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Pacific Northwest Labor and Employment Law Departments

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

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

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

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Seattle, Washington

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Our Presenters

Mike Reynvaan, partner with Perkins Coie LLP, focuses on labor and employment, sports law, and the wine industry. He is the head of the Wine Industry practice at Perkins, which now encompasses Corporate Formation, Mergers and Acquisitions, Water Rights, Land Use, State and Federal Regulatory Compliance, Trademark and Copyrights, and Dispute Resolution. Mike is listed in *The Best Lawyers in America* and *Washington Law & Politics,* "Washington's Super Lawyers." His family has planted a vineyard and is starting a winery in Walla Walla.

Maralee (Marti) M. Downey, as a member of the Labor & Employment practice, helps defend companies in matters arising under federal and state laws, including the Family and Medical Leave Act, the Civil Rights Act, the Americans with Disabilities Act, the National Labor Relations Act, the Age Discrimination in Employment Act, and the Washington Law Against Discrimination. She also provides advice and training to employers on a variety of topics, including hiring, medical leave, harassment, employee termination, and handbooks. In addition to her representation of private employers, Marti counsels and defends Washington school districts in connection with personnel issues and issues arising under the Washington Public Records Act.

Sonia Cook focuses her practice on labor and employment law. As a member of the firm's Labor & Employment practice, Sonia counsels and defends clients on matters arising from the complex task of managing and maximizing a twenty-first century workforce. Sonia's work revolves around her mission to cultivate positive relationships between employers and workers. Particular areas of interest include implementing best employment practices, avoiding workplace discrimination, and navigating privacy and security rights and responsibilities. In addition to employment matters, Sonia keeps abreast of the latest developments in election and immigration law and volunteers her time to advocate for youth in the juvenile justice system.

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Spring 2009 Employment Law Update

By Mike Reynvaan, Marti Downey, and Sonia Cook

I. SIGNIFICANT LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. FEDERAL DEVELOPMENTS

1. Department of Labor Revises Existing FMLA Regulations and Issues New Regulations Implementing Military Family Leave Entitlements

On November 17, 2008, the Department of Labor ("DOL") issued a comprehensive set of revisions to the regulations implementing the Family and Medical Leave Act ("FMLA") and issued new regulations implementing the military leave entitlements enacted by Congress as part of the 2008 National Defense Authorization Act. The new regulations, which took effect on January 16, 2009, are the first significant revisions to the FMLA regulations since the law was enacted 15 years ago and will affect all employers subject to the FMLA.

New Regulations Provide Clarification Regarding Military Family Leaves

Qualifying Exigency Leave: Under qualifying exigency ("QE") leave, eligible employees of covered employers may take up to 12 weeks of FMLA leave due to a "qualifying exigency" that arises because the employee's spouse, son, daughter or parent is on active duty or has been notified of an impending call to active duty in support of a "contingency operation," as defined under specific military statutes.

Family members are defined broadly. For example, a "son or daughter" includes an employee's biological child, adopted child, foster child, legal ward, stepchild, or one for whom the employee stood in place of a parent, regardless of age.

The new regulations clarify that QE leave applies only to families of members of the National Guard, the military Reserves, and certain retired members of the military, not to families of active members of the regular armed services. The regulations also contain a "specific and exclusive" list of reasons for QE leave:

(1) Issues arising out of short-notice deployment, meaning a call or order that is given no more than seven calendar days before deployment;

(2) Military events and related activities;

(3) Urgent childcare and school activities arising from active duty/call to active duty status;

(4) Financial or legal tasks arising from active duty/call to active duty status;

(5) Counseling for the employee, the covered service member, or the covered service member's minor/dependent child where the need for counseling arises out of active duty/call to active duty status;

(6) Time spent with the covered service member on rest and recuperation breaks during deployment, for up to five days per break;

(7) Post-deployment military events and related activities; and

(8) Any other purposes arising out of the call to duty, as agreed upon by the employee and employer.

Employers may require certification for QE leave by requesting a copy of the service member's active-duty orders, for example. However, if the employee provides a complete, sufficient certification supporting his or her request for QE leave, the employer may not request additional information. Recertification for QE leave is not permitted.

The regulations also allow an employer to verify with a third party that the employee met with the third party (a teacher, or counselor, for example) while on leave.

<u>*Military Caregiver Leave*</u>: Under military caregiver leave, eligible employees may take up to 26 weeks of FMLA leave during a single 12-month period to care for a spouse, daughter, son, parent or next of kin who is a "covered service member." A "covered service member" is a person who is a member of the regular Armed Forces, the Reserves or the National Guard or anyone in one of these categories who is on the temporary disability retired list. The service member must have a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation, therapy or outpatient care.

As with QE leave, family members are defined broadly. The new regulations also address "next of kin," which is defined as "the nearest blood relative other than the covered service member's spouse, parent, son, or daughter." A service member can designate in writing a specific blood relative to be his "next of kin" for purposes of caregiver leave. Absent such a designation, the order for "next of kin" is as follows: (1) blood relatives who have been granted legal custody by a court or statute; (2) brothers and sisters; (3) grandparents; (4) uncles and aunts; and (5) first cousins.

There is a separate "FMLA year" for military caregiver purposes, beginning the first day the employee takes military caregiver leave and ending 12 months later. Employees are entitled to a combined total of 26 weeks of leave for any FMLA-qualifying reason during this 12-month period. For example, if an employee uses 15 weeks of FMLA leave during a single 12-month period to care for a covered service member, then that employee is limited to 11 additional weeks of leave during that single 12-month period for any other FMLA-qualifying reason. Note that if military caregiver leave also qualifies

as leave to care for a family member with a serious health condition, the employer must designate the leave as military caregiver leave.

Military caregiver leave entitlement is determined on a per service member, per injury basis. The 26 weeks of leave do not carry over from year to year.

Employers may require certification of the need for military caregiver leave. The DOL offers an optional form for caregiver certification (WH-385), but employers must accept "invitational travel orders" and "invitational travel authorizations" issued by the Department of Defense to family members to join an ill service member as sufficient certification, at least until the order's or authorization's expiration date. Employers may seek authentication or clarification of the certification, but employers may not seek second or third opinions or recertification.

New Regulations Contain Notable Nonmilitary Revisions to FMLA Regulations

The new regulations are intended to provide clarification for both employers and employees regarding their rights and responsibilities under the FMLA, and to address rulings issued by the U.S. Supreme Court and lower courts that have invalidated portions of the DOL's previous regulations. The final regulations adopt many of the regulatory changes proposed in February 2008, and on the whole grant employers greater flexibility in managing employee leave. Below are some of the main nonmilitary changes included in the final DOL regulations.

Eligibility Clarifications:

12 months: To be eligible for FMLA leave, an employee must have been employed by the employer for at least 12 months. These 12 months do not have to be consecutive. Thus, under the previous regulations, questions had arisen concerning how to count an employee's past service toward the 12-month requirement. The final regulations clarify that employment prior to a break in service of seven years or more does not have to be counted toward the 12-month requirement. There are, however, exceptions to this rule for military service and certain types of rehire agreements that anticipate a break in service longer than seven years.

