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Hot Topics: What Employers Need to Know in 2012

We could not present an employment law workshop without including our popular "Employment Law Update." The always popular employment law update returns with coverage of the most important developments from the last year and some of the issues we see on the horizon that may impact employers. In addition, our comprehensive written materials will serve as an ongoing resource for employment law issues in the coming year. (This is a 60-minute presentation.)

Session Presenters:

Kevin Hamilton focuses his practice on labor and employment counseling and litigation. With over two decades of experience, Mr. Hamilton has addressed, through counseling, negotiation, or litigation, a broad range of key issues critical to the modern workplace. Mr. Hamilton has particular experience with noncompetition, trade secret, multiple plaintiff and class action litigation. Mr. Hamilton chairs the firm's nationally recognized Retail and Consumer Industry practice, including more than 160 lawyers throughout the firm who focus on issues across the spectrum of those confronting the retail and consumer products industry. Kevin has worked closely with a wide variety of clients on employment-related issues, including Starbucks, Microsoft, Vulcan, Inc., Experience Music Project, Eddie Bauer, The Boeing Company, and Puget Energy, among others.

Jeff Hollingsworth, a Perkins Coie partner for more than twenty years in the firm's Labor & Employment practice, litigates complex class employment cases for large commercial businesses and public employers. His extensive experience permits rapid and incisive case assessment, aggressive strategic and tactical planning and efficient litigation management tailored closely to the particular facts and circumstances of a case. His concerns also extend to practical but vital collateral issues often related to large litigation, such as public relations and employee morale. In addition to his litigation practice, Jeff also counsels employers on prevention of class claims and in this arena focuses on statistical analysis of employment transactions such as compensation, promotion and reduction in force.

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by Kevin Hamilton and Jeff Hollingsworth

I. SIGNIFICANT LEGISLATIVE AND REGULATORY DEVELOPMENTS

The last year has brought a number of significant developments in labor and employment law on both the federal and the state levels. At the federal level, the National Labor Relations Board, under a Democratic administration, continues to push measures aimed at strengthening protections for employees. Similarly, the EEOC continues to reinforce its positions aimed at protecting the rights of job applicants in a still difficult job market. The turmoil over healthcare reform legislation presents unique challenges as employers grapple with implementing required changes while, at the same time, awaiting the Supreme Court's determination of the legislation's fate.

At the state level, social media was a notable trend this year, with Maryland becoming the first state to ban employers from accessing employees' social media accounts such as Facebook. Many other states around the country have proposed similar legislation. In Washington, the new sick/safe leave law is set to begin in the fall of 2012. Washington also continues a national trend of increased protections for nursing mothers.

Several significant court cases have come down in the last year as well, including the U.S. Supreme Court's landmark class action ruling in *Walmart v. Dukes* case and the long-awaited California decision, *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, on meal and rest breaks.

This paper provides an overview of recent federal and state legislative, regulatory, and executive activity. Additionally, it focuses on a number of significant court decisions at the federal and state level, with a focus on Washington.

A. FEDERAL DEVELOPMENTS

1. NLRB Poster Requirement Postponed

The new employee poster requirement adopted by the National Labor Relations Board, originally scheduled to take effect on April 30, 2012, was postponed by the United States Court of Appeals for the D.C. Circuit pending consideration of an appeal from the decision of the lower court upholding the requirement. *National Ass'n of Mfrs. v. NLRB*, No. 12-5068 (D.C. Cir. April 17, 2012) (injunction pending appeal). The appeal will be heard in the Fall of 2012.

Government contractors, however, remain required by an Executive Order to post a similar notice.

The new rule was adopted by the National Labor Relations Board ("NLRB") and requires virtually all private sector employers to post large official notices informing employees of their rights under the National Labor Relations Act—the federal law that protects employees who engage in union and other concerted activities. The labor law posters are required even in workplaces where there currently are no unions. The posting requirement applies to all employers subject to jurisdiction of the National Labor Relations Board—virtually all private sector employers except for agricultural employers, airlines and railroads.

The new NLRB notice must be posted wherever notices to employees are typically posted. Employers may reproduce the official poster so long as they do not change the size, content,

format, font or font size. The notice must be at least 11 x 17 inches in size and may be combined with other required employee notices.

If 20 percent or more of the employer's workforce is not proficient in English and speaks another language, the employer must post the notice in the language those employees speak. If the employer has two or more such groups who speak different languages, the employer must either post the notices in each of those languages or, at the very least, post the notice in the language spoken by the largest group of employees and give the other employees a copy of the notice in a language in which the employees are proficient.

The required notices, including those translated into other languages, are available at no cost from the NLRB's regional offices. The notices can also be downloaded from the NLRB's website at www.nlrb.gov/poster.

The notice must also be published on the employer's intranet or Internet site if the employer customarily uses such media to communicate with employees about rules and policies. As an alternative to posting the poster on its intranet or Internet site, an employer may instead post a link to the NLRB's website that contains the poster. The link must read: "Employee Rights Under the National Labor Relations Act."

Federal contractors, who are already required by the Department of Labor to post a similar notice of employee rights, need not post the new NLRB notice so long as they post the Department of Labor's notice.

The lower court's decision upholding the poster requirement, *National Association of Manufacturers v. National Labor Relations Board*, 1:11-cv-01629 (D.D.C. March 2, 2012), nonetheless struck down two related provisions of the new rule. Those stated that failure to comply with the new posting requirements would be an unfair labor practice and could also have the effect of enabling employees to file unfair labor practice charges after the normal six-month time limit has expired.

Regardless of whether the new posting rule is upheld or rejected, the controversy about the posting requirement has highlighted employees' rights to organize. Employers should consider steps to ensure that they are positioned to respond to any union activity that might occur. Adopting nondiscriminatory bulletin board rules or guidelines with respect to use of electronic communications systems should be considered now, in advance of any organizing campaign. Many of those steps must be taken before any union activity actually begins.

2. NLRB's So-Called "Ambush" Election Rule Struck Down

On May 14, 2012, U.S. District Judge James Boasberg of the U.S. District Court for the District of Columbia struck down the National Labor Relations Board's new regulation aimed at streamlining the election process, referred to by opponents as the "ambush rule." The new rule had the effect of allowing elections to take place much more quickly, within only a few weeks after a union asks for one. This gave employers much less time to mount a campaign to try to convince employees to vote against union representation.

The new rule had taken effect on April 30, 2012. Judge Boasberg ruled that the NLRB did not have a quorum when it voted on the new rule and that the rule was thus invalid. The court held that, for now, union elections must take place under the old system. The National Labor Relations Act requires that the NLRB have a quorum of at least three members to vote.

In December 2011, the NLRB voted to adopt the new regulations. At the time, the NLRB had three members; only two members voted for the rule, while the third member did not participate. The U.S. Chamber of Commerce sued to invalidate the rules on various grounds, including arguing that the NLRB had not had a requisite quorum. The court agreed and held that without a quorum, the rule was invalid.

3. NLRB Says Arbitration Agreements That Waive Class Actions Are Illegal

On January 3, 2012, the NLRB issued its decision in *D.R. Horton, Inc.*, concluding that private arbitration agreements that require employees to waive their right to pursue class actions are illegal because they interfere with the employees' rights to engage in collective activities protected by federal labor law.

According to the NLRB, an employer that wants to have a mandatory arbitration program for employment claims has two alternatives: either allow class actions to be pursued through the program to arbitration or allow employees to pursue class or collective actions in court. In the latter alternative, apparently, the employer could preclude class actions in arbitration.

On a related and equally important point, the NLRB said that the employer must permit employees to file charges with the NLRB. Therefore, an arbitration program that requires ***all*** claims to be submitted to arbitration is unlawful on its face because it would preclude employees from filing unfair labor practice charges with the NLRB.

4. NLRB Chimes in on Employer Social Media Policies

On May 30, 2012, Lafe Solomon, Acting General Counsel of the NLRB, issued a report concerning recent social media cases. Employee use of social media as it relates to the workplace continues to increase, raising various concerns by employers, and in turn, resulting in employers' drafting new and/or revising existing policies and rules to address these concerns. These policies and rules cover such topics as the use of social media and electronic technologies, confidentiality, privacy, protection of employer information, intellectual property, and contact with the media and government agencies. The NLRB's opinion was that many of these policies violated Section 8(a)(1) of the National Labor Relations Act because they "would reasonably tend to chill employees in the exercise of their Section 7 rights."

For example, one employer's policy of requiring employees to follow the employer's guidelines before mentioning the employer on social media sites like Facebook or YouTube was unlawful. Its instruction that employees not "release confidential guest, team member or company information" could reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves--activities that are clearly protected by Section 7.

Another policy instructing employers to be sure that their posts are "completely accurate and not misleading and that they do not reveal non-public information on any public site," was struck down because the term "completely accurate and not misleading" is overbroad because it would reasonably be interpreted to apply to discussions about, or criticism of, the Employer's labor policies and its treatment of employees that would be protected by the Act so long as they are not maliciously false. Moreover, a provision prohibiting employees from expressing their personal opinions to the public regarding "the workplace, work satisfaction or dissatisfaction,

wages hours or work conditions" was deemed unlawful because it precludes employees from discussing and sharing terms and conditions of employment with non-employees.

When viewed as a whole, the NLRB Report make it clear that overly broad or restrictive social media policies will be rendered unlawful if they can be interpreted as stifling employees' exercise of their Section 7 rights.

5. Commonplace Employer Policies That Are Unlawful

The National Labor Relations Board continues to find garden-variety employer policies to be unlawful because they restrict or interfere with employee rights protected by the federal labor law, the National Labor Relations Act (the "NLRA"). Well advised employers should be wary and attentive.

The NLRA protects virtually all nonsupervisory employees—not just those represented by a union. This is probably the single biggest misunderstanding about federal labor law. Even non-union shops are covered by the NLRA.

