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Fall 2009 Employment Law Update

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Perkins Coie LLP 2009

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

Julie Lucht, a partner in the firm's Labor & Employment practice, focuses on employment litigation and counseling. She represents clients in all phases of 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, FLSA, WARN, NLRA, 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. Julie also represents clients in special remedies litigation instigated to protect clients from trade secret misappropriation, corporate raiding, breach of contract and fiduciary duties and other employment-related offenses. She counsels clients in arbitration, mediation and other alternative dispute resolution proceedings and defends clients in class action litigation and in lawsuits litigated by the EEOC.

Tammy Sittnick is an associate in the firm's Labor & Employment practice, where she focuses on representing employers in a wide range of litigation matters before federal and state courts and agencies. Her practice includes employment counseling on wage and hour laws, federal and state discrimination laws, non-competition agreements, employment contracts and employee handbooks. Tammy also has experience with class action lawsuits relating to gender issues and wage and hour laws. As a member the Employment Privacy group, Tammy is knowledgeable about employment privacy issues and employer policies on the monitoring and use of emerging technologies. Tammy devotes a significant amount of her time to pro bono work. She is a volunteer for the King County Bar Association Neighborhood Legal Clinics and has represented clients on a pro bono basis in asylum and immigration cases.

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Fall 2009 Employment Law Update

Julie Lucht and Tammy Sittnick

I. FEDERAL DEVELOPMENTS

A. Proposed ADA Regulations Open for Comment

The Equal Employment Opportunity Commission ("EEOC") approved a proposed rule that would revise existing Americans with Disabilities Act ("ADA") regulations to conform with the ADA Amendments Act of 2008. The proposed rule was published in the Federal Registry on September 23, 2009, commencing a 60-day public comment period. Written comments on the proposed regulation must be submitted on or before November 23, 2009.

The ADA Amendments Act was signed into law by President George W. Bush on September 25, 2008, and took effect January 1, 2009. The Amendments Act rejected United States Supreme Court decisions and EEOC regulations that narrowly interpreted the ADA's coverage. Although the Amendments Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment, it changed the way that these statutory terms should be interpreted. The effect of these changes is to make it easier for an individual to establish that he or she has a disability within the meaning of the ADA.

Consistent with the provisions of the Amendments Act, the EEOC's proposed rule provides for several significant revisions to the regulations including the following:

- Provides that the definition of "disability" shall be interpreted broadly;
- Revises the definition of the term "substantially limits'' by providing that a limitation need not "significantly'' or "severely'' restrict a major life activity in order to meet the standard, and by deleting reference to the terms "condition, manner, or duration'' under which a major life activity is performed;
- Expands the definition of "major life activities'' through two non-exhaustive lists. The first list includes activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. The second list includes major bodily functions such as functions of the immune system, special sense organs, and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions;

- Provides that mitigating measures other than "ordinary eyeglasses or contact lenses'' shall not be considered in assessing whether an individual has a "disability";

- Provides that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;

- Provides that the definition of "regarded as'' no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead provides that an applicant or employee who is subjected to an action prohibited by the ADA (e.g., failure to hire, denial of promotion, or termination) because of an actual or perceived impairment will meet the "regarded as'' definition of disability, unless the impairment is both transitory and minor;

- Provides that actions based on an impairment include actions based on symptoms of an impairment;

- Provides that individuals covered only under the "regarded as'' prong are not entitled to reasonable accommodation; and,

- Provides that qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision shall not be used unless shown to be job-related for the position in question and consistent with business necessity.

B. Employment Non-Discrimination Act of 2009

The Employment Non-Discrimination Act of 2009 ("ENDA"), H.R. 3017/S. 1584, was introduced by Congressman Barney Frank (D-Massachusetts) on June 19, 2009, and Senator Jeff Merkley (D-Oregon) on August 5, 2009. If passed into law, ENDA would prohibit discrimination in the workplace based on actual or perceived sexual orientation or gender identity by making it illegal to fire, refuse to hire, or refuse to promote an employee simply based on his or her sexual orientation or gender identity. ENDA closely follows the model of existing federal civil rights laws, including Title VII of the Civil Rights Act of 1964 and the ADA. Like Title VII, ENDA would only apply to employers that have at least 15 employees. ENDA would also prohibit "association discrimination," which occurs when an employer discriminates against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom he or she associates or has associated. The House of Representative's version of the legislation is currently being considered by the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties. The Senate version is pending before the Committee on Health, Education, Labor and Pensions.

Washington law already prohibits discrimination on the basis of sexual orientation, as do some local laws such as the Seattle Municipal Code. However, if passed into law, ENDA would allow victims of sexual orientation discrimination to file

claims with the EEOC, file lawsuits in federal court, and seek punitive damages, which are not available under Washington law.

C. Employee Free Choice Act Update

Although the Employee Free Choice Act ("EFCA") has stagnated for months, it appears that a compromise version of the legislation, first passed by the U.S. House of Representatives in 2007, will pass sometime within the next several months. As originally proposed, EFCA contained three significant provisions. The first, and most controversial provision, would allow for "card-check" certification of unions, which means that once a union gets a majority of employees to sign authorization cards, it will become the employees' collective bargaining representative. Currently, employers can voluntarily recognize a union based on receiving a majority of signed authorization cards or refuse recognition in which case the National Labor Relations Board ("NLRB") conducts a secret-ballot election to determine if employees want to be represented by the union. Opponents of the card-check certification provision expressed concerns that employees would be pressured to sign cards and that employers would not have an opportunity to communicate with employees about why unionization is not in the employees' best interest.

Second, EFCA also contains a provision that either side can request mediation if a contract is not reached within 90 days after a union is certified. If after 30 days of mediation a contract is still not agreed to, an arbitrator would impose the terms of a binding two-year agreement. Third, EFCA would make existing labor laws more punitive for employers who violate the National Labor Relations Act ("NLRA") during a union-organizing campaign or contract negotiations. Currently, the NLRA provides for remedial penalties if an employer discharges or discriminates against an employee for protected activities. EFCA would require employers to pay the employee triple back pay and would allow for punitive fines for willful or repeated violations.

It appears that the card-check provision will likely not be included in a compromise version of EFCA. Instead, media reports indicate that the revised bill will require shorter unionization campaigns and faster NLRB elections, which would limit the time employers would have to communicate with their employees about why unionization is not in the employees' best interests. The arbitration and punitive penalty provisions appear to still be under consideration. In comments made this summer, Senator Arlen Specter (D-Pennsylvania) predicted that a compromise version of EFCA would pass this year.