Worksite: To be eligible for FMLA leave, an employee must work at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite. The worksite of a jointly employed employee is the primary employer's office from which the employee is assigned or reports *unless* the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that facility for purposes of determining whether the 50 employee/75 mile requirement has been satisfied.

Serious Health Condition: The final regulations maintain the six definitions of "serious health condition" and provide additional guidance. For leave involving incapacity of three consecutive, full-calendar days, the employee must receive either (1) two treatments from a health care provider within 30 days of the first day of incapacity or (2) one treatment that results in a regimen of continuing treatment. In either case, the

first treatment must occur in the first seven days. For leave involving a chronic condition that requires "periodic visits" to a health care provider, the final regulations clarify that at least two visits to a health care provider per year are required.

Employer Notice Obligations: The final regulations require four types of notice: general notice, eligibility notice, rights and responsibilities notice, and designation notice. As a general rule, employers are now required to provide notice within five business days (previously two).

General Notice: All employers must take some immediate steps in order to ensure compliance with the new general notice requirements. First, every employer covered by the FMLA must post a notice explaining employee rights and responsibilities under the FMLA—including the new rights created by the military family leave amendments. An employer can fulfill this requirement by posting the newly revised DOL "Employee Rights and Responsibilities" poster on its premises in conspicuous places where employees work. Covered employers must post this general notice even if they do not have any employees currently eligible to take FMLA leave. The final regulations provide that the general notice may be electronically posted, as long as it includes all of the information in the updated poster and is accessible to all employees and job applicants. Second, if an employer has even one employee eligible for FMLA leave, the new regulations require the employer to also provide each of its employees individually with general notice information—including, at a minimum, all of the information contained in the new DOL poster. Employers can provide the information to employees through employee handbooks or other written guidance given to employees covering benefits or leave rights, or if the employer has no employee handbook or other written guidance on employee benefits or leaves, by distributing a copy of the general notice to each employee upon hire. Either way, the final regulations allow the employer to distribute this information electronically. Employers that have employee handbooks must update their handbooks immediately to include the required general notice information. In addition, if an employer's workforce is comprised of a significant portion of workers who are not literate in English, then the employer must provide the general notice in a language in which the employees are literate.

A copy of the new DOL "Employee Rights and Responsibilities" poster is available on the DOL Web site at http://www.dol.gov/esa/whd/regs/compliance/posters/fmlaen.pdf.

Eligibility Notice: Employers must notify employees in either the eligibility notice or the designation notice (see below) of how much FMLA leave they have available. Only one eligibility notice is required per qualifying FMLA reason, per year. If an employer notifies an employee that the employee is ineligible for FMLA leave, the employer must provide the employee with at least one reason for ineligibility.

Rights and Responsibilities Notice: The rights and responsibilities notice must be provided with the eligibility notice and includes information on furnishing certification (and the consequences of not doing so), the right to substitute paid leave, and the requirement of paying health insurance premiums while on leave. The notice should also include any required certification forms.

Designation Notice: Once the employer has enough information to determine whether there is an FMLA-qualifying reason for the requested leave (usually after the employer receives certification), the employer has five business days within which to notify the employee of whether the leave will be designated and counted as FMLA leave. In the designation notice, or earlier, the employer must notify the employee if he or she will be required to provide a fitness for duty certification to return to work. If the employer wants the fitness for duty certification to reflect the employee's ability to perform the essential functions of his or her job, the designation notice must include a list of the essential functions.

Employee Notice Obligations: Where the need for leave is foreseeable, employees must give at least 30 days' notice. If 30 days' notice is not practicable, the employee must provide notice "as soon as practicable." In the case of unforeseeable leave, employees must provide notice "as soon as practicable." According to the final regulations, this means that employees must follow an employer's usual and customary call in procedures for reporting an absence, unless there are unusual circumstances (such as a medical emergency). An employer may deny or delay FMLA leave when an employee fails to comply with the employer's procedures and there are no unusual circumstances justifying noncompliance.

Medical Certification: Under the final regulations, employers have five business days to request certification, and the employee has 15 calendar days to submit certification. Employees have at least seven days to cure incomplete or insufficient certifications, following written notice of the insufficiency.

The final regulations permit annual certifications of conditions lasting more than one year. In addition, employers can contact the employee's health care provider directly to obtain authentication (verification that the information on the certification is complete and authorized) and/or clarification (e.g., deciphering handwriting or understanding the meaning of a response), provided the employee has been given an opportunity to cure a faulty certification. The employer representative responsible for contacting the health care provider must be (1) a human resources specialist; (2) a leave administrator; (3) a manager; or (4) a health care provider. The employee's direct supervisor is never permitted to contact the employee's heath care provider. Employers are required to obtain valid Health Insurance Portability and Accountability Act ("HIPAA") authorization to contact HIPAA-covered health care providers.

Fitness for Duty Certification: Under the final regulations, an employer may require the employee to have the employee's health care provider certify that the employee is fit to perform the essential functions of the job. In order to do this, however, the employer must provide the employee with a list of the job's essential functions when it provides the designation notice, and the employer must tell the employee at the time of designation that the employee will be required to have the employee's health care provider certify the ability to perform essential job functions. An employer may also require an employee on intermittent leave to submit a fitness for duty certification where there are reasonable safety concerns, defined as a "reasonable belief of a significant risk of harm to the individual employee or others."

Substitution of Paid Leave: The previous regulations applied different procedural requirements to the use of paid vacation or personal leave than to medical or sick leave. Under the final regulations, all forms of paid leave offered by an employer will be treated the same, regardless of title. An employee that elects to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer's policy that apply to other employees who use such leave. The employee is always entitled to unpaid FMLA leave if he or she does not qualify for paid leave. The employer may also waive the procedural requirements for taking any form of paid leave.

Light Duty: At least two courts have held that when an employee accepts a "light duty" assignment after FMLA leave, the light duty assignment counts as FMLA leave. The final regulations reject this interpretation and clarify that an employee who voluntarily performs a light duty assignment is not on FMLA leave. The employee's right or reinstatement to his or her former position or an equivalent position is held in abeyance during the light duty assignment or until the end of the applicable 12-month FMLA leave year.

Perfect Attendance: Under the previous regulations, an employer was not permitted to disqualify an employee from perfect attendance awards (or similar awards related to hours worked and/or products sold) due to an absence caused by FMLA leave. The final regulations permit an employer to deny a perfect attendance award to an employee who does not have perfect attendance due to FMLA leave, but only if the employer treats employees who take non-FMLA leave in an identical manner.

Waiver of FMLA Claims: The final regulations clarify that employees may voluntarily settle or release their past FMLA claims without court or DOL approval. Prospective waivers of FMLA rights, however, remain prohibited.

Employer Liability/Penalties: The previous regulations stated that an employee's leave did not count against the employee's FMLA entitlement until the employer designated the leave as FMLA leave. However, the U.S. Supreme Court invalidated this portion of the regulations. In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), the Supreme Court held that the previous regulations' "categorical" penalty for failure to appropriately designate leave, which would have required employers to provide leave above and beyond the statute's 12-week allotment, was inconsistent with the statutory entitlement to 12 weeks of FMLA leave and contrary to the statute's remedial requirement that an employee must demonstrate individual harm. Consistent with the *Ragsdale* decision, the final regulations remove the "categorical" penalty provisions and clarify that an employer may be liable where an employee suffers individualized harm because the employer failed to follow the notification rules.