One of the rights protected by Section 7 of the NLRA is an employee's right to engage in "concerted activities for . . . mutual aid or protection." These "Section 7 rights" are very broad, and protection by the NLRA extends to many forms of employee activities. In turn, any action by an employer that improperly restricts or interferes with any of those activities is unlawful. Even an unwritten rule can be unlawful—for example, telling an employee that he or she cannot do something or must stop doing something the employee is legally entitled to do.

One of the most common ways these issues arise is when an employer disciplines an employee for engaging in conduct protected by Section 7. For example, suppose the employer has a written rule prohibiting employees from discussing their wages. Sound familiar? If the employer discharges an employee for violating that rule, the discharge would be illegal because the rule itself is illegal—employees have a Section 7 right to discuss their wages. The remedy would be to reinstate the employee, make him or her whole for all lost wages and benefits, rescind the rule, and promise never to do it again—undertakings that would have to be publicized throughout the workplace with large official posters placed wherever employee notices are typically posted. The notice would also have to be posted on the employer's intranet and disseminated via email to all employees if the employer uses such media to communicate with the workforce.

Another way these issues arise is when a union is attempting to "organize" a group of employees—trying to convince them that they should select the union to represent them in dealings with their employer. An unlawful rule can be grounds for a union to obtain a second election even if it has already lost the first election and even if the rule was never actually enforced against protected activities. Also, the union can challenge a rule directly and force the employer to change it and post a remedial NLRB notice reciting the employees' right to engage in union activity. Having accomplished that, the union can brand the employer a lawbreaker that has been called on the carpet and made to repent by the union seeking to improve the lot of the employees, thereby demonstrating that employees need the union's protection. In short, nothing good comes from unlawful rules.

What sort of rules are we talking about? In general, there are three categories of unlawful rules: (1) those adopted in response to union activity even though they would otherwise have been

lawful; (2) those that expressly restrict Section 7 activities; and (3) those that, although not expressly mentioning Section 7 activities, would reasonably be understood to prohibit such activities.

The first category—rules adopted in response to union activity—includes access, solicitation and distribution rules that can be lawfully adopted only *before* there is any sign of union activity. This demonstrates how important it is to have lawful rules in place before any union activity starts. Failing to do so then may prevent an employer from adopting them later.

Examples of the second category of rules—those expressly prohibiting Section 7 activities—include rules that prohibit such things as:

- Discussing wages and benefits.
- Soliciting employees about nonwork-related issues at work.
- Distributing literature in nonwork areas.
- Striking or picketing.
- Joining unions.

Determining the scope of the third category is more challenging. The question is whether the rule would reasonably tend to discourage employees from exercising their Section 7 rights. Although the rule must be given a reasonable reading in context, ambiguities are construed against the employer. If a particular rule is overly broad, merely maintaining it is unlawful, even if it has never been enforced. Examples of rules in this category include the following:

- Prohibiting the disclosure of information from the company's email, instant messaging and phone systems to unauthorized persons.
- Prohibiting the disclosure of "confidential or sensitive information concerning the Company or any of its employees" without approval.
- Prohibiting the disclosure of "information from an employee's personnel file" without approval.
- Directing employees to "Voice your complaints directly to your immediate supervisor or to Human Resources through our 'open door' policy."
- Prohibiting "making false, vicious, profane or malicious statements" toward or concerning the company or any of its employees.
- Prohibiting "negative conversations about employees or managers."
- Prohibiting "performing activities other than Company work during working hours."
- Routinely instructing employees involved in an investigation not to talk with other employees about the substance of the investigation.

Because each of these rules could be reasonably construed to interfere with an employee's right to engage in Section 7 activities, the NLRB found them unlawful.

Employers should carefully review their rules of conduct—particularly their confidentiality/nondisclosure rules—to ensure that they pass muster under the NLRA. Sadly, even common employer rules have increasingly found to be unlawful.

6. EEOC Reminds Employers That Criminal Screens Must Be Job-Related

In April 2012, the Equal Employment Opportunity Commission ("EEOC") issued "Updated Enforcement Guidance," reminding employers that screen applicants' criminal backgrounds that the information they acquire must be job-related in order to avoid potential discrimination suits. The Enforcement Guidance takes the position that an employer that is accused of violating Title VII would carry the burden of proving that it followed the standards and that it did not discriminate against applicants with criminal records who could perform the job's tasks adequately or against minorities.

The EEOC explained that the new guidelines do not reflect a change in policy. Rather, the EEOC maintained that further background and legal analysis were necessary, particularly after a Third Circuit Court of Appeals decision from 2007, *El v. Southeastern Pennsylvania Transportation Authority*, in which the court called on the EEOC to provide more analysis and updated research on the issue.

EEOC Chairwoman Jacqueline A. Berrien stated that the Guidance "clarifies and updates the EEOC's longstanding policy concerning the use of arrest and conviction records in employment, which will assist job seekers, employees, employers, and many other agency stakeholders." Commissioner Constance S. Barker was the only EEOC commissioner to vote against the guidelines. She expressed concern that the Guidance goes outside the jurisdiction of the EEOC, that it will harm business owners, and that the EEOC did not receive sufficient public comment.

The EEOC emphasized that while the guidelines may place a slightly higher burden on employers during hiring processes, they will go a long way to prevent undue discrimination against job seekers and employees. The guidelines also note that employers who use more stringent state or local laws and regulations to determine their employment screening processes will not be protected from Title VII liability.

A report published by the National Consumer Law Center estimates that 93 percent of employers run criminal background checks for some job candidates, and 73 percent of employers conduct criminal checks on all potential new hires. The report states that such background checks often contain mistakes such as mismatching the actual subject of the background check with a different person, including misleading information, or mischaracterizing the seriousness of an offense.

Criminal and other background checks raise a host of issues in the modern workplace. The Fair Credit Reporting Act at the federal level and numerous state law counterparts require advance notice and consent from the employees at issue, notification of rights, and in some cases an opportunity to correct inaccurate records.

Criminal records checking should be conducted carefully and only after careful evaluation with counsel.

7. DOL Releases Proposed Rules Implementing Expanded FMLA Leave for Flight Crew Members and Military Caregivers

On February 15, 2012, the U.S. Department of Labor ("DOL") issued a notice proposing regulations to implement amendments to the military leave provisions of the Family and Medical Leave Act ("FMLA") made necessary by the passage of the National Defense Authorization Act for Fiscal Year 2010 and to implement the Airline Flight Crew Technical Corrections Act that established new FMLA leave eligibility requirements for airline flight crew members and flight attendants.

Key Provisions of the Proposed Regulations:

- Expand the amount of time an employee may spend with a service member on rest and recuperation leave from 5 to 15 days. Currently, eligible employees are permitted to take five days of leave to spend with a service member on rest and recuperation leave during a period of deployment.

- Allow for second or third opinions on military caregiver leave certifications that are completed by healthcare professionals who are not associated with the military or with Veteran's Affairs.

- Clarify and define the foreign deployment requirement for qualifying exigency leave for all service members, including the Reserves, the National Guard, and the Regular Armed Forces. Qualifying exigency leave is available only to families of service members who are deployed to a "foreign country." Deployment to a foreign country would now be defined as areas outside the United States, the District of Columbia, or any Territory/Possession of the United States, and would include international waters. The DOL wants to ensure that family members of the Navy, Coast Guard, and other military service members deployed in international waters have access to qualifying exigency leave.

- Create a three-part flexible definition for serious illness or injury of a veteran in order to allow caregiver employees expanded coverage. Under the proposed definition, a veteran would be considered to have a serious illness or injury if he or she (1) meets the same requirements of a serious illness or injury as a current service member; (2) has received a disability rating of 50 percent from Veteran's Affairs (covering more conditions such as amputations, traumatic brain injuries, post-traumatic stress disorders, etc.); or (3) has a similarly severe illness or injury but is not technically covered under the first two categories.

- Clarify that although it is the employee's responsibility to provide the employer with sufficient certification to receive qualifying exigency leave, an employee will not be held liable for administrative delays on the part of the military despite his or her good-faith effort to obtain the necessary documents.

- Establish special eligibility requirements for airline flight crew members, therefore allowing a larger number of airline employees to access FMLA leave.

FMLA Leave for Airline Flight Crew Members

The Airline Fight Crew Act establishes a special leave eligibility requirement under the FMLA for airline flight crew members, including flight attendants and pilots, to address the airline industry's unique scheduling requirements. Under the new law, a flight crew member is now eligible for FMLA leave if he or she has worked or been paid for not less than 60 percent of the applicable total monthly guarantee and has worked or been paid for not less than 504 hours during the previous 12 months.

FMLA Military Family Leave

The National Defense Authorization Act expanded the FMLA's military caregiver leave and qualifying exigency leave provisions. The FMLA's military leave provisions allow eligible employees leave to care for a family member who becomes seriously ill or injured in the line of duty during active military service (military caregiver leave) and leave to address family emergencies resulting from a family member being called to active military duty (qualifying exigency leave). Under the military caregiver leave provision, caregivers are entitled to up to 26 weeks of leave in a single 12-month period. Qualifying exigency leave gives employees up to 12 weeks of leave.

The original military leave provisions, signed into law in 2009, provided that:

- An employee is entitled to take qualifying exigency leave for any covered service member, regardless of whether that person is a member of the Reserves, the National Guard, or the Regular Armed Forces. Previously, such leave was available only for service members who were in the National Guard or Reserves or called to active duty after retiring from the Regular Armed Forces.

- An employee may take leave to care for a veteran with a serious illness or injury received in the line of duty as long as the family member served in the military within five years prior to the leave requested by the employee. Before, employees were only permitted to take military caregiver leave to care for current service members.

