contrast, an employee works at one restaurant (Employer A) in the mornings and at a different restaurant (Employer B) in the afternoons. The owners and managers of each restaurant know that the employee works at both establishments. The establishments do not have an arrangement to share employees or operations, and do not otherwise have any common management or ownership. These facts are not indicative of joint employment between *Employers A and B.*

AI at 9.

Vertical Joint Employment

The other type of joint employment—often referred to as vertical joint employment—occurs when a worker is economically dependent on two employers: (1) an intermediary employer (such as a staffing agency, farm labor contractor, or other labor provider) and (2) another employer that engages the intermediary to provide workers. The workers are the employees of the

intermediary, and the issue is whether they also are employed by the employer that engaged the intermediary to provide labor.

To determine whether vertical joint employment exists, factors must be considered that show whether an employee is economically dependent on not just the intermediary employer but also the other employer. A non-exhaustive list of factors to consider includes the following:

- Does the other employer direct, control, or supervise (even indirectly) the work?
- Does the other employer have the power (even indirectly) to hire or fire the employee, change employment conditions, or determine the rate and method of pay?
- How permanent or lengthy is the relationship between the employee and the other employer?
- Does the employee perform repetitive work or work requiring little skill?
- Is the employee's work integral to the other employer's business?
- Is the work performed on the other employer's premises?
- Does the other employer perform functions for the employee typically performed by employers, such as handling payroll or providing tools, equipment, or workers' compensation insurance or, in agriculture, providing housing or transportation?

The full text of the interpretation is available at https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf.

Responsibilities of Joint Employers

Joint employers—whether vertical or horizontal—are responsible, *both individually and jointly*, for complying with the FLSA and MSPA.

The FLSA provides that each of the joint employers must ensure that the employee receives all employment-related rights under the FLSA, including payment of at least the federal minimum wage for all hours worked and overtime pay at not less than one and one-half the regular rate of pay for hours worked over 40 in a workweek, unless an exception or exemption applies. In addition, joint employers are required to combine all of the hours worked by the employee in a workweek to determine if the employee worked over 40 hours and is owed overtime pay.

The MSPA provides that each of the joint employers must ensure that the employee receives all employment-related rights granted by the statute, such as accurate and timely disclosure of the terms and conditions of employment, written payroll records, and payment of wages when due.

A joint employer, however, is not necessarily responsible for complying with MSPA housing and/or transportation requirements. In particular, an employer is responsible for MSPA-covered housing *only if* it "owns or controls" the housing occupied by a migrant agricultural worker.

Similarly, an employer is responsible for transportation requirements *only if* it is "using or causing to be used" any vehicle for providing transportation.

Joint Employment and the FMLA

The DOL also issued a fact sheet detailing joint employers' responsibilities under the federal Family and Medical Leave Act (FMLA). Dep't of Labor, Fact Sheet #28N, https://www.dol.gov/whd/regs/compliance/whdfs28n.htm. The fact sheet states that when an individual is employed by two employers in a joint employment relationship under the FMLA, in most cases one employer will be the primary employer while the other will be the secondary employer.

The primary employer is responsible for giving required notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same job or an equivalent job upon return from leave. Also, the primary employer is prohibited from interfering with a jointly employed employee's exercise of or attempt to exercise his or her FMLA rights.

The secondary employer, whether an FMLA-covered employer or not, also cannot interfere with a jointly employed employee's exercise of FMLA rights and, under certain circumstances, must restore the employee to the same or equivalent job upon return from FMLA leave.

4. DOL Issues Proposed Rule Implementing Paid Sick Leave for Federal Contractors

On February 26, 2016, the DOL announced a proposed rule to implement Executive Order 13706 (Establishing Paid Sick Leave for Federal Contractors), which requires that covered federal government contractors provide employees with up to seven days of paid sick leave per year, including paid leave for family care. The Notice of Proposed Rulemaking (the "Notice") was published on February 25, 2016 in the Federal Register, and the public comment period for the rule ended in April 2016. *See* Dep't of Labor, Paid Sick Leave for Workers on Federal Contracts, https://www.dol.gov/whd/flsa/eo13706/faq.htm.

In particular, the Notice proposes a set of rules to implement the Executive Order, which the DOL estimates will provide paid sick leave to nearly 437,000 workers employed by federal contractors who currently receive no paid sick leave. The Notice specifies the contracts and employees covered by the Executive Order, as well as rules for how sick leave will accrue, when it can be used, and how the DOL will ensure that covered employers comply with these new requirements. Most of the key provisions are outlined in further detail below.

Covered Employees and Employers

Executive Order 13706 applies to new contracts issued on or after January 1, 2017. Under the proposed ruler, the Executive Order applies to four major categories of contractual agreements:

1. procurement contracts for construction covered by the Davis-Bacon Act (DBA);

2. service contracts covered by the McNamara-O'Hara Service Contract Act (SCA);

3. concessions contracts, including any concessions contracts excluded from the SCA by the DOL's regulations at 29 C.F.R. § 4.133(b); and

4. contracts in connection with Federal property or lands and related to offering services for federal employees, their dependents, or the general public.

A covered employee under the proposed rule would mean any person engaged in performing work on or in connection with a contract covered by the Executive Order whose wages under such contract are governed by the SCA, DBA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. As a result, the paid sick leave requirements would apply, for example, to employees employed in a bona fide executive, administrative, or professional capacity. In addition, the paid sick time requirements would extend even to independent contractors who are covered by the SCA and the DBA.

Contracts Not Covered by the Executive Order and the Notice

The Notice contains certain narrow exclusions from coverage for the following types of contractual agreements: (1) grants; (2) contracts and agreements with and grants to Indian tribes under Public Law 93-638, as amended; (3) any procurement contracts for construction that are not subject to the DBA (i.e., procurement contracts for construction under $2,000); and (4) any contracts for services, except for those otherwise expressly covered by the proposed rule, that are exempted from coverage under the SCA or its implementing regulations.

Paid Sick Leave

Accrual
Under the proposal, employees would accrue not less than one hour of paid sick leave for every 30 hours worked on or in connection with a covered contract, to be calculated at the end of each workweek. The proposal also creates an option for contractors to provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year, rather than allowing the employee to accrue the leave based on hours worked. All covered contractors would be required to inform employees in writing of the amount of paid sick leave they have accrued no less than monthly and at other times.

Maximum Accrual, Carryover, Reinstatement, and Payment for Unused Leave
The proposal allows contractors to limit the amount of paid sick leave employees accrue to 56 hours each year, and employees must be able to carry over accrued, unused paid sick leave from one year to the next. The DOL also proposes to permit contractors to limit the amount of paid sick leave employees have accrued to 56 hours at any point in time. Contractors will not be required to pay employees for accrued, unused paid sick leave at the time of a job separation (a "cashout").

Permissible Uses
Similar to other sick leave laws, an employee may use paid sick leave for an absence resulting from (i) physical or mental illness, injury, or medical condition of the employee; (ii) obtaining diagnosis, care, or preventive care from a health care provider by the employee; (iii) caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship

and who has any of the conditions or need for diagnosis, care, or preventive care described in (i) or (ii); or (iv) domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes described in (i) or (ii) or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, or assist an individual related to the employee as described in (iii) in engaging in any of these activities.

Interaction with Other Laws and Paid Time Off (PTO) Policies
The DOL's proposal explains how the paid sick leave requirements interact with contractors' obligations under the SCA, DBA, FMLA, and state or local paid sick time laws. It also explains that, if certain conditions are met, contractors' existing PTO policies can fulfill the paid sick leave requirements of the Executive Order.

For example, paid sick leave may run concurrently with unpaid FMLA leave under the same conditions as other PTO, and a contractor's compliance with state or local paid sick leave laws must also comply with the Executive Order.

Enforcement Procedures

The proposed rule provides that complaints may be filed with the WHD by any person or entity that believes there to be a violation of the Executive Order or its implementing regulations. The Notice explains the mechanism for WHD investigations and informal complaint resolution, as appropriate. It also specifies remedies and sanctions for violations of the Executive Order and its implementing regulations, including the payment of damages and debarment. The DOL's proposal also includes an administrative process, including administrative hearings, to resolve disputes of fact or law.

5. OLMS Issues Final Rule on Persuader Reporting

On March 24, 2016, the DOL's Office of Labor-Management Standards (OLMS) published a long-awaited rule that will force employers to disclose outside consultants they hire to counter workers' union organizing efforts. Effective as of April 25, 2016, the final rule revised two public disclosure reporting forms, the Form LM-10 (employer report) and the Form LM-20 (agreement and activities report). More generally, and subject to exceptions, these reports must be filed when an employer and a labor relations consultant make an arrangement or an agreement that the consultant will undertake efforts to persuade the employer's workers to reject an organizing campaign or collective bargaining effort by a union. *See generally* U.S. Dep't of Labor, OLMS Final Rule on Persuader Reporting Increases Transparency for Workers (last updated May 5, 2016), https://www.dol.gov/olms/regs/compliance/ecr_finalrule.htm.

Employer Requirements in the New Rule

The final rule addresses the employer and labor relations consultant/"persuader" reporting requirements of section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 433. Under section 203 of the LMRDA, employers and labor relations consultants must report their agreements or arrangements pursuant to which the consultants undertake activities with an object, directly or indirectly, to persuade workers concerning their rights to organize and bargain collectively. This requirement is subject to an exemption in section 203(c)

of the LMRDA, which states that no one is required to file a report covering the services of a consultant "by reason of his giving or agreeing to give advice" to the employer.

Under the final rule, an employer-consultant agreement is reportable if a consultant engages in "persuader activities." These activities are defined as any actions, conduct, or communications that are undertaken with an object, explicitly or implicitly, directly or indirectly, to affect an employee's decisions regarding his or her representation or collective bargaining rights. 29 C.F.R. parts 405-406. The typical reportable agreement or arrangement provides that a consultant agrees to manage a campaign or program to avoid or counter a union organizing or collective bargaining effort, either jointly with the employer or separately. Under the DOL's prior interpretation of section 203(c) of the LMRDA, the employer and consultant had to file a report *only if* the consultant communicated directly to the workers. The final rule, however, requires that both direct and indirect activities must be reported.

The final rule also mandates that consultants must file reports when they hold union avoidance seminars for employers. Employers do not, however, need to report simple attendance at these seminars.

Revised interpretation in the Final Rule

The revised interpretation in the final rule states that consultant activities that trigger reporting include direct contact with employees with an object to persuade them, as well as the following categories of indirect consultant activity undertaken with an object to persuade employees:

> (a) planning, directing, or coordinating activities undertaken by supervisors or other employer representatives, including meetings and interactions with employees;
> (b) providing material or communications for dissemination to employees;
> (c) conducting a union avoidance seminar for supervisors or other employer representatives; and
> (d) developing or implementing personnel policies, practices or actions for the employer.

Exempt "advice" activities that do not trigger reporting are now limited to those activities that meet the plain meaning of the term: an oral or written recommendation regarding a decision or course of conduct.

By contrast, under the prior interpretation, persuader agreements did not need to be reported if the consultant had no direct contact with employees and if the consultant limited his or her activity to providing the employer with materials that the employer had the right to accept or reject. In the DOL's view, full disclosure of both direct and indirect persuader activities protects employee rights to organize and bargain collectively and promotes peaceful and stable labor-management relations.

For more information, see U.S. Dep't of Labor, Overview/Summary, Persuader Agreements: Ensuring Transparency in Reporting For Employers and Labor Relations Consultants, https://www.dol.gov/olms/regs/compliance/ecr/Persuader_OverviewSum_508_2.pdf.

6. EEOC Issues Proposed Guidance on Retaliation Claims

The EEOC announced on January 21, 2016, that it has voted to seek public input on proposed enforcement guidance addressing retaliation and related issues under federal employment discrimination laws. The EEOC's last guidance update on retaliation was issued almost 20 years ago, in 1998. Since that time, the Supreme Court and lower courts have issued numerous significant rulings regarding retaliation under employment discrimination laws, and the percentage of retaliation charges has roughly doubled, making retaliation the most frequently alleged type of violation raised with the EEOC. Nearly 43 percent of all private sector charges filed in fiscal year 2014 included retaliation claims. In the federal sector, retaliation has been the most frequently alleged basis since 2008, and retaliation violations constituted 53 percent of all violations found in the federal sector in fiscal year 2015. *See generally* EEOC, Proposed Enforcement Guidance on Retaliation and Related Issues (Jan. 21, 2016), https://www.regulations.gov/#!documentDetail;D=EEOC-2016-0001-0001 (hereinafter "Draft Retaliation Guidance").

What the Guidance Says

The 76-page proposed guidance sets out the standards for proving retaliation under the various civil rights laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Rehabilitation Act, and the Equal Pay Act. To establish a claim of retaliation, the employee must show that:

> (1) He or she engaged in protected activity either by participating in equal employment opportunity activity or by opposing discrimination;
>
> (2) The employer took adverse action against him or her; and
>
> (3) There is a causal connection between the protected activity and the adverse action.

