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Fall 2012 Employment Law Update Breakfast Seminar

Bruce Michael Cross
BCross@perkinscoie.com
(206) 359-8453

Amy Kunkel-Patterson
AKunkelPatterson@perkinscoie.com
(206) 359-3785

Zachary P. Jones
ZJones@perkinscoie.com
(206) 359-3768

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A. Introduction

These materials contain a brief description of some of the most important recent developments in labor and employment law. We hope you will find them helpful. We would be pleased to speak with you following today's presentation about any questions you may have concerning any of these issues.

B. National Labor Relations Board Continues Its Expansion Into Nonunion Workplaces

1. The Protections of the National Labor Relations Act Extend to Virtually All Private Sector Employees

Although it comes as a surprise to many employers, the National Labor Relations Act (NLRA), enforced by the National Labor Relations Board (NLRB), is not limited to labor union activities or union-represented employees. It protects virtually all private-sector employees,[1] and its protections extend far beyond traditional labor union activities. The core protections are in Section 7:

> Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, ***and to engage in other concerted activities for the purpose of*** collective bargaining or ***other mutual aid or protection***, and shall also have the right to refrain from any or all of such activities.

Collectively, these are referred to as the employees' "Section 7 rights."

For activities to be "concerted," and thus protected by the NLRA, all there needs to be is one employee purporting to act on behalf of himself or herself and one other employee, or two employees taking action, in connection with something concerning their employment. For example, wearing a t-shirt critical of the employer's incentive program was protected so that the employer committed an unfair labor practice when it criticized him for it and told him to take it off. *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25 (2011). Even public complaints about an employer can be protected if they are tied to employment conditions. For example, in *MasTec Advanced Technologies*, 357 NLRB No. 17 (2011), a group of satellite television equipment technicians contacted a local television reporter to complain about their employer's business practices, specifically, that they had been instructed to lie to customers. Because the technicians' criticism was related to a pay dispute with their employer, it was protected. "[T]he Board has held that employee communications to third parties in an effort to obtain their support are protected where the communication indicates it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the "Act's protection."

[1] Agricultural employers and very small employers are not within the jurisdiction of the NLRB. Nor are public employers, but many of them are covered by comparable state public employment laws. Railroads and airlines are also not covered by the NLRA; instead, they are covered by an even older federal law, the Railway Labor Act.

The "reckless or maliciously untrue" standard is very high: the mere fact that a statement is false, misleading or inaccurate is not enough. Rather, it must be made with knowledge of its falsity or made with reckless disregard for its truth or falsity. Depending upon the circumstances, even a profane outburst can be protected when it relates to an employment issue. Instructive on this point is the recent decision in *Fresenius USA Manufacturing., Inc.*, 358 NLRB No. 138 (Sept. 19, 2012). In that case, during the course of a decertification effort in which employees were attempting to vote out a union, a male union supporter wrote the following on three newspapers left in the employee break room: "Dear Pussies, Please Read!" "A Cat Food Lovers, How's Your Income Doing?" "Warehouse Workers, RIP." Several female warehouse workers complained that the statements were vulgar, offensive and threatening. After determining who wrote the statements, the employer discharged the perpetrator. The NLRB found the discharge to be unlawful because the perpetrator was clearly engaged in protected activities (urging employees to vote for the union) and his comments were not so egregious as to cause him to lose protection of the NLRA.

On the other hand, activities limited to individual complaints or not related to terms and conditions of employment are not protected. For example, in the recent *Knauz v. BMW* [2] case, an automobile dealership fired an employee because his Facebook postings made fun of an automobile accident at the dealership. According to the NLRB's Administrative Law Judge (ALJ), the employee acted apparently "as a lark, without any discussion with any other employee of the [dealership], and had no connection to any of the employees' terms and conditions of employment." Therefore, the ALJ concluded that his activity was unprotected and his discharge was legal. The NLRB agreed.

The NLRA's protection of Section 7 rights leads to results that might be surprising to many employers, such as:

- Suggesting that a disgruntled employee should resign or find a job elsewhere if he or she is unhappy with wages or benefits is illegal. *Plaza Outdoor Ctr.*, 355 NLRB No. 85 (2010); *Teddi of Cal.*, 338 NLRB No. 157 (2003); *W.V. Steel Corp.*, 337 NLRB 34 (2001).