- Military caregiver leave was extended to include caring for both current service members and veterans whose pre-existing serious illnesses or injuries were aggravated during military service.

8. Auditing Health Plan Dependent Eligibility? Be Careful!

Employers that allow dependents to be covered under their health plans need to be aware of health care reform rules that may limit their ability to retroactively remove ineligible dependents from coverage.

Background

To ensure that only dependents who meet a health plan's eligibility requirements are enrolled, many employers audit dependent eligibility and require documentation to verify eligibility. In general, if an employee cannot provide verification of a dependent's eligibility, the dependent is removed from coverage either retroactively to the date of enrollment or prospectively as of a date specified by the employer. The health care reform law placed limits on retroactive cancellation of coverage, and employers will need to understand the new rules in order to avoid

triggering possible penalties. Group health plans (including both grandfathered and non-grandfathered plans) and insurers that issue group or individual health insurance coverage are all subject to the rules on retroactive cancellations.

The Impact of Health Care Reform

The health care reform law defines "rescission" as a retroactive cancellation of an individual's health coverage, unless the retroactive cancellation is due to a failure to pay required premiums or contributions toward the cost of coverage. A retroactive cancellation of a dependent's coverage for failure to meet the plan's eligibility requirements would be a rescission.

Under the health care reform law, rescission is permissible only if the individual (or someone acting on behalf of the individual, such as an employee who enrolls a dependent):

- obtained coverage through fraud or an intentional misrepresentation of material facts as prohibited by the terms of the plan or coverage and

- is given at least 30 days' advance notice of the rescission.

The rescission can be challenged through the health plan's appeals process and, if the plan upholds the rescission, the individual can demand external review of the rescission by an outside decision maker, known as an Independent Review Organization ("IRO").

The limits on rescissions put in place by the health care reform law apply very broadly. For example, if a health plan does not cover grandchildren, but an employee enrolls a grandchild anyway and then cannot provide verification of eligibility when audited, the plan cannot cancel the grandchild's coverage retroactively unless it can show that the employee made an intentional misrepresentation of the grandchild's eligibility or otherwise engaged in fraud in enrolling the grandchild. An unintentional or mistaken misrepresentation would not be sufficient to permit the plan to cancel the grandchild's coverage retroactively. A claim by the employee that the plan's eligibility rules were not clear or that the employee did not understand the eligibility rules might be enough to raise doubt about the plan's ability to cancel the grandchild's coverage retroactively. In addition, if the plan were to cancel the grandchild's coverage retroactively, the employee would have the right to appeal the cancellation and, if the plan did not change its position, the employee could take the matter to an outside IRO.

An employer can avoid having to meet the conditions for rescission by choosing to cancel coverage only on a prospective basis. While this approach avoids the difficulties presented by the health care reform rules, it may leave the health plan's fiduciaries in a difficult position, because they have a duty to follow the plan's eligibility rules and to act solely in the interest of legitimate plan participants. In addition, employers with insured plans should fully consider how best to address eligibility issues with insurers, including prospective versus retroactive cancellation. For example, insurers may insist on retroactive cancellation if a claim is large and the insurer believes there is a reasonable chance of showing fraud or an intentional misrepresentation of a material fact.

Practical Tips

Employers that want to be able to cancel coverage of ineligible dependents retroactively should consider the following actions:

- Discuss the issue of retroactive cancellation of coverage with the plan's insurer or third-party administrator to learn how they prefer to handle removal of ineligible dependents and to ensure that they can and will support the employer's preferred approach. If the plan decides to make retroactive cancellations, be sure the plan, the insurer, or the third-party administrator has contracts in place with IROs to handle the outside review.
- Make sure that the plan's eligibility provisions are stated very clearly and prominently in all enrollment materials, summary plan descriptions, and other plan documents to avoid claims by employees that they did not know or did not understand the eligibility rules. It might be wise to seek professional help to state the eligibility rules in very plain language.
- Include in the enrollment materials strong and prominent language warning that dependent eligibility may be audited and that enrollment of a dependent who does not meet the plan's eligibility requirements as stated in the enrollment materials will be treated as an intentional misrepresentation of a material fact, or fraud. Inclusion of this language will not guarantee that the plan can prevail, but it may help.

9. HIPAA Audits Come With Short Turnaround Times

The Department of Health and Human Services ("HHS") has begun a pilot program of HIPAA privacy and security audits for health care providers and health plans, and the audits will have some very short turnaround times.

The Pilot Program

The pilot program will be in two phases. First, a small number of audits will be performed to test the audit protocols and make any necessary revisions. The rest of the audits will be performed using the revised protocols and will be completed by the end of 2012. The pilot program will focus on covered entities of all sizes, including health care providers, health plans and health care clearinghouses. Business associates will be included in future audits.

Short Turnaround Times

The planned timeline for the audits is aggressive. As described by HHS, an audit notification letter describing the initial documents and information to be turned over will be sent to a covered entity. The covered entity is then expected to provide the documents and information within 10 business days. Every audit in the pilot program will include on-site fieldwork. The covered entity will receive notice of the visit 30 to 90 days before it occurs. The on-site visit may last from 3 to 10 business days, during which time the auditor will observe the covered entity's operations and interview key personnel. A draft audit report will be made available to the covered entity within 20 to 30 days after the visit concludes. The covered entity will have 10 business days to review and discuss the draft with the auditor. Any corrective action that the covered entity would need to undertake will need to be addressed during this period. The final audit report will be submitted to HHS within 30 business days after the covered entity reviews and comments on the draft.

Some Good News

Despite the short turnaround times in the audit process, there is some good news. There will not be a posted list of audited entities, and audit findings will not be disclosed in a way that would identify the audited entity. In addition, the audit reports will generally be used to identify issues

that need additional technical assistance rather than to impose penalties. However, if an audit identifies a serious compliance issue, HHS may take action to address the problem.

Practical Tips

- If you receive an audit notification letter and have questions about whether your documentation and operations are in compliance with the regulations, speak with your attorney immediately—there's no time to waste.
- Be ready to give the auditor a copy of your HIPAA privacy and security policies and procedures. The regulations require that they be documented in writing (both hard copies and electronic documentation are acceptable), and although HHS has not stated what the auditors will ask for, the policies and procedures will almost certainly be the starting point.
- Take advantage of the opportunity to review the draft audit report and discuss any appropriate corrective action with the auditor. If the auditor has misunderstood your policies or procedures or failed to grasp any aspect of your operations, provide a clarification for the final audit report.

B. WASHINGTON DEVELOPMENTS

1. Seattle City Council Passes Paid Sick/Safe Leave Ordinance

In September 2011, the Seattle City Council passed an ordinance ("Ordinance No. 123698) that requires all but the very smallest employers to provide their employees who work in Seattle a minimum amount of paid sick and safe leave, or "PSL." The Seattle Office for Civil Rights has proposed a set of interpretive rules that answer some of the questions that the ordinance leaves open. The Office for Civil Rights is accepting public comments on the proposed rules until June 13, 2012, after which the interpretive rules will be finalized. The ordinance is effective September 1, 2012. Employers will want to review the final interpretive rules carefully, as many employers' current sick leave policies and practice will not comply with the requirements of the Seattle ordinance.

2. Seattle Bans Restrictions on Nursing Mothers

The Seattle City Council unanimously passed legislation protecting breastfeeding mothers, citing the measure's importance as a public health issue. The ordinance will allow mothers to breastfeed at any time, place or manner, making it illegal for restaurant or store management to tell them to leave, cover the baby with a blanket or towel, or move to another location. The ordinance expands on state protections afforded in 2009 to mothers breastfeeding in public. The Seattle Office of Civil Rights is tasked with enforcing the new law.

Since the state law was passed, three mothers have filed complaints with the state's Human Rights Commission. One woman was asked to leave a physical therapist's waiting room, another was told to stop breastfeeding at a Head Start facility, and the third was breastfeeding at the Sol Duc Hot Springs.

Other states, too, have given nursing women specific protections. In New York, infants may accompany their mothers to prison if their mothers are nursing them when they are committed. Nursing mothers in Virginia may breastfeed on any land or property owned by the state. And in Maryland, equipment for breastfeeding is exempt from sales tax.

C. SIGNIFICANT DEVELOPMENTS IN OTHER STATES

1. Maryland Bans Employers From Workers' Social Media Accounts

Maryland became the first state this past April to pass legislation banning employers from asking for employees' and job applicants' social media site passwords. In addition to banning employers from requesting or requiring usernames or passwords to personal online websites such as Facebook, the Maryland bill also prohibits them from taking, or threatening to take, disciplinary action against employees or applicants who refuse to disclose such information.

The Maryland bill came to life after a Division of Corrections officer's recertification interview, in which he was asked to give the interviewer his Facebook account information. According to the ACLU, Officer Robert Collins was forced to sit and watch while the interviewer logged into his account and reviewed his activity, stating that he felt he had no choice but to provide the information. Collins had taken a voluntary leave of absence following the death of his mother, and when he returned, he had to apply for another position within the corrections system because his previous job had been filled in his absence.

2. Other States Consider Similar Bans on Accessing Social Media Accounts

Concerns about employers seeking social media account access from applicants and employees have gained momentum over the past few months and the issue has caught the attention of lawmakers at the state and federal levels. Facebook's chief privacy officer issued a statement in March that the social networking site had seen an increase in reports of employers or others seeking to gain inappropriate access to users' profiles. The CPO said the practice undermines the privacy expectations and security of Facebook users and their friends and has the potential to expose access-seeking employers to claims of discrimination or liability for failing to protect workers' information.

The following eight states have pending legislation regarding prospective employers accessing information on social media accounts as part of the application process. This trend is almost certain to continue, and employers are encouraged to contact their labor and employment attorney to discuss their rights with regard to requesting social media information from employees or applications.