The guidance explains each of these elements and provides examples of conduct that qualifies as retaliatory—or not—according to the EEOC. The guidance also clarifies that an employee need not prove an underlying discrimination claim to be successful on a retaliation claim.

1. "Protected activity"

The guidance states that "protected activity"—or "opposition activity"—can occur explicitly or implicitly. Draft Retaliation Guidance at 6 & n.16. This means that an employee can issue a direct complaint or engage in "protected opposition" (e.g., by providing corroborating information during an interview as part of an investigation). The guidance also notes that employees do not have to prove their claims of workplace wrongdoing are accurate and true to win a retaliation charge. Employees' complaints or opposition activities will be protected as long as their actions are based on a reasonable, good faith belief that their assertions are accurate.

2. "Adverse action"

The EEOC's view of what constitutes retaliation gets even broader still. The guidance seeks to expand the definition of "adverse action" to include anything that could be reasonably likely to deter protected activity even if it has no tangible effect on a person's employment. *Id.* at 37.

It also states that adverse actions can be activities that are not work-related and take place outside of work. Plus, the EEOC says that an adverse action could be taken against a third party who is closely linked to a complaining employee.

Example: Threatening to terminate a spouse of a complaining employee or threatening to terminate a business relationship with a spouse's company could both constitute adverse actions.

3. "Causal connection"

Possibly the most significant change for employers in the guidance is the EEOC's attempt to expand what constitutes a "causal connection" between a protected activity and adverse action.

The EEOC seeks to adopt the position that retaliation can be established by creating "a 'convincing mosaic' of circumstantial evidence" that would support the inference of retaliation. *Id.* at 52. The guidance says that an "employer will prevail if it produces credible unrebutted evidence that the adverse action was based on a legitimate reason" (e.g., excessive absenteeism) and "the employee cannot show other evidence of retaliation." *Id.* On the other hand, the EEOC states that an employee can "discredit" the employer's explanation and "demonstrate a causal connection between the prior protected activity and the challenged adverse action" by presenting a "convincing mosaic" of "circumstantial evidence that would support" an inference of retaliatory animus. *Id.* According to the EEOC, the "mosaic" may include the timing of the adverse action, oral or written statements, comparative evidence, and any other "bits and pieces" from which an inference of retaliatory intent could be drawn. The EEOC even said that to create a convincing mosaic, it could go back years into a person's employment history to find evidence of either a protected activity or an adverse action. *Id.* at 53-54.

As an example, the guidance described a termination that occurred five years after an employee filed a discrimination lawsuit. According to the EEOC, even if a lengthy amount of time had passed between a protected activity and an adverse action, evidence other than temporal proximity could be revealed to establish a causal connection.

Best Practices

The guidance provides a number of "best practices" for employers to prevent and address retaliation claims. *Id.* at 68. These include maintaining a written, plain-language retaliation policy that has a complaint procedure and reviewing all policies to make sure that they do not include language that might deter employees from reporting suspected discrimination or harassment.

Other best practices include training on the policy for all employees, providing antiretaliation information and advice to everyone involved in an investigation of a discrimination complaint, and initiating proactive follow-up after a complaint is made to ensure that any concerns about retaliation are addressed immediately. Finally, the EEOC recommends that human resources or

in-house counsel review proposed employment actions to make sure they are based on legitimate nondiscriminatory and nonretaliatory reasons.

The full text of the draft guidance is available for review at http://www.regulations.gov/#!docketDetail;D=EEOC-2016-0001.

7. EEOC Proposes New Compensation Reporting Requirements to Assess Gender Gap in Wages

On January 29, 2016, the EEOC announced a proposed change in reporting requirements that would require employers with 100 or more employees to report the earnings and hours worked for *all* of their employees, including executives, beginning September 30, 2017. Public comment on the proposal ended on April 1, 2016.

This required disclosure will become a new category on the EEO-1 report, which employers already give to the federal government and contains workforce data sorted by race, ethnicity, gender, and job category. In particular, the revised EEO-1 will collect aggregate W-2 data in 12 pay bands for the 10 EEO-1 job categories already used. The EEOC noted that it does not intend to require employers to track hours worked by salaried employees but that it is seeking input on the issue. The 12 pay bands are as follows:

(1) $19,239 and under;
(2) $19,240 - $24,439;
(3) $24,440 - $30,679;
(4) $30,680 - $38,999;
(5) $39,000 - $49,919;
(6) $49,920 - $62,919;
(7) $62,920 - $80,079;
(8) $80,080 - $101,919;
(9) $101,920 - $128,959;
(10) $128,960 - $163,799;
(11) $163,800 - $207,999; and
(12) $208,000 and over.

Announced on the anniversary of President Obama's signing of the Lily Ledbetter Fair Pay Act of 2009, which addressed gender pay inequity, the EEOC intends this compensation reporting requirement to "assist the agency in identifying possible pay discrimination and assist employers in promoting equal pay in their workplaces." The new rule comes nearly two years after President Obama issued an executive order to mandate the same reporting from federal contractors.

The overview of the proposed changes explains that "[t]he pay data will provide EEOC and [Office of Federal Contract Compliance Programs] with insight into pay disparities across industries and occupations and strengthen federal efforts to combat discrimination." The agencies could therefore use this pay data to assess complaints of discrimination, focus agency investigations, and identify existing pay disparities that may warrant further examination. To

mitigate this risk, employers subject to EEO-1 reporting should proactively analyze their compensation data and review for any red flags that may raise the ire of the EEOC.

An example of the proposed EEO-1 form is available at http://www.eeoc.gov/employers/eeo1survey/2016_new_survey.cfm.

The overview of the proposed changes is available at https://www.eeoc.gov/employers/eeo1survey/2016_eeo-1_proposed_changes_qa.cfm.

8. Defend Trade Secrets Act Contains New Immunity Notification Requirements for Employers

The new Defend Trade Secrets Act (DTSA), signed into law by President Obama on May 11, 2016, creates a new private civil cause of action in federal court for trade secret misappropriation. Prior to the DTSA, trade secret misappropriation claims were almost always governed by state law, with most states having adopted the Uniform Trade Secrets Act. The DTSA does not preempt existing state law but instead creates a uniform federal law that, among other things, will allow trade secret misappropriation claims to be filed in federal court. Employers need to be aware of one important feature of the DTSA, the new notification requirement discussed below.

The DTSA creates statutory protections that provide for civil and criminal immunity for employees who disclose trade secrets in three situations: (1) where the employee discloses trade secrets in confidence to a local, state or government official or to an attorney for the purpose of reporting or investigating a suspected violation of law; (2) where the disclosure is made in a sealed filing in a lawsuit or other proceeding; and (3) where the employee discloses the trade secret to the employee's attorney in the course of pursuing a lawsuit in which the employee alleges retaliation for reporting a suspected violation of the law.

Employers must now notify employees who are bound by agreements and contracts dealing with the use of trade secrets or other confidential information about the immunity provisions discussed above. Employers have the option of inserting the notification language directly into their employment agreements, or they may provide the notification in a separate policy document that is cross-referenced in the employment agreement. The notice requirement applies only to agreements that are entered into or updated after May 12, 2016. The penalty for failing to comply with the notice requirement is that the employer will not be allowed to recover exemplary damages or attorney fees in an action under the DTSA against an employee who did not receive the notice.

B. State and Local Law Developments

1. Local Wage-and-Hour Updates

a. U.S. Supreme Court Declines to Hear Challenge to Seattle's Minimum Wage Law

In May 2016, the U.S. Supreme Court issued an order declining to hear a challenge by business groups to Seattle's $15-an-hour minimum wage law. *Int'l Franchise Ass'n, Inc. v. City of Seattle*, No. 15-958, 2016 WL 1723297, at *1 (U.S. May 2, 2016). In 2014, five franchises and the International Franchise Association sued the city, saying the law treats Seattle's 623 franchises like large businesses because they are part of multistate networks. The franchises argued that they are small businesses and should have more time to phase in the higher wage.

The justices did not comment in their order, which leaves in place the Ninth Circuit ruling in favor of the City of Seattle. Seattle's law, which took effect in April 2015, requires businesses with more than 500 employees nationwide to raise their minimum wage to $15 per hour by 2018. Smaller companies have until 2021 to do so.

The Supreme Court's decision means that cities and states that pass similar wage laws must treat franchises as offshoots of brand parents rather than independent small businesses.

b. Office of Labor Standards Issues Updates to Seattle Sick and Safe Leave Ordinance

The Seattle Sick and Safe Leave ordinance was amended as of April 1, 2016. The amendments include the following changes:

- *Clarification:* The amendments clarify that the definition of "employee" supports "joint employer" relationships. Previously, the ordinance was silent on this point.

- *Three-year record requirement*: Employers must retain employees' paid sick and safe time (PSST) records for three years.

- *PSST increments*: Employers must permit employees to use PSST in minimum increments of 15 minutes. Previously, employers could require employees to use PSST in minimum increments of one hour. For example, if an employee becomes sick at work and needs to leave at 4:45 p.m., the employee can use 15 minutes of accrued PSST.

- *Benefit year:* Policies should clearly define the "year" (e.g., calendar year, tax year, fiscal year, contract year, or year running from an employee's one-year anniversary of employment) with regard to both accrual/carryover and use of PSST.

- *Occasional basis employees*: If an employee is typically based outside of Seattle and works in the city only on an irregular basis, the employee is covered by the PSST ordinance after working 240 hours in Seattle for an employer in a benefit year. Once the employee meets this initial requirement, the employee remains covered by the ordinance for the duration of employment with that employer.

- *Written PSST policy*: As of April 1, 2016, employers must provide all employees with a written PSST policy that explains the benefit year the employer will be using (e.g., calendar year, tax year, fiscal year, contract year, or year running from an employee's one-year anniversary of employment) as well as the employer's policies and procedures for meeting PSST requirements.

- *Notice requirements*: Policies must notify employees of the employer's tier size and the manner (via email, paystubs, etc.) in which the employer will provide employees with an updated PSST balance at each pay period. Previously, employers were not required to include their tier size or the manner in which they would provide updated balances.

- *Successor employers*: Purchasers of existing businesses must keep any previously accrued PSST hours for employees.

A summary of the changes is available at http://www.seattle.gov/Documents/Departments/LaborStandards/OLS-LaborStandardsChanges-2016.pdf.

c. Spokane's Sick Leave Law Now in Effect

Beginning January 1, 2017, employees who work more than 240 hours in Spokane in a calendar year must be provided paid sick and safe leave. The law does not apply to work-study students, seasonal workers, temporary workers, independent contractors, domestic workers or employees engaged in certain construction work. *See* Title 9, Spokane Municipal Code (SMC).

Eligible employees will accrue one hour of paid sick leave for every 30 hours worked. Employees of businesses with up to nine employees may use up to 24 hours of leave per year, while employees of businesses with 10 or more employees per year may use up to 40 hours of leave per year. Employees may carry over up to 24 hours of accrued, unused sick leave to the next year. The law does not appear to have an accrual cap.

Sick leave may be used for the diagnosis, care, or treatment of the employee's—or the employee's family member's—mental or physical illness, injury or health condition, for domestic violence-related purposes, for times when the employer's business or the employee's child's school or place of care is closed by order of a public health official, or for bereavement leave for a family member's death. Under this law, like other sick leave laws, employers may require documentation of the appropriate use of sick leave as set forth in the law.

Employers must post notice of employee rights under the law and maintain records of each employee's earned sick leave accrual and use for at least three years. In addition, employers need to provide employees with information about their accrued earned sick leave balance at least once per quarter. The ordinance gives a startup business one year after the issuance of its first City of Spokane business license before it must comply with all the law's requirements.

The full text of Ordinance No. C-35300 is available at https://static.spokanecity.org/documents/citycouncil/interest-items/sick-leave/essl-ordinance-sick-and-safe-leave-adopted-2016-01-11.pdf.

d. Tacoma's New Minimum Wage and Paid Leave Laws Now in Effect

As of February 1, 2016, employers with employees in Tacoma have two new legal obligations to meet. First, employers must pay employees in Tacoma at least $10.35 per hour instead of Washington's minimum wage rate of $9.47 per hour. Second, employers must provide

employees at least 24 hours of paid leave per year. Each requirement is outlined in more detail below.

Minimum Wage Increase

Chapter 18.20 Tacoma Municipal Code (TMC) increases the city's minimum wage to $10.35 per hour. The increase applies to all employees who are age 16 or older and work at least 80 hours within the city limits per year, regardless of whether the employer is located in Tacoma.

The increase is the first phase of a three-year process that will gradually increase Tacoma's minimum wage to $12 per hour. The next hike, which increases the minimum wage to $11.15 per hour, takes effect January 1, 2017. The final increase—to $12—will take effect January 1, 2018. Beginning January 1, 2019, the minimum wage will be adjusted annually for inflation. Voters approved the gradual increase to $12 per hour in November but rejected an initiative that would have raised the minimum wage to $15 per hour.