- Disciplining an employee for complaining about pay or benefits is illegal. *NLRB v. Caval Tool Div., Chrome Alloy Gas Turbine Corp.*, 263 F.3d 184 (2d Cir. 2001); *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25 (2011).

- Disciplining an employee for complaining about a supervisor is illegal. *In re American Tissue Corp.*, 336 NLRB 435, 448-49 (2001); *Meyers Industries, Inc.*, 281 NLRB 882 (1986), *aff'd*, 835 F.2d 1481 (D.C. Cir. 1987).

- A broad invitation to report "harassment" may be unlawful, but invitations to report "threats or intimidation" are lawful. *Battle Creek Health Sys.*, 341 NLRB 119 (2004); *Liberty Nursing Homes, Inc.*, 245 NLRB 1194 (1979).

- Prohibiting all employee solicitations "during work hours" or "on company time" is illegal because employees are permitted to solicit for protected concerted activities on paid break time. *Costco Wholesale Corp.*, 358 NLRB No. 106 (Sept. 7, 2012); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

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[2] 358 NLRB No. 164 (Sept. 28, 2012).

- Prohibiting the distribution of literature anywhere on the premises is unlawful because employees are permitted to distribute written material pertaining to concerted activities in nonwork areas. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

- Prohibiting "trespassing on company property when off duty" is unlawful because off-duty employees have the right to access parking lots and other outside nonworking areas. *The Roomstores of Phoenix LLC*, 357 NLRB No. 143 (2011).

Some years ago, nonunion employees seldom were aware of their Section 7 rights. That is no longer the case. The NLRB has actively expanded its outreach efforts to educate employees about their Section 7 rights. Just a few months ago, the NLRB established a web page dedicated to describing the "rights of employees to act together for their mutual aid and protection, even if they are not in a union."[3] And, as discussed later in Section B(3) concerning social media cases, there has been widespread publicity about employee rights and nonunion employees are becoming much more knowledgeable. More is sure to come!

2. The NLRB's Attack on Garden-Variety Rules of Conduct

a. The Legal Underpinnings

Because Section 7 protects employees who engage in concerted activity, any employer action that constrains, restricts or interferes with the exercise of a Section 7 right is an unfair labor practice.

Merely maintaining an unlawful rule is a violation even if it had never been enforced, because the mere presence of the rule could "chill" protected activity. *Mastec Advanced Techs.*, *supra*.

When the NLRB examines a challenged rule, it asks five questions:

- Does the rule expressly constrain a Section 7 right?

- If not, was it applied to interfere with Section 7 activity?

- If not, was it adopted in response to union activity?

- If not, would an employee reasonably construe the rule to prohibit some Section 7 activity?

- If not, has it been applied in a nondiscriminatory fashion to unprotected activities as well as Section 7 activities?

Although most of the new developments have occurred in the context of the fourth question, it is good to remember the other questions as well, but for different reasons.

Question 1: When crafting rules of conduct, you must keep in mind Section 7 rights. For example, employees have the right to discuss their wages and benefits. Therefore, a rule that says that employees may not discuss their pay is unlawful on its face. Another example:

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[3] The NLRB's new website, "Protected Concerted Activity," can be accessed at http://www.nlrb.gov/concerted-activity.

employees have the right to solicit their fellow employees to support a union that is trying to "organize" the employer. Consequently, a rule prohibiting all solicitations at work would be unlawful. Similar issues exist with rules restricting the distribution of written materials and employee access to the workplace outside normal working hours. Some restrictions are permissible, but the legal limitations are quite complex and require careful wording.

Question 2: Even if a rule is perfectly legal, if it is applied to restrict protected activity, it is an unfair practice. For example, in *NLRB v. Honda of America Manufacturing, Inc.*, 73 F. App'x 810 (6th Cir. 2003) (unpublished opinion), the employer had a standard of conduct that prohibited employees from using "abusive or threatening language to or about fellow associates or creating and intimidating, hostile or offensive work environment." Although this language might have been lawful, the employer cited it when disciplining an employee for distributing a newsletter to fellow employees expressing the belief that the employer's benefit booklet was misleading and detailing his meetings with management to which the employer gave him a written statement denying that the booklet contained any inaccuracies.