Washington

Sen. Steven Hobbs (D-Lake Stevens) introduced the "Facebook bill" (Senate Bill 6637), which would prohibit employers from requesting a password from a current or prospective employee for the purpose of gaining access to a social networking site. The bill is currently in the Committee on Labor, Commerce & Consumer Protection.

California

Assembly Bill 1844 would prohibit employers from requiring a prospective employee to disclose a user name or account password to access a personal social media account. The bill received unanimous support from the Assembly Judiciary Committee in April and Senate Bill 1349 would go a step further; it would prohibit postsecondary educational institutions and employers from requiring or formally requesting a student or employee—or a prospective student or employee—to disclose the user name or password for a personal social media account.

Illinois

House Bill 3782 would amend the Right to Privacy in the Workplace Act to prohibit an employer from asking any employee or prospective employee to provide any password or other related account information in order to gain access to a social networking website. The bill is currently pending with the Senate.

Michigan

House Bill 5523, the Social Network Account Privacy Act, prohibits employers and educational institutions from requiring disclosure of information that allows access to social networking accounts. If passed, the bill would protect employees, prospective employees, students and prospective students. The bill is currently pending in the House Committee on Energy and Technology.

Minnesota

A bill (H.F. No. 2963) is pending before the House that would prohibit employers from requiring, as a condition for employment or consideration of employment, an employee or prospective employee to provide a password or other account information in order to gain access to the employee's or prospective employee's social networking website.

Missouri

House Bill 2060 prohibits employers from requesting or requiring an employee or applicant to disclose information to access a personal account or service though an electronic communications device. The bill is currently pending with the House.

New York

Senate Bill 6831 prohibits employers from requesting or requiring an employee or applicant to disclose information to access a personal account or service though an electronic communications device. The bill is currently pending with the Senate Labor Committee.

South Carolina

House Bill 5105 prohibits employers from requesting a password or other related information in order to gain access to an employee's or prospective employee's profile or account on a social networking website. The bill is currently pending before the House Judiciary Committee.

3. California Assembly Passes Bill to Cut Overtime From Fixed Salaries

The California State Assembly, in early May, passed a bill aimed at undoing a state appeals court decision by excluding overtime hours from fixed salaries for nonexempt workers, even if they signed a private employment deal covering all wages. These arrangements are sometimes referred to as the "fluctuating work week" method of calculating overtime. The Assembly passed Assembly Bill 2103, which would require that a fixed salary payment to a nonexempt employee include only regular hours, not overtime hours, even if the employee entered a contract with a company to the contrary. The legislation is currently at the State Senate for consideration.

The bill seeks to overturn a February 2011 decision by the Second Appellate District that sided with employer Dolores Press Inc. in finding that California's Labor Code allows employers and nonexempt employees to enter contracts setting fixed salaries, including regular and overtime pay. In the decision, the Second District held that an "explicit mutual wage agreement," under which janitor Carlos Arechiga and Dolores Press agreed that payment of a fixed salary of $880 a week would provide compensation for 66 hours of work each week, complied with state overtime law and that no additional overtime compensation was owed. He sued under Section 515 of the Labor Code, which states that, for the purpose of determining overtime rates for nonexempt, full-time, salaried employees, the regular pay rate is 1/40 of an employee's weekly salary.

This bill would amend Section 515 to provide that payment of a fixed salary to a nonexempt employee serves as compensation only for the employee's regular, non-overtime hours, notwithstanding any private agreement to the contrary, and would criminalize any violation.

4. Governor Brown Engages in Bill-Signing Frenzy for Employment-Related Legislation

Governor Brown of California signed several bills significantly impacting employers toward the end of 2011. These new laws were wide ranging and cover many diverse issues, including: limiting an employer's use of consumer credit reports, barring discrimination on the basis of gender and sexual identity, imposing stiff penalties for employers who willfully misclassify employees as independent contractors, extending healthcare coverage to employees taking Pregnancy Disability Leave, and employment contract requirements for certain employees earning commission-based compensation.

The majority of the laws took effect January 1, 2012. California employers will want to familiarize themselves with these news laws and make appropriate revisions to policies and procedures.

Consumer Credit Reports (Assembly Bill 22): The new law restricts when employers (except financial institutions) can lawfully use consumer credit reports and further imposes notice and disclosure obligations on employers who intend to do so. Specifically under new Labor Code Section 1024.5, employers can use consumer credit reports only if an individual applies for work (or will work) in the following positions:

- A managerial position (covered by the executive exemption);
- A position in the state Department of Justice;
- A sworn peace officer or other law enforcement position;
- A position for which the employer is required to consider credit history information;
- A position that involves regular access to bank or credit card information, social security numbers or date of birth; however, this does not involve merely routine solicitation and processing of credit card applications in a retail establishment;
- A position in which the person is, or would be, a named signatory on the bank or credit card account of the employer or authorized to transfer money or enter into financial contracts on behalf of the employer;

- A position that involves access to trade secret, confidential or proprietary information; or

- A position that involves regular access to the employer's, customer's or client's money totaling $10,000 or more in a workday.

Labor Code Section 1024.5 does not establish an independent remedy for a violation; however, a remedy may be provided under California's Private Attorneys General Act ("PAGA").

The law also imposes additional notice obligations on employers using consumer credit reports. Specifically, the employer must notify the applicant or employee in writing of the basis (under Labor Code Section 1024.5) upon which it relies in seeking the report.

Protection for Gender Identity and Gender Expression (Assembly Bill 887): This law defines "gender" under several existing laws, including the Fair Employment and Housing Act, to include gender identity and gender expression. It defines "gender expression" as "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." More importantly, this law requires an employer to allow an employee to appear or dress in a manner consistent with the employee's gender identity or gender expression.

No Discrimination in Healthcare Plan Coverage Between Spouses and Domestic Partners (Senate Bill 757): This law makes it unlawful for a health care plan or policy to discriminate in coverage between spouses or domestic partners of a different sex and spouses or domestic partners of the same sex.

Willful Misclassification of Employees as Independent Contractors (Senate Bill 459): This law prohibits employers from willfully misclassifying employees as independent contractors. "'Willful misclassification' means avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor."

The law also provides the Labor Workforce Development Agency ("LWDA") with authority to assess civil penalties and take other disciplinary actions. A person or employer violating the law would be subject to a civil penalty of $5,000 to $15,000 for each violation. If the LWDA determines there is a pattern and practice of these violations, a civil penalty of $10,000 to $25,000 may be imposed. Lastly, anyone who knowingly advises an employer to improperly classify an employee could be found jointly and severally liable with the employer (excluding a person who provides advice to his/her employer and an attorney providing legal advice).

The law is likely to have significant repercussions. Mischaracterization of independent contractors has been the focus of enforcement by the U.S. Department of Labor and California's Employment Development Department. A finding of mischaracterization usually results in payment of wages to which the individual would otherwise have been entitled, payroll taxes with interest, and multiple monetary penalties. Companies should regularly monitor the characterization of independent contractors. However, when undertaking an audit or examining payroll practices or pay differentials, companies should use counsel to establish and maintain the privileged nature of the audit or examination, together with the results. Failing to do so could make the audit or report discoverable should litigation thereafter ensue.

Health Plan Coverage Continued During Pregnancy Disability Leave (Senate Bill 299): This law, related to AB 592 (prohibiting interfering with, restraining, or denying the exercise of rights under the California Family Rights Act ("CFRA")), requires employers to continue group

health coverage to employees on pregnancy disability leave for up to four months. Most California employers have long been required to comply with California law permitting employees disabled by pregnancy to take a leave of absence of up to four months for the disabling condition. This leave is in addition to traditional birth of a child leave, which separately provides the employee up to 12 weeks of leave for baby bonding (if the employer has 50 or more employees and is covered under the FMLA/CFRA for family and medical leaves of absence).

With the passage of SB 299, effective as of January 1, 2012, California employers must now extend the continuation period to four months for pregnancy disability leaves, where previously they were not required to do so. The law further provides that group health benefits must be continued as if the employee continued actively reporting to work. For example, if the employer pays the entire premium for health care benefits, it must continue to do so for up to four months of pregnancy disability leave. If the employee, however, fails to return from pregnancy disability leave, the employer may recoup from the employee the premiums the employer paid to continue the employee's coverage during the leave, unless the reason the employee did not return is a continuing disability or because the employee took a separate protected leave under the FMLA/CFRA. Employers should review their current policies for pregnancy disability leave and revise them to conform to this new law.

Mandatory Contract Requirements for Commissioned Workers in California (Assembly Bill 1396): This law requires that whenever an employer (whether or not California based) enters into a contract with an employee that involves commission-based compensation for services to be rendered in California, the contract must be in writing and set forth the method by which the commissions will be computed and paid. Should the contract expire but the parties continue to work under its terms, the contract terms remain in effect until the contract is superseded or terminated by either party. The law specifically excludes (1) short-term productivity bonuses such as those paid to retail clerks; and (2) bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed. Failure to comply with the new law could subject an employer to penalties under PAGA. This law becomes effective on January 1, 2013.

New Written Notice Required at the Time of Hire (Assembly Bill 469): This new law requires employers to provide written notice of the following to each employee at the time of hire: (1) pay rate and whether paid by the hour, shift, day, week, salary, piece, commission or otherwise, including any rates for overtime; (2) allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances; (3) the regular payday designated by the employer; (4) the name of the employer, including any "doing business as" names used by the employer; (5) the physical address of the employer's main office or principal place of business and a mailing address, if different; (6) the telephone number of the employer; (7) the name, address and telephone number of the employer's workers' compensation insurance carrier; and (8) any other information the Labor Commissioner deems material and necessary. Separately, within seven days of any changes to the above, the employer must notify employees in writing, unless the changes are reflected on a timely wage statement in accordance with Labor Code Section 226.