Paid Leave Requirements

On February 1, 2016, Tacoma became the third city in Washington to mandate paid sick leave for employees. According to the new law, employers will be required to provide up to 24 hours of paid leave annually to employees working within Tacoma. Ordinance No. 28275; TMC Chapter 18.10. The leave can be used for temporary time off of work when a worker or the worker's immediate family member has health or safety needs. Other uses include work or school closures ordered by public officials or for bereavement.

TMC § 18.10.030: Use of Paid Leave

The law covers any employee who works more than 80 hours per year within the City of Tacoma. TMC § 18.10.010(J). The geographic requirement is determined based on where the work is performed and not where the employer is located. Once employees are covered by the ordinance, they remain covered through the next calendar year, even if they do not meet the 80-hour threshold.

Employees are entitled to be compensated at their normal hourly rate of pay. However, employers need not compensate employees for loss of tips, gratuities, or travel allowances. TMC § 18.10.010(O). Salespersons are not entitled to a calculation of their lost commissions, unless they qualify as an "outside salesperson" under Washington law.

TMC § 18.10.020: Accrual of Paid Leave

At a minimum, employees are entitled to accrue one hour of paid leave time for every 40 hours worked within Tacoma's city limits, and they can earn up to 24 hours per calendar year. This minimum accrual rate does not differ by employer size. Employees can carry over up to 24 hours of unused accrued time into the next year and can start using their accrued leave 180 days after their hire date. TMC § 18.10.030(A), (B).

An employee can use up to 40 hours of accrued leave, each calendar year, for any of the following reasons:

- to accommodate absences due to his or her own illness, injury, health condition, diagnosis, or preventative medical care, or to care for a covered family member with a mental or physical illness, an injury, or a medical appointment;

- if the employee's place of business has closed by order of a public official due to health concerns, or to care for a child whose school or place of care has been closed for the same reasons; and

- to seek legal or law enforcement assistance, or seek safe accommodations, due to domestic violence, sexual assault, or stalking, or to assist a qualified family member in taking shelter from the same; and for bereavement following the death of a family member.

Notice and Posting

The law requires that employers give notice that employees are entitled to paid leave and give notice of, among other things, the amount of paid leave and the terms of its use guaranteed under the law. TMC § 18.10.050.

2. New California Law Allows for Individual Liability for Labor Code Violations

Effective January 1, 2016, under new law, certain individuals may be held liable in addition to employers for violations of specific wage-related California Labor Code provisions. The new law is California Labor Code section 558.1. Specifically, newly enacted Senate Bill ("SB") 588 (known as "A Fair Day's Pay Act") added section 558.1 to the California Labor Code, which states that "any employer or *other person acting on behalf of an employer*, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, *may* be held liable *as the employer* for such violation." Cal. Lab. Code § 558 (emphasis added). Thus, individuals face potential liability for the following:

1) the violation of any provision regulating *minimum wages* or hours and days of work in any state Industrial Welfare Commission ("IWC") wage order;

2) *waiting time penalties* under section 203 of the California Labor Code;

3) violation of the requirement to provide itemized *wage statements* under section 226 of the California Labor Code;

4) failure to provide *rest, meal* and recovery periods under section 226.7 of the California Labor Code;

5) actions to recover *unpaid minimum wages and overtime* under sections 1193.6 and 1194 of the California Labor Code; and

6) failure to pay *expense reimbursements* under section 2802 of the California Labor Code.

Section 558.1 defines a "person acting on behalf of an employer" as a person "who is an owner, director, officer, or managing agent of the employer." Cal. Lab. Code § 558.1. Notably, the law states that a person "may" be liable, suggesting that liability is discretionary as to when individuals—rather than employers—face personal liability for these violations.

This law marks a shift in personal liability for corporate directors and executives in wage-related claims in California. Before 2016, the California Supreme Court had held that the IWC's definition of "employer" did not extend to individual corporate agents acting "within the scope of their agency." *See Reynolds v. Bement*, 36 Cal. 4th 1075, 1087, 32 Cal. Rptr. 3d 483, 116 P.3d 1162 (2005), *abrogated on other grounds by Martinez v. Combs*, 49 Cal. 4th 35, 109 Cal. Rptr. 3d 514, 231 P.3d 259 (2010); *Martinez v. Combs*, 49 Cal. 4th 35, 66, 109 Cal. Rptr. 3d 514, 231 P.3d 259 (2010) Under this standard, corporate officers and directors could not be found personally liable for unpaid wages unless they acted outside the scope of their employment.

SB 588's Expansion of Liability Against Individuals for Failure to Pay Wages

SB 588—by amending and adding sections to the California Labor Code—will likely change the way courts analyze wage claims against individual defendants. Most notably, the law adds California Labor Code section 558.1, a provision authorizing permissive individual liability for certain wage violations. It also increases the Labor Commissioner's power to enforce judgments against individuals and employers. *See* Cal. Lab. Code §§ 96.8, 238.1.

The new bill has two provisions holding individuals liable for wage violations. First, the bill amends section 98 of the Labor Code to allow the Labor Commissioner to "provide for a hearing to recover civil penalties due pursuant to section 558 against any employer or *other person acting on behalf of an employer*, including, but not limited to, an individual liable pursuant to Section 558.1." Cal. Lab. Code § 98. Previously, the statute did not explicitly authorize the Labor Commissioner to collect civil penalties against individuals on behalf of their employers.

Second, section 558.1 creates individual liability for individuals "acting on behalf of an employer" who violate certain sections of the Labor Code. Cal. Lab. Code § 558.1. The concept of a person "acting on behalf of an employer" is further defined as "a natural person who is an owner, director, officer, or managing agent of the employer." *Id.* § 558.1(b). The definition then refers to section 3294 of the California Civil Code to define "managing agent." *Id.* California courts have defined "managing agents" under section 3294 as employees who exercise "substantial discretionary authority over decisions that ultimately determine corporate policy." *See Davis v. Kiewit Pac. Co.*, 220 Cal. App. 4th 358, 366, 162 Cal. Rptr. 3d 805 (2013) (quoting *White v. Ultramar, Inc.*, 21 Cal. 4th 563, 573, 88 Cal. Rptr. 2d 19, 981 P.2d 944 (1999). The terms "owner," "director," and "officer," however, are undefined in the statute.

Importantly, the language in the statute—that the "owner" must "violate" or "cause to be violated" the Labor Code provision—could limit liability to those who play a role in decisions about employees' wages and hours, but the provision is unclear about what those terms mean.

Finally, the statute makes individual liability discretionary. Section 558.1 states that any "other person acting on behalf of an employer" who violates certain labor code provisions "*may* be held liable *as the employer* for such violation." Cal. Lab. Code § 558.1 (emphasis added). The statute

and the legislative history of SB 588 do not explain how this discretion should be used. It is possible that this language means that individuals will be held liable "as the employer" only when an employer cannot pay the aggrieved employee. But the language may also give the Labor Commissioner the freedom to impose individual liability in other circumstances as well.

Enhanced Enforcement Mechanisms

The new law also expands the mechanisms the Labor Commissioner can use to collect judgments. Essentially, the law authorizes the Labor Commissioner to use any of the existing remedies available to a judgment creditor and to act as a levying officer when enforcing a judgment pursuant to a writ of execution. Cal. Lab. Code § 96.8.

SB 588 authorizes the Labor Commissioner to file a lien on real estate, impose a levy on an employer's property, or impose a stop order on an employer's business in order to assist an employee in collecting unpaid wages where there is a judgment against the employer.

The bill also adds section 238.1 to the California Labor Code, which creates criminal liability for individuals. Specifically, it makes an employer, owner, director, officer, or managing agent of the employer who fails to observe a stop order guilty of a misdemeanor. *Id.* § 238.1(b). The Labor Commissioner may issue a stop order on an employer for failing to meet its bond requirements. *Id.* §238.1(a). If an employer or applicable individual fails to pay a judgment, it must post a bond of between $50,000 and $150,000 or be barred from doing business in the state. *Id.* § 238. The stop order prohibits the use of employee labor by the employer until the employer complies.

III. CASE LAW DEVELOPMENTS

A. 2016 Supreme Court Decisions

1. *DIRECTV, Inc. v. Imburgia*

The case stems from a class action lawsuit filed in 2008 against DIRECTV, Inc. ("the Company") by Amy Imburgia, the named plaintiff. The suit alleged that the Company had improperly charged its customers an early termination fee. Three years later, in 2011, while the litigation was ongoing, the United States Supreme Court held in an entirely unrelated case that the Federal Arbitration Act (FAA) preempted California precedent that arbitration clauses in customer agreements were unenforceable in certain circumstances. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352, 131 S. Ct. 1740 (2011).

A few weeks after the Supreme Court issued its decision in *Concepcion*, the Company moved to either stay or dismiss the plaintiffs' case and compel arbitration pursuant to the customer agreement. *Imburgia v. DIRECTV, Inc.*, 225 Cal. App. 4th 338, 340, 170 Cal. Rptr. 3d 190 (2014), *rev'd*, 136 S. Ct. 463 (2015). The agreement required that claims relating to it be first addressed through an informal dispute resolution process, and then, if not resolved informally, through binding arbitration. *Id.* at 341. It also prohibited class action lawsuits. *Id.* The "Applicable Law" section of the agreement stated that it was governed by "the laws of the state and local area where Service is provided," but that nonetheless, the FAA governed. *Id.* at 342. The Company stated that it had not previously argued for enforcement of the arbitration

agreement because, until the Supreme Court's decision in *Concepcion*, the clause was void under California precedent.

The California trial court denied the Company's motion. The Company appealed, but in early 2014, the California Court of Appeal for the Second District affirmed the trial court's decision, holding that the arbitration agreement was unenforceable. *Imburgia*, 225 Cal. App. 4th at 347.

Specifically, the appellate court held that the arbitration agreement waived federal preemption of California law that deemed the agreement unenforceable. *Imburgia*, 225 Cal. App. 4th at 347. In other words, the California appellate court answered "yes" to the question, "Where section 9 [of the agreement] requires us to consider whether 'the law of your state would find this agreement to dispense with class arbitration procedures unenforceable . . .,' does it mean 'the law of your state without considering the preemptive effect, if any, of the FAA'?" *Id.* at 343-44. Additionally, the court held that the class action waiver was invalid under both California law and the FAA, which triggered a provision invalidating the entire agreement. *Id.* at 347.

The Arguments

In petitioning for *certiorari* (i.e., asking the United States Supreme Court to hear and decide the case) in late 2014, the Company argued that the California appellate court's decision flouted binding Ninth Circuit precedent: in 2013, before the appellate court had issued its decision, the Ninth Circuit had applied *Concepcion* in upholding the same arbitration agreement in a similar but unrelated case. *See Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1228 (9th Cir. 2013). The California appellate court had specifically addressed *Murphy* in its decision, stating that it found the Ninth Circuit's analysis "unpersuasive." *Imburgia*, 225 Cal. App. 4th at 346.

In its brief and at oral argument, the Company urged the Supreme Court to find that the California appellate court's decision violated the FAA by failing to interpret and enforce the arbitration agreement according to its terms and as required by Ninth Circuit precedent (*Murphy*). The respondents (the plaintiffs) argued that the California appellate court was correct to interpret the arbitration agreement according to California contract law.

The Supreme Court's Decision

In a 6-3 decision, the majority agreed with the California Court of Appeal that, under California law at the time plaintiffs entered into their agreements with DIRECTV in 2008, contractual provisions waiving classwide arbitration were unenforceable. The Supreme Court accepted the Court of Appeal's view that, as a matter of state law, the parties' contractual reference to the "law of [the customer's] state" incorporated even invalid state doctrines like the *Discover Bank* rule. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). In this case, however, the Supreme Court concluded "that California courts would not interpret contracts other than arbitration contracts the same way," and because the state court's "interpretation of this arbitration contract is unique, restricted to that field [of arbitration]," the Supreme Court held that that interpretation was preempted by the FAA. *Id.* at 465. In other words, the appellate court's interpretation unfairly discriminated against arbitration agreements.

Several considerations led the Supreme Court to conclude that California courts would not interpret other contracts to incorporate invalid state law. First, the Court reasoned that the

ordinary meaning of a contractual reference to state law is *valid* state law. *Id.* at 469. Second, the California Supreme Court has held that, under general contract principles, references to state law mean the law as it stands at the time of contract interpretation. Third, nothing in California law indicates that state courts would hold in other contexts that contractual references to state law incorporate invalid state law. Fourth, the California Court of Appeal's language "focused only on arbitration," which "suggests that the Court of Appeal could well have meant that its holding was limited to the specific subject matter of this contract—arbitration." *Id.* at 470. Fifth, the Court of Appeal incorrectly reasoned that invalid state arbitration law (i.e., the *Discover Bank* rule) retained independent force even after being invalidated by the Supreme Court in *Concepcion*. *Id.* "Taking these considerations together," the Supreme Court concluded that "California's interpretation of the phrase 'law of [the customer's] state' does not place arbitration contracts on equal footing with all other contracts" and therefore "does not give due regard to the federal policy favoring arbitration." *Id.* at 465.