Question 3: It may be unlawful to adopt an otherwise lawful restriction if it is adopted to counter on-going union activity. Therefore, if you would want to have lawful restrictions in place to counter a union organizing drive, you need to have them in place ***before*** any activity starts.

Question 5: Even if you have a lawfully worded rule, if you do not enforce it for nonunion activity, you will not be able to enforce it against union activity. Use it or lose it!

So, what is it about Question 4 that has caused such a stir? Let's look at some of the examples.

b. Curtailing Criticism of the Employer

Because employees have the right to criticize their employer concerning terms and conditions of employment, any company rule that, when reasonably construed, would tend to chill that activity is illegal. The most recent example of this occurred in *Costco Wholesale Corp.*, 358 NLRB No. 106 (Sept. 7, 2012). There, one of the employer's rules prohibited the posting of messages that "damage the Company, defame any individual or damage any person's reputation." The NLRB found that employees reasonably would interpret this rule as prohibiting protected communications critical of the employer or its terms and conditions of employment. Therefore, the rule was unlawful. In *The Roomstores of Phoenix* case, the following rule was found to be "dramatically overbroad and unlawful": "You should not engage in any outside activity that would conflict in any way with the interests of the company or could result in criticism or have an adverse effect on the company." 357 NLRB No. 143.

c. Politeness and Courtesy Rules

Employers may not insist that employees behave nicely when discussing employment issues. For example, in the *Knauz v. BMW* case, the employee handbook stated:

> Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

358 NLRB No. 164. In reviewing this language, the NLRB focused primarily on the last sentence and found that it was overly broad because employees would reasonably construe the broad prohibition against "disrespectful" conduct and "language which injures the image or reputation of the Dealership" to cover Section 7 activities such as employees' statements—to co-workers, supervisors or third parties who deal with the employer—that object to working conditions and seek the support of others in improving them. The rule's prohibition against "disrespectful" conduct that damages the employer's reputation would lead reasonable employees to believe that expressions of disagreement with their employer's employment policies would constitute grounds for discipline. (On the other hand, it appears that, if the rule had been limited to the first two sentences, it might have passed muster.)

In contrast, a contrary result was reached concerning one of the rules in the recent *Costco* case, *supra*. That rule required employees to use "appropriate business decorum" in communicating with others. The ALJ thought that rule was lawful because employees reasonably would construe the rule as intending to promote "a civil and decent workplace"—not to restrict Section 7 activity. The NLRB agreed.

d. Confidentiality Rules

Because employees have the right to talk about employment issues among themselves and with third parties, any effort to curtail that right is unlawful. As a result, many common confidentiality rules are unlawful. For example, in *Flamingo Hilton-Laughlin*, 330 N.L.R.B. 287 (1999), a handbook provision that prohibited employees from disclosing "confidential information regarding fellow employees" was unlawful because employees have the right to discuss among themselves, and share with others, information relating to wages, hours and other terms and conditions of employment.

Simply including one "inappropriate" item in a laundry list will cause the entire list to be struck down. Examples are:

- "We honor confidentiality. We recognize and protect the confidentiality of all information concerning the company, its business plans, its [employees], new business efforts, customers, accounting and financial matters." This language was unlawful because the blanket prohibition covering "employees" would include information about wages and other employment issues. *Cintas Corp.*, 344 N.L.R.B. 943 (2005), *aff'd*, 482 F.3d 463 (D.C. Cir. 2007).

- In the recent *Costco* decision, the NLRB found that the following confidentiality rules were unlawful because they would reasonably be construed to prohibit the discussion of terms and conditions of employment:

    - Discussing "private matters of members and other employees . . . includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc."

    - Disseminating "[s]ubstantive information such as membership, payroll, confidential financial, credit card numbers, social security numbers, or employee personal health information"

    - Sharing "confidential" information, such as employees' names, addresses, telephone numbers, and email addresses.