D. E-Verify Requirements for Federal Contractors

Beginning September 8, 2009, federal contractors and subcontractors—including companies receiving American Recovery and Reinvestment Act funds—are required to use E-Verify to confirm that their employees are eligible to work in the United States. E-Verify is an automated system that allows employers to cross reference I-9 information against government database records in order to electronically verify the employment eligibility of new hires and Social Security numbers. The free E-Verify

system has been in operation for several years and available to employers on a voluntary basis up until now.

In June 2008, President Bush issued an executive order requiring federal contractors to verify the work authorization of all new hires and existing personnel assigned to perform work on future federal contracts. The Federal Acquisitions Regulatory Council subsequently issued a proposed rule to spell out federal agencies' responsibilities under the executive order. Originally scheduled to take effect on January 15, 2009, the rule was delayed several times and has faced several legal challenges.

Under the E-Verify requirement, contractors who perform contract services for the federal government will be required to verify new hires and current employees assigned to work on the contract as a term of their contract. The final rule applies to solicitations issued and contracts awarded after the applicability date of the final rule—September 8, 2009. Certain contracts are exempt from E-Verify requirements, including contracts for "commercially available off-the-shelf items" (commonly referred to as "COTS"), prime contracts that do not exceed $100,000, and subcontracts that do not exceed $3,000 (if the applicable prime contract includes the E-Verify requirement). Federal contractors and subcontractors have 30 calendar days from the federal contract award date to enroll in the program.

E. DHS Final Rule Rescinds "No-Match" Regulation

The Department of Homeland Security ("DHS") has rescinded its "no-match" regulation aimed at employers with undocumented workers. Under the no-match rule (also known as the safe harbor rule), the Social Security Administration would have been required to notify employers receiving no-match letters, which are issued when employees' Social Security numbers do not match government records, that they must resolve the discrepancy or face liability. As stated in the final rule, DHS has decided to focus its enforcement efforts relating to the employment of unauthorized aliens on increased compliance through improved verification, including participation in E-Verify, ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs.

Originally issued by the Bush Administration in 2007, the controversial no-match regulation was challenged in U.S. District Court and an injunction prevented the regulation from going into effect. In response to concerns raised by the Court, DHS revised the regulation in 2008. Although the lawsuit remains pending, it will likely be dismissed in light of the decision by DHS to rescind the regulation.

DHS originally announced its decision to rescind the no-match regulation in July 2009. In response, Senator David Vitter (R-Louisiana) offered an amendment to the 2010 DHS appropriation bill that would prevent DHS from using funds to rescind the rule. Although the amendment was approved by voice vote in July, there is no guarantee that it will be part of the final appropriation bill.

DHS issued a proposed rule rescinding the no-match regulation on August 19, and the final rule, published on October 7, 2009 in the Federal Registry, states that the proposed rule will be adopted without changes. The rule rescinding the no-match regulations will take effect on November 6, 2009.

F. Interim Final Rules Regarding Genetic Discrimination Issued

The U.S. Departments of Health and Human Services, the Treasury, and Labor issued interim final rules implementing sections of Title I of the Genetic Information Nondiscrimination Act of 2008 ("GINA"), which prohibits discrimination based on genetic information in health insurance coverage and group health plans. The interim final regulations are effective December 7, 2009, and comments must be received on or before January 5, 2010.

Under GINA and the interim final rules, a group health plan and a health insurance issuer are generally prohibited from (i) increasing the group premium or contribution amounts based on genetic information; (ii) requesting or requiring an individual or family member to undergo a genetic test; or (iii) requesting, requiring or purchasing genetic information prior to or in connection with enrollment, or at any time for underwriting purposes. "Underwriting" includes any rules for determining eligibility, computing premiums or contributions, and applying preexisting conditions, and it is not limited to activities relating to rating and pricing a group policy.

The new regulations would also amend the Health Insurance Portability and Accountability Act ("HIPAA") nondiscrimination rules, as well as the HIPAA privacy regulations to incorporate GINA Title I restrictions on the collection and use of genetic data by group health plans and health insurers.

It is of note that the rules broadly define "underwriting purposes" to include changing cost-sharing mechanisms such as deductibles, or providing "discounts, rebates, payments in kind, or other premium differential mechanisms in return for activities such as completing [a health risk assessment] or participating in a wellness program." Therefore, "wellness programs that provide rewards for completing a health risk assessment that requests genetic information, including family medical history, violate the prohibition against requesting genetic information for underwriting purposes." An incentive may be offered to complete a health risk assessment that does not request genetic information, but the form must explicitly state that such information must not be provided.

Although GINA prohibits group health plans and insurance companies from requesting or requiring that an employee or family member undergo genetic testing, the regulations include three exceptions: (1) GINA does not prohibit a health care provider that is treating an individual from requesting that the patient undergo genetic testing; (2) plans may obtain genetic test results and use them to make claims payment determinations when it is necessary to do so in order to determine whether the treatment provided to the patient was medically advisable; and, (3) plans may request, but not require, genetic testing in certain very limited circumstances involving research,

so long as the results are not used for underwriting, and then only with written notice to the individual informing him or her that participation is voluntary and will not affect his or her eligibility for benefits, premiums, or contributions.

In March 2009, the EEOC issued a separate set of guidelines concerning Title II of GINA prohibiting employment discrimination based on genetic information, barring employers from intentionally acquiring genetic information from applicants and workers and instating strict confidentiality requirements.

G. Protecting Older Workers Against Discrimination Act Introduced in Congress

On October 6, 2009, U.S. Senators Tom Harkin (D-Iowa) and Patrick Leahy (D-Vermont), and Representative George Miller (D-California) introduced the Protecting Older Workers Against Discrimination Act ("POWADA"); S. 1756/H.R. 3721. If enacted, POWADA would overturn the United States Supreme Court decision in *Gross v. FBL Financial* (see summary below), which held that a plaintiff must prove that age was the "but for" cause of employment discrimination in Age Discrimination Employment Act ("ADEA") claims. The "but for" standard is a more difficult standard of proof than the "motivating factor" standard applied to Title VII claims. POWADA would amend the ADEA to clarify that the appropriate standard of proof in unlawful disparate treatment cases under the ADEA is the same standard applicable to Title VII.

II. FEDERAL CASE LAW DEVELOPMENTS

A. U.S. Supreme Court Rules on Firefighters' Reverse Discrimination Claim

The United States Supreme Court ended its 2008-09 term with its highly anticipated decision in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), a case made even more noteworthy by the nomination of Sonia Sotomayor to the Supreme Court. In *Ricci,* the city of New Haven threw out the results of a written exam used to promote firefighters because of concerns that not enough minorities had passed the exam. A group of white firefighters and one Hispanic firefighter who passed the exam sued the city, claiming that by throwing out the exam results the city discriminated against them because of their race. A district court ruled in favor of the employer and the Second Circuit Court of Appeals, which included Sotomayor, affirmed.