Justice Thomas, in a one-paragraph dissent, reemphasized his long-held view that the FAA does not apply to proceedings in state courts. In a separate, much lengthier, dissent, Justice Ginsburg, joined by Justice Sotomayor, argued that the Court had failed to defer to the California court's reasonable interpretation based on state contract law. Justice Ginsburg noted that the parties had anticipated at the time of contract and even at the time of suit that the arbitration agreement would be unenforceable in light of the *Discover Bank* rule. Criticizing the Court's continued efforts to reduce the availability of class arbitration, she argued that the decision sets a "dangerous" precedent as the first time the Court has reversed a "state-court decision on the ground that the state court misapplied state contract law when it determined the meaning of a term in a particular arbitration agreement." *Id.* at 473 (J. Ginsburg dissenting).

2. *Tyson Foods Inc. v. Bouaphakeo*

In *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court examined the role played by expert testimony and statistical models in determining whether a plaintiff has met his burden of showing class certification is warranted and the degree to which such testimony and modeling is rigorously scrutinized. On March 22, 2016, the Supreme Court held that a group of employees in a class action could use a statistical study to establish the employer's liability for unpaid overtime. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).

Background

Concerning the first issue, the Supreme Court in *Tyson* is set to resolve a current circuit split regarding the "predominance" requirement of Federal Rule of Civil Procedure ("Rule") 23(b)(3) as it relates to the "averaging" approach to calculating damages on a classwide basis. Rule 23 is the rule that lays out what requirements must be met for a class action lawsuit to go forward.

Concerning the second issue, the Supreme Court may resolve a Second Circuit split regarding the predominance requirement of Rule 23(b)(3) as it relates to injury. Tyson argued that the Second, Ninth, and D.C. Circuits have "held that to obtain class certification, plaintiffs must be able to show injury to all class members," while the Third, Seventh, Eighth, and Tenth Circuits have held that plaintiffs are allowed to "bring damages claims on behalf of individuals who were not injured and thus would have no viable individual claim for damages." Petition for a Writ of

Certiorari at *3-4, *Tyson Foods, Inc. v. Bouaphakeo*, 2015 WL 1285369 (U.S. Mar. 19, 2015) (No. 14-1146).

The respondent-employees were hourly workers in a food-processing facility who alleged that Tyson failed to compensate them for time spent donning and doffing protective equipment and walking to and from their work stations in violation of the FLSA and a parallel state law. The district court allowed plaintiffs to prove liability and damages by employing statistical evidence that presumed all class members were identical to an "average" employee and spent equal time on the tasks at issue. In addition, the court certified class members whom the plaintiffs' own expert conceded were not underpaid and thus not injured. After denying Tyson's motion to decertify, the case went to trial and resulted in a jury verdict in favor of the plaintiff class. The district court then denied Tyson's motion for judgment as a matter of law, and Tyson appealed to the Eighth Circuit, which affirmed the district court's rulings.

In a 2-1 decision, the Eighth Circuit held that (1) the "averaging" method in the instant case was distinguishable from the "trial by formula" method the Supreme Court rejected in *Wal-Mart Stores, Inc. v. Dukes*, and (2) a class definition is permissible despite the definition including individuals who clearly incurred no damages. *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014), *aff'd*, 136 S. Ct. 1036 (2016).

The Eighth Circuit distinguished the case from *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2560 (2011) (requiring "individualized determinations of each employee's eligibility for backpay" as a procedural prerequisite for certification under Title VII of the Civil Rights Act of 1964). *Tyson*, 765 F.3d at 799. The court noted that, unlike in *Dukes*, Tyson had a specific company policy (i.e., the payment for time spent donning and doffing necessary equipment and walking to and from workstations) that applied to *all* class members, whereas the sex-discrimination claims at issue in *Dukes* relied on individual interactions of putative class members with their employers. Moreover, dissimilar to *Dukes*, all Tyson class members worked at the same plant and used similar equipment. Thus, the Eighth Circuit held that calculation of classwide damages based on the *average time* class members spent donning and doffing equipment was permissible and not in violation of *Dukes*. *Tyson*, 765 F.3d at 797-99.

The Supreme Court Decision

In a 6-2 opinion, authored by Justice Kennedy, the Supreme Court affirmed the Eighth Circuit and held that the class properly proved its claims through the use of expert testimony. The Court rejected Tyson's argument that individual inquiries were needed to determine whether the amount of time each employee spent donning and doffing, when added to his or her regular hours, amounted to more than 40 hours in a given week. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).

The Court refused to adopt "a broad rule against the use in class actions of what the parties call representative evidence." *Id.* at 1046. Instead, the Court reasoned that the question of whether representative proof or statistical sampling is permissible depends on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action, not whether it is used in a class or individual action. The Court explained that in some cases "a representative sample is the only practicable means to collect and present relevant data" to

establish a defendant's liability. *Id.* (citation and internal quotation marks omitted). In the employment context, the Court cited its 1946 decision in *Anderson v. Mt. Clemens Pottery Co.* for the proposition that where an employer violates its statutory duty to keep proper records related to time worked, employees need not prove exactly how much time they spent on the uncompensated task, but instead, they may meet their burden by showing they performed work for which they were improperly compensated and by producing sufficient evidence to show the amount and extent of that work "as a just and reasonable inference." *Id.* at 1047 (citation and internal quotation marks omitted).

The Court reasoned that, because Tyson did not keep records of employees' donning and doffing time, the class needed statistical studies or representative proof to establish its claims. The Court concluded that, even if an employee had brought an individual suit, the employee likely would have needed to introduce statistical evidence, such as that provided by the study on which the class relied.

In addressing the issue of how employers can combat the use of such representative evidence, the Court explained that employers may argue that the evidence is "statistically inadequate" or "based on implausible assumptions [that] could not lead to a fair or accurate estimate" of the hours worked. *Id.* at 1048-49.

Lessons for Employers

The Supreme Court's decision in *Tyson Foods* means that employers will need to rigorously combat the validity of aggregate, statistical evidence in both individual and class action lawsuits. Notably, the Supreme Court declined to address whether plaintiffs are required to articulate a method that would show that uninjured class members do not contribute to the size of the damages award and will not recover any damages. The *Tyson Foods* parties agreed that hundreds of class members were uninjured and not entitled to damages. Tyson argued that the judgment could not stand because the employees could not devise a method to prevent uninjured class members from being awarded damages. The Supreme Court found that the issue was not ripe for review because the record did not indicate that the award had been disbursed or how the award would be disbursed. The Supreme Court noted that Tyson Foods could later challenge any proposed method for allocation once the issue was ripe. Chief Justice Roberts' concurrence pointed out that a challenge to allocation of damages was not simply an administrative issue but a constitutional issue: Article III of the Constitution does not give federal courts the power to order relief for uninjured parties.

In the wake of *Tyson Foods*, there has already been at least one case in which the plaintiffs argued to the Eighth Circuit that the decision supports affirming certification of the class in question there.

3. *Campbell-Ewald Co. v. Gomez*

Recently, the U.S. Supreme Court held in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669, (2016), that a lawsuit is not moot after a plaintiff declines to accept an offer of judgment made by the defendant pursuant to Rule 68. On January 20, 2016, Justice Ginsburg, in a 6-3 majority opinion, explained that a district court retains jurisdiction over a case even after a plaintiff rejects

a Rule 68 offer of judgment for complete relief because, given that the claim has not been paid or settled, the plaintiff maintains a concrete interest in the lawsuit. The Court left the door open to the possibility of mooting individual or class claims where a defendant transfers funds constituting complete relief to a plaintiff in conjunction with a Rule 68 offer.

Background

The plaintiff sued Campbell-Ewald, a marketing consulting company hired by the Navy to provide "multimedia recruiting campaign" services, under the Telephone Consumer Protection Act (TCPA) after receiving an unsolicited text message from Campbell-Ewald. Campbell-Ewald admitted fault and offered a full settlement of $1,503 to the plaintiff pursuant to Rule 68. The amount was a little more than three times the maximum award permitted under the TCPA. The plaintiff, however, refused the offer of judgment and sought class certification instead. To prevent certification, Campbell-Ewald argued that its Rule 68 offer of judgment mooted the plaintiff's individual *and* putative class claims.

According to Rule 68, an offer of judgment fully satisfies the individual plaintiff's claim for relief without the risk or delay of litigation. The issue is complicated in a class action case because if a plaintiff accepts the offer prior to class certification, class counsel is denied the opportunity to recover substantial fees from a larger judgment or settlement, and therefore counsel is not incentivized to allow the named plaintiff to accept an early settlement offer.

The district court and Ninth Circuit rejected Campbell-Ewald's argument and held that a Rule 68 offer does not moot claims if the offer is made prior to filing or ruling on a motion for class certification. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 874-75 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016). Although this holding aligned with some circuits' decisions, the Seventh Circuit had held the opposite—that a Rule 68 offer made before the plaintiff had filed a motion for class certification mooted the class claims.

The Supreme Court's Decision

The majority adopted the view from Justice Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), that under basic principles of contract law, the "rejection of an offer 'leaves the matter as if no offer had ever been made.'" 133 S. Ct. at 1533-34 (Kagan, J., dissenting) (quoting *Minneapolis & St. Louis Ry. Co. v. Columbus Rolling-Mill Co.*, 119 U.S. 149, 151 (1886)). Thus, an unaccepted offer of complete relief is precisely that—an offer with "no lasting right or obligation." *Campbell-Ewald*, 136 S. Ct. at 666. The text of Rule 68 similarly guided the Court's conclusion: Rule 68 provides that an offer of judgment "is considered withdrawn" if not accepted within 14 days. Fed. R. Civ. P. 68(a), (b). The Court explained that because Gomez "remained emptyhanded," his claim and the class claims "retained vitality" during the pendency of the class certification process. *Id.* at 672

The fact that Gomez had not actually received the offered payment was central to the Court's decision. "We need not, and do not, now decide whether the result would be different," the Court explained, "if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Campbell-Ewald*, 136 S. Ct. at 672. Accordingly, the Court left open the door to

mooting a claim by a Rule 68 offer combined with payment. In his separate dissent, Justice Alito noted that payment could be accomplished by transferring funds to a bank account in the plaintiff's name or to the custody of the district court.

Chief Justice Roberts, joined by Justices Scalia and Alito, argued in his dissent that payment was not necessary and that, in declining to accept the offer, Gomez was clinging to jurisdiction simply because he "want[ed] a federal court to say he is right." The dissent categorized this as not a "real dispute"—as required to confer standing to the federal courts under Article III of the Constitution—but as a request that a federal court "rule on a plaintiff 's entitlement to relief already there for the taking." *Id.* at 676 (J. Roberts dissenting). Under the dissent's view, after a defendant agrees to fully redress an injury, there is no longer a case or controversy for purposes of Article III.

Key Takeaways

A defendant may still be able to moot a claim by making a Rule 68 offer *and* depositing the offered funds with the court or otherwise providing them to a plaintiff. If a plaintiff rejects the Rule 68 offer, a defendant can move for dismissal based on mootness or move for an entry of judgment for the plaintiff under Rule 58(d). Either path may lead to resolution of individual claims prior to class certification.

Companies can still use Rule 68(d)'s cost-shifting mechanism as a method of challenging class certification. Rule 68(d)'s built-in sanction, recognized by Justice Ginsburg, means that "[i]f the [ultimate] judgment . . . is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." To the extent a named plaintiff rejects a Rule 68 offer of judgment, companies may be able to argue that the named plaintiff has individual affirmative defenses related to waiver or estoppel or that the named plaintiff's interests are in conflict with the class generally. Defendants may therefore be able to challenge the typicality or adequacy of individual class representatives under Rules 23(a)(3) and (a)(4).

4. *Spokeo, Inc. v. Robins*

On May 16, 2016, in a 6-2 decision, the Supreme Court held that the mere allegation of a statutory violation is not necessarily enough to create Article III standing. *Spokeo, Inc. v. Robins*, No. 13-1339, 2016 WL 2842447 (U.S. May 16, 2016). Instead, the plaintiff has the burden of alleging "concrete" injury, meaning injury that actually exists or is real and not abstract. Concrete injury may be tangible or intangible, but particularly when a statute creates the possibility of a "procedural" violation, the plaintiff must establish a harm sufficiently "concrete" to satisfy Article III.

Background

The plaintiff in the case, Thomas Robins, brought a putative class action under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq*. Despite the plaintiff's failure to plead a specific harm to himself, the Ninth Circuit held that the "alleged violations of [his] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413-14 (9th Cir. 2014), *vacated and remanded*, No. 13-1339 2016 WL 2842447 (U.S. May 16, 2016).