As an example of how carefully the NLRB reads the language of a challenged policy, it concluded that having the word "payroll" in the second bullet was sufficient to render the entire passage unlawful. 358 NLRB No. 106.

- In *Security Walls, LLC*, 356 NLRB No. 87 (2011), the employer had the following rule:

> All records and files of the Company are property of the Company and considered confidential. No employees are authorized to copy or disclose any file or record. Confidential information includes all letters or other information concerning transactions with customer, customer lists, payroll or personnel records of past and present employees, financial records of the Company, all records pertaining to purchases from vendors or suppliers, correspondence and agreements with manufacturers or distributors and documents concerning operating procedures of the Company. All telephone calls, letters, or other requests for information about current or former employees should be immediately directed to the proper member of [the Company's] management.

It was found illegal because it prohibited discussions about pay and employees.

- A business ethics policy that stated, "As an employee of the [employer] you must not use information obtained from company records, vendor records or customer records for your own personal use" was unlawful because employees reasonably could construe the language to prohibit them from obtaining payroll information, wage rates, names of employees, discipline, and other information that they are entitled to share with co-workers. *The Roomstores of Phoenix LLC*, *357 NLRB No. 143.*

- In *Hyundai American Shipping Agency, Inc.*, 357 NLRB No. 80 (Aug. 26, 2011), the NLRB found the following language to be unlawful: "unauthorized disclosure of information from an employee's personnel file is a ground for discipline including discharge," because the prohibition reasonably included discussion of wage information and disciplinary action as well as other information that employees are entitled to know and share with co-workers and outsiders. In the same case, a rule that instructed employees to "voice your complaints directly to your immediate supervisor or to human resources" and stating that "complaining to your fellow employees will not resolve problems" were overly broad by restricting employees from complaining about work-related matters to co-workers or to interested third parties (such as a union).

e. Attitude Rules

Because employees have the right to discuss concerns about working conditions, any rule that employees would reasonably construe to prohibit that activity is unlawful. For example, a handbook rule prohibiting "any type of negative energy or attitudes" was unlawful because employees would reasonably construe it to bar them from discussing concerns about working conditions. *The Roomstores of Phoenix LLC*, *357 NLRB No. 143*. Similarly, a rule prohibiting "negative conversations" about associates or managers was found unlawful in *Claremont Resort & Spa*, 344 N.L.R.B. 832 (2005), and maintaining a rule prohibiting "negative conversations" about associates or managers is illegal. *KSL Claremont Resort, Inc.*, 344 NLRB No. 105 (2005).

On the other hand, a rule against "exhibiting a negative attitude toward or losing interest in your work assignment" was not overly broad because it applied only to employees' attitudes toward their own work assignments and not to conversations with others and thus was not likely to be construed by employees as prohibiting protected concerted activity. *Hyundai American Shipping Agency, Inc.*, 357 NLRB No. 80 (2011).

f. Suggestions for Writing Rules of Conduct

Policies regulating employee conduct and confidentiality must be carefully written to avoid overly broad, sweeping pronouncements. The more specific and detailed the language is, the better. Broad prohibitions against "disrespectful" language or behavior will not pass muster, while language prohibiting insubordination, bullying, intimidation and the like probably will. Remember, also, that if you have an overly broad rule, merely maintaining it is illegal, even if it has never been enforced, much less enforced against protected activity.

3. Developments in Social Media

The great expansion of NLRB involvement in social media started famously two years ago with a Facebook case. It involved one of the country's largest ambulance service providers. After an unhappy confrontation with her supervisor, an employee posted a negative remark about him on her Facebook page using her home computer. She drew supportive responses from her co-workers, prompting the employee to post further negative comments about her supervisor, using vulgar language and mocking him. The company learned about the postings and discharged her. The company said she violated a policy against making disparaging remarks about the company or company supervisors, and also a policy forbidding employees from depicting the company in any way on the Internet without the company's permission. The NLRB accused the company of committing unfair labor practices. *Am. Med. Response of Conn.*, Case No. 34-CA-12576 (Oct. 27, 2010).