In reversing the Second Circuit, the Supreme Court held in a 5-4 decision that the city had violated Title VII because it did not have a "strong basis in evidence" that, had it not taken the action, it would have been liable under the disparate-impact statute. With this ruling, the Court adopted a new "strong-basis-in-evidence" standard to resolve conflict between the disparate-treatment and disparate-impact provisions of Title VII. Here, the city threw out the exam results because it was concerned with the *disparate impact* on minorities resulting from the exam, while the white and Hispanic firefighters alleged *disparate treatment*. Under the new standard, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to

believe that it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.

The Court concluded that because there was no support in the record for the conclusion that the city had an objective strong basis in evidence to believe it would face disparate-impact liability if it certified the examinations, discarding the test results was impermissible under Title VII.

B. U.S. Supreme Court Affirms Arbitration of Discrimination Claims

In *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456, the United States Supreme Court held that under the Federal Arbitration Act, an agreement between an employer and a union to arbitrate statutory discrimination claims, including those arising under the ADEA, was enforceable. Plaintiffs were three night watchmen who worked at an office building owned and operated by 14 Penn Plaza. The three individuals were also members of the Service Employees International Union (SEIU). Under the collective bargaining agreement between SEIU and 14 Penn Plaza, union members were required to submit all employment claims to binding arbitration, specifically including claims under the ADEA and other federal and state discrimination statutes. The agreement stated that arbitration would be the "sole and exclusive remedy for violations" of federal and state antidiscrimination laws.

The three plaintiffs were reassigned from their positions after 14 Penn Plaza entered into an agreement with a security contractor to provide licensed security guards for the office building. Subsequently, SEIU filed grievances on the employees' behalf, alleging violations of the collective bargaining agreement ("CBA") and age discrimination. SEIU withdrew the age discrimination claims before arbitration, and the employees filed charges with the EEOC. After receiving their right-to-sue letters, the plaintiffs filed a lawsuit against 14 Penn Plaza alleging that their reassignments constituted age discrimination.

In a 5-4 decision, the Supreme Court held that an agreement to arbitrate discrimination claims is "no different from the many decisions made by parties in designing grievance machinery" and is a "condition of employment" subject to mandatory arbitration under the NLRA. Because a union will agree to the inclusion of an arbitration provision in a CBA in exchange for other concessions from the employer, courts are not allowed to interfere with this agreement. Unless the ADEA removes this particular class of grievances from "the NLRA's broad sweep," such provisions are enforceable.

C. U.S. Supreme Court Adopts "But For" Standard of Proof for ADEA Claims

In another 5-4 decision, the United States Supreme Court held that a plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343. The burden of persuasion does not shift to the employer to show that it would have taken the action

regardless of the employee's age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Thus, the burden-shifting framework in mixed motive Title VII cases is inapplicable to age claims under the ADEA, and the burden of proving that age was the decisive factor in the employer's decision remains with the plaintiff.

Petitioner Jack Gross field suit against his employer FBL Financial Services ("FBL"), alleging that FBL had demoted him in violation of the ADEA. At the close of trial, and over FBL's objections, the trial court instructed the jury to enter a verdict for Gross if he proved, by a preponderance of the evidence that he was demoted and his age was a motivating factor in the demotion decision. The jury returned a verdict for Gross. FBL appealed to the Eight Circuit, which reversed and remanded the case for a new trial, holding that the jury had been incorrectly instructed as to the proper standard of proof.

The Court observed that unlike Title VII, which was amended to explicitly authorize discrimination claims where an improper consideration was "a motivating factor" for the adverse action, the ADEA does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. The Court relied on the precise language of the ADEA, which states that it shall be unlawful for an employer to take adverse employment action against an individual "*because of* such an individual's age." (Emphasis added.) The Court declined to adopt Gross's contention that the proper interpretation of the ADEA is controlled by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which initially established the burden-shifting framework in mixed-motives Title VII claims (i.e., claims where both permissible and impermissible considerations are alleged to have played a part in an employment decisions).

In response to the Court's ruling, Congress introduced the Protecting Older Workers Against Discrimination Act, legislation that would amend the ADEA to clarify that the same standard of proof applicable to Title VII actions applies to action under the ADEA. (See summary above.)

D. The Pregnancy Discrimination Act and Pension Credits

The United States Supreme Court held in *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, that a bona fide seniority system can insulate an employer from liability even where the system is based in part on practices that have subsequently been deemed unlawful.

AT&T long based its pension calculations on a seniority system that relied on years of service minus uncredited leave time, giving less retirement credit for pregnancy absences than for medical leave generally. In response to the ruling in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that such differential treatment of pregnancy leave was lawful, Congress added the Pregnancy Discrimination Act ("PDA") to Title VII in 1978 to make it "clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." On the date that the PDA became effective, AT&T replaced its old plan with a new plan that provided the same

service credit for pregnancy leave as for other disabilities prospectively, but did not make retroactive adjustments for the pre-PDA personnel policies. Respondents received less service credit for their pre-PDA pregnancy leave than they would have for general disability leave, resulting in a reduction in their total employment term and smaller AT&T pensions. After receiving right-to-sue letters from the EEOC, respondents filed suit in the U.S. District Court for the Northern District of California. Following Ninth Circuit precedent, the district court ruled against AT&T and the Ninth Circuit affirmed.

The United States Supreme Court reversed, holding that an employer does not necessarily violate the PDA when it pays pension benefits calculated in part under an accrual rule, that applied only pre-PDA, and gave less retirement credit for pregnancy than for medical leave generally. The Court began its analysis by examining seniority systems under Title VII § 703(h), which states in part, "it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." Because AT&T did not continue to apply its pre-PDA service credit system after the passage of the PDA, it did not violate Title VII. The Court stated that a seniority system "does not necessarily violate [Title VII] when it gives current effect to such rules that operated before the PDA." The Court also found "no intention to discriminate," even though the policy differentiated pregnant employees from other employees because, at the time of its inception, such differential treatment was lawful under *Gilbert.* Relatedly, the Court refused to apply the PDA retroactively.

Finally, the Court considered whether the recently enacted amendments to Title VII, known as the Lilly Ledbetter Fair Pay Act, dictated a different result. Under the Ledbetter Act, a Title VII violation 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 . . . ." Respondents argued that the payment of the pension benefits was "affected by application of a discriminatory compensation decision or other practice." The Court rejected this argument, stating that because AT&T's pre-PDA system was lawful, respondents were not "affected by application of a discriminatory compensation decision or other practice."