Spokeo is an online "people search engine" that sells information about individuals based on public data. Robins sued under the FCRA after he discovered that Spokeo misstated information about his age, marital status, education, and professional experience. The FCRA allows consumers to claim damages from $100 to $1,000 if a company publishes false information about them. Robins claimed that Spokeo's website contained false information about him, but his specific allegations of harm were "sparse." 742 F.3d 409, 410 (9th Cir. 2014). He asserted only that the misinformation harmed his "employment prospects" and that remaining unemployed had cost him money and caused "anxiety, stress, [and] concern." *Id.* at 411. Through a class action, Robins sought to represent others who have experienced the same problem.

Article III's standing doctrine limits the jurisdiction of the federal courts to cases in which the plaintiff has suffered an "injury in fact." To establish injury in fact, a plaintiff must show (1) "an invasion of a legally protected interest" that (2) is "concrete and particularized" and (3) is actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff, "as the party invoking federal jurisdiction, bears the burden of establishing these elements." *Id.*

The district court dismissed the action because Robins failed to allege a sufficient injury in fact. The Ninth Circuit, however, reversed, concluding that Robins's allegation of Spokeo's violation of the FCRA—which authorizes a private right of action—was enough to satisfy the injury-in-fact requirement, despite Robins's failure to allege a particularized, concrete harm to himself. *Spokeo*, 742 F.3d at 413-14. Specifically, the Ninth Circuit's ruling was not based on any alleged harm to the plaintiff's employment prospects, but rather the mere violation of the statute.

The Supreme Court's Decision

The Supreme Court vacated and remanded the Ninth Circuit Court's decision on the ground that the court's analysis was "incomplete" because it failed to analyze whether Robins had established that his injury was "concrete" as required under Article III.

The *Spokeo* decision turns on the "concrete and particularized" element of the injury-in-fact test. The Court clarified that "concrete" and "particularized" are distinct requirements that must be independently satisfied. The Court held that the Ninth Circuit had actually addressed only whether Robins's injury was "particularized" and that the "independent requirement [of concreteness] was elided." *Spokeo*, 2016 WL 2842447, at *6.

With respect to whether an injury is "concrete," the Court began by stating that a "concrete" injury is one that is "'*de facto*'; that is, it must actually exist." *Id. at 7.* Citing dictionaries, the Court also said that a concrete injury is one that is "'real,' and not 'abstract.'" *Id.* The Court also noted that while "tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete." *Id.* The Court cited free speech and free exercise of religion cases as examples of intangible injuries that may confer standing. *Id.* But not every intangible injury will create standing. One "instructive" consideration in assessing whether an intangible injury is concrete is whether it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* Another "instructive and important" consideration is the judgment of Congress—as expressed through the adoption of a statute—because "Congress is well positioned to identify intangible harms that meet minimum Article III requirements." *Id.*

The remainder of the Court's decision addresses what constitutes a sufficiently "concrete" injury to satisfy Article III standing when a plaintiff alleges a violation of a federal statute with an intangible harm. The Court provided these guideposts:

- **Bare allegation of a statutory violation does not automatically confer standing.** The mere allegation of a statutory violation, with nothing more, does not automatically give rise to a "concrete" injury establishing Article III standing. "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*

- **Allegations of a procedural statutory violation in particular may not be enough.** The Court emphasized that "a bare procedural violation, divorced from any concrete harm," is not enough to confer standing. *Id.* But the Court contrasted cases alleging violations of certain public disclosure laws, stating that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact" and "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Id.* at *8.

- **A risk of harm may be enough to confer standing.** Building on its decision in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1146 (2013), the Court stated that a risk of harm can in some circumstances satisfy the concreteness requirement. *Spokeo*, 2016 WL 2842447, at *8. The Court cited tort theories, such as slander, as examples of cases in which standing is present "even if [the plaintiffs'] harms may be difficult to prove or measure." *Id.*

Applying these principles to Robins's claim under the FCRA, the Court held that "Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm." *Id.* The Court explained that if a consumer reporting agency failed to provide a required notice, but all the information in the background report was accurate, there would be no injury in fact. *Id.* Or, as another example, it would be hard to "imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Id.*

The Court vacated and remanded the case because "the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization" and thus "did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Id.*

What's Next?

Both sides are claiming victory, and the Court's decision gives each side something:

- **Asserting a violation of a federal statute is not necessarily enough to establish Article III standing.** Before this decision, and as Robins argued here, plaintiffs not uncommonly took the position that merely asserting a violation of a federal statute was, in and of itself, enough to confer Article III standing. *See, e.g., Edwards v. First Am.*

Corp., 610 F.3d 514, 517 (9th Cir. 2010), *cert. granted*, 564 U.S. 1018 (2011), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536 (2012). The Court's decision refutes that approach: "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 2016 WL 2842447, at *7.

- **But the Court did not resolve whether Robins had alleged sufficient injury.** The Court remanded the case to the Ninth Circuit to consider the "concreteness" inquiry in light of the Court's guidance. Thus, the application of the Court's guidance, both as to Robins's claim and as to other possible claims, will be left for future decisions.

Although the *Spokeo* case itself involved an alleged violation of the FCRA, the decision will likely have broad application to many areas of federal statutory law that include a private right of action. In particular, class actions seeking statutory damages only, without any attempt to allege harm other than the violation of the statute—such as those commonly alleged for privacy or financial services claims—will require careful analysis under this decision. And although Article III applies to federal courts only, practitioners and litigants may assess whether the decision has implications for cases brought in state court, depending on the law and analysis required in a given state.

B. Other Federal Decisions

1. Ninth Circuit Finds that Washington Teacher's Complaints Were Not Protected by the First Amendment

In *Coomes v. Edmonds School District No. 15*, 816 F.3d 1255 (9th Cir. 2016), the Ninth Circuit held that a teacher's communication with administrators about the school district's mismanagement of the special education program and similar comments made to parents were not communications made in her capacity as a private citizen, and thus her discharge was not protected by the First Amendment.

The plaintiff in *Coomes* worked at Meadowdale Middle School in the Edmonds School District as a manager of the emotional/behavioral disorders (EBD) program. During her first couple of years in the role, she received satisfactory performance reviews and seemed to get along with the school principal and assistant principal. Over time, however, the relationships deteriorated due to differing views on the "mainstreaming" of some of the EBD students. Coomes came to believe that the principal and assistant principal were denying the transfer of EBD students ready to be mainstreamed based purely on impermissible financial reasons.

Coomes first expressed her concerns first in an email message to both a union representative and a district human resources manager. She then forwarded the message to other Meadowdale teachers, with the entire email chain finally making its way to the principal. The principal in turn passed the message to district administrators, saying that Coomes had made false accusations and that the district should "take a very strong position on stopping this behavior." *Id.* at 1258.

In the following year, the EBD program underwent change. EBD students were placed in more "mainstream" academic classes than in the past, with the goal of making the program less self-

contained and more integrated into the school. Coomes initially objected to the change, expressing her view that the students who had come to Meadowdale from self-contained elementary classrooms should start the year with her so that she could get to know their needs and help them adjust.

Meanwhile, Coomes' performance reviews got worse. In addition, the principal and assistant principal sent her letters criticizing her performance and reiterating their expectations for the EBD program. Coomes finally complained to the district superintendent, who arranged to transfer her to nearby Lynnwood High School for the upcoming 2011-2012 school year. But before the new year began, Coomes collapsed in the school hall, sobbing uncontrollably. At her request, she was granted medical leave through the end of 2011.

Rather than returning to work following leave, Coomes quit on the advice of her therapist. A lawyer's letter soon arrived at the district claiming that conditions made it impossible for Coomes to continue working and that she had been constructively discharged. She then filed a lawsuit claiming that she had been wrongfully discharged under Washington law because of her exercise of constitutional free speech protected by the First Amendment. The trial court granted summary judgment against Coomes, and she appealed. *Id.*

The Decision

Coomes argued on appeal that her communications both with her supervisors and with parents of students in the EBD program were on a matter of public concern and did not constitute part of her job duties. She claimed that the district had retaliated against her for exercising rights protected by the First Amendment. *Id.* at 1259.

The Ninth Circuit recognized that public employees do not forfeit all constitutional safeguards because of their employment. At the same time, the court said, they may not "constitutionalize [an] employee grievance." *Id.* (citation and internal quotation marks omitted).

The court uses a well-established five-factor test for determining whether a public employee's speech gives rise to First Amendment protections. *Id.* (citing *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009). To show actionable retaliation, an employee must present evidence that:

(1) She spoke on a matter of public concern;

(2) Her speech was as a private citizen rather than as a public employee; and

(3) The speech motivated an adverse employment action.

If those three elements are established, the public employer has to demonstrate that:

(1) It had justification for treating the employee differently than other members of the public; or

(2) It would have taken the same action even in the absence of the employee's speech.

Applying the test to the facts in the case, the Ninth Circuit stated that the deciding element was whether Coomes' complaints had been made as a private citizen or as a public employee. *Id.* The district presented Coomes' job description and the email messages she had sent, arguing that the content related to classroom happenings with individual students during the day. Put another way, from the district's perspective, Coomes had spoken out in her role as a teacher, not a private citizen.

Coomes argued that her job description did not include battling with district officials over the rights of her students or speaking out about "bullying and harassment by Meadowdale administrators." But she did not point to any specific evidence that raised a serious question about the context in which her complaints were made.

The court observed that Coomes had registered her complaints within the district chain of command rather than in a public forum. In such situations, an employee is ordinarily deemed to be speaking in the course of performing her job. In addition, the court noted that Coomes' job description expressly contemplated that she would be speaking up about the EBD program: "This position will have significant contact with parents, students, and District staff requiring the ability to work collaboratively with a variety of people." *Id.* at 1262.

Examining the contents of Coomes' communications, the court found that her concerns were entirely about the EBD program and her disagreements with school administrators about the program. *Id.* The concerns she expressed were entirely job-related. Indeed, Coomes herself stated in one of her messages that she wanted to ensure that her "professional input [was] recorded and documented." *Id.* at 1263. Although she also communicated with parents of her students, that was also part of her job, not a public statement.

The Ninth Circuit agreed with the trial court and affirmed the dismissal of Coomes' First Amendment claim. The case was sent back to the trial court to consider her state law claim.

2. Ninth Circuit Holds that Timing Matters in Employer's Response to Union's Arbitration Request

The lawsuit, *SEIU United Healthcare Workers–W. v. Los Robles Reg'l Med. Ctr.*, 812 F.3d 725 (9th Cir. 2015), arose from a dispute between the parties of a collective bargaining agreement (CBA)—Service Employees International Union, United Healthcare Workers–West (the "Union") and Los Robles Regional Medical Center (the "Medical Center"). In October 2011, the Union filed a grievance alleging that the Medical Center's reorganization of its engineering department violated multiple provisions of the CBA.

Typically, unions and employers resolve disputes over the terms of their collective bargaining agreement through the agreement's grievance process. Once the parties have completed this process and the employer still refuses to go to arbitration, section 301 of the Labor Management Relations Act gives the union, or an employee, six months to file a claim in federal court for a petition to compel arbitration. But when this six-month statute of limitations period begins to run is sometimes disputed.

To resolve grievances, the parties' CBA requires them to follow a three-step sequential process. First, the Union must file its grievance in writing to the Medical Center, and the Medical Center

must respond in writing. If the grievance is not resolved after those two steps, then the Union, as part of the third step, must notify the Medical Center in writing of its intention to arbitrate the matter. If the Medical Center rejects the request, the grievance process is complete and the Union has six months to file a motion with the court to compel arbitration under section 301. In this case, the parties dispute at what point they reached the third step of the process and, thus, when the six-month statute of limitations commenced.

At the district court level, the Medical Center argued that the limitations period started on December 2, 2011, when the Medical Center emailed the Union denying its initial request for arbitration. The Union , however, did not think the e-mail made it clear that the medical center refused to arbitrate. Instead, the Union believed that the period began to run when the medical center officially replied on June 22, 2012, to the its January 17, 2012 letter demanding arbitration.

Under the Medical Center's theory, because the Union filed its motion to compel in September 2012, its claim would be barred by the six-month period. The district court agreed with the Medical Center, and the Union appealed to the Ninth Circuit.

Statute of Limitations Begins to Run at Employer's "unequivocal rejection"

On appeal, the Ninth Circuit panel reversed and remanded the district court's decision, holding that the Union 's petition to compel arbitration was *not* barred by the statute of limitations. The panel reasoned that for the period to commence, the Medical Center must have "unequivocally and expressly" rejected the Union's request to arbitrate.

In particular, the panel found that the Union did not reach the third step until January 17, 2012. As a result, the grievance process was not complete—and the six-month limitations period did not commence—until June 22, 2012, when the Medical Center "unequivocal[ly]" rejected this request. *Id.* at 731.

Medical Center's Delay in Responding Unreasonable

Because the statute of limitations did not bar the Union's claims, the panel also considered whether the Medical Center's five-month delay in responding to the Union's request for arbitration violated its duty of good faith. In holding that it did, the panel noted that the Medical Center's June response "hardly merited such a delay" because it simply reiterated its earlier message that it did not think the matter was subject to arbitration. *Id.* at 731.