The case drew nationwide publicity, and the company promptly settled withdrawing the challenged policies and assuring employees that it would not interfere with their rights under the NLRA. The company reached a separate, private agreement with the employee—presumably paying her lots of money to go away.

As a result of the widespread publicity received by this case, many social media cases have been filed, and any employee disciplined for social media comments will quickly and easily learn that he or she may have a remedy.

The NLRB's General Counsel has issued three helpful reports that summarize cutting-edge cases regarding employees' use of social media. (See the attachment to this handout for directions on how to find the reports on the NLRB’s Website.) They are must reads for anyone concerned about employee use of social media. The most recent report includes a complete social media policy that is lawful—a good model to follow.

As discussed before, the NLRB has typically considered employee conduct protected when it is engaged in with, or on the authority of, other employees, and not solely by and on behalf of the employee alone. Activities that are the logical outgrowth of concerns expressed by employees collectively, and efforts by employees to initiate group action or to bring group complaints to an employer's attention, will generally be protected.

For example, the NLRB General Counsel found invalid an employer's broad social media policy that prohibited employees from posting any disparaging remarks about the company and its managers and depicting the company in any way on the Internet without the company's prior permission. Thus, the discipline of an employee under this policy when he posted on the Internet that his supervisor was a "crook," among other four-letter words, and that his manager was "stupid, nobody liked him, and everyone talked about him behind his back," was unlawful.

Even clicking a Facebook "Like" button may be protected. One of the cases currently pending before the NLRB involves employees of a sports bar who clicked the Like button under a comment posted by a former employee complaining that the owners of the bar could not even do tax paperwork correctly and that she was owed taxes. After a hearing, the ALJ concluded that clicking the Like button was protected activity just the way a person's complaining would be. *Triple D LLC*, Case No. 34-CA-12915 (2012). In the other case, the ALJ ordered a nonprofit organization to rehire five employees who were discharged because of their Facebook postings. *Hispanics United of Buffalo Inc.*, 3-CA-27872, 2011 WL 3894520 (NLRB Sept. 2, 2011). One of the employees posted a message on Facebook telling some of her co-workers that another co-worker had complained about their job performance: "Lydia Cruz, a co-worker feels that we don't help our clients enough at HUB I about had it! My fellow co-workers how do u feel." Other employees responded: "What the f… Try doing my job" and "[w]e don't have a life as is, What else can we do???" Their employer discharged them for what it deemed harassing and bullying conduct. The ALJ concluded that the comments were protected speech about the employees' working conditions, including staffing issues. The NLRB's General Counsel called the case a "textbook" example of an illegal firing, commenting that "the discussion was initiated by the one co-worker in an appeal to her co-workers for assistance."

However, not all social media activities are protected.

Conduct or communications that are simply personal gripes that do not suggest any intention to elicit comment from other employees or to speak in the interest of other employees will not be protected. For example, the NLRB's General Counsel upheld an employer's discharge of an employee of a nonprofit residential facility who posted disparaging comments online about residents of the facility as she was communicating with friends rather than co-workers. Her posts were not directed to co-workers and none of her co-workers responded. She was simply posting about what was happening during her shift. NLRB General Counsel Memorandum OM 11-74 (Aug. 18, 2011).

Similarly, the NLRB' General Counsel concluded that an employer did not violate the NLRA when it discharged a bartender after he posted negative comments about his employer's tipping and pay policies on Facebook. Although his posting concerned his wages, which is oftentimes protected subject matter, his posts were in response to a family member's question about how his previous evening went. His posting was not directed to any co-workers and none of his co-workers responded to his posting. Id.

Suggestions for Drafting a Social Media Policy. In addition to looking at the policy approved by the NLRB General Counsel, the first thing to do is to look at your existing policy to see whether it will pass muster under the NLRA. Second, when drafting or revising a policy, keep in mind the following tips:

- Be as specific as possible when stating what employees should not do. Overbreadth is dangerous. Do not try to regulate off-duty conduct in general.