Revised Forms: Employers should note that the DOL has substantially updated its FMLA forms to reflect the changes in FMLA leave administration under the new regulations. These updated forms, including certification forms, FMLA eligibility notice and FMLA designation notice, are available on the DOL Web site at http://www.dol.gov/esa/whd/fmla/.

2. President Obama Signs the Lilly Ledbetter Fair Pay Act

Signed into law on January 29, 2009, the Lilly Ledbetter Fair Pay Act (Pub. L. No. 111-2) (the "Act") overturns the U.S. Supreme Court's opinion in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). In *Ledbetter*, the Supreme Court held that a plaintiff bringing a claim for discriminatory pay practices had to show that the discriminatory acts affecting his or her pay occurred during the 180 days (for states without a fair employment agency) or 300 days (for states with a fair employment agency) prior to the filing of a discrimination charge. The Act eliminates this required showing by amending Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Rehabilitation Act. Each statute will now permit the period for an employee to file a charge of pay discrimination to be triggered each time the employee receives an allegedly discriminatory paycheck, even if the pay decision was made much earlier. Under the so-called "paycheck rule," each paycheck triggers a new 180- or 300-day filing period.

The Act Is Retroactive

The Act is retroactive to May 28, 2007, which is the date of the U.S. Supreme Court's decision in the *Ledbetter* case. Therefore, pending pay discrimination cases that might otherwise have been dismissed as time-barred might now remain active.

The Act Does Not Affect the Two-Year Cap on Back Pay Damages

While the Act does affect the statute of limitations for compensation-related discrimination claims, it does not change other elements of antidiscrimination law, such as remedies and burdens of proof. Thus, for example, a plaintiff's back pay damages remain capped at two years. Although plaintiffs under the Act can now look back to the first day of their employment for evidence of discrimination, they cannot recover back pay for a period longer than two years.

The Act May Apply to Retirees

Finding 4 in Section 2 of the Act states that "[n]othing in this Act is intended to change current law treatment of when pension distributions are considered paid." The language in this finding has led to uncertainty regarding if and how the law will apply to retirees. Because the Act applies to "wages, benefits, or other compensation," pensions are likely covered by the Act in some manner. Plaintiffs may attempt to raise claims of pension benefit discrimination, either as of the date the pension is calculated or the date of the first annuity check. In *Florida v. Long*, 487 U.S. 23 (1988), the U.S. Supreme Court held that there are limits regarding a retiree's ability to disrupt an employer's reasonable expectations of payments to be made on a pension plan. It remains to be seen how the courts will balance this precedent against the new time-limit formula created by the Act. Answers may be on the way, as the U.S. Supreme Court is currently considering a case brought by a group of female AT&T Corp. employees who allege that they have been shortchanged on pension benefits based on a penalty issued

for maternity leave taken 30 years ago. (The case is *AT&T Corp. v. Hulteen*, No. 07-543 (U.S.).)

The Act May Cover Promotions

The text of the Act states that "an unlawful employment practice occurs . . . when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice."

Because the term "other practice" is vague, it is possible that promotions are covered by the Act. However, as Justice Ginsburg explained in her *Ledbetter* dissent, promotions are different from secret compensation decisions, because employees are aware of promotions when they happen. Congressional intent underlying the Act appears to have been directed at the adverse effects of practices that may not have been known at the time they occurred. The issue of promotions will likely be a hot topic in upcoming pay discrimination litigation.

Next Steps for Employers?

Employers should resist the temptation to jump into any rushed statistical analysis. Such assessments should be approached with caution. The implementation of a self-audit is complicated and, when done hastily and without assistance of counsel, can create more problems than it may resolve. Valid statistical assessments should generally be undertaken only for the purpose of obtaining legal advice. Any study of pay practices should be undertaken carefully and with the assistance of expert statisticians or labor economists. The first step is for an employer to consult with its attorney to determine what information the attorney needs to make an evaluation. An attorney will be able to discuss whether and to what extent any such review may be discoverable in subsequent litigation, and what actions are appropriate once the results are known. Undertaken properly, compensation analyses can be informative, can support adjustments in compensation, where appropriate, and can help to reduce potential future liability on compensation claims.

3. President Obama Signs Three Labor-Friendly Executive Orders Affecting Government Contractors

On January 30, 2009, President Obama signed three Executive Orders that will impact the relationship between government contractors and union employees.

Nondisplacement of Qualified Workers Under Service Contracts

President Obama's Executive Order entitled "Nondisplacement of Qualified Workers Under Service Contracts" provides, with a number of exceptions, that where one contractor is replaced by another performing the same or similar services at the same location, then the successor contractor must offer a "right of first refusal" of employment

to qualified employees of the predecessor contractor. The right of first refusal is inapplicable to supervisors and managers, and the successor contractor is permitted to employ fewer workers than the predecessor contractor. A successor contractor may offer work to its own personnel who have worked for it for at least three months immediately prior to the commencement of the new contract and "who would otherwise face lay-off or discharge." Successor contractors are not required to offer a right of first refusal to any employee of the predecessor contractor who is not a service employee within the meaning of the Service Contract Act of 1965, as amended (41 U.S.C. 357(b)). Furthermore, successor contractors are not required to offer a right of first refusal to an employee of the predecessor contractor "whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job." Generally speaking, the successor contractor may not make an offer of new employment until it has offered the right of first refusal to the predecessor contractor's employees. Willful violation of the Executive Order could result in debarment from future government contract work.

Notification of Employee Rights Under Federal Labor Laws

Under the National Labor Relations Act ("NLRA"), contractors must post notices that describe employees' rights to organize under the Act. The Executive Order signed by President Obama entitled "Notification of Employee Rights Under Federal Labor Laws" requires contractors to post notices that describe employees' rights to organize. The new Executive Order policy revokes the Bush-era policy, expressed in Executive Order 12301, requiring contractors to post information informing employees of their right ***not*** to join a union and their right to take issue with dues used for purposes other than collective bargaining, contract administration and grievance adjustment. Contractors who violate the new executive policy not only risk termination of their government contracts, but also being declared ineligible for future government contracts.

Economy in Government Contracting

Under President Obama's Executive Order entitled "Economy in Government Contracting," contractors will not be reimbursed for funds spent attempting to persuade employees to unionize, to not unionize, or that "concern the manner of exercising, rights to organize and bargain collectively." For example, the policy prevents reimbursement of certain costs – those associated with distributing printed materials, engaging consultants or legal counsel, holding meetings, or conducting activities by managers, supervisors or union representatives during work hours – that are designed to influence employees' decision to bargain collectively. The policy requires such costs to "be excluded from any billing, claim, proposal, or disbursement applicable to any such Federal Government contract." The Executive Order directs the Federal Acquisition Regulatory Council (FAR Council) to adopt rules and regulations necessary to implement the Executive Order.