In reaching its decision, the panel reiterated that arbitration should be promptly invoked and promptly administered to avoid "poison[ing] the relationship between the contracting parties." *Id.* at 733 (citation and internal quotation marks omitted). Here, the delay added tension between the parties because it took up almost the entirety of the limitations period—five of the six months.

Lesson: Be Responsive

This case reminds employers to carefully follow the grievance process outlined in their collective bargaining agreements and to respond promptly to the grieved party at each step of the process.

3. Ninth Circuit Orders Enforcement of EEOC Investigative Subpoena

In a decision issued toward the end of 2015, the Ninth Circuit held that an employer had to disclose to the EEOC the names, Social Security numbers, and contact information of employees who had to perform the company's strength test and that the EEOC was not precluded from seeking the enforcement of an administrative subpoena issued as part of an investigation into an employee's sex discrimination claim. *U.S. EEOC v. McLane Co., Inc.*, 804 F.3d 1051 (9th Cir. 2015).

The plaintiff in the case was a cigarette selector for the McLane company for eight years. Following a maternity leave, McLane required her to pass a strength test before returning to work. The plaintiff failed the test three times and was fired. She then filed a charge with the EEOC, alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

In response to the EEOC's inquiries, McLane provided general information about its strength test, which it required nationwide for new employees and those returning from leave to physically demanding positions. The company voluntarily submitted information about the sex and the success or failure of individuals who had taken the strength test at the Arizona subsidiary where the plaintiff had worked. *Id.* at 1054.

But the EEOC demanded more. The agency requested that McLane provide what it described as "pedigree information" for the test takers—name, Social Security number, address, and phone number. For workers who were no longer employed, the EEOC also wanted the reason their employment ended. Eventually, the EEOC expanded the investigation into McLane's grocery facilities nationwide and sought the more comprehensive information for all.

McLane gave the EEOC the same information for its other grocery facilities as it had for the Arizona subsidiary and continued to withhold the pedigree information and reasons for termination. The company contended that it had given the EEOC sufficient information to evaluate the claim of sex discrimination based on the strength test. The EEOC disagreed and took enforcement action, issuing a subpoena and then filing suit against McLane to require compliance with the subpoena.

The federal trial court agreed with McLane that it should not have to provide the pedigree information or the reasons for termination. To that extent, the court declined to enforce the subpoena, and the EEOC appealed.

The Decision

The Ninth Circuit observed that once the EEOC has received a charge of discrimination, it has broad investigatory authority. In the course of investigating an individual charge, the agency may obtain information to expand its inquiry, as it did with McLane. It is empowered to seek information that "relates to" the employment actions targeted by the charge.

In response to the appeal, McLane argued once again that the EEOC did not need the so-called pedigree information to decide whether its use of the strength test discriminated against women. The company had already provided data on the sex and success (or lack of success) of those taking the test, identifying them by employee number. Why would the agency want names,

Social Security numbers, addresses and phone numbers? The court noted that in a Title VII investigation, the standard of relevance is somewhat looser than for evidentiary rulings during a trial. Information relates to a charge if it would cast light on the allegations of discrimination.

Although statistical data could be developed from the limited information that McLane had already turned over, the EEOC might want to contact and interview other applicants and employees about their own experiences with the strength test. Such conversations could lead to a better understanding of whether the test had been administered or the results interpreted more stringently when women were involved—or whether the opposite had occurred. Disagreeing with the trial court, the Ninth Circuit concluded that McLane should be required to produce the pedigree information.

With regard to providing reasons why the employment of test takers had been terminated, McLane argued that the task would be unduly burdensome. The court found that it did not have sufficient information to evaluate the burden of gathering and submitting this information to the EEOC. The matter was returned to the trial court on this issue, where the company must introduce evidence justifying its objection.

Lessons for Employers

Most employers covered by Title VII will eventually have to respond to a charge of discrimination. In most cases, it will be beneficial to take a cooperative approach with the EEOC. If an employer disagrees with the scope of information requests, it should try to work with the assigned investigator and see whether an approach can be found that meets both parties' needs. This will typically be better—and less expensive—than facing an EEOC subpoena and enforcement proceeding.

4. Ninth Circuit's Decision Changes How Washington Employers Should Handle Tips

In *Oregon Restaurant & Lodging Association v. Perez,* 816 F.3d 1080 (9th Cir. 2016), a divided Ninth Circuit panel held 2-1 that it is a violation of federal law for an employer to use a tip-pooling arrangement in which tips are shared with employees who do not normally receive tips (e.g., kitchen workers or supervisors), even if the employer does not take advantage of the tip credit permitted under the FLSA. The decision also reverses two federal district court rulings that relied on the Ninth Circuit's ruling in *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010).

Background on Tip Pooling and the FLSA

In 1966, Congress amended the FLSA to cover hotels and restaurants. Congress added language that permitted those employers to use employees' tips to satisfy part of their minimum wage obligations so long as certain requirements were met. If an employer required tips to be pooled rather than retained individually, employees who did not "customarily and regularly" receive tips (e.g., cooks and dishwashers) could not share in the proceeds. If an employer required tips to be shared with non-tipped employees, it could not use any part of those tips to satisfy its minimum wage obligations. Instead, it had to pay at least the minimum wage in addition to whatever tips employees received. In 1974, Congress amended the FLSA again to impose additional requirements on the tip credit.

In Washington and other states, however, state law imposes minimum wage requirements that do not allow employers to use the tip credit. As a result, employers in those states cannot use the federal tip credit. Instead, they pay employees at least the applicable minimum wage (the federal or state minimum wage, whichever is higher), without taking into account tips that employees receive. Some employers have adopted tip-pooling policies that force tipped employees to share their tips with kitchen workers and other employees who do not meet the FLSA's "customarily and regularly" tipped requirement. Because those employers do not seek to claim the tip credit (and are already paying employees at least minimum wage), they claim that the FLSA's tip-pooling limitations do not apply to them.

In 2010, the Ninth Circuit agreed that so long as an employer does not take advantage of the tip credit, the FLSA's tip-pooling limitations do not apply. *Cumbie*, 596 F.3d 577. However, in 2011, the DOL adopted a regulation to reverse that ruling. The regulation, 29 C.F.R. § 531.52, states, in relevant part:

> Tips are the property of the employee whether or not the employer has taken a tip credit . . . . The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted . . . : As a credit against its minimum wage obligations to the employee, or in furtherance of a . . . tip pool [that limits pooling to customarily and regularly tipped employees].

The Claim

In its decision, the Ninth Circuit consolidated two cases, which the DOL had appealed—one from Nevada and one from Oregon. In both cases, the employers did not take a tip credit against their minimum wage obligation but instead paid their tipped employees at least the federal minimum wage. The employers required their employees to participate in tip pools. Under section 203(m) of the FLSA, a tip pool is valid if it is comprised exclusively of employees who are "customarily and regularly" tipped. 29 U.S.C. § 203(m). Unlike the tip pools contemplated by section 203(m), however, these tip pools were composed of both customarily tipped employees and non-customarily tipped employees.

When the Oregon district court and the Nevada district court conducted their *Chevron* analysis (i.e., the analysis courts use to determine whether a federal agency had proper authority to issue a rule), both held that *Cumbie* left "no room" for the DOL to promulgate its 2011 rule and thus granted Oregon Restaurant & Lodging's motion for summary judgment, *Or. Rest. & Lodging v. Solis*, 948 F. Supp. 2d 1217, 1226 (D. Or. 2013), *rev'd sub nom. Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2016), and Wynn's motion to dismiss, *Cesarz v. Wynn Las Vegas, LLC*, No. 2:13-cv-00109-FCJ-CWH, 2014 WL 117579, at *3 (D. Nev. 2014), *rev'd sub nom. Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2016). The DOL appealed the decisions to the Ninth Circuit.

The Decision

The Ninth Circuit disagreed with the district courts' applications of *Cumbie* and their *Chevron* analyses. Specifically, the Ninth Circuit upheld the DOL's regulation, holding that the Ninth Circuit's prior ruling that employers that did not take the tip credit could use tip pools that

included tipped and non-tipped employees did not foreclose the DOL from promulgating the regulation and that the DOL's regulation was a reasonable interpretation of the FLSA and thus entitled to *Chevron* deference. *Oregon Rest. & Lodging Ass'n*, 816 F.3d 1080 at 1086-87.

The court reasoned that the statute was confusing and misleading with respect to ownership of tips, and legislative history indicated that the statute was enacted to clarify that all tips received were to be paid out to tipped employees and not to be used by employers. *Id.* at 1089. Additionally, the court found the district courts' reading of the FLSA as too narrow and instead reiterated "that the purpose of the FLSA does not support the view that Congress clearly intended to permanently allow employers that do not take a tip credit to do whatever they wish with their employees' tips." *Id.* at 1090. Further, "[a]s previously noted, the FLSA is a broad and remedial act that Congress has frequently expanded and extended." *Id.*

Unless the decision is reviewed and overturned by the full Ninth Circuit or the U.S. Supreme Court, employers in the Ninth Circuit are not permitted to impose tip-pooling arrangements that share tips with anyone other than employees who are customarily tipped.

5. Ninth Circuit Affirms Use of Timecard Rounding

The Ninth Circuit upheld a decision dismissing a Time Warner Cable employee's proposed class action claiming the company's timeclock system that rounded to the nearest quarter-hour deprived him of wages, finding that the practice was generally fair and the amount in question was too small to consider. *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, No. 13-55622, 2016 WL 1730403 (9th Cir. May 2, 2016).

Background

Time Warner Entertainment-Advance/Newhouse Partnership (TWEAN) operates a call center in California where its employees field telephone calls from customers. In May 2010, TWEAN began using an online timekeeping platform that links an employee's time stamps to another computer program, which must be activated before employees can begin taking customer phone calls. TWEAN's compensation policies incorporate a "rounding" procedure that uses the time stamps from the computer program and rounds them to the nearest quarter-hour. For example, "an employee who clocks in at 8:07 a.m. to begin his workday would see his wage statement reflect a clock-in of 8:00 a.m." *Id.* at *1.

The case originated from a putative class action brought by a plaintiff (an employee of TWEAN) seeking lost compensation based on two claims. Or, as described by the Ninth Circuit panel, "this case turns on $15.02 and one minute"—with $15.02 representing the amount of compensation that the plaintiff alleges he lost in one year due to TWEAN's rounding policy and one minute representing the total amount of time he failed to receive compensation for before logging in to TWEAN's timekeeping software.

Specifically, in his "rounding" claim, the plaintiff alleged that TWEAN's compensation policy of rounding all employee time stamps to the nearest quarter hour deprived him of earned overtime compensation. *Id.* at *3. Second, in his "logging-in" claim, the plaintiff alleged that he was not compensated for one minute when he mistakenly opened an auxiliary computer program before logging into TWEAN's timekeeping software.

Ninth Circuit Decision

With regard to the rounding policy, the plaintiff argued that TWEAN's rounding policy violates 29 C.F.R. § 785.48(b), the federal rounding regulation, because it is not facially neutral or neutral as applied to him. The panel disagreed, holding unanimously that TWEAN's rounding policy comported with the federal rounding regulation. *Corbin*, 2016 WL 1730403, at *3. The panel reasoned that under a 1961 DOL regulation, timekeeping rounding, like the system used by TWEAN, is legal. Such systems are presumed legal as long as they are neutral in theory and practice, the panel said. Noting that the plaintiff sued over a single minute of uncompensated time, the panel said that it would be ridiculous to overturn a largely fair system because of a tiny difference on one employee's paycheck. The panel ultimately concluded that the district court properly interpreted and applied the regulation and granted summary judgment to TWEAN. *Id.* at *6.

With regard to the logging-in claim, the panel held that the district court properly granted summary judgment to TWEAN on this claim and the district court properly classified the one minute of uncompensated time as *de minimis*. *Id.* at *8-9. The panel held that the district court properly considered the *de minimis* doctrine, even though TWEAN did not affirmatively plead it in its answer.

Further, the panel found that all three factors in *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984), supported the district court's conclusion that plaintiff's one minute of uncompensated time was *de minimis*. As articulated by the panel, "[t]o determine if otherwise compensable time is properly classified as *de minimis*, in *Lindow* we established a three-prong test, instructing courts to 'consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.'" *Corbin*, 2016 WL 1730403, at *8 (quoting *Lindow*, 738 F.2d at 1063). The panel noted that TWEAN would face a high administrative burden in cross-referencing every employee's log-in/out patterns, only one minute of compensable time was at issue, and the uncompensated time was not "regular" at all but instead was the result of the plaintiff's "violation of a company policy mandating that all work activities be on the clock." *Id.* at *8-9.

Finally, the panel held that the plaintiff also failed to demonstrate the existence of a material fact as to his derivative California state law claims. Moreover, the panel found that the district court did not err by limiting consideration of the plaintiff's rounding claim to the period after the implementation of a new online timekeeping system. Given that the court affirmed the grant of summary judgment on the plaintiff's rounding claim, the panel held that the district court need not reconsider whether the claim can form the basis of a viable class action proceeding.