- Give specific examples of prohibited conduct. That will put potentially troublesome wordage in context that is permissible. For example, prohibiting any derogatory language on the basis of race, religion and the like will pass muster, whereas a blanket statement against derogatory comments will not.

- Keep attuned to developments under the NLRA so that you are on top of the legal issues.

4. Some "At-Will" Language May Be Illegal

Employers are well aware of the importance of having strong "at-will" statements in employee handbooks and personnel policies, and many employers ask their employees to sign express acknowledgments of the at-will relationship. According to the NLRB's General Counsel, however, those statements can be illegal if they go too far. For example in February, 2012, an NLRB ALJ concluded that a American Red Cross unit committed an unfair labor practice by using the following language to be signed by employees acknowledging receipt of the employee handbook: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." According to the ALJ, this language would be reasonably construed by employees as a waiver or relinquishment of their right to engage in concerted activity designed to alter their at-will status through union representation and collective bargaining. *American Red Cross Arizona*, Case No. 28-CA-23443 (Feb. 1, 2012). The case settled thereafter.

At about the same time, the NLRB General Counsel issued a complaint against Hyatt Hotels challenging language that Hyatt used in its acknowledgment form:

> I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's Executive Vice-President/Chief Operating Officer or Hyatt's President.

The General Counsel's theory was that, by requiring an employee to agree that at-will status could be amended only via an individual agreement signed by the employee, the employee was waiving the right to engage in concerted activity to alter his or her at-will status through union representation and collective bargaining. The case settled before hearing.

Just a few weeks ago, however, on October 31, 2012, the General Counsel reported on the language in two other handbooks and found both handbooks to be lawful. The first stated:

> No manager, supervisor or employee of [the employer] has any authority to enter into an agreement for employment for any specific period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.

Even stronger language was approved in the second case:

> No representative of the Company has authority to enter into any agreement contrary to the foregoing "employment at will" relationship.

In both cases, the language was viewed as simply reinforcing the general at-will statement and did not call for the employee to waive the right to engage in concerted activities. NLRB Advice Memorandum (Oct. 31, 2012).

Take Away for Employers: Be careful not to ask employees to waive their Section 7 rights when signing at-will statements.

5. Instructing Employees Not to Discuss a Workplace Investigation

In *Banner Health Systems*, 358 NLRB No. 93 (July 30, 2012), the NLRB concluded that an employer committed an unfair labor practice by uniformly instructing complaining employees not to talk to co-workers pending completion of an investigation. In that case, a human resources representative conducting the investigation had a practice of uniformly instructing complaining employees not to discuss the investigation with co-workers pending completion of the investigation. Her purpose in doing so was to preserve the integrity of the investigation. However, the NLRB concluded that employees have a Section 7 right to talk to their co-workers about work-related complaints and a generalized concern about the "legitimacy" of investigations could not overcome those rights. Instead, according to the NLRB, an employer is required to conduct an individualized analysis to determine whether, in any given investigation, witnesses needed protection, or evidence was in danger of being destroyed, or testimony was in danger of being fabricated, or there otherwise was a need to prevent a cover up. A blanket approach was unacceptable.

An earlier case found the following provision unlawful:

> In cases involving a report of harassment or discrimination, all reasonable efforts will be made to protect the privacy of the individuals involved. In many cases, however, [the employer's] duty to investigate and remedy harassment makes absolute confidentiality impossible. [The employer] will try to limit the sharing of confidential information with employees on a "need to know" basis. Employees who assist in an investigation are required to maintain the confidentiality of all information learned or provided. Violation of confidentiality will result in disciplinary action.

It was found unlawful because it prohibited employees from talking about an investigation. *Security Walls, LLC*, 356 NLRB No. 87 (2011).

The NLRB reiterated this position in a more recent case, *Fresenius USA Mfg., Inc.*, 358 NLRB No. 138 (Sept. 19, 2012).