Less Stringent Restrictions on Farm Workers Organizing a Labor Union (Senate Bill 126): This law makes it easier for farm workers to organize a labor union. Specifically, it deals with petitions objecting to the conduct of an election before the Agricultural Labor Relations Board ("ALRB"). It specifies that where the ALRB refuses to certify an election based on employer misconduct that, in addition to affecting the results of the election, would render slight the chances of a new election reflecting the free and fair choice of employees, the labor union shall

be certified as the exclusive bargaining representative for the bargaining unit. Moreover, it specifies time limits pertaining to the scheduling of hearings on election objections and challenges to ballots and the issuance of decisions by the board with respect to those objections and challenges.

Finally, the law specifies what courts may consider in determining whether temporary relief or a restraining order is just and proper – when the alleged unfair labor practice is such that, by its nature, it would interfere with the free choice of employees to choose or not choose an exclusive bargaining representative, appropriate temporary relief or a restraining order must issue on a showing that reasonable cause exists to believe that the unfair labor practice has occurred. Such an injunctive order would remain in place for 30 days or until an election has been held, whichever occurs first. The temporary relief or restraining order cannot be stayed pending appeal.

Farm Labor Contractor and Hiring Entity Must Both Be Listed on Wage Statement (Assembly Bill 243): This law requires an employer who is a farm labor contractor to disclose in an employee's itemized wage statement under Labor Code Section 226 the name and address of the legal entity that secured the employer's services. This potentially makes it easier to find joint liability for farmers and farm labor contractors.

No Requirement to Use E-Verify (Assembly Bill 1236): This law prohibits a state, city or county from requiring private employers to use E-Verify as a means of verifying that new employees are authorized to work in the United States.

II. SIGNIFICANT CASE LAW DEVELOPMENTS

A. U.S. SUPREME COURT AND NLRB DEVELOPMENTS

1. Supreme Court Tightens the Rules for Employment Class Actions

The United States Supreme Court issued its opinion in the long-awaited *Wal-Mart Stores Inc. v. Dukes* making it more difficult for plaintiffs to pursue large class actions against employers. 131 S.Ct. 2541 (2011). Specifically, the Court held that (1) plaintiffs cannot recover damages, such as back pay, in class lawsuits brought under the more lenient class certification standards applicable to claims for injunctive relief (decided unanimously, 9-0); and (2) a class action should not be certified absent a showing of "commonality"—that the class claims present a common question. To satisfy this burden, plaintiffs must produce substantial evidence of unlawful policies; a showing that an employer allows managers to have subjective discretion in making employment decisions is not enough (decided 5-4).

The case was brought by Betty Dukes and five other former Wal-Mart employees who worked in 13 of Wal-Mart's 3,400 stores. Plaintiffs claimed that the company discriminated against female employees in violation of Title VII of the Civil Rights Act of 1964 and sought to represent a class consisting of all of the approximately 1.5 *million* female Wal-Mart employees employed at the end of 1998. Plaintiffs alleged that Wal-Mart's "corporate culture" enabled local managers to pay women less than their male counterparts and to promote males more rapidly than females. The class sought not only injunctive and declaratory relief, but also billions of dollars in punitive damages and back pay.

The district court certified the lawsuit as a single, massive class action. The district court found that plaintiffs met the "commonality" requirement of Federal Rule of Civil Procedure ("Rule")

23(a)(2) and allowed the plaintiffs to tack on back pay claims that would normally be forced to qualify for class action treatment under the more stringent requirements of Rule 23(b)(3). A divided Ninth Circuit affirmed the decision in most respects, and the U.S. Supreme Court accepted review.

The Supreme Court's Decision

A 5-4 majority Court reversed the Ninth Circuit's "commonality" ruling, while ruling unanimously that the Ninth Circuit erred by allowing plaintiffs to seek billions in back pay damages in a Rule 23(b)(2) class action. Justice Antonin Scalia wrote for the Court.

The 5-4 majority found the proposed class lacked sufficient "glue" holding its claims together. According to the Court, it is not enough for putative class representatives to merely pose a common question, such as, "Is that an unlawful employment practice?" Instead, plaintiffs seeking such class treatment must show a "common contention . . . capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." The Court found that plaintiffs' statistical and anecdotal evidence failed to establish that plaintiffs could prove their case on a classwide basis. Instead, the claims would have to be addressed individually.

The Court also held, unanimously, that plaintiffs could not bring back pay class action claims under Rule 23(b)(2). The Court reasoned that plaintiffs could proceed under Rule 23(b)(2) only when they sought a single injunction or declaratory judgment for the entire class but *not* where each class member sought an individual award of damages.

The decision is enormously significant for employment class action litigation and is likely to have a number of long-term implications:

- Decentralized decision-making models are likely to impede plaintiffs' ability to obtain certification of sprawling classes—sweeping allegations of subjectivity or discretion in decisionmaking are insufficient to support class action treatment.

- Plaintiffs seeking certification of a discrimination class action must clearly identify common discriminatory policies that can be litigated through common evidence, a daunting task in most circumstances because nearly all employers have formal policies *forbidding* discrimination; statistics and anecdotal evidence will not satisfy plaintiffs' burden to identify specific policies or practices they claim are unlawful.

- Class action plaintiffs cannot obtain damages without showing that common issues predominate over any individual issues—plaintiffs may not primarily seek injunctive relief and then ask for damages as an "incidental" claim. This ruling is likely to be fatal to a number of pending cases and will greatly reduce the potential for awards of large attorneys' fees in class action cases.

- Depending on a company's management structure and policies, plaintiffs may have to pursue much smaller class actions, possibly even down to the store or unit level, where the claims can be directed at the decisions of specific decisionmakers.

2. Terminated Relative Allowed to Sue for Retaliation After Fiancée's Complaint

The Supreme Court held in *Thompson v. N. Am. Stainless, LP*, 31 S. Ct. 863 (2011), that a terminated employee can sue for retaliation where his termination is temporally proximate to a relative's work complaint. In this case, Miriam Regalado and her fiancé, Eric Thompson, both worked for North American Stainless (NAS). In 2003, Regalado filed a claim with the EEOC alleging that her supervisors discriminated against her on the basis of her sex. Thompson was not involved in Regalado's complaint and did nothing to engage in a protected activity that would have typically afforded him retaliation protection under Title VII of the Civil Rights Act. Three weeks after Regalado filed the complaint, NAS terminated Thompson for allegedly failing to call in sick for a missed day of work. Thompson asserted that he missed work to deal with the stress of Regalado's discrimination claim.

This case involved two distinct issues. First, whether Title VII prohibited NAS from retaliating against her fiancé even though he did not engage in any protected activity? Second, assuming a protected activity occurred, could an employer retaliate against one employee by terminating another. After a bit more discussion, the Court concluded that Thompson's firing fell within the "zone of interest" of Regalado's protection and that his firing in effect "touched" Regalado and he was, thus, permitted to sue.

What Employers Should Know:

- Employers should consider the risk of suit before terminating an employee who has a close relationship with someone in the company who has engaged in a protected activity.

- The temporal proximity between a protected activity by an employee and the termination of a closely related employee may itself provide a sufficient inference of a retaliatory termination to support a prima facie case for retaliation.

B. NINTH CIRCUIT DEVELOPMENTS

1. Computer Fraud and Abuse Act Does Not Apply to Employee Data Theft

In April 2012, the Ninth Circuit refused to reinstate Computer Fraud and Abuse Act ("CFAA") charges against a man who allegedly stole trade secrets from his old company, finding the CFAA applies to hackers and not to employees who violate private computer use policies. *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012).

The case centered on the conduct of David Nosal, who, as a former employee of executive search company Korn/Ferry International, allegedly conspired with some of his former colleagues who were still working for Korn/Ferry to help him start a competing business. Prosecutors claimed that after leaving Korn/Ferry, Nosal engaged three Korn/Ferry employees to help him start his competing company, and those employees accessed the company's computer system to obtain trade secrets and other proprietary information. Nosal allegedly ended up getting source lists, names and contact information from Korn/Ferry's Searcher database, which the company considered to be one of the most comprehensive databases of executive candidates anywhere.

The government indicted Nosal on 20 counts, including trade secret theft, mail fraud, conspiracy and violations of the CFAA, according to the suit. In January 2010, a district court nixed the five CFAA counts, and the government appealed. In April 2011, a three-judge panel ruled 2-1 in favor of the government and Nosal petitioned the full court for review of the panel's ruling.

The U.S. Court of Appeals for the Ninth Circuit, sitting en banc, held that the CFAA is limited to violations of restrictions on access to information and not restrictions on its use. Because the man's accomplices had permission to access the company database and obtain the information contained within, the government's charges fail under the CFAA, the Ninth Circuit ruled. Writing for the majority, Chief Judge Alex Kozinski said that the phrase "exceeds authorized access" in the CFAA does not extend to violations of use restrictions.

Additionally, the court ruled that the government's interpretation of the CFAA statute would expand its scope beyond computer hacking to criminalize any unauthorized use of information obtained from a computer. According to the Ninth Circuit's opinion, this would make criminals of large groups of people who would have little reason to suspect they are committing a federal crime. "While ignorance of the law is no excuse, we can properly be skeptical as to whether Congress in 1984 meant to criminalize conduct beyond that which is inherently wrongful, such as breaking into a computer," Judge Kozinski wrote.

Under the government's interpretation of the CFAA, minor distractions at work such as chatting online with friends, playing games, shopping or watching sports highlights could become federal crimes, the Ninth Circuit observed. "Basing criminal liability on violations of private computer use policies can transform whole categories of otherwise innocuous behavior into federal crimes simply because a computer is involved," the appeals court wrote.