E. Inconsistent Enforcement of Email Policy Constitutes Unfair Labor Violation

The *Register-Guard* is a daily newspaper in Eugene, Oregon. In 1996, the *Register-Guard* installed a new computer system and adopted a Communication Systems Policy ("CSP") to govern the use of communication systems, including email. The CSP stated, in part that the "communication systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations or other non-job-related-solicitations." Despite the limitations placed on email use, evidence showed that employees sent and received emails regarding parties, jokes,

breaks, community events, sporting events, births, meetings for lunch, and poker games without reprimand.

In May and August 2000, Suzi Prozanski, a copy editor and union president, received written disciplinary warnings for sending three union-related emails to her fellow employees in violation of the CSP. Prozanski's May email communicated information clarifying facts related to union rally that had been held the previous afternoon. The August emails sought support for upcoming union activities. The union filed a charge with the NLRB alleging that the company committed an unfair labor practice by sending the August disciplinary action.

An Administrative Law Judge ("ALJ") found that the *Register-Guard* did not violate the NLRA merely by maintaining the CSP, but that it did violate the NLRA by discriminatorily enforcing the policy to prohibit union-related emails while allowing a variety of nonwork-related emails. The ALJ found that the *Register-Guard*'s discipline of Prozanski was an unfair labor practice. On review, the NLRB agreed with the ALJ's determination that the CSP did not violate the NLRA and that the May discipline constituted an unfair labor practice. However, the NLRB concluded that the August emails were solicitations prohibited by the CSP, and that there was no evidence that the *Register-Guard* allowed emails to solicit other employees to support any group or organization. Therefore, the August discipline was not an unfair labor practice.

On appeal, the Court of Appeals for the District of Columbia affirmed the NLRB's finding that the *Register-Guard* committed an unfair labor violation by disciplining Prozanski for the May email. *Guard Publ'g Co.* v. *NLRB*, 571 F.3d 53 (2009).[1] The court agreed with the NLRB's conclusion that the CSP only prohibited "non-job-related solicitations," not all non-job-related communications. Because Prozanski's May email was not a solicitation but merely sought to clarify facts about the rally, the CSP did not cover such an email. Therefore, the only difference between Prozanski's May email and other non-job-related emails permitted by the *Register-Guard* was that Prozanski's email was union-related. Accordingly, enforcement of the CSP with respect to the May email was discriminatory and violated the NLRA.

Although the court affirmed the NLRB's determination as to the discipline for the May email, it reversed the NLRB's determination related to the discipline for the August emails, finding that the discipline for those emails also violated the NLRA. The court agreed with the NLRB that the emails did constitute solicitations because they "called

[1] The court also considered whether the *Register-Guard* committed an unfair labor practice when it directed Ronald Agnail, a circulation district manager and union representative, not to wear a union armband or display a union placard in public. The NLRB found that the company committed an unfair labor practice by prohibiting Kangail's display of union insignia. On appeal, the court rejected the company's argument that Kangail's appearance implicates a special circumstance justifying a ban on union insignia merely because Kangail interacted with the public as part of his job. The court noted that the company's asserted special concern for its public image was at odds with the ALJ's finding that the company maintained only a vague, unwritten insignia policy. Accordingly, the court affirmed the NLRB's determination that the *Register-Guard* violated the NLRA "by maintaining an overly broad rule prohibiting employees from wearing or displaying union insignia while working with the public."

for employees to take action in support of the Union." However, the court disagreed with the NLRB's determination that it was not discriminatory to discipline Prozanski for the August emails because "they were solicitations on behalf of an organization rather than an individual, and there was no evidence that the [Register-Guard] permitted employees to use email to solicit other employees to support any group or organization." Finding the organization-versus-individual distinction unpersuasive, the court noted that neither the CSP nor the disciplinary notices invoked such a distinction. Accordingly, the court concluded that substantial evidence did *not* support the NLRB's determination that Prozanski was disciplined for a reason other than that she sent a union-related email. Accordingly, the *Register-Guard*'s discipline of Prozanski related to the August emails violated the NLRA.

F. Emailing Company Documents to Home Computer Not Hacking

The Ninth Circuit held in *LVRC Holdings LLC v. Brekka,* 2009 WL 2928952, that an employee did not violate the Computer Fraud and Abuse Act ("CFAA") when he emailed LVRC documents from his work computer to himself during the course of his employment. LVRC operates a residential treatment center for addicts. LVRC hired Christopher Brekka to oversee a number of aspects of the facility, including interacting with LOAD, Inc., the company that provides email, Web site, and related services for the facility. LOAD also monitored Internet traffic to LVRC's Web site and compiled statistics about that traffic.

At the time he was hired, Brekka owned and operated two consulting business that obtained referrals for rehabilitation services and provided referrals to potential patients through use of Internet sites and advertisements. Because Brekka commuted between Florida and Nevada, he frequently emailed documents that he obtained or created in connection with his work for LVRC to his personal computer. There was no written employment agreement or employee guidelines that prohibited employees from emailing LVRC documents to personal computers.

During the course of his employment, Brekka requested and received from LOAD an administrative log-in for LVRC's Web site. By using the administrative log-in, Brekka gained access to information about LVRC's Web site, including the usage statistics gathered by LOAD. Brekka used those statistics to manage LVRC's Internet marketing. A few months later, Brekka and LVRC entered into discussions regarding the possibility of Brekka purchasing an ownership interest in LVRC. During these negotiations, Brekka emailed a number of LVRC documents to his personal email account including financial information and a master admissions report, which included the names of past and current patients at the facility. After negotiations regarding Brekka's purchase of an ownership interest in LVRC broke down, Brekka ceased working for LVRC. Subsequent to Brekka's departure, other LVRC employees had access to Brekka's former computer and at some point the email containing Brekka's administrative log-in for LOAD was deleted.

Shortly after Brekka's departure from LVRC, LOAD's administrator discovered that someone had logged into the LVRC Web site using Brekka's log-in and was

accessing LVRC's LOAD statistics. The log-in was immediately deactivated. LVRC subsequently brought action against Brekka for violation of the CFAA, and other state laws. The federal district court granted summary judgment in favor of Brekka and LVRC appealed.

The CFAA was enacted in 1984 to enhance the government's ability to prosecute computer crimes. The act was originally designed to target hackers who accessed computers to steal information or disrupt or destroy computer functionality. The CFAA prohibits a number of different computer crimes, the majority of which involve accessing computers without authorization or in excess of authorization, and then taking specified forbidding actions, ranging from obtaining information to damaging a computer or computer data.