4. EEOC Releases Proposed Regulations to Implement Law Banning Genetic Discrimination

On March 2, 2009, the Equal Employment Opportunity Commission ("EEOC") published proposed regulations to implement the Genetic Information Nondiscrimination Act ("GINA"). GINA is the first expansion of the EEOC's jurisdiction since the Americans with Disabilities Act ("ADA") was enacted nearly 20 years ago. GINA prohibits employment discrimination based on individuals' genetic information. In addition, GINA restricts employers and other covered entities from (1) acquiring individual or family genetic information from job applicants and employees, (2) requiring genetic tests, and (3) disclosing private medical data. GINA's employment provisions, Title II of the act, take effect November 21, 2009. The final version of the proposed regulations will be codified at 29 C.F.R. pt. 1635. The deadline for publishing the final regulations is May 21, 2009.

The proposed regulations implement GINA's general rule that employers may not request, require, or purchase genetic information regarding a job applicant or employee. The proposed regulations describe GINA's five exceptions to the general rule prohibiting acquisition of genetic information, including: (1) inadvertently requesting or requiring genetic information; (2) acquiring genetic information as part of voluntary health or genetic services programs, such as a voluntary wellness program; (3) acquiring genetic information in connection with a request for FMLA leave; (4) acquiring genetic information that is commercially and publicly available; and (5) acquiring genetic information in connection with genetic monitoring of the biological effects of toxic substances in the workplace. The proposed regulations also describe GINA's six narrow exceptions to the rule prohibiting disclosure of genetic information, including disclosure: (1) to the individual to whom the genetic information relates; (2) to an occupational health researcher; (3) to comply with a court order; (4) to comply with the requirements of the FMLA, or similar state and local laws; (5) to government officials investigating GINA compliance; and (6) to government health officials in connection with a family member's contagious disease.

The EEOC is seeking public comment on how to define the term "voluntary" in the context of an exception that permits employers to obtain genetic information as part of a "voluntary" wellness program. Under the ADA, the EEOC has defined a voluntary wellness program as one that does not require employees to participate and does not penalize employees who decline to participate. The EEOC is also seeking public comment on an exception for genetic information acquired through "commercially and publicly available" sources. GINA explicitly lists newspapers, magazines, and books as sources of public information. In addition, the EEOC's proposed regulations add electronic sources such as the Internet, television, and movies. Specifically, the EEOC is soliciting comments on whether these electronic sources should remain in the regulations, and whether other sources such as social networking sites or personal Web sites should also be added to the list.

EEOC stakeholders have already asked for additional illustrative examples of employment practices that GINA either prohibits or allows. For concepts like "genetic

test," "genetic information," and "manifested disease," which are defined in the proposed regulations, stakeholders are asking the EEOC to provide clear examples of such concepts that can remain flexible as science changes. Guidance has also been requested with respect to defining what constitutes "inadvertent" acquisition of genetic information. For example, the Equal Employment Advisory Council, an association of large employers, has asked for a regulation providing that an employer's request for medical certification when an employee requests FMLA leave falls within a GINA exception. They have also asked for assurance that if an employer complies with the ADA regarding storage of confidential medical information, then it is complying with GINA as well. The Society for Human Resource Management has asked for more guidance regarding situations that do not fall squarely into the exceptions enumerated in GINA. For example, they have asked that genetic information that an employee self-discloses to the employer be classified as "inadvertent," and that an employer's acquisition and disclosure of medical information associated with a sick leave program that is not FMLA-qualifying be included in the FMLA exception.

The proposed regulations state that GINA does not limit protections available under federal, state, and local laws, including privacy laws, particularly those that offer equal or greater protection to individuals. Nor does GINA limit individual rights under state workers' compensation laws and laws prohibiting disability discrimination. The proposed regulations also state that the HIPAA privacy rule, not GINA, governs the obligations of HIPAA-covered entities regarding genetic data that constitutes protected health information. Finally, the proposed regulations clarify that GINA does not limit or expand federal agencies' rights to conduct or support health and occupational research. Nor does GINA limit the statutory or regulatory authority of the Department of Labor's Occupational Safety and Health Administration or Mine Safety and Health Administration, or any other workplace health and safety laws and regulations. The proposed regulations also include a stipulation that the EEOC will not punish employers for neutral policies that have a disparate impact on employees with genetic diseases.

The text of the EEOC proposed regulations may be accessed online at: http://op.bna.com/dlrcases.nsf/r?Open=kmgn-7pnndx

5. Employee Free Choice Act Loses Momentum, but Federal Labor Law Will Likely Change

The much-publicized Employee Free Choice Act ("EFCA") was reintroduced in Congress March 10, 2009. Among other things, the legislation in its current form (H.R. 1409, S. 560) would amend the NLRA to require the National Labor Relations Board ("NLRB") to certify a union as the representative of employees if a majority of employees signs union authorization cards. By doing away with an employer's right to demand a secret ballot election, the EFCA would inevitably increase unionization across the country by making it easier for employees to organize. The EFCA would also allow parties unable to reach a first contract after 90 days of collective bargaining to refer the dispute to the Federal Mediation and Conciliation Service. If, after 30 days, the dispute is unresolved, the EFCA would require the dispute to be referred to binding arbitration.

In addition, the EFCA would increase the penalties for labor law violations by employers.

The EFCA hit a roadblock on March 24, 2009, when Senator Arlen Specter (D-Pa.), who voted to allow debate on the bill in 2007, announced that he would not support the bill in its current form. Stakeholders had been considering Specter as a potential 60th vote to break an anticipated Senate filibuster. Specter stated that the main reason for his opposition was the elimination of the secret ballot, which he considers "the cornerstone of how contests are decided in a democratic society." Although the bill would allow employees to choose between card check and secret ballot elections, opponents to the EFCA argue that unions would always seek card checks. Furthermore, Specter announced that the recession made it a particularly bad time to enact the EFCA. Specter noted that if the NLRA was not amended in another way, then he would be willing to reconsider the EFCA after the economy normalizes. Adding to the bill's decreasing momentum, Senator Dianne Feinstein (D-Calif.) and Senator Blanche Lincoln (D-Ark.) have since announced that they would not support the EFCA in its current form.

The battle over the federal labor law, however, is far from over. Although the EFCA appears to be stalled for now, it is only the most extreme of several proposed "reforms" that would fundamentally change current labor laws to strengthen unions in their organizing activities. Even centrist Senators support some of these "reforms." They include the RESPECT Act that would allow working supervisors, who now are treated as members of management, to be represented by unions just as rank-and-file employees are. Other "reforms" would allow unions to come into company cafeterias and break rooms to talk directly with employees in the workplace. These dramatic changes in the law come on top of resurging growth by unions. Nationwide, they added nearly half a million members in 2008 – the biggest annual gain since the government began keeping records in 1983. It was the second straight year that unions have added to their ranks.

Under the Obama Administration, unions have advocates in the highest offices and majority support in Congress. These individuals are advocating many of the labor "reforms" referenced above that will make it much easier for unions to gain the right to represent employees. In the current economy, the general public appears more open to union organization as well. The results of a Gallup poll released on March 17, 2009, reveal that a majority of Americans would favor a new law making it easier for labor unions to organize workers. Although the poll also found that the majority of Americans do not closely follow the issue, the public's general support for the idea of easing union organizing is telling.