In a dissenting opinion, Judge Barry G. Silverman argued that the majority took a plainly written statute and analyzed it in a way that distorted the clear intent of Congress. Judge Silverman wrote that because the indictment adequately states the elements of a valid crime, the district court erred in dismissing the charges. "The majority's opinion is driven out of a well-meaning but ultimately misguided concern that if employment agreements or Internet terms of service violations could subject someone to criminal liability, all Internet users will suddenly become criminals overnight," Judge Silverman wrote in his dissent.

2. Unequal Discipline of Older Saleswoman Leads to Age Discrimination Suit

A recent case from the Ninth Circuit, *Earl v. Nielsen Media Research*, addressed the recurring problem of inconsistent discipline of similarly-situated employees. 658 F.3d 1108 (9th Cir. 2011).

Nielsen, of course, is the well-known research company that measures the television viewing habits of U.S. households. Christine Earl, 47, was hired as a recruiter for Nielsen Media Research in 1994. Earl's job was to recruit households with specified demographics and obtain their consent to install TV monitoring devices.

Earl was at the top of her game until 2005 when she began to repeatedly violate Nielsen's policies. Earl first violated a policy that forbade leaving gifts at unoccupied households and received a verbal warming. But, only a few months later, Earl did it again. In addition, Earl violated a second company policy and her supervisor placed her in a "developmental improvement plan (DIP)" and warned her that future violations could lead to discipline. (At

Nielsen, a DIP is less serious than a performance improvement plan (PIP), which warns of disciplinary action up to and including termination).

Despite the DIP, Earl's yearly review was largely positive but cited her need to follow company policies. Only a month later, however, Earl mistakenly wrote down a household's address and failed to verify it, causing installers to put in survey equipment at the wrong house. In 2007, Nielsen terminated Ms. Earl (age 59) for the violations of company policy listed above.

Earl presented evidence that during the relevant time frame, Nielsen did not terminate, and in one instance may not have even disciplined, younger recruiters in their 30s and 40s when those recruiters repeatedly violated similar Nielsen policies. In one instance, a 37-year-old employee received two "DIPs" for violating company policy and was placed on a PIP for a third violation. Another employee even signed up a home without a cable television. When that employee then failed to verify the address of another household she had recruited, she was not disciplined by Nielsen. Although these violations were similar to Earl's, the younger employee was not terminated. Similar patterns were seen for two other employees who were 40 and 42 at the time of the performance problems.

Ultimately, Nielsen's disparate treatment of younger employees was enough to raise a question for further proceedings at the trial court.

Important lessons:

- An employer must be consistent in its methods of discipline between employees of all ages.

- As the court noted, an employee can cast doubt by showing that the employer treated younger but otherwise similarly situated employees more favorably than the plaintiff. Ensure that managers follow and administer discipline in an impartial manner. Where special cases arise, an employer should have a clear rationale for the deviation.

- Employers should understand the risks of deviating from established internal disciplinary procedures when the deviation would disadvantage the employee. It is important to follow one's own policies to at the very least avoid the appearance of wrongdoing that comes with deviation.

3. Court Upholds Employer’s One-Strike Drug Use Policy

Pacific Maritime ("PMA") represented the shipping lines, companies, and terminal operators that run the ports along the West Coast of the United States and enforce the policies that govern the hiring of longshore workers who work along the West Coast. *Lopez v. Pacific Maritime Ass'n*, 657 F.3d 762, 764 (9th Cir. 2011). PMA and the longshore workers union agreed to a "one-strike rule," which eliminated from consideration any applicant who tests positive for drug or alcohol use during the pre-employment screening process. PMA notified its applicants at least seven days in advance of administering the drug test. Failing the drug test permanently disqualified the applicant from any future employment.

Lopez applied to be a longshoreman in 1997. Unfortunately, when he applied, Lopez suffered from an addiction to drugs and alcohol. When Lopez took the company's standard drug test, he predictably tested positive for marijuana. Lopez was then disqualified from further consideration under the one-strike rule.

Lopez eventually addressed his addiction, became clean and sober, and, in 2004, reapplied to be a longshoreman. But, because of the one-strike rule, Lopez's application was denied. At that time, PMA had not known of Lopez's earlier addiction. Lopez attempted to appeal the denial, but PMA never wavered on its drug policy. Lopez then filed suit, claiming that Pacific Maritime violated the ADA by discriminating against him on the basis of his protected status as a rehabilitated drug addict. (Federal law expressly protects from employment discrimination any person who has been rehabilitated successfully and is no longer engaging in illegal drug use.)

The Court held that the ADA only prohibited employment decisions made because of a person's qualifying disability, not decisions made because of factors merely related to a person's disability. Accordingly, it was lawful for PMA to eliminate applicants who were using drugs when they applied to be longshore workers. It was also lawful for PMA to disqualify those applicants permanently. Nothing in the record suggested that Defendant targeted or attempted to target recovered drug addicts, as distinct from recreational users.

Something to Consider:

A drug-use policy such as that of the one-strike rule should be upheld in a suit so long as the rule is not adopted with a discriminatory purpose. Although the ADA protects people who are recovering or who have recovered from a drug addiction, it does not protect people who are using illegal drugs when they apply for a job. The key consideration is to design a policy that prohibits ***any*** drug use, indiscriminate of the frequency.

4. Reasonable Accommodation Has Its Limits

Accommodating disabled employees can present difficult decisions for employers. The court in *Dep't of Fair Employment & Housing v. Lucent*, addressed just how far an employer need go to accommodate disabled employees. 642 F.3d 728 (9th Cir. 2011). In that case, Steven Carauddo worked for Lucent Technologies as a telecommunications worker. His job was physically demanding and often required him to lift up to 50 lbs. When Carauddo suffered a back injury in 2005, he requested the paid disability period provided under Lucent's benefits plan, which also required a Lucent medical department representative to communicate with the employee and any care providers during the process. Under Lucent's policy, if an employee was unable to return to work after 52 weeks, Lucent terminated employment unless he applied for an additional period of unpaid leave.

The Lucent nurse assigned to Carauddo kept in regular touch with both him and his care providers. When the initial doctor's report came to Lucent limiting Carauddo to no climbing or limiting above 20 lbs., Carauddo's supervisors indicated that accommodation was not possible. After almost a year of doctor visits, Carauddo's physician informed Lucent in January 2006 that Carauddo could not lift, carry, or pull more than 10 lbs.—in other words, physical restrictions that could not be accommodated in the installer job. Lucent's benefits department then informed Carauddo that his paid leave would be ending, but he never requested an extension. After his employment ended, Carauddo underwent a functional performance test which suddenly indicated he could lift 45 lbs. Finally in March 2006, Carauddo's doctors cleared him to return to work without restrictions, but Lucent didn't hire him back.

The Ninth Circuit found that Lucent maintained consistent contact with Carauddo and that he had not brought to its attention any possible accommodations other than extending his leave. Thus, Lucent interacted with the employee to the best of its abilities in finding a reasonable accommodation. In addition, Lucent repeatedly reevaluated Carauddo's physical abilities during

the leave, whether the employee could perform given his restrictions or be placed in another position. Lucent was not required to do more, such as modifying the essential job functions of the installer position or extending leave indefinitely.

Things to Consider During the Reasonable Accommodation Process:

- If an employee does not participate in accommodation planning the employer may eventually take the position that it has met its burden to engage in the interactive process.

- Employers should maintain frequent communication with injured employees during a leave of absence.

- When an injured employee provides updated information about their disability status, evaluate that information and let the employee know how such information impacts their accommodation.

- Document the entire accommodation process, including any communication with the employee and care providers in preparation for a future lawsuit.

- Finally and probably most importantly, remember that Washington law has considerably broader requirements than those that exist under federal law. Had the case been decided under Washington law, the result could well have been different.

C. WASHINGTON DEVELOPMENTS

1. Washington Employees Are Entitled to Additional Pay When They Work During an Already-Paid Meal Break

In November 2011, the Washington Court of Appeals released its decision in *Pellino v. Brink's Inc.*, concerning Washington's meal and rest breaks requirements. 164 Wn. App. 668 (2011). Brink's paid its armored car drivers and couriers for their meal and rest break time, but the employees claimed that they were not permitted to engage in personal pursuits and were never relieved of work responsibilities during these times. They sued for additional wages and won over $2 million after trial. The court of appeals affirmed that judgment and directed the company to pay an additional amount to cover the employees' attorney fees and costs for the appeal.

The court adopted the view of the Washington State Department of Labor and Industries that, even when the employer pays for the meal break, employees must be given a total of 30 minutes to eat and relax without doing any active work. If the employer willfully fails to do that, as happened here, the remedy is to pay for the time twice—likely at overtime rates—plus interest and attorney fees.

Under Washington law, employees are entitled to a paid 10-minute rest break for each four hours worked, plus an unpaid 30-minute meal period after 5 hours of work. It has long been established that if an employee is not given time to take a rest break, the employer must pay extra for the missed break. This principle is based on the fact that the law requires rest breaks to be paid. That means for a standard eight-hour shift, for example, the employee is entitled to 20 minutes of paid rest time. But, if the employee does not get a break, the employer has

actually received more work from the employee than legally permissible and, therefore, the employee is entitled to be paid for that extra work.

Meal breaks, however, are different because the law permits them to be unpaid if the employee is relieved of work responsibilities. Because of this difference, employers have argued that, if an employee works during what would otherwise be an unpaid meal break, all they need to do is to pay for the missed break—not pay for the time worked and give the employee another 30 minutes of unpaid time to eat. Indeed, "straight eight hours" shifts, where the employee is at work only eight hours, does not have an unpaid meal break and eats on paid time, are common in some industries—especially those that have continuous operations such as at petroleum refineries. If the Brink's decision remains the law, however —and the Washington Supreme Court could well disagree—it will be challenging for employers to have work schedules where employees remain on duty while they eat a meal even if they are paid for the time, unless they are paid double (or more) for the time.