On appeal, the court found that Brekka had not violated the CFAA when he emailed documents to his home computer because, absent a computer access policy barring that kind of use, Brekka was authorized as an employee to access the company computer and, therefore, did not act "without authorization" as required under the CFAA. Dismissing LVRC's argument that Brekka use of the computer became unauthorized when he emailed himself LVRC documents, the court stated, "No language in the CFAA supports LVRC's argument that authorization to use a computer ceases when an employee resolves to use the computer contrary to the employer's interest." The court explicitly noted that an employee's breach of a state law fiduciary duty to an employer is not a violation of the CFAA unless the employer had rescinded the employee's right to access the computer. Although Brekka would have violated the CFAA if he had accessed LVRC's information after his employment terminated, the court concluded that LVRC had failed to put forth sufficient evidence that Brekka had accessed the computer after his employment ended. Accordingly, the court affirmed summary judgment for Brekka.

G. Supervisor Not Liable for Damages Related to Employee's Discharge

In *Lakeside-Scott v. Multnomah County*, 556 F.3d 797 (2009), the Ninth Circuit Court of Appeals held that, based on the facts of the case, a subordinate supervisor who was not the final decision maker was not liable for an employee's discharge where she was not the substantial or motivating cause of the employee's discharge.

Lea Lakeside-Scott ("Scott") worked for the Multnomah County, Oregon, Department of Community Justice as an information systems specialist. She frequently complained about her coworkers and third-level supervisor, Jann Brown, all of whom she believed were violating county policies. Specifically, Scott alleged that Brown improperly favored gays and lesbians in hiring decisions. She eventually filed a formal whistleblower complaint with the Oregon Bureau of Labor and Industries ("BOLI"). Brown was shocked by the allegations of favoritism, which she took personally.

In November 2001, Brown's boss Joanne Fuller, ordered Brown to search the email box of an employee, David Landis, as part of the investigation of another employee who had reportedly sent racially discriminatory email messages at work.

Lacking the technical ability to do the search herself, Brown directed another employee to perform the search. The search turned up email messages from Scott to Landis. Attached to one of the emails was a journal written by Scott that contained discriminatory comments about homosexuals as well as excerpts from other employees' work documents and emails. The material was turned over to Human Resources.

Brown read the journal found in Landis's mailbox and immediately showed it to Fuller. Fuller placed Scott on administrative leave pending an investigation by an investigator on Fuller's staff. As part of the investigation, 22 employees, including Scott and Brown, were interviewed. Scott admitted that she had engaged in the conduct for which she was being investigated. As a result of the investigation, Scott was terminated for misuse of county property, conducting personal business on county time, accessing other employees' email messages and other documents, and engaging in workplace harassment. Scott filed suit against Multnomah County and Brown claiming, among other things, that her termination was in retaliation for her complaints to BOLI. The trial court dismissed the claims against Multnomah County, and a jury found for Scott on the claims against Brown, awarding her more than $650,000 in damages.

Cases have held that the actions of an unbiased decision maker can be tainted by input from a biased or retaliatory subordinate. Depending on the law at issue, the biased subordinate could be found personally liable. The Ninth Circuit held that Brown would be liable if Brown's feelings about Scott were a substantial or motivating *cause* of her termination. However, if Fuller's decision to terminate Scott was based entirely on the results of the independent investigation that resulted from a report of misconduct, the causal connection between Brown's feelings and the discharge decision would be broken. The court noted that determining whether a subordinate is liable "is an intensely factual one, the results of which will vary depending on the circumstances." Based on the facts of this case, the court found that even though Brown had brought the journal to the attention of Fuller, this was not sufficient to connect any motives she may have had to Scott's termination. As the court observed, the journal had been discovered inadvertently as part of the investigation Fuller had ordered concerning the misconduct of another employee.

In light of the independence of Fuller's investigation and Brown's limited role, the court concluded that Brown was not liable because her role was not a substantial or motivating factor in Fuller's decision to terminate Scott. The Court reversed the jury verdict and remanded the case for entry of judgment in favor of Brown.

H. Pre-2009 ADA Claims Are Governed by the Original ADA Definitions

As noted above the ADA Amendments Act, which became effective on January 1, 2009, was intended to make it easier for an individual to establish that he or she has a disability within the meaning of the ADA. Federal appeals courts considering ADA cases that arose before January 1, 2009, have held that the ADA Amendments Act is not retroactive and, therefore, disability discrimination claims arising before the effective date of the ADA Amendments Act cannot be evaluated under its standards. However,

federal appellate courts are split about whether the new ADA Amendments Act should influence a court's interpretation of the statutory terms under the original act.

In *Rohr v. Salt River Project Agricultural Improvement Power District,* 555 F.3d 850 (2009), the Ninth Circuit noted that although its decision was governed by the original definitions of the ADA, not the 2008 amendments that loosened the ADA's coverage, the recent amendments show congressional intent for a broad construction of the statute. Accordingly, the court remanded plaintiff's disability claim based on diabetes. In *Brooks v. Kirby Risk Corp*, 2009 WL 3055305, however, a federal district court in Indiana dismissed an ADA claim filed by a former employee of a distribution company who claimed she was "regarded as" disabled by her former employer. The court held that the interpretations of the ADA contained in United States Supreme Court rulings that Congress overturned in passing the ADA Amendments Act still apply to cases involving alleged discrimination that occurred prior to the ADA Amendments Act's effective date. The court declined to adopt plaintiff's argument and the Ninth Circuit's view that the new law should "influence" a court's interpretation of statutory terms under the original act.

III. STATE CASE LAW DEVELOPMENTS

A. Fee-Shifting Arrangement In Arbitration Agreements Conflicts With Wage and Hour Law

In *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316 (2009), the Washington Court of Appeals held that an arbitration agreement in an employment contract that entitles the employer to an award of attorneys fees if the employer prevails conflicted with state wage and hour law and thus, was unconscionable but severable. The court also found the agreement's requirement that the arbitration take place in Denver unconscionable and severable, noting that the requirement would make the "cost of arbitration prohibitive for this middle-class plaintiff."

Plaintiff Derek Walters managed the Washington facility of defendant A.A.A. Waterproofing, a Colorado company. In 2002, Walters sued the company for approximately $70,000 in overtime wages. Under Washington law, a plaintiff who prevails in an action brought under the wage and hour laws is statutorily entitled to an award of reasonable attorneys' fees and costs. However, the attorneys' fees provision in the agreement between Walters and the company provided for a fee-shifting arrangement that would have required Walters to pay the company's legal fees should it prevail.