Take Away for Conducting Investigations: Of course, employers should continue to follow best practices and keep investigations as confidential as possible. Witnesses who are supervisors and managers, and therefore not covered by the NLRA, can be instructed to treat the investigation and the matter being investigated as confidential. With regard to nonsupervisory employees, however, the investigator should conduct an individualized analysis to determine whether witness confidentiality is really necessary. If so, the investigator should document the reasoning for the record. If the investigator is not certain that witness confidentiality is essential, he or she can still inform the witness that the investigator will do everything possible to keep the investigation confidential and that the witness can do so as well, and explain the reasons why

the witness might want to do so, but not tell the witness that he or she must keep it confidential. Of course, it is important to memorialize all conversations with the witness.

6. NLRB Says Class Action Waivers in Employment Agreements May Be Illegal

According to the NLRB, an employment agreement that requires employees to pursue claims through arbitration and waive the right to pursue class actions is illegal because it interferes with the employees' right to engage in collective activity. *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012). According to the NLRB, an employer with 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. The NLRB also concluded that an employer cannot insist that employees waive their right to file charges with the NLRB. Therefore, an arbitration program that requires all claims to be submitted to arbitration is unlawful on its face, according to the NLRB, because it would preclude employees from filing unfair labor practice charges with the NLRB.

At the same time, the United States Supreme Court has ruled that an employer is not required to arbitrate class claims under an employment agreement unless the agreement clearly contemplates that class actions may be pursued. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

How these two, seemingly contradictory, conclusions will be reconciled is uncertain. The *D.R. Horton* decision is on appeal to the Fifth Circuit.

7. NLRB General Counsel Says Confidentiality Provisions in an Arbitration Policy Are Illegal

In *Advance Services, Inc.*, Case No. 26-CA-63184, NLRB General Counsel asserted that language in an alternative dispute resolution process requiring employees to maintain the confidentiality of arbitration proceedings was unlawful because it curtailed the employees' right to discuss the terms and conditions of employment. An ALJ agreed in a decision dated July 2, 2012.

8. The NLRB's New Poster

On August 30, 2011, the NLRB adopted new rules that would require virtually all private sector employers to post notices informing employees of their rights under the NLRA. The labor law posters would be required even in workplaces where there are currently no unions.

The rules have been postponed pending a court decision on their enforceability.

If they are upheld, the rules will require employers to post the notice wherever notices to employees are typically posted, and it 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. The posting requirement applies to all employers subject to the jurisdiction of the NLRB—thus, virtually all private sector employers except for agricultural employers, airlines and railroads.

A copy of the notice is included in these materials.

9. The NLRB's Proposed Rules for Quicker Union Elections

In June 2011, the NLRB adopted new rules for union representation elections. The rules would greatly speed up the time between when a union asks for an election and when the election will occur. Today, that time is roughly seven weeks. Under the new rules, the time would be shortened to a little as three or four week.

These rules have been enjoined until their legality is resolved in court. If they are upheld, they would greatly assist unions in gaining the right to represent employees.

C. Recent Discrimination Issues – in Washington and Beyond

1. Seemingly Neutral Comment May Be Unlawful Harassment

When we think of unlawful harassment, extreme circumstances usually come to mind: racial slurs, gendered comments, religious intolerance. In September, the Washington Supreme Court addressed a case where a supervisor who was about to commence a military deployment said that he would return from deployment "a very angry man." *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264 (2012). A staff member filed suit under the Washington Law Against Discrimination (WLAD) alleging a hostile work environment based on sexual orientation. The supervisor had made anti-gay comments in prior years but had not made such comments since WLAD was amended to prohibit discrimination based on sexual orientation. Most would agree that the supervisor's conduct was unacceptable, but would it support a WLAD hostile work environment claim? The Washington Supreme Court said maybe.

The superior court initially dismissed the case because the 2006 amendments to the WLAD to include sexual orientation as a protected class were not retroactive, and no acts contributing to a hostile work environment had occurred in the time since the amendments had been passed. The court of appeals reversed, holding that a jury could find that the "angry man" comment was based on his demonstrated hostility toward the plaintiff's sexual orientation. The supreme court agreed. It is important to note, however, that the supreme court did not decide that this comment created a hostile work environment; indeed, the court stated that "a single act of harassment is rarely enough to establish a prima facie claim" for a hostile work environment. *Id.* What they did hold was that a jury could consider the supervisor's pre-amendment conduct as evidence to prove discriminatory intent for the post-amendment comment. Additionally, the supreme court held that damages were only available for the post-amendment conduct.