2. Public Records Act Update: The Washington Supreme Court Defines What Constitutes an Adequate Search for Records and the Scope of Permissible Discovery in Public Records Act Lawsuits

In *Neighborhood Alliance of Spokane County v. County of Spokane*, the Washington Supreme Court clarified two topics previously unresolved in Washington: what constitutes an adequate search for records in response to a Public Records Act ("PRA") request and the scope of permissible discovery in PRA lawsuits. 172 Wn.2d 702 (2011). The court held that a public entity must undertake a search "reasonably calculated to uncover all relevant documents," and that discovery is permitted into any matter, not privileged, that is relevant to the subject matter of the lawsuit.

The records dispute arose after two records requests were submitted to Spokane County seeking to uncover suspected illegal hiring practices in the county's Building and Planning Department. On February 19, 2005, a seating chart and an accompanying letter were anonymously transmitted to the Neighborhood Alliance of Spokane County. The letter alleged improper hiring practices at the county and stated that the positions assigned to "Ron" and "Steve" on the seating chart had not yet been posted.

The Alliance became interested in the hiring issue the following month when Steve Harris, son of Commissioner Phil Harris, and Ron Hand, a former county employee, were hired. The Alliance first sent a PRA request to the county seeking all records created in January, February, or March 2005 displaying current or proposed office-space assignments for the Building and Planning Department. The county provided three iterations of the same seating chart, two of which were dated, and a third, matching the one the Alliance had received anonymously, which was not dated. This led to the next PRA request, which is the subject of this decision.

Essentially, the Alliance wanted to know when the "Ron & Steve" seating chart was created. It sought to prove, using the Building and Planning Department's records, that the undated chart was created prior to job postings for the positions later filled by Ron and Steve. The Alliance sent the following PRA request to the county:

> The complete electronic file information logs for the undated county planning division seating chart provided by Pam Knutsen, manager, Spokane County Planning Division, to the Neighborhood Alliance on May 13th. This information should

> include, but not necessarily be limited to, the information in the "date created" data field for the document as it exists on the specific Microsoft Publisher electronic document file created for the referenced seating chart. The requested information should also include, but not be limited to, the computer operating system(s) data record indicating the date of creation and dates of modification for the referenced seating chart document.

The identities of "Ron & Steve" individuals who are situated near the center of the seating chart referenced in item # 1. Also, the identity of the individual listed as "Steve" in the cubicle with the number 7221 at the top of the chart.

The county provided one document in response to the first request, a log showing the dates each document was created and modified, but in the log the "date created" field was later than the "date modified" field for each of the charts. The county declined to respond to the second request. Not satisfied with the county's response, the Alliance brought suit the following year.

The lawsuit was apparently contentious and discovery disputes erupted almost immediately, largely involving the scope of permissible discovery in PRA disputes. Eventually, the parties filed motions for summary judgment largely focused on whether the search undertaken by the county for relevant records was adequate. The Alliance had also argued, in response to an earlier discovery motion, that the normal discovery rules—which generally permit discovery of relevant evidence—should apply to PRA disputes. The trial court granted summary judgment to the county, finding no evidence that additional responsive documents existed.

On appeal, the Alliance argued that the County failed to conduct an adequate search for responsive records, and that the trial court erred by limiting the scope of discovery. After the court of appeals issued a mixed decision on the two questions, the Washington Supreme Court took up the case.

In a lengthy opinion, the Washington Supreme Court clarified what constitutes an adequate search. In short, while a search need not be perfect, it "must be reasonably calculated to uncover all relevant documents." In particular:

(1) Public entities are required to make more than a perfunctory search and to follow obvious leads as they are uncovered.

(2) A search should not be limited to one or more places if there are additional sources for the information requested.

(3) A public entity must search those places where a responsive record is reasonably likely to be found.

Most importantly, in lawsuits in which a requestor challenges the adequacy of a search, the agency bears the burden of showing, beyond material doubt, that its search was adequate by providing "reasonably detailed, nonconclusory affidavits" identifying "the search terms and the type of search performed," and establishing "that all places likely to contain responsive materials were searched."

The court next took up the scope of permissible discovery, clarifying that "the civil rules control discovery in a PRA action" and that parties generally may obtain discovery regarding any

matter, not privileged, that is relevant to the subject matter of the lawsuit. Moreover, while a trial court may exercise its "discretion to narrow discovery, . . . it must not do so in a way that prevents discovery of information relevant to the issues that may arise in a PRA lawsuit." The court went on to clarify the categories of evidence that might be discoverable in a PRA action:

(1) Documents, communications and other material related to responsive documents;

(2) The adequacy of an agency's search, including search terms used and the type of search performed, and information sufficient to establish that all places likely to contain responsive materials were searched;

(3) An explanation as to why responsive documents may have been withheld, destroyed or lost; and

(4) An agency's motivation in failing to disclose responsive documents.

Neighborhood Alliance continues the trend of Washington courts in expanding the obligations of public entities when records requests are received. Unless the Neighborhood Alliance decision is addressed by the Washington State Legislature, the best practice for public agencies will be to confirm that their search procedures comply fully with the new test defined by the court and to permit reasonable discovery into relevant matters in PRA cases. We also suggest that public entities confirm with requestors the search terms to be used and the scope of the search to be undertaken.

3. When Reasonable Accommodation Goes Bad

In the best-case disability accommodation situation, the medical evidence clearly identifies an accommodation that is both reasonable and effective in enabling the employee to do the essential functions of the job. But what happens when it's not clear what an effective accommodation looks like? What about when the employer tries an accommodation that fails to work? The Washington Court of Appeals attempted to answer just that in *Frisino v. Seattle School District No. 1*, 160 Wn. App. 765 (2011).

The case involved Denise Frisino, a teacher in the Seattle School District who developed respiratory sensitivity to unknown environmental factors possibly including molds, chemicals, and other irritants. In 2004, to accommodate her sensitivities, Frisino and the District agreed that she would transfer to a different school, but she experienced problems there as well and started a leave of absence.

The District proposed and began various accommodation efforts focused on improving ventilation and reducing mold and other irritants. After attempting a variety of remedial measures, Frisino was instructed to return to work but refused, stating that her workplace was still too unhealthy. After extensive communication with specialists, the school concluded that none of its facilities would be "clean" enough to meet Frisino's needs, declined to transfer her again and terminated her employment for failing to return to work.

The court held that where an employer cannot readily conclude that a possible accommodation would be effective, the parties must give the accommodation a try.

If an accommodation fails, the employer has two options. First, the employer can decide that it has done enough because every plausible alternative accommodation would impose an undue

hardship on the employer—and then defend that decision in court. Second, the employer can propose something else and give *that* accommodation a try.

Both the employer and the employee have a continuing duty to engage in an interactive dialogue to identify an appropriate accommodation. Only after all reasonable options have been exhausted may an employer consider terminating that dialogue (and the employee's employment). Thus, in a lawsuit, the employer's final proposed accommodation is the proposal that will ultimately be examined for "effectiveness."

But, the burden of accommodation is not entirely on the employer. If the employer is willing to engage in a trial-and-error process (the "interactive dialogue") to identify an effective accommodation, the employee has a duty to participate. This means that an employee has a duty to try out a proposed accommodation, at least where doing so would not endanger the employee, or to suggest alternatives. The employee also "has a duty to communicate to the employer whether the accommodation was effective." And that communication has to occur "while the employer still has an opportunity to make further attempts at accommodation." In the end, the court transferred the case back to the lower court to determine whether transferring Frisino would have been an undue burden on the District.

Lessons for Employers

The most important lesson to take away from *Frisino* is that a failed accommodation does not necessarily mean that the accommodation process is over. That's not to say that the process is limitless. Employers should hesitate to declare the accommodation process a failure in any given case unless there is no reasonable accommodation available. Employers should recognize that some amount of trial and error may be essential to the reasonable accommodation process but that at some point that process may run its course. And it is important to remember that while an employee is entitled to *a* reasonable accommodation, he or she is not entitled to choose that accommodation. If there are equally effective accommodations available, the employee has no right to insist on his or her preferred accommodation.

4. School Districts Not Required to Provide Attorneys for Students at Initial Truancy Hearings

When E.S. was a 13-year-old middle school student in the Bellevue School District, she was absent for 73 of the first 100 days of the 2005-06 school year. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695 (2011). In January 2006, E.S., her mother and the assistant principal of her middle school met to ensure her future attendance and to reengage E.S. with school. At the meeting, E.S. and her mother were told that any further medical absences would need to be verified. They were also informed that the school district would be required by Washington law to file a truancy petition in juvenile court if the unexcused absences continued. Despite these warnings, E.S. continued to miss school.

In March 2006, the district filed a truancy petition in King County Juvenile Court pursuant to RCW 28A.225.035, seeking an order requiring E.S. to attend school. E.S., her mother, and the district's representative attended the initial truancy hearing. E.S. was not represented by an attorney. The Court Commissioner found E.S. truant and informed E.S. that any further absences would require a medical note. E.S. said that she understood and she agreed with the school attendance requirement. The Court Commissioner also informed E.S. and her mother

that if E.S. did not go to school, the district could bring a motion for contempt and that the juvenile court could enter sanctions against E.S.

Despite these warnings, E.S. continued to miss school, and the school initiated contempt proceedings. E.S. failed to comply with the initial contempt proceedings. Over the course of the next year, the juvenile court held several contempt hearings and ordered sanctions against E.S., who failed to comply with the sanctions and did not attend school.

E.S. was represented by counsel at all of her contempt hearings. In May 2007, E.S.'s counsel filed a motion with the juvenile court to set aside the truancy finding on the ground that the juvenile court should have appointed E.S. counsel at the initial truancy hearing. E.S.'s counsel also argued that E.S. could not have fully understood the legal issues in her case at the initial truancy hearing because of her age, and an attorney could have presented arguments on her behalf at the initial hearing.