After a complicated procedural history, the case came before the court of appeals for a second time. Walters argued that the arbitration agreement was substantively unconscionable—and entirely unenforceable—on two grounds. First, the "loser pays all" fees and costs provision was substantively unconscionable because the risk of having to pay the employer's arbitration expenses and attorneys' fees would deter employees from seeking to vindicate their statutory rights. Second, the agreement's requirement that the arbitration take place in Denver, Colorado was

substantively unconscionable because the cost associated with arbitrating in the designated location made arbitration inaccessible to Walters.

The court noted that the Federal Arbitration Act governs agreements to arbitrate, and there is a general presumption in favor of enforcing such agreements. However, a party may challenge an arbitration agreement's validity if the agreement is substantively unconscionable. Here, the court found that the "loser pay all" provision was unconscionable because the risk of paying the employer's legal fees "is an enormous deterrent to an employee contemplating a suit to vindicate the right to overtime pay." The court similarly concluded, after considering supporting documentation from Walters concerning his financial means, that the cost of participating in an arbitration conducted in Denver was "prohibitive" for Walters. The court directed that the two unconscionable provisions be severed from the overall agreement so that the case could proceed to arbitration.

B. Company's Bankruptcy No Defense to Executive Liability for Employee Wages

Bankruptcy is not a valid defense to negate a finding of willful failure to pay wages owed to employee, the Washington Supreme Court held in *Morgan v. Kingen*, 166 Wn.2d 526 (2009). Gerald Kingen and Scott Switzer established Funsters Grand Casino, Inc., a minicasino located in SeaTac, Washington. As CEO and president, Kingen set the compensation for senior employees and possessed the authority to hire and fire employees. As CFO and general manager, Switzer managed Funsters' finances. Both Kingen and Switzer controlled the payment of wages to employees, which included the authority to prioritize payment of wages and other corporate obligations. A year after its opening, Funsters filed for bankruptcy protection under chapter 11, which allowed Kingen and Switzer to continue to operate the minicasino as debtor-in-possession. Because Funsters continued to decline financially, the bankruptcy trustee moved to convert the bankruptcy to a chapter 7 liquidation proceeding. At that time, Kingen and Switzer made it clear that they were unwilling to inject additional capital sufficient to satisfy unpaid debts, including wages owed. As part of the conversion to chapter 7, the bankruptcy trustee seized Funsters' assets, which included $85,823.23 in cash.

Washington law imposes liability for wage payments on not only corporate employers but also individual officers and agents whose actions willfully deprive employees of wages owed to them. Accordingly, several Funsters employees filed a class-action lawsuit against Kingen and Switzer individually to recover unpaid wages. The trial court entered judgment against the Kingen and Switzer and awarded double damages, costs, and attorneys' fees to the employees. Kingen and Switzer appealed, claiming they had not willfully withheld wages, but rather had been prevented from paying them because the bankruptcy court had frozen all available funds.

Finding Kingen's and Switzer's argument unpersuasive, the Washington Supreme Court held that bankruptcy is not a valid defense to negate a finding of willful failure to pay wages owed to employees. The court found that Kingen and Switzer had

continued to operate Funsters before and during the chapter 11 proceedings. Under their control, Kingen and Switzer made payroll decisions and determined which bills and obligations would be paid and when. Before the conversion from chapter 11 to chapter 7, Kingen and Switzer allowed unpaid wages to accrue in excess of $179,000. The Court held that Kingen's and Switzer's refusal to infuse capital sufficient to satisfy its debts, which was the reason the bankruptcy court converted the proceeding from a chapter 11 to a chapter 7 liquidation proceeding, was a willful business decision that caused the wages owed to remain unpaid. Because Kingen's and Switzer's failure to pay wages owed was willful, they were personally liable.

C. Withholding Payment Because of Genuine Dispute Over Violation of Terms of Severance Package Not Willful

Blue Frog Mobile, Inc. terminated plaintiff Jeffrey Moore, but agreed to pay him according to the terms of a severance agreement. Blue Frog's CEO Victor Siegel later decided Moore had breached the severance agreement's nondisparagement clause by voluntarily submitting a declaration in a third party's litigation against Blue Frog. Siegel directed Blue Frog to stop paying Moore, who then sued the company and Siegel personally.

Although Washington law provides for double damages when an employer (or officer) willfully withholds an employee's wages, a withholding is not willful if there is a bona fide dispute over the employee's entitlement to the wages. In *Moore v. Blue Frog Mobile, Inc.*, 2009 WL 2462330, the Washington Court of Appeals reversed the trial court's grant of summary judgment for Moore, finding that "a reasonable jury could find that Siegel genuinely and reasonably believed that Moore materially breached the severance agreement, thereby relieving Blue Frog of its severance obligation." Because a bona fide dispute over Moore's entitlement existed, a willfulness finding was negated precluding Siegel's personal liability of double damages.

D. Court Rejects Wrongful Discharge Claims of Employees Who Challenged Management

In *Briggs v. Nova Services*, 213 P.3d 910, the Washington Supreme Court rejected wrongful discharge and retaliation claims asserted by two employees who were fired after they complained about the management of their employer, and by six other employees who walked off the job after the first two employees were fired.

Eight employees of Nova Services wrote to Nova's board of directors expressing dissatisfaction with Nova's executive director, Linda Brennan. They criticized Brennan's "performance in areas of leadership, administration, finance, board development, corporate culture, and community and government." The employees asked for a meeting with the board and stated that if Nova discharged any of them for raising concerns, all of them would "leave."

Nova investigated and attempted to mediate the dispute. Ultimately, however, Nova fired two of the employees "for insubordination, petitioning grievances directly to

the board, and for using 'company time to enlist the support of fellow managers to undermine [the executive director]' authority and position." The other employees then threatened to "walk off the job and not return" until Nova reversed the termination and fired Brennan. When the board did not respond to their demands, they did walk off the job. Nova deemed them to have resigned.

The employees sued for, among other things, wrongful termination in violation of public policy and retaliation. The trial court dismissed their claims. In an August 27, 2009 opinion, the Washington State Supreme Court affirmed the dismissal.