Employers who believe it is in their best interests, and the best interests of their employees, to remain union free must take proactive preventive steps to maintain that status. Employers should take immediate steps to ensure that their employees are treated fairly and consistently at all levels and will not feel the need to seek union representation to achieve the dignity, respect, and competitive wages and benefits they deserve. To that end, employers may want to implement additional training for

supervisors so that they become more effective leaders. There is nothing more important in a union prevention program than effective first-line supervision. Now is also a good time for employers to review their employee policies to ensure that they provide meaningful and effective avenues for resolving employee complaints.

There are a number of other steps employers can and should consider to make it less likely that employees will sign union cards and to be in the best possible position to fend off a union drive. Studies of NLRB elections show that it is too late to prepare properly for a union organizing drive, much less deter organizing efforts, after a union has knocked on the door. In the current political and economic climate, employers are strongly encouraged to have a candid discussion with experienced labor counsel about what they can do now to adequately prevent unionization.

6. Proposed Legislation Would Amend the Equal Pay Act, Provide Paid Family Leave for Federal Employees, Expand the FMLA, and Allow Comp Time for Overtime

The national economic crisis has made employment law an exceedingly hot topic in the nation's capital, as evidenced by the proposed legislation discussed below.

a. Paycheck Fairness Act of 2009 (H.R. 12; S. 182)

The Paycheck Fairness Act of 2009 ("PFA") would amend the Equal Pay Act ("EPA") by revising the EPA's "other factor" exception to the general prohibition on wage rate differentials between men and women in the same establishment performing equal work. Currently, employers are prohibited from paying lower wages to an employee of one sex than to an employee of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. The EPA includes a number of exceptions to this rule including where such payment is made pursuant to a differential "based on any other factor" other than sex. The PFA would limit the "other factor" defense to "bona fide factors" such as education, training, or experience. The PFA would also limit the application of the "bona fide factor" exception to situations where the employer can demonstrate that the factor is (1) not based on or derived from a sex-based differential in compensation; (2) job-related with respect to the position in question; and (3) consistent with business necessity. Conversely, the "bona fide factor" defense would not apply where the employee bringing the claim was able to demonstrate that (1) an alternative employment practice exists that would serve the same business purpose without producing such a differential and (2) the employer has refused to adopt such an alternative practice.

The EPA also includes provisions that (1) prohibit retaliation for inquiring about, discussing, or disclosing the wages of the plaintiff employee or another employee in response to a complaint or charge, or in furtherance of a sex discrimination investigation, proceeding, hearing, or action, or an employer's internal investigation; (2) authorize compensatory and punitive damages in civil actions; (3) state that actions to enforce the provisions of the FPA may be brought as class actions in which individuals

may be joined as party plaintiffs without their consent (i.e., an "opt out" provision); and (4) authorize the Secretary of Labor to seek additional compensatory or punitive damages in sex discrimination actions.

The FPA has been passed by the House and is currently pending in the Senate.

b. Federal Employees Paid Parental Leave Act of 2009 (H.R. 626; S. 354)

Under the Federal Employees Paid Parental Leave Act of 2009 ("FEPPLA"), four of the 12 weeks of leave currently provided for the birth or adoption of a child under the FMLA would be designated as paid leave for federal employees. In addition to providing paid leave, this measure would allow federal employees to substitute accrued paid leave in lieu of the 12 weeks of unpaid leave currently provided by the FMLA. Currently, federal employees may ask to substitute paid leave, but federal agencies are not required to approve the requests in all circumstances. On March 25, 2009, FEPPLA was approved by the House Oversight and Government Reform Subcommittee on Federal Workforce, Postal Service, and the District of Columbia.

c. Family and Medical Leave Enhancement Act (H.R. 824)

The Family and Medical Leave Enhancement Act ("FMLEA") would amend the FMLA to allow employees to take "family wellness" leave to accompany family members to regularly scheduled medical appointments. The proposed legislation would also permit workers to take "parental involvement" leave to participate in their children's and grandchildren's educational and extracurricular activities. Under the FMLEA, employees would also be permitted to take "parental involvement" leave to meet routine family medical care needs and to assist elderly family members. The FMLEA would also expand the scope of FMLA coverage to include businesses with 25 or more employees (currently, the FMLA only applies to businesses with 50 or more employees).

d. Family-Friendly Workplace Act (H.R. 933)

The Family-Friendly Workplace Act ("FFWA") would amend the Fair Labor Standards Act ("FLSA") to authorize private employers to offer employees compensated time off (comp time) at the rate of one and one-half hours per hour of employment for which overtime compensation is required. The bill specifies that employers are authorized to provide comp time in lieu of cash overtime only if such payment is permitted by the applicable collective bargaining agreement ("CBA") or, in the absence of a CBA, a written agreement between the employer and the employee. The bill would reserve employees the right to select payment in overtime cash wages rather than comp time. Under the FFWA, comp time agreements may not be made a condition of employment. Moreover, the FFWA does not affect the manner in which overtime wages are calculated or the existence of the 40-hour workweek. Thus, under the FFWA, a worker who works 48 hours in one week could elect payment for the eight hours of overtime by

accepting a check for eight hours of pay at time and one-half (the current method), or the employee could elect payment in the form of twelve hours of comp time.

According to Representative Mike Rogers (R-Mich.), the purpose of the FFWA is to even the playing field for hourly workers who are less able to take unpaid leave under the FMLA. Some Democrats have expressed concerns that the bill might undermine the FLSA or deprive hourly workers of overtime pay. In contrast, Republicans in both the House and the Senate have made repeated attempts to extend comp time to the private sector.

B. STATE DEVELOPMENTS

1. State Minimum-Wage Increases Currently in Effect in Washington and Oregon

As of January 1, 2009, state minimum-wage rates have increased in Washington and Oregon. Washington's cost-of-living increase brings the effective minimum-wage rate to $8.55 per hour. The prior rate in Washington was $8.07 per hour, and the 48-cent increase is based on a 5.9 percent increase in the cost of living in Washington over the last year. In Oregon, the prior minimum-wage rate was $7.95 per hour. The current rate in Oregon, effective January 1, 2009, is now $8.40 per hour. The adjustment reflects the cost of living defined by the August Consumer Price Index, which increased 5.4 percent from one year ago. As of July 24, 2008, Congress raised the federal minimum wage rate to $6.55 per hour. An employer must pay the highest federal or state minimum-wage in the state where its employees work.

2. Washington Developments

a. Governor Gregoire Signs Bills on Prevailing Wages and Worker Licenses

In April 2009, Washington State Governor Christine Gregoire signed into law two construction-related bills that establish the definition of "independent contractor" for prevailing wage purposes (Substitute S.B. 5904) and ensure that prevailing wages are paid on public works (S.B. 5903). Also, on April 9, 2009, Governor Gregoire signed a bill requiring construction workers to carry copies of their licenses and permits (Substitute H.B. 1055). These new laws will take effect on July 26, 2009.