The juvenile court denied the motion, and the superior court affirmed the juvenile court's decision. The court of appeals reversed and held that "[a] child's interests in her liberty, privacy, and right to education are in jeopardy at an initial truancy hearing." The court of appeals also held that "due process requires the provision of counsel for all children appearing at an initial truancy hearing."

The Washington Supreme Court held that students are *not* required to be provided with an attorney at an initial truancy hearing. The court rejected E.S.'s argument that she had been denied due process, reasoning that the truancy hearing was the step before a contempt hearing at which sanctions could be imposed. Specifically, the court noted that it is significant that contempt sanctions could not have been imposed on E.S. at the initial hearing. Further, because E.S. was provided with counsel at all contempt hearings, where sanctions were a possibility, the court held that E.S. was not deprived of her due process rights.

The supreme court explained that E.S. was not denied her right to an education. E.S. argued that "a misguided decision made during an initial truancy hearing 'could disrupt the child's education by introducing or exacerbating stigma, uncertainty, and instability.'" The court rejected this argument and noted that the "overriding purpose of the compulsory school attendance law, Chapter 28A.225 RCW, is to *protect*, rather than interfere with, the child's right to an education." The court also noted that the statute protects students by providing the right to counsel, even at the initial hearing stage, in circumstances where a trial court deems counsel necessary.

Although the supreme court agreed that a student should be provided with counsel at contempt proceedings, the court rejected E.S.'s argument that because children are unable to think as adults, counsel is required at the initial hearing. The court reasoned that issues addressed at initial truancy hearings are uncomplicated and straightforward and students are not at risk of being disadvantaged. The court also recognized that costs would rise for school districts and additional administrative resources would be expended if an attorney had to be appointed at all initial truancy hearings.[1] Ultimately, the court held that not having counsel at all initial truancy hearings does not deprive students of any federal or state constitutional rights.

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[1] In most counties, the prosecuting attorney represents school districts in truancy matters, and public defender organizations furnish counsel to students. Thus, there is typically no direct cost to school districts for counsel in such matters.

Lessons for Superintendents

The *Bellevue School District* decision reestablishes the principle that students are not entitled to have legal counsel at initial truancy hearings. Implementation of the Becca Bill is already an expensive proposition for school districts and counties. The *Bellevue School District* decision returns districts and counties to the common practice of having no legal representative for students present at the initial truancy hearing.

D. CALIFORNIA DEVELOPMENTS

1. California Supreme Court Issues Monumental Decision on Meal and Rest Breaks

The California Supreme Court has issued its much anticipated decision on meal and rest breaks, *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, No. S166350 (Cal. Apr. 12, 2012). Although the case was decided under California law, its significance extends far beyond California. Because of the tsunami of wage-hour litigation that has consumed California employers for over a decade, California wage-hour decisions often influence state courts consider similar claims elsewhere. Few decisions are as important, or were as eagerly anticipated, as *Brinker.*

In a unanimous opinion authored by Justice Werdegar, the court address several important issues concerning an employer's obligation to provide meal and rest breaks under California law.

Meal Periods

Obligation to Relieve Employees of All Duty and Relinquish Control But Not to Ensure That No Work Is Performed

An employer satisfies its obligation to "provide" a meal period to its employees "if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay. . . ." The court observed that "[i]ndeed, the obligation to ensure employees do no work may in some instances be inconsistent with the fundamental employer obligations associated with a meal break: to relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time."

The court, commenting that "[w]hat will suffice may vary from industry to industry," declined to try to "delineate the full range of approaches that in each instance might be sufficient to satisfy the law."

The court noted the potential for a scenario where an employee who has been validly relieved of all duty nonetheless chooses to work, with the employer's knowledge or in circumstances where the employer reasonably should know. In such a circumstance, the employer may be liable for straight pay for the meal break, but not for the premium hour for failure to provide a meal.

Obligation to Commence Meals No Later Than Five- and Ten-Hour Marks, Not on "Rolling Five" Basis

The court held that first meal periods must start after no more than five hours, and the same principle applies to second meals, that is, they are required after no more than ten hours of work in a day, "i.e., no later than what would be the start of the 11th hour of work, absent waiver." This is true under both the applicable statute and the wage orders.

The court rejected plaintiffs' contention that a second meal period is required no later than five hours after the end of a first meal period if a shift is to continue. "The text does not permit such a reading. It requires a second meal after no more than 10 hours of work; it does not add the caveat 'or less, if the first meal period occurs earlier than the end of five hours of work.'"

Rest Breaks

Obligation to Allow Rest Break Every Four Hours or Major Fraction Thereof

An employer must authorize 10 minute rest breaks for every four hours worked or "major fraction" thereof, which means time in excess of two hours (subject to an initial threshold of three and a half hours of work before a break need be allowed). In practical effect: "Employees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on."

No Categorical Obligation to Provide a Rest Break Before Meals, Depending on Facts

The court rejected an argument by plaintiffs that employers always have a legal duty to permit their employees a rest period before any meal period. Giving the example of an employee working a six-hour shift, the court observed that such an employee is ordinarily entitled to one meal period and one rest period. "Either the rest period must fall before the meal period or it must fall after. Neither text nor logic dictates an order for these. . . ." To be clear, however, the court had no quarrel with the dictate of the wage orders that "insofar as practicable[, rest breaks] shall be in the middle of each work period."

Class Certification

Although conventional wisdom has held that it is difficult to justify certification of a rest break class because the right to take a break may be waived and waiver can present individualized issues, the court here approved the trial court's decision to certify such a class. The court's decision relied in significant part on the employer's uniform corporate rest break policy, which appears on its face to have authorized breaks only for each full four hours worked. Such a policy could be read to violate the law by failing "to give full effect to the 'major fraction' language." The court concluded that this "theory of liability—that Brinker has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law—is by its nature a common question eminently suited for class treatment." Although plaintiffs may now argue that the court expressed a preference for certification of rest break classes, the opinion is by no means so broad and does not deny the disparate issues that may be presented in an appropriate case where waiver is genuinely at issue. It is telling that the court wrote, "[n]o issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it."

Certification of Off-the-Clock Claims

The court agreed that it was inappropriate to certify an "off-the-clock" class premised on the time allegedly worked by employees during their meal breaks. The court did not, of course, hold that such a class could never be appropriate. But in contrast to the rest break class discussed above, where the court relied on the employer's uniform policy, the court held here that "neither a common policy nor a common method of proof is apparent." The only formal company policy submitted disavowed off-the-clock work, consistent with state law, and plaintiffs failed to present substantial evidence of a systematic company policy to pressure or require employees to work off the clock.

The court added some observations about the presumptions that may be drawn from meal punch records. First, the court noted that employees having clocked out creates a presumption they are doing no work. In the face of that presumption, plaintiffs bear the burden to rebut it and show that they were working and that the employer knew or should have known off-the-clock work was occurring. By contrast, Justice Werdegar's separate concurrence commented that if an employer's records show no meal period for a given shift over five hours, this creates a rebuttable presumption that the employee was not relieved of duty and no meal period was provided. She added that "[a]n employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, . . . the assertion is an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it." Thus, while employers need not scrupulously police their employees to ensure they are never working during meals, significant caution is in order when an employee wishes not to clock out at all.

Brinker's impact is difficult to overstate. By addressing and clarifying the rules applicable to the multitude of California wage-hour class actions, *Brinker* breaks something of a log jam. For employers operating in other states, it offers instructive lessons on wage-hour administration, surely one of the most dangerous (and expensive) missteps an employer might make.

2. California Court Limits Class Arbitration in Employment Pacts

A California appeals court ruled in late April that an arbitration provision contained in an employment contract cannot be expanded to require classwide arbitration unless explicitly set out in the agreement. *Kinecta Alternative Financial Solutions Inc. v. Superior Court of Los Angeles County*, B235491 & B236084 (Cal. Ct. App. 2d Dist., Div. III 2012).

California Court of Appeals Judge Patti S. Kitching granted Kinecta Alternative Financial Solution Inc.'s appeal of a lower court's order requiring the bank to enter classwide arbitration in response to a wage-and-hour suit brought by branch manager Kim Malone, saying the trial court erroneously allowed Malone to expand her employment contract's individual arbitration provision to the entire class action.

"By denying Kinecta's motion to dismiss class allegations from Malone's complaint, the order compelling arbitration imposed class arbitration even though the arbitration provision was limited to the arbitration of disputes between Malone and Kinecta," the opinion said. "Malone cites no evidence that despite the language of the arbitration provision, the parties agreed to arbitrate disputes of classes of other employees, employee groups or employee members of classes identified in the complaint."

"We conclude that the parties did not agree to authorize class arbitration in their arbitration agreement," the opinion said. "Therefore the order denying Kinecta's motion to dismiss class claims without prejudice must be reversed."

Malone sued her employer in November 2010 in California Superior Court in Los Angeles County, bringing a class action accusing the credit union of violating labor laws by failing to pay overtime to its branch managers and denying its workers rest and meal breaks. Kinecta, however, filed in June a motion to dismiss Malone's class allegations and compel arbitration, citing a provision in an employment agreement that required her to resolve any disputes with Kinecta through binding arbitration. But the trial court the following month denied Kinecta's motion and instead ordered arbitration on a class basis. The credit union in September petitioned the court of appeals to vacate the order, arguing that Malone's employment contract did not compel Kinecta to arbitrate class claims.

The appeals court concurred, citing the U.S. Supreme Court's 2010 ruling in *Stolt-Nielsen v. Animalfeeds International Corp.* that held "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."

"Consequently 'a party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so,'" the opinion said. The court reiterated that "there is no evidence, and no substantial evidence, that plaintiff had established a factual basis that would require a declaration that the arbitration agreement was unenforceable."