C. Washington Supreme Court Decision

1. Attorney Fees Recoverable in Superior Court for a Successful Seattle Civil Service Commission Claim

The court in *Arnold v. City of Seattle*, No. 91742-6, 2016 WL 2586691 (Wash. May 5, 2016), addressed whether a City of Seattle ("City") employee who had recovered wages from a Seattle Civil Service Commission ("Commission") hearing was entitled to attorney fees under RCW

49.48.030, even though the city code provides that she may be represented in those proceedings only at her own expense. *See* Seattle Municipal Code (SMC) 4.04.260(E). The employee had recovered wages in the civil service proceeding and then initiated an action in superior court requesting attorney fees. The trial court denied attorney fees, but the Court of Appeals reversed, granting her attorney fees.

The Decision

The Washington Supreme Court affirmed, holding that the commission proceedings constitute an "action" for which RCW 49.48.030 provides attorney fees when requested in a separate court action. Under the law at issue in the case, employees are entitled to reasonable attorney fees from their employer or former employer "[i]n *any action* in which any person is successful in recovering judgment for wages or salary owed to him or her." RCW 49.48.030 (emphasis added).

The court, therefore, first analyzed whether the City's civil service proceedings are "actions" within the meaning of the statute. *Arnold*, 2016 W 2586691, at *5. In holding that City civil service proceedings are "actions," the court relied on its decision in *International Association of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002), where it held that a grievance arbitration proceeding constitutes an "action." *Arnold*, 2016 W 2586691, at *5. The court in *Fire Fighters* relied on the remedial purpose of RCW 49.48.030, noting that "the statute is meant to be construed liberally in order to effectuate the purpose of protecting employees' rights." *Id.* (citing *Fire Fighters*, 146 Wn.2d at 34). Further, the court cited numerous definitions of "action," which incorporate a broader range of proceedings than an ordinary judicial action. *Id.* In extending its holding in *Fire Fighters* to the City's civil service proceedings, the court noted the following judicial-like features of the proceeding: all parties were represented by counsel, the parties conducted discovery and exchanged witness lists and exhibits, the hearing examiner issued evidentiary rulings, the hearing spanned multiple months and eight days of testimony, and the parties submitted written closing briefs. *Id.* at *6. Moreover, the hearing officer ordered a 25-page order and the record as a whole for the proceeding was 2,997 pages. *Id.* The court also noted that chapter 49.48 RCW was amended in 2006 in a way that suggests that "action" includes administrative proceedings. *Id.* at *7.

Second, the court addressed the City's argument that the Commission lacks statutory authority to award attorney fees. As a threshold matter, the court noted that the plaintiff in the case was not seeking attorney fees from the Commission because she instead filed an action in superior court to collect the fees. *Id.* at *8. The proper inquiry, therefore, is whether the court has authority to grant attorney fees when the plaintiff files a separate action in state court. In finding that the court does have authority to award fees, the court again relied on its decision in *Fire Fighters*, where it held that "an employee who successfully recovers wages in an action may institute a separate court action to recover attorney fees, even when the body issuing the wages has no authority to grant attorney fees." *Id.* at *9.

Third, the City argued that the plaintiff is not entitled to attorney fees because the SMC explicitly prohibits such fees in Commission hearings. *Id.* The plaintiff countered, and the court agreed, that state law preempts the SMC. The court articulated the standard for preemption based on the state constitution and its own precedent. Specifically, it noted that the Washington state

constitution permits local governments to make "all . . . local police, sanitary and other regulations as are not in conflict with general laws." *Id.* at *9 (quoting Wash. Const. art. XI, § 11). "A local regulation conflicts with state law where it permits what state law forbids or forbids what state law permits." *Id.* (quoting *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009)). Here, the court found that SMC 4.04.260(E) directly conflicts with RCW 49.48.030 because "the state statute requires an employer to pay the employee's attorney fees in any action in which the employee recovers wages, while the city code provides that an individual may be represented by counsel in civil service hearings at only the employee's own expense." *Id.* at *10.

Finally, the court was not persuaded by the City's policy argument that allowing employees to collect attorney fees would create a disincentive for local government to adopt similar codes and might reduce employee protections. *Id.* The court noted that the circumstances in which attorney fees can be awarded are limited to when an employee's discipline was wrongful and the employee was successful in recovering wages. *Id.*

Limited Scope of the Decision

Importantly, the court limited the scope of its holding, noting that the decision "does not necessarily extend attorney fee awards under RCW 49.48.030 to all quasi-judicial proceedings." *Id.* at *11. Rather, the court held that "when an employee recovers wages in a proceeding with sufficient judicial hallmarks to constitute an 'action' and seeks attorney fees in a separate court action, she is entitled to recover attorney fees in that separate proceeding under RCW 49.48.30." *Id.*

D. NLRB Decision

1. NLRB Finds Another Set of Employee Handbook Rules Unlawful

So far in 2016, the National Labor Relations Board (NLRB) has continued its trend of invalidating seemingly neutral employer handbook policies for "chilling" employees' rights under Section 7 of the National Labor Relations Act (NLRA).

On April 29, 2016, the NLRB, agreeing with administrative law judge (ALJ) Christine E. Dibble, overturned several of T-Mobile's (and its sister company, MetroPCS's) employee handbook rules. *T-Mobile USA, Inc.*, 363 N.L.R.B. No. 171 (Apr. 29, 2016). The NLRB also went beyond the ALJ's decision and found additional rules to be unlawful. *Id.* at *2.

Section 7 of the NLRA gives employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Even if a work rule does not explicitly prohibit such activity, it still will be found unlawful if "employees would reasonably construe the [rule's] language to prohibit Section 7 activity." *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 647 (2004). Further, under that decision, the mere maintenance of a work rule may violate the NLRA if the rule has a chilling effect on employees' Section 7 activity.

The NLRB first struck down T-Mobile's rule on positive work environment, which said:

> [T-Mobile] expects all employees to behave in a professional manner that promotes efficiency, productivity, and cooperation. Employees are expected to maintain a positive

> work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management.

363 N.L.R.B. No. 171, at *2. The NLRB found ambiguous and vague the phrases "positive work environment" and "communicating in a manner that is conducive to effective were relationships." *Id.* In the NLRB's view, "[w]e find that employees would reasonably construe the rule to restrict potentially controversial or contentious communications and discussions, including those protected by Section 7 of the [NLRA], out of fear that the [employer] would deem them to be inconsistent with a 'positive work environment.'" *Id.*

The NLRB also found unlawful a rule that prohibited recordings in the workplace. That rule said:

> To prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information employees are prohibited from recording people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace. Apart from customer calls that are recorded for quality purposes, employees may not tape or otherwise make sound recordings of work related or workplace discussions. Exceptions may be granted when participating in an authorized TMUS activity or with permission from an employee's Manager, HR Business Partner, or the Legal Department. If an exception is granted, employees may not take a picture, audiotape, or videotape others in the workplace without the prior notification of all participants.

Id. at *4. The NLRB noted that this rule was overly broad and not tailored to the specific needs of the employer. Further, the NLRB reasoned that the "rule does not differentiate between recordings that are protected by Section 7 and those that are not, and includes in its prohibition recordings made during nonwork time and in nonwork areas." *Id.* at *5.

The other rules struck down by both the ALJ and the NLRB were rules that (1) declared the employee handbook to be a confidential and proprietary document; (2) prohibited disclosure of the handbook to third parties without prior written permission; (3) mandated that employees must maintain the confidentiality of the names of employees involved in internal investigations; and (4) declared employee salary information to be confidential.

In finding these rules unlawful, the NLRB had no evidence that any of these rules in fact restricted protected employee activity under section 7 or that the rules were issued in response to union organizing or other conduct protected under section 7.

PERKINSCOIE

Discipline & Discharge of Employees: Lessons from 35 Years

PERKINSCOIE

DISCIPLINE AND DISCHARGE OF EMPLOYEES:

LESSONS FROM 35 YEARS

Presented by Nancy Williams

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PERKINSCOIE

DISCIPLINE AND DISCHARGE OF EMPLOYEES: LESSONS FROM 35 YEARS

by

Nancy Williams

I. INTRODUCTION: WHY WE'RE HERE

Approximately 90,000 charges of discrimination or retaliation are filed each year with the Equal Employment Opportunity Commission. Thousands more are filed with the Washington State Human Rights Commission and similar agencies. Many charges develop into lawsuits, and there are, of course, many other theories besides discrimination on which a present or former employee may base a claim.

More often than not, charges or lawsuits by former employees raise allegations that the claimant has been discharged wrongfully or unfairly. Discharge, sometimes labeled as the "capital punishment of the workplace," often is preceded by disciplinary action that may also be attacked as unfair. Thus, most employers want to be sure that their decision to discipline or discharge an employee is well-justified and fairly carried out—if only to protect themselves from legal liability. There are many other reasons for sound disciplinary practices. Such practices advise employees of the employer's expectations, provide guidance and incentives for improved performance and/or conduct, and demonstrate to other employees that poor performance and misconduct will be addressed. Consistent, fair discipline and discharge practices will not only help avoid or defend legal claims, but also make the work environment better for all.

II. VARIOUS THEORIES FOR CHALLENGING DISCIPLINE/DISCHARGE

A. General Presumption of Employment at Will

The general presumption in Washington is that an employment relationship of indefinite duration is terminable at the will of the employer. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219 (1984). In *Thompson*, the Washington Supreme Court also rejected the idea that termination of employment should be subject to a covenant of good faith and fair dealing. *Id.* at 227.

> [T]o imply into each employment contract a duty to terminate in good faith would . . . subject each discharge to judicial incursions into the amorphous concept of bad faith.

Id. In other words, in the absence of an unlawful motive or breach of an employment agreement, an employer may discharge an employee for any reason or no reason at all.

B. Laws Against Discrimination

Title VII protects employees from discrimination because of race, color, sex, national origin and religion. The Age Discrimination in Employment Act (ADEA) bars discrimination against workers over 40 years of age because of age. The Americans with Disabilities Act bars discrimination against workers because of disability.

Similarly, the Washington Law Against Discrimination protects employees from discrimination because of race, creed, color, sex, age, marital status, presence of a disability, or use of a dog guide or service animal. Local statutes often provide protection based on some other status.

Employees who are disciplined and/or discharged may challenge the employer's action with the allegation that it was taken *because of* the employee's protected status. Although it is the employee's legal burden to prove that the discipline or discharge was because of discrimination, that burden is much easier if it appears that the employer has acted arbitrarily, capriciously or without a reason that can be understood by average jurors.

C. Wrongful Discharge Claims

1. Tort Claim for Public Policy Violation

Washington also recognizes two types of wrongful discharge claims. The first is a discharge in violation of public policy. *Thompson*, 102 Wn.2d at 232.

> Courts have found contravention of a clear mandate of public policy in four general areas: (1) where the discharge was a result of refusing to commit an illegal act; (2) where the discharge resulted due to the employee performing a public duty or obligation; (3) where the termination resulted because the employee exercised a legal right or privilege; and (4) where the discharge was premised on employee "whistleblowing" activity . . . .

Dicomes v. State of Washington, 113 Wn.2d 612, 618 (1989) (citations omitted).

An employee who is discharged may try to assert that she was discharged for one of these reasons. Again, although it is her burden to prove the wrongful motive, the defending employer is on firmer ground if there is an easily explained reason for its action and apparently fair procedures leading to the discharge.

2. Claim for Breach of Employer's Policies

The second theory of wrongful discharge is based on an employer's failure to follow its own published policies. *Thompson*, 102 Wn.2d at 229. Under this theory, the discharged employee must show that the employer created an atmosphere of job security and fair treatment with promises of specific treatment in specific situations, inducing him to remain on the job and not seek other employment. *Id.* at 230. In such instances, the employer has created an expectation and an obligation to treat employees in accord with its written promises.

An employee who is discharged in violation of published policies may assert a claim on that basis alone, although the potential damages are different and less than those available for a claim of public policy wrongful discharge.

D. Lack of "Cause" Under Bargaining Agreements or Other Contracts

In some situations, most commonly under collective bargaining agreements, the parties agree that employment may be terminated only for "cause." Some individual employment agreements contain a similar provision. In such instances, employment is not terminable at will, and the burden is on the employer to show that there was cause for any discharge. Cause may be defined in a particular contract. In the collective bargaining setting, there is a body of law, largely developed in arbitration, as to what constitutes cause.

Note that even in the absence of an express agreement, an employment relationship may also be terminable only for cause if there is an implied agreement to that effect or the employee has given consideration to the employer in addition to the contemplated service, *id.* at 233, for example, financial investment in the business.

E. Standards by Which Decision Is Judged

1. At-Will Employment

Was the decision discriminatory, retaliatory or in violation of public policy? Was it carried out in compliance with the employer's published policies?

2. Implied "Just Cause" Protection

Was the decision to discharge:

(a) not for an arbitrary, capricious or illegal reason,

(b) based on facts supported by substantial evidence, and

(c) reasonably believed by the employer to be true?