Substitute S.B. 5904 Defines an Independent Contractor for Prevailing Wage Requirements Applicable to Public Projects

Substitute S.B. 5904 establishes that under prevailing wage requirements of public projects, a worker is considered an independent contractor exempt from prevailing wage requirements if he or she:

- performs services outside the "usual course of business" of the contractor for whom he or she works;

- is customarily engaged in an independently established trade;
- is responsible for filing paperwork with the Internal Revenue Service;
- is registered with the Department of Revenue;
- is not directed or controlled regarding the performance of services;
- maintains books and records separate from the contractor for whom he or she works; and
- Possesses contractor licenses and registrations required for the kind of work performed.

S.B. 5903 Requires Employers to Pay the Correct Minimum Wage Under Prevailing Wage Requirements Applicable to Public Projects

S.B. 5903 makes sure that Washington State government entities pay the correct minimum wage under prevailing wage requirements applicable to public works projects that employ workers, laborers, and mechanics. The bill provides that if workers are paid the residential construction rate, but later the work is categorized as commercial, then the state or local jurisdiction that entered into the work contract must pay the difference between the residential and commercial pay rates by paying the contractors or subcontractors the difference in wages.

Substitute H.B. 1055 Requires Certain Construction Workers to Carry Their Licenses or Certificates

Substitute H.B. 1055 mandates that construction workers who do electrical, plumbing, and elevator work must have in their possession photo identification and their licenses or certifications while on the job. Washington State law already requires that the workers attain the licenses and certificates for their trades. The new bill, however, requires the workers to carry proof of licensure to ease enforcement of the already-existing licensure requirements. The new bill remedies a problem arising whereby contractors hire uncertified construction workers to gain an unfair advantage in the currently depressed construction industry. The failure to carry license certificates and identification can result in fines.

b. Governor Gregoire Signs Bill Creating Military Service Exemption for Employers Paying Unemployment Benefits

On April 10, 2009, Governor Gregoire signed into law Substitute S.B. 5009. The bill creates a military service exemption for benefits charged to an employer's experience rating account. Typically, unemployment insurance benefits paid to unemployed workers are charged to the former employer. Charges against an employer are then accounted for in the employer's experience rated tax. Some unemployment insurance benefits, however, are not charged to a specific employer, but rather are socialized among all employers. Of the socialized unemployment benefit taxes, some are

automatically socialized and others are socialized based on the discretion of the Commissioner of the Employment Security Department. Employers are able to request relief from benefits charged to their experience rating accounts from the Commissioner if (1) an employee voluntarily leaves work for reasons not attributable to the employer; (2) if the employee is discharged for work-related misconduct; (3) if the work location is scaled back due to natural disaster or catastrophe; or (4) if the employee continues working as a permanent part-time employee and is separated from concurrent employment with a different employer at some time during the base year.

Substitute S.B. 5009 creates a fifth category of discretionary exemptions for unemployment benefits charged to an employer's experience rating account. Under Substitute S.B. 5009, the Commissioner has discretion to grant benefit charge relief to an employer for an employee who was hired to replace another employee who is a member of the military reserves or National Guard and was called to federal active military service by the President, and is subsequently laid off when the military employee returns to work within the time provided for in the state service reemployment statute. This new law goes into effect on July 26, 2009.

3. Oregon Developments

a. Oregon Employers Must Satisfy New BOLI Rule Regarding Meal and Rest Breaks

In January 2009, the Oregon Bureau of Labor and Industries ("BOLI") issued a new rule regulating meal and rest breaks that became effective immediately.

Employers Must Give Employees Working Six Hours a 30-Minute Meal Break

Under BOLI's new meal and rest break rule, employers must give employees who work shifts of six or more hours 30 minutes of unpaid, uninterrupted meal time. During the meal break, the employee must be relieved of all employment duties. Before the enactment of the new rule, employers were exempt from providing the full meal break where "the nature or circumstances of the work prevent the employee from being relieved of all duty." Without guidance, the prior rule was vague and led to confusion among employers. The new rule, however, clarifies that an employer is exempt from providing the full 30-minute meal break in the following three circumstances:

> (1) Emergency or unanticipated circumstances prevent the full meal period rarely or temporarily;
>
> (2) Industry custom or practice permits a shorter meal period, not less than 20 minutes, where the employee is paid and relieved of all duties; or
>
> (3) The employer would suffer undue hardship if required to provide 30 minutes of unpaid, uninterrupted meal time.

The first exemption for emergencies applies to unforeseen, unpredictable circumstances. The exemption is to be used rarely, and a regular pattern of

understaffing is unlikely to exempt an employer from providing the requisite meal break. When a true emergency does arise, employers should carefully document the circumstances preventing the break. The second exemption for custom or practice remains vague and unclear. BOLI has not issued guidance regarding which industry standards it will evaluate when granting this exception. Employers are, therefore, cautioned against relying on this exemption because it is unclear what standards of industry custom or practice are contemplated. The third exemption for undue hardship requires an employer to demonstrate that it will suffer "significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business." Factors relevant to this inquiry include the company's financial resources, the nature of the work, the number of employees and the costs associated with implementing the 30-minute meal break. An employer who uses the undue hardship exemption is nonetheless required to provide its employees with paid time sufficient to eat a meal.

In addition, as of March 16, 2009, employers must use the new BOLI notice form to notify employees that they will not be given the uninterrupted 30-minute meal break. The employer is responsible for maintaining accurate records of such notice. The form is available at http://www.oregon.gov/BOLI/WHD/Undue_Hardship_Notice.pdf.

BOLI has clarified that its new rule does allow meal and rest periods to be modified in accordance with the parties' collective bargaining agreement.

Certain Tipped Food Service Workers May Waive the 30-Minute Meal Break

Food service employees over the age of 18 who receive and report tips are eligible to wave the requisite meal break. In order to do this, the eligible employee must make a written, voluntary request to waive meal breaks to his or her employer within seven days of hire. Employees who waive meal breaks must be allowed to eat during shifts longer than six hours and must be paid for breaks where the employee remains on duty. In addition, employees may not work more than 8 hours without receiving a 30-minute uninterrupted meal break. Employers are required to maintain records of each employee's hours and meal breaks and to post a conspicuous notice informing employees of the meal and rest period rules. Once these requirements are met, an employee may legally waive the 30-minute meal break, but the employee or employer can revoke the waiver at any time upon seven days' written notice.

Employers Must Give Employees One Ten-Minute Break per Each Four-Hour Shift

Under BOLI's new meal and rest break rule, employers must give their employees at least one ten-minute paid rest break for each four-hour shift worked. During the rest break, the employee must be relieved of all employment duties. Employers should provide the rest break in the middle of the employee's shift. The rest break is in addition to the meal break, and employers may not require employees to combine the two breaks. An employer may be exempt from providing the ten-minute rest break to an employee if five conditions are met: (1) the employee is over age 18; (2) the employee works less than five hours in a 16-hour period; (3) the employee works alone; (4) the

workplace is a retail or service establishment; and (5) the employee is permitted to leave his or her workstation to use the restroom as necessary. Employers with employees that work long hours should consult the new BOLI regulations for additional guidance on requisite breaks pertaining to long shifts.

b. Because Oregon Family Leave Regulations May Differ From New Federal Regulations, Oregon Employers Should Consult BOLI's Comparison Chart for Guidance on Administering Employee Leave

Oregon state and federal law both require covered employers to provide job-protected leave to eligible employees to care for themselves or family members in connection with a serious health condition, childbirth, or adoption. The Oregon Family Leave Act ("OFLA") applies to employers with 25 or more employees, whereas the federal FMLA is limited to employers with 50 or more employees. In some cases, Oregon law is more generous to employees than federal law. For example, OFLA includes parents-in-law, grandparents and grandchildren in its definition of family members, while the FMLA does not. Likewise, OFLA permits leave to care for sick children who do not have serous health conditions. In all employment situations covered by parallel federal and state laws, employers are required to follow the law most beneficial to the employee.