The employees argued that their terminations violated Washington's public policy that protects employees' rights to engage in "concerted activities." RCW 49.32.020. The right is expressly not limited to unionized employees. But, according to four supreme court justices, it is limited to concerted activities aimed at improving "working conditions." According to the lead opinion, "working conditions" include things like "better wages, improved medical coverage, better treatment from supervisors, lunch and rest breaks, layoffs and recalls, production quotas, and work rules, on the job harassment, and even food prices at in-plant dining rooms." But, working conditions does not include "managerial decisions, which lie at the core of entrepreneurial control," including "the choice of one's supervisor and the wisdom of company practices [or] the hiring and firing of management." Thus, "Nova did not violate a clear public policy when it fired two employees based on an undeniable conflict of personalities and stated inability to work within the company. Nor did Nova violate a clear public policy when it accepted the resignation of the other six employees who would not work for Nova's choice of an executive director."

Four justices, however, disagreed. In the dissenters' opinion, "concerted activity means 'action in concert' or simply acting together" for "mutual aid and protection," which "includes listing grievances or complaints" and "walking off their jobs for . . . mutual aid and protection . . . in protest of working conditions." And "working conditions" included, in this case, the employees' "dissatisfaction with Brennan's professional performance as executive director of Nova," specifically allegations of lack of adequate supervision, failure to properly delegate authority, failure to hire needed staff, failure to accurately apply accrued sick leave, failure to communicate with employees, and failure to adequately manage finances. Moreover, the dissenters wrote, "Courts also have recognized that employees are protected in engaging in concerted activities for the purpose of seeking the reinstatement of a co-worker."

The remaining justice concurred with the result in favor of the employer but she did not express an opinion on whether the employees had engaged in protected activities. Because the court split evenly on the question of whether the employees in *Briggs* were engaged in protected concerted activity, the law remains less than clear on the subject.

E. Custodian's Emotional Distress Claim Not Barred by Workers' Compensation

Although workers' compensation is usually the exclusive remedy for employees who suffer an on-the-job injury or illness, there are some narrow exceptions. In *Rothwell v. Nine Mile Falls School District*, 149 Wn. App. 771 (2009), the Washington Court of Appeals permitted plaintiff Debbie Rothwell, a custodian for defendant Nine Mile Falls School District, to proceed with her claim of intentional and negligent infliction of emotional distress against the District because her post-traumatic stress disorder ("PTSD") was not an "injury" or "occupational disease" under the Industrial Insurance Act (the "Act").

The facts of the case are quite graphic and disturbing in nature. In December 2004, Rothwell was called and asked to report early for her shift because "a co-worker was distraught and needed to go home." When Rothwell arrived at work, she learned that a student had committed suicide in the main entrance of the high school by shooting himself in the head. Rothwell was then directed by the school superintendent to clean up the scene of the suicide. She was later told to go through the classrooms where the suicide victim had attended class earlier that day to determine whether he had left any bombs.

After completing the search, Rothwell was given permission to begin cleaning the suicide scene. She found a book bag in the corner, but did not realize that it belonged to the victim. Rothwell picked it up and began removing items from the area when one of the deputies told her that the bag needed to remain where it was. Rothwell later learned that a bomb squad had detonated a pipe bomb contained in the bag.

Rothwell finished cleaning the scene at 4:15 a.m. The superintendent then ordered Rothwell to return to school the following morning between 7:30 and 8:00 a.m. to hand out cookies and coffee to students, parents, and staff members. Over the course of the next few days, Rothwell was required to clean up candles and cards left at the suicide scene, which she found very disturbing. Rothwell subsequently filed suit against the District for intentional and negligent infliction of emotional distress, alleging that she "suffered and continues to suffer physical and emotional distress" as a result of the District's actions.

On appeal from the trial court's summary judgment for the District, Rothwell asserted two arguments as to why her claim was not barred by the Industrial Insurance Act, also known as workers' compensation. First, Rothwell contended that the she was not engaged in employment duties when she was ordered to clean up the scene of the student suicide. The court found this argument unpersuasive, noting that Rothwell was complying with her supervisors' orders and was, therefore, acting in the course of her employment when she suffered the emotional trauma and stress that lead to her PTSD.

Next, Rothwell contended that her action was not barred because her claims were not based on an "injury" or "occupational disease" as defined by the Act. Specifically, conditions caused by "stress" do not fall within the definition of occupational

disease, unless caused by a single traumatic event. Rothwell argued, and the court agreed, that her PTSD was not the result of a single traumatic event, but rather a series of incidents that occurred over a period of a few days. Therefore, the court held that Rothwell's PTSD was not an injury or occupational disease under the Act and her claims against the District were not barred.

F. Violinist's Disability Claim Dismissed

Plaintiff Peter Kaman sued his employer, the Seattle Symphony Orchestra, claiming that he had been discriminated against because of his disability in violation of the Washington Law Against Discrimination. Kaman, a violinist with the Symphony, claimed that the music director and management subjected him to a hostile work environment and failed to accommodate his mental disability. Specifically, Kaman alleged that the music director's style and personality, along with management's actions, caused him anxiety to a disabling degree. Kaman requested medical leave for three periods in the fall and winter of 2005-06. In each case, the medical clearance form merely indicated that the leave was for "illness" with no other description or explanation. Each medical leave request coincided with periods when the music director was conducting.

During Kaman's January 2006 medical leave the Symphony again requested information about Kaman earlier absences. The Symphony provided Kaman with a letter for his doctor asking about the nature of the illness, which work-related activities Kaman would be unable to perform during his leave, whether "there will be any limitations on his ability to perform his duties" upon his return, whether he will need any form of accommodation, and whether future leave is anticipated. Kaman refused to provide the information. The Symphony informed Kaman that it would advance the sick pay on condition that he provide documentation as required by the collective bargaining agreement between Kaman's union and the Symphony. Kaman then sent a letter to the Symphony threatening to file suit. The letter included a memo from his therapist. Kaman later provided a note from his physician that the Symphony accepted as the required documentation for Kaman's January absences. The following month, Kaman filed a lawsuit against the symphony alleging various causes of action including disability discrimination. The trial court dismissed the case in favor of the Symphony.

In affirming the trial court's dismissal of Kaman's case, the court of appeals held that Kaman had failed to prove the elements necessary to sustain a claim of disability discrimination based on a hostile work environment. *Kaman v. Seattle Symphony Orchestra,* 2009 WL 1279009. As the court observed, the employee's disability must be a motivating factor for the unwelcome conduct that creates a hostile environment. Kaman failed to show "a nexus between the disability and the conduct complained of." The court found that the testimony of a former concert master who testified that the music director had once called Kaman "crazy" and had asked him to find a way to fire Kaman was insufficient evidence to prove that the music director knew of Kaman's disability, or that he treated him poorly because of it. The evidence showed that the music director referred to others as "crazy" or "nuts," and there was no evidence that he

knew Kaman was seeing a therapist. Moreover, the court noted that "knowledge that a person is stressed or anxious is not, standing alone, knowledge of a mental disability."