3. Express "Just Cause" Protection

This protection arises from a collective bargaining agreement, bilaterally negotiated employment contract, civil service law, tenure protections or similar source.

(a) Decision must be substantively correct;

(b) Decision must be procedurally fair and consistent with past practice; and

(c) Discharge must be reasonable penalty under the circumstances.

III. KEYS TO EFFECTIVE DISCIPLINE

A. Clear Communication

1. Setting the Standard

Tell employees clearly the rules or standards for conduct and performance. This may take the form of written work rules, orientation materials, communications in crew or staff meetings and/or individual one-on-one meetings. Although there are some standards that should be common sense, employers will be on the surest footing where they have let employees know what is expected.

2. Identifying the Deficiency

If discipline is contemplated or undertaken, tell the employee clearly what the problem is. Don't rely on vague terms like "bad attitude." Be specific. For example, if the employee's bad attitude surfaces through the disruption of meetings or a failure to carry out her share of unpleasant tasks, say so.

3. Expectation for Correction/Improvement

Describe what would demonstrate improved conduct: for example, "Don't speak in meetings without raising your hand and waiting to be called on," or "When it's your turn to clean out the refrigerator in the crew room, do it without being reminded." Set a time frame for the correction or improvement.

B. Consistency Tempered With Flexibility

Consistency is often the key to showing that discipline has not been discriminatory or retaliatory. If employees in similar situations are treated similarly, regardless of protected status, an employer has a strong defense to claims of discrimination, retaliation or violation of public policy. On the other hand, one instance of misconduct or poor performance may be markedly different in severity from another. Sometimes uniform treatment of situations is not necessarily fair treatment. Although some employers have strict rules that apply regardless, most will temper discipline depending on specific circumstances. In those situations, the reasons for lesser discipline in some situations should be based on a good reason that can easily be explained to and understood by a third party—such as a juror.

C. Progressive Steps as Appropriate

Many deficiencies in performance or conduct may be correctable. Common examples are absenteeism or sloppy workmanship. A generally accepted approach to correcting such problems is progressive discipline. Often, this takes the form of an initial informal discussion with the employee about the issue. If the misbehavior continues to occur, progressive steps impress upon the employee the seriousness of the need to improve. Typical steps include a formal oral warning, followed by a written warning, followed by a suspension if appropriate, followed by discharge. Progressive discipline is not appropriate in all situations, however. Employers who have a stated policy of progressive discipline should take care to reserve the right to determine when to utilize it. In situations where employment is terminable only for "cause," progressive discipline will be expected except where the employee's conduct clearly warrants immediate dismissal.

D. Documentation

A good idea is to keep a record of every disciplinary action, including informal discussions. This does not mean that a written document must go into the employee personnel file at an informal stage of the disciplinary process, but it is important to have some institutional memory of informal discussions or warnings. Because oral communications are often remembered differently by the participants, confirming even the informal conversations is another good idea: for example, "Just following up on our conversation from this morning. Reliable attendance is important, and I'm hoping to see you do better. Strive to be here on time every day."

Some employers keep disciplinary logs for notation of discussions and oral warnings. A notation that an oral warning was given also may be placed in the employee's file, if desired. Once discipline advances to the written stage, copies of warnings acknowledged by the employee should be retained in the employee's file. Written documentation should contain a succinct statement of the performance or conduct issue, the expected improvement and time frame for improvement, and the consequences of failure to improve.

E. Human Resources Involvement and Review

Many employers get their human resources professionals involved at every step in the disciplinary process. Others routinely involve human resources only as more severe disciplinary steps, including discharge, are contemplated. The role of human resources generally is to ensure that discipline is warranted by the circumstances and also that discipline is applied consistently across the organization. If the employer has written policies on discipline, human resources can assist in ensuring that the policies are followed.

In addition to providing advice on specific situations, human resources should periodically review the application of discipline within the organization. Are there patterns that suggest training would be helpful for particular departments or individuals? Does it appear that members of a particular racial or ethnic group are receiving discipline out of proportion to other segments of the workforce? Do disciplinary actions reflect good understanding of employer policies and documentation requirements? The answers to these questions may

indicate steps to be taken by management and human resources personnel to improve the working of the disciplinary process.

IV. GETTING TO DISCHARGE

A. Making the Decision

1. Are all facts recorded?

2. Are all documents assembled?

3. Is the employee aware of the problem?

4. In appropriate cases, have progressive disciplinary steps been taken and documented?

5. Has the employee had an opportunity to tell his or her side of the story?

6. Have you considered past similar situations to be certain your actions are consistent?

7. Have you complied with all internal review procedures or other practices called for by the organization's policies?

B. Logistics of Discharge

1. Communications to Employee

(a) Who will tell the employee;

(b) Who else will be there;

(c) Where and when the meeting will occur; and

(d) What to say.

While some supervisors or managers prefer sugarcoating the explanation, there is no good reason (other than a desire to avoid confrontation) not to tell the employee the reason for termination in a tactful way. The employer's representative should *never* give a false reason.

2. Security Issues

(a) Take necessary security precautions prior to discharge meeting.

(b) Escort individual from premises if appropriate.

(c) Retrieve or protect confidential information, including computer codes and programs.

(d) Retrieve other employer property, including identification and keys.

(e) Consider changing locks or security codes.

3. Option to Resign

There may be situations where an employer offers the employee a chance to resign in lieu of a discharge. This may be a compassionate gesture for employees whose discharge is warranted, but they have not engaged in willful misconduct or otherwise acted in bad faith or in derogation of the employer's interests.

C. Separation Agreements

Many employers consider offering a separation agreement to a discharged employee. Sometimes a separation agreement is viewed as a constructive way to end the employment of an employee whose deficiencies are not intentional. Some employers offer a separation agreement on almost all involuntary terminations of employment. The reason is simple: a separation agreement generally includes a release of all claims arising out of the employment or the termination of employment. A valid and enforceable release is the strongest protection against potential employee charges or lawsuits. Releases do raise several issues, however.

1. Form

For a general release of claims under Washington law, no particular form is required. The format can range from an informal letter to a highly formal separation agreement. There are particular requirements, however, for a valid release of claims under the ADEA. A binding release of claims of age discrimination under federal law requires the following substantive and procedural elements:

(a) The employee must receive additional consideration, i.e., something more than she is already entitled to receive;

(b) The release must expressly recite that it is a waiver of claims under the ADEA;

(c) The employee must be advised to seek her own attorney;

(d) The employee must be given at least 21 days to consider the agreement; and

(e) The employee must be given at least seven days after signing the release to revoke acceptance.

2. Purposes

Why does the employer want a release from this employee? The release must be carefully drafted to accomplish an effective bar to this employee's potential claims.

3. Presentation

Give careful thought to how to present the concept of a separation agreement and release. If the employee does not accept the offered release, it may be put before a jury as evidence of the employer's "guilty conscience." *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338 (9th Cir. 1987). Therefore, the approach to raising the idea must be carefully planned.

V. AFTER THE DISCHARGE

A. Communications About the Discharge

1. Co-Workers

Co-workers will have substantial interest in the termination of an employee. Anticipate that the rumor mill will be in high gear.

2. Customers and Suppliers

Customers and suppliers with whom the employee dealt—particularly if the employee had contracting or check-signing authority—will have to be informed.

3. References

Potential employers will likely attempt to contact the employee's former supervisor or co-workers. In July 2005, a Washington statute took effect that is designed to protect employers who give honest references on former employees. It provides:

> An employer who discloses information about a former or current employee to a prospective employer . . . at the specific request of that individual employer . . . is presumed to be acting in good faith and is immune from civil and criminal liability for such disclosure or its consequences if the disclosed information relates to: (a) The employee's ability to perform his or her job; (b) the diligence, skill, or reliability with which the employee carried out the duties of his or her job; or (c) any illegal or wrongful act committed by the employee when related to the duties of his or her job.

RCW 4.24.730(1).

The statute recommends that employers providing references keep a record of the identity of the person to whom information is disclosed. The former employee has a right to review the record. If there is clear and convincing evidence that an employer gave a reference that was knowingly false, deliberately misleading or made with reckless disregard for the truth, the presumption of good faith may be lost.

4. Liability

The aforementioned Washington statute protects employers who give references at the request of a prospective employer or employment agency. Generally speaking, however, employers in other situations should treat information about a former employee and the reasons for termination of the employment relationship as confidential. If such information is volunteered outside the context of a protected request, there could be potential claims by the former employee for defamation, blacklisting or interference with contract. Any statements concerning the employee should be truthful and limited to objective facts.

5. Authorization

Many employers ask departing employees to execute an authorization for references. Such authorizations may supplement the protection provided by the aforementioned Washington statute.

B. Compensation and Benefits

1. Final Paycheck

An employee is entitled to be paid by the end of the regular pay period. RCW 49.48.010.

2. Commissions and Bonuses

Commissions and regularly accrued bonuses are "wages," which must be paid according to the terms of the applicable policy or plan.

3. Withholding From Final Paycheck

It is unlawful to withhold any part of wages to repay or offset employee debt to an employer without express prior authorization from the employee. RCW 49.48.010. Illegal withholding risks double damages and attorneys' fees. RCW 49.48.030; RCW 49.52.070.

4. Vacation/Sick Leave

If accrued, and not subject to forfeiture upon termination, vacation time is generally paid out as part of compensation. If an employer wants to limit the obligation to pay out vacation time, its policy should be clearly stated to employees (e.g., with a policy that unused vacation is lost or that the maximum payout upon termination of employment will be a certain number of days or hours). In the absence of a written policy, an employer's practice should be consistent, and any departure from standard practice should be justified. Generally speaking, accrued, unused sick leave need not be paid out upon termination of employment. *Teamsters, Local 117 v. Northwest Beverages, Inc.*, 95 Wn. App. 767 (1999).

5. COBRA/Medical Insurance Continuation

a. For covered employers, all employees are entitled to COBRA coverage, unless discharged for "gross misconduct."

b. Continuation of medical insurance at the employee's expense is available for up to 18 months, or until the employee becomes covered under another group insurance plan.

c. The employee can be charged no more than 102% of the employer's per-employee cost.

d. The employer must notify the employee of COBRA continuation rights within 30 days of termination, and the employee has 60 days to elect coverage.

C. Unemployment Claims

1. Questionnaire

In Washington state, if the employer responds to the initial inquiry with the suggestion of a discharge for misconduct or a voluntary quit, the Employment Security Department responds with standard questionnaires. These should be answered with extreme care. Inconsistent statements will suggest pretext or other fault.

2. Presumption of Receipt of Benefits

Unemployment compensation provides benefits to any person unemployed through no fault of his or her own. RCW 50.01.010. Poor job performance is not "fault."

3. Disqualification for Misconduct

If terminated for "misconduct," the employee will be disqualified from receiving unemployment compensation. The burden is on the employer to prove:

(a) the employer has established a rule or policy that is reasonable under the circumstances of the work;

(b) the employee's conduct is connected with the work; and

(c) the employee's conduct violates the rule.

Macey v. Dep't of Employment Sec., 110 Wn.2d 308 (1988).

4. Off-Duty Misconduct

If the employee's actions were off-duty, the employer must also prove:

(a) the conduct has some nexus to the employee's work;

(b) the conduct results in some harm to the employer's interest; and

(c) the employee acted with the intent or knowledge that the employer's interest would suffer.

5. Inadmissibility of Determination

The results of any Employment Security Department proceedings are inadmissible in any other proceedings. RCW 50.32.097. Testimony *may* be used, however, as discovery or for impeachment. Thus,

(a) examination of the employee is valuable, but

(b) any employer witnesses must be carefully prepared, particularly because hearsay is admissible in the hearing.

D. Service Letter

Within ten days of a written request from the former employee, the employer must provide a statement of the reasons for discharge. WAC 296-126-050(3).

E. Review of Personnel File

1. Review Rights

Washington law gives employees the right to an annual review of their personnel file, and the ability to insert rebuttal material in the file. RCW 49.12.250 *et seq.* Former employees retain rebuttal rights for two years after termination. RCW 49.12.250(3).

2. Denial of Review

A technical legal argument can be made that the former employee has the right to insert rebuttal material into the file, but doesn't have the right to *review the contents* of the file. This conclusion is not certain, however; why force an employee to sue to get the file through discovery?

3. What Is a "Personnel File"?

Washington law offers no definition of the term "personnel file." However, the Washington State Department of Labor and Industries has interpreted the term "personnel file" to include "records that are regularly maintained by the employer as part of the business records or those that are subject to reference for information given to persons outside the company." Specifically, these records include:

- records of employment and such other information required for business or legal purposes;
- documents containing employee qualifications;
- verification of training completed;
- signed job descriptions;
- supervisor files;
- all performance evaluations, letters of commendation and letters of reprimand;
- salary, sick and vacation leave hours; and
- summaries of benefits and other similar information.

Care must be taken to not include documents in the personnel file to which the employee would not be entitled, such as correspondence with counsel or notes memorializing conversations with counsel.