The DOL's new regulations[1] created a number of inconsistencies between the OFLA regulations and the FMLA regulations in certain areas covered by both laws. To address possible confusion created by these inconsistencies, BOLI extensively reviewed the FMLA regulatory changes to identify areas of conflict. During February 2009, BOLI invited public comment regarding whether BOLI should amend the OFLA regulations to conform to the new FMLA regulations. The public comment period ended on March 6, 2009, and the BOLI Civil Rights Division is currently reviewing the comments received.

Until such time as the OFLA regulations are amended to conform to the new FMLA regulations, OFLA regulations require employers covered by both laws to follow the regulation that is more beneficial to the employee's circumstances. To determine which law is more beneficial to a particular employee, employers should utilize the comparison chart posted on the BOLI website at http://www.oregon.gov/docs/feature_story/OFLA_NewFMLA_Chart_Compared_V2.pdf. Employers with specific questions regarding compliance with the new FMLA regulations and OFLA are advised to seek guidance from experienced employment counsel. Alternatively, employers can call BOLI's hotline at 971-673-0824 or email BOLI's Technical Assistance for Employers Program at BOLI.MAIL@state.or.us.

[1] *See supra* Section I.A.1.

C. IMMIGRATION DEVELOPMENTS

1. New Form I-9 Must Be Used as of April 3, 2009

As of April 3, 2009, employers are required to use the new Form I-9 available at http://www.uscis.gov/files/form/i-9.pdf for all new hires. The old form is no longer acceptable and employers who use the outdated form are subject to civil money penalties. Employers are not required to re-verify employment authorization unless it is their policy to do so, or an employee's authorization expires. When an employee's authorization is due to expire, re-verification with the new Form I-9 must occur no later than the date of expiration.

Employers filling out the new Form I-9 should pay attention to the new "List of Acceptable Documents" to ensure compliance with the new regulations. The Department of Homeland Security has revised its regulations regarding the kinds of identification and employment authorization documents that employees may present to their employers in order to complete the new Form I-9. The new Form I-9 requires that employees present only unexpired documents during the verification process. Consequently, it eliminates the use of forms for Temporary Resident Cards and outdated Employment Authorization Cards (Forms I-688, I-688A, and I-688B) from List A. Added to List A are foreign passports with machine-readable visas and foreign passports from Micronesia and the Marshall Islands when accompanied with the applicable Form I-94 or I-94A.

2. E-Verify Rule Effective Date Is Postponed Until June 30, 2009

On April 16, 2009, the federal government agreed to postpone implementation of an Executive Order that will require federal contractors to use E-Verify. E-Verify is the federal government's electronic employment verification system. It is an Internet-based system that electronically compares information on employment authorization Form I-9s with records held by the Social Security Administration and the Department of Homeland Security. This postponement is the third delay in implementing the rule. According to the Department of Homeland Security, this additional delay will provide the Obama Administration additional time to adequately review the entire rule before it is applied to federal contractors and subcontractors. Under the final rule, all federal contractors holding a contract with a performance period over 120 days at a value of over $100,000 will be required to participate in E-Verify. Subcontractors providing services or construction worth over $3,000 will also be required to participate in E-verify. The E-Verify rule is the subject of a lawsuit filed in the U.S. District Court for the District of Maryland on December 23, 2008. In the lawsuit, opponents of the rule allege that the rule is contrary to the Illegal Immigration Reform and Immigrant Responsibility Act's express statutory prohibition against requiring participation in the program. At this time, federal contractors should plan to be capable of satisfying the E-Verify requirements by June 30, 2009, and stay tuned for further developments.

3. DOL Will Extend Employer Transition Period for H-2A Recruitment Compliance

The DOL has extended the transition period for employers to comply with the recruitment requirements of the new H-2A visa program to include all employers who need H-2A workers starting on or before January 1, 2010. The H-2A Final Rule changes the H-2A process by requiring employers to perform additional recruitment for U.S. workers before submitting their H-2A applications. The intent of the new program is to give U.S. workers additional time to apply for jobs before the employer applies to hire H-2A temporary, foreign agricultural workers. Under the previous rule, employers were required to begin recruiting at least 45 days before they needed the workers. The new rule extends the recruitment period to 75 days prior to the date the employer needs the workers.

II. SIGNIFICANT CASE LAW DEVELOPMENTS

A. U.S. SUPREME COURT EXPANDS SCOPE OF RETALIATION LAW UNDER TITLE VII

Employees who proactively complain about race or gender discrimination are protected from workplace retaliation pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"). In *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S. Ct. 846 (2009), the U.S. Supreme Court held that Title VII's antiretaliation provision protects not only an employee who speaks out against discrimination on his or her own initiative, but also an employee who speaks out against discrimination while answering questions during an employer's internal investigation. In *Crawford*, the plaintiff was terminated shortly after participating in an internal sexual harassment investigation during which she informed their employer that the target of the investigation had engaged in sexually inappropriate conduct.

Title VII prohibits retaliation against an employee who (1) has opposed unlawful practices under Title VII or (2) "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. Courts typically refer to these two sections as the "opposition clause" and the "participation clause." In *Crawford*, the plaintiff alleged that her employer violated both clauses. The district court granted summary judgment for the employer and the court of appeals affirmed, holding that (1) plaintiff failed to satisfy the opposition clause because she did not initiate a complaint, but merely answered questions in a pending investigation initiated by someone else, and (2) plaintiff failed to satisfy the participation clause because it only applied to an employer's internal investigation if that investigation occurred pursuant to a pending EEOC charge. The Supreme Court reversed, holding that plaintiff's conduct was covered by the opposition clause (and therefore finding it unnecessary to address her arguments under the participation clause).

Noting that the term "oppose" was not defined by the statute, the Court applied its ordinary meaning (from *Webster's Dictionary*): "to resist or antagonize." Applying this definition in light of Title VII's remedial purposes, the Court concluded that a reasonable

jury could find plaintiff's candid answers during the investigation to be "resistant or antagonistic" to the alleged harasser's treatment. In support of its conclusion, the Court pointed to an EEOC guideline that explained "[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication virtually always constitutes the employee's *opposition* to the activity." According to the Court, legally protected opposition includes taking no action at all to advance a position beyond merely disclosing it.

Under *Crawford*, a noncomplainant who speaks out against discrimination in her employer's internal investigation is protected from retaliation. Unfortunately, the full scope of the Court's opinion remains somewhat of a mystery. What is clear is that the reach of Title VII's antiretaliation provision has become much more expansive. Going forward, employers should exercise caution when terminating or disciplining employees who have recently made comments (even informal comments) about perceived discrimination or harassment. Employers should always have well-documented nondiscriminatory reasons for employment decisions.