IV. H1N1 FLU VIRUS AND COMPLIANCE WITH EMPLOYMENT LAWS

Undoubtedly employers are concerned about the possible impact an H1N1 influenza outbreak may have on business operations and employees. During an influenza outbreak, businesses and other employers have an important role in protecting employees' health and safety as well as limiting the negative impact to the economy and society. It is never too early for employers to develop a pandemic flu preparedness plan to help ensure continuity of operations in the event of an outbreak. In developing such a plan, employers must keep in mind compliance with applicable employment regulations and statutes to avoid potential liability that could result from an H1N1 outbreak.

A. OSHA General Duty Clause

Under the Occupational Safety and Health Act's ("OSHA") General Duty Clause, employers are required to provide employment free from recognized hazards and follow the practices that public health experts agree are necessary to protect workers' health. OSHA has indicated that it will rely on the General Duty Clause to protect workers from a pandemic flu. Employers may be required to take protective measures such as providing employees with personal protective equipment (such as respirators). An employer who willfully or repeatedly violates the requirements of the General Duty Clause may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

OSHA and the Center for Disease Control ("CDC") have issued general guidelines for employers, which include:

- Prepare and plan for operations with a reduced workforce;
- Develop a sick leave policy that does not penalize sick employees, thereby encouraging employees who have influenza-related symptoms to stay home so that they do not infect other employees. Employees with ill family members may need to stay home to care for them;
- Cross-train employees or develop ways to function in the absences of people required to sustain business-necessary functions and operations;
- Establish contact with local and state health departments;
- Educate and train employees in proper hand hygiene, cough etiquette and social distancing techniques; and,
- Keep employees informed about pay, leave, safety and health issues.

B. The Family and Medical Leave Act

An employee who has a serious health condition or is required to provide care to a qualified family member with a serious health condition may be entitled to up to 12 weeks of continuous or intermittent leave under the Family and Medical Leave Act ("FMLA"). Because an employee who contracts H1N1 may be considered to have "a serious health condition," he or she may be entitled to leave under the FMLA. Employees may also be entitled to take leave under the FMLA to care for a family member diagnosed with H1N1. Although the CDC guidelines discourage employers from requiring medical documentation from employees absent for H1N1 infection due to the potential strain on health care facilities during an outbreak, employers have a right to require a medical certification for the serious health condition of an employee or a qualified family member.

Employers who have not already done so, should review their policies now and make sure requirements for reporting absences are clear, and that the policies are up to date.

C. The Americans with Disabilities Act

The EEOC issued guidance with respect to the ADA and the H1N1 flu. The ADA regulates medical examination and disability-related inquiries of employees and applicants, only permitting them if certain conditions are met.

- Prior to the offer of employment, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.
- Post-offer but prior to the employee's first day of work, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.
- After employment begins, an employer may make disability-related inquiries and require medical examinations only if the inquires and examinations are "job related and consistent with business necessity."

Employers may want to consider a post-offer medical examination as a preventative measure to limit introducing a pandemic flu into the working environment.

Although employers are limited in their ability to make individual employee disability inquiries, the EEOC guidance makes clear that an employer may make broad-brush, general inquires of its workforce in order to prepare for an outbreak. An inquiry would not be disability-related if it identified non-medical reasons for an absence during a pandemic. For example, an employer may ask its workforce whether certain conditions (such as a school closing or reduced public transportation) will affect an employee's ability to come to work.

An employee diagnosed with H1N1 is not disabled under the ADA if he or she is able to perform the essential functions of his or her job, with or without accommodation. However, where an employee poses a workplace safety threat, an employer may place the employee on leave. Employers should be careful not to place employees unnecessarily on leave thereby creating exposure to "regarded as" disability claims.

D. Retaliation Claims

Employers should not discriminate against employees who take FMLA leave because they contract H1N1 or because they are caring for a family member who has contracted the illness.

Employers should also be cautious about disciplining an employee or groups of employees for refusing to come to work because they are afraid of a pandemic flu infection. Under OSHA, employees with a *good faith* belief that the workplace is unsafe may be entitled to refuse to work. Similarly, under the NLRA, employees are entitled to engage in protected, concerted activity.

E. The Fair Labor Standards Act

Many employers may consider cross-training employees to cover for employees who contract H1N1. Consequently, employees may find that their job descriptions are significantly altered. Altered job descriptions may have implications for the employee's exempt/non-exempt status and overtime compensation.

Employers may also choose to allow certain categories of employees to telecommute and work remotely in order to minimize exposure. Indeed, these measures are encouraged by both OSHA and the CDC. Allowing workers to telecommute, however, may have serious Fair Labor Standards Act and state wage and hour law implications. For example, guidelines should clearly establish expectations that non-exempt workers are not to work remotely outside of regularly scheduled hours without prior approval to ensure compliance with overtime laws. Employers who choose to allow employees to work remotely should work with legal counsel to develop a comprehensive telecommuting program that complies with relevant federal and state wage and hour law.

F. Workers' Compensation Claims

Employers should be aware that under certain circumstances, contracting the H1N1 virus may be a compensable injury under workers' compensation laws. Generally, an injury is compensable under a workers' compensation law if the injury arises out of and in the course of employment. Health care workers who become infected with H1N1 virus as a result of patient contact will almost certainly have compensable claims. Employees who are exposed to the virus on company business travel, in company-provided transportation, such as a van, or at the office may also have compensable claims.

G. Privacy and Medical Information (FMLA, HIPAA, ADA, Workers' Compensation)

In accordance with several federal and state laws, employers are required to ensure that all medical information obtained about an employee (whether voluntarily revealed or obtained through an employer inquiry) is private and confidential and must be treated as such. An employee's diagnosis with or without a condition is considered protected health information. Accordingly, employers should not disclose whether a person has or has not contracted H1N1.

H. Helpful Resources

Several government agencies have helpful information related to influenza outbreaks.

2009 H1N1 Influenza Information www.cdc.gov/h1n1flu/

One-stop www.flu.gov

2009 H1N1 Flu Resources for Business and Employers
www.cdc.gov/h1n1flu/business

Worker Safety and Health Guidance for Pandemic
www.osha.gov/dsg/topics/pandemicflu/index.html

OSHA's Guidance on Preparing Workplaces for an influenza Pandemic
http://www.osha.gov/Publications/influenza_pandemic.html

CDC/NIOSH Occupational Health Issues Associated with 2009 H1N1 Influenza
www.cdc.gov/niosh/topics/h1n1flu

Equal Employment Opportunity Commission
www.eeoc.gov/facts/h1n1_flu.html