B. U.S. SUPREME COURT UPHOLDS MANDATORY ARBITRATION OF DISCRIMINATION CLAIMS

On April 1, 2009, the Supreme Court issued a 5-4 decision holding that a CBA that requires employees to arbitrate federal discrimination claims is enforceable. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009). The plaintiffs in *Penn Plaza* were two night watchmen represented by the Service Employees International Union and subject to a CBA that included a clause stating that all claims made under Title VII, the ADA, and the Age Discrimination in Employment Act ("ADEA") were subject to binding arbitration. Following a reassignment, plaintiffs asked their union to file a grievance on their behalf alleging violations of the CBA and the ADEA. Shortly after filing the grievance, the union withdrew plaintiffs' ADEA claims. Plaintiffs proceeded to file a lawsuit alleging that their employer had violated their rights under the ADEA. The employer moved to compel arbitration and the district court denied the motion. The Second Circuit Court of Appeals affirmed, concluding that a CBA provision purporting to waive an employee's right to pursue statutory discrimination claims in a federal forum was unenforceable. The Supreme Court disagreed holding that, "there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and [the employer], and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal."

According to the Court, the arbitration of statutory discrimination claims was clearly a "condition of employment" subject to mandatory bargaining under the NLRA, and "[t]he decision to fashion a CBA to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery. . . . As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a [CBA] in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange." Thus, although federal antidiscrimination laws protect important rights, they do not prohibit agreements requiring employees to pursue these rights in arbitration.

This is a positive development for employers, especially in the current economic climate. When measured against the rising costs of litigation, arbitration is widely considered to be one of the more expedient and cost-efficient methods of dispute resolution.

C. WASHINGTON SUPREME COURT HOLDS THAT NEW DEFINITION OF DISABILITY APPLIES RETROACTIVELY

In 2006, the Washington State Supreme Court found that the meaning of "disability" as used in the Washington Law Against Discrimination ("WLAD") was consistent with the definition of disability found in the ADA. *See McClarty v. Totem Elec.*, 157 Wn.2d 214 (2006). In 2007, the Washington Legislature rejected the ADA's narrow definition of "disability," and amended the WLAD to include a new – and far more expansive – definition of "disability." The legislature purported to make the new definition retroactive to all claims occurring before July 2006, the date of the *McClarty* decision.

In *Hale v. Wellpinit School District No. 49*, 165 Wn.2d 499 (2009), the Washington State Supreme Court was asked to determine whether the Washington Legislature's retroactive amendment to a statute previously construed by the supreme court violated the separation of powers. The court held that there was no constitutional violation in applying the new definition retroactively to claims predating the court's July 2006 decision. While noting that "statutory amendments are generally presumed to be prospective only," the court went on to explain that where, as here, "no constitutional prohibition applies, an amendment may act retroactively if the legislature so intended or if it is curative." In support of its conclusion that retroactive application of the 2007 amendment would not violate the separation of powers, the court pointed to the fact that at the time of its *McClarty* decision, the WLAD contained no definition of the term "disability." The court's July 2006 decision was merely an attempt to fill the legislative void. Under these circumstances, the legislature's subsequent action did not infringe upon the court's power because it was merely clarifying what lawmakers believed was the proper definition under the WLAD. The court noted that the legislature was careful not to reverse the *McClarty* decision or interfere with any judicial function. Far from violating the separation of powers, the court praised the work of the legislature and the court in this situation as "a model of how two separate and independent branches of government can work together in harmony and in the spirit of reciprocal deference to the other's important role and function in the art of governing."

D. WASHINGTON SUPREME COURT DENIES UNEMPLOYMENT BENEFITS FOR CERTAIN RIF VOLUNTEERS

The Washington State Supreme Court recently denied unemployment benefits to a group of former Verizon workers who had volunteered for layoff during a workplace reduction in force ("RIF"). The key to the decision was that the company retained no discretion to select who would be laid off and who would stay. Thus, the workers who chose to leave were deemed voluntary quits and disqualified from unemployment benefits.

"Final Action" Is Mandatory for RIF Volunteers to Receive Unemployment Benefits

In 2003, Verizon announced its plan to lay off 5,000 workers. To implement the RIF, Verizon created a voluntary separation program for management employees whereby employees would receive severance payments, health benefits, immediate stock option vesting, and in some cases, pension enhancements. Employees who wished to participate in the RIF program signed a separation agreement and a release stating that the employee was voluntarily leaving employment due to the RIF. The number of Verizon employees that accepted the offer exceeded Verizon's expectations, so the company gave the volunteers the option to opt out of the separation program if they preferred to retain their jobs. Despite Verizon's opposition, over 200 employees who volunteered for the RIF applied for and received unemployment benefits. Verizon appealed, first through the administrative process, then through the courts.

Typically, workers who voluntarily quit their jobs are ineligible for unemployment benefits. However, there is an exception to this rule whereby an employee who quits his or her job for "good cause" can receive unemployment benefits. Good cause includes the circumstance where (1) the employer initiates a volunteer RIF program, (2) one or more employees volunteer for the RIF, and (3) the employer makes the final decision (final action) on whether to accept the volunteers' offers to leave. In *Verizon Northwest, Inc., v. Washington Employment Security Department*, 164 Wn.2d 909 (2008), the court held that an employer only takes the final action if it retains the right to pick and choose among the volunteers to determine which ones will actually be laid off. Because Verizon retained no right to reject anyone who volunteered for the RIF program, the employees retained control over their own terminations. Those who chose to leave, therefore, left voluntarily and did not qualify for unemployment benefits under the "good cause" exception. Consequently, the court denied the RIF volunteers' requests for unemployment benefits.

Employers planning voluntary RIFs should be aware of the consequences of how they structure their programs, particularly regarding whether or not they retain discretion to pick and choose among the volunteers. If employers retain such discretion, they will have taken the "final action" and affected employees will likely be eligible for unemployment.

E. NINTH CIRCUIT HOLDS EMPLOYER CANNOT WITHDRAW RECOGNITION FROM UNION DURING CERTIFICATION YEAR

On February 25, 2009, The U.S. Court of Appeals for the Ninth Circuit ruled that a Washington medical center violated federal labor law by withdrawing recognition of union representation before the certification year had concluded. In *Virginia Mason Medical Center. V. NLRB*, 558 F.3d 891 (9th Cir. 2009), the court affirmed the NLRB's 2007 decision that the certification year did not begin to run until the employer and the union held their first bargaining session. The act of providing requested information to a union does not trigger the beginning of the certification year. Thus, for one year from the date of the parties' first bargaining session, the union was entitled to a nonrebuttable presumption of majority status. During this time, the employer must recognize and

bargain with the union. The court noted that while the presumption of majority status during the certification year can be lost if the union causes inexcusable delay in bargaining, four months is a reasonable amount of time for a union to process information and begin collective bargaining. Unfortunately for the employer, it withdrew union recognition four days shy of the one-year anniversary of the start of collective bargaining.