What does this all mean? Nip inappropriate and threatening workplace conduct in the bud, even if it is not prohibited under current law. Under this decision, past conduct matters, even if it was legal at the time.

2. WLAD Does Not Support a Failure to Accommodate Claim for Religious Beliefs

The plaintiff in *Short v. Battle Ground School District*, 169 Wn. App. 188 (2012), held strong religious beliefs that she said prevented her from telling a lie. The plaintiff overheard a comment about a co-worker and relayed that information to her co-worker. When the superintendent of the school district instructed her to tell her co-worker that what she had previously said was in fact not true, the plaintiff refused because it would require her to lie, which would violate her religious beliefs.

Shortly thereafter, the plaintiff attended a meeting with the superintendent and another employee. She was instructed not to divulge the substance of the meeting had or even the fact that the meeting occurred to the aforementioned co-worker. The plaintiff alleged that the work environment became extremely hostile, eventually resulting in a leave of absence and the plaintiff's resignation.

The plaintiff sued alleging religious discrimination, failure to accommodate her religious beliefs, and retaliation under WLAD. The superior court granted defendant's motion for summary judgment and the plaintiff appealed. Affirming the dismissal of the failure to accommodate based on religious beliefs claim, the court of appeal held that Washington has not recognized a claim for failure to accommodate based on religious beliefs; such claims are cognizable only under federal antidiscrimination law.

Does this change what employers are required to accommodate? Not really. Even though this claim is not available under state law, it is still a cognizable federal claim, and liability may lie for failure to make appropriate accommodations.

3. Age Discrimination in Practice

Most of us recognize that calling an employee an "old goat" or commenting that an employee is "too old to stay on the job" is not wise. Division I of the Court of Appeals agrees. In *Rice v. Offshore Systems, Inc.*, 167 Wn. App. 77, review denied, 174 Wn.2d 106 (2012), a younger supervisor made such comments to an older subordinate over a period of several years. In December 2007, a vessel owned by one of the employer's customers caught fire and the plaintiff was summoned even though he was off duty at the time. Plaintiff was the only manager present, but other employees thought he seemed intoxicated. The plaintiff got into a dispute with fire and police officials, resulting in an altercation with strong language.

Plaintiff was fired three weeks later without being interviewed by the operations manager. He was told that he had been fired because he tried to cut the lines of the burning vessel. Two weeks later he received a letter stating that he had been terminated due to his behavior on the night of the fire, including being intoxicated, and his long-term poor treatment of other employees. Unsurprisingly the plaintiff sued, alleging age discrimination. His suit was dismissed by the superior court but the court of appeals reversed, holding that a jury could find that the employer's explanation was a pretext for discrimination.

The appellate court relied on several key facts. First, the employer gave inconsistent reasons for terminating the plaintiff. Second, the court noted the operations manager's history of comments regarding plaintiff's age. The court also stated that a jury could find that the employee acted reasonably considering that there were no other managers present – a violation of company policy – and he was off duty at the time of the fire. Lastly, the court found that there was no evidence that the plaintiff had a history of mistreating other employees.

The takeaway here? It is important to follow company procedures when terminating an employee. Make sure your reasons are consistent and supported by factual evidence. And make sure your employees know not to call each other old goats. If nothing else, it is not good for company morale and can set up liability under WLAD.

4. Federal Age Discrimination in Employment Act (ADEA)

To prevail on an age discrimination claim under the ADEA, a plaintiff must prove at trial that age was the "but-for" cause of an employer's adverse action. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009). In *Gross*, the U.S. Supreme Court held that "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor." *Id.* at 174. The *Gross* Court expressly noted that it did not "definitively decide[] whether the evidentiary framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), utilized in Title VII cases" on summary judgment, "is appropriate in the ADEA context." *Id.* at 175 n.2.

In *Shelley v. Geren*, 666 F.3d 599 (9th Cir. 2012)**,** the Ninth Circuit held that *McDonnell Douglas*'s burden-shifting framework is applicable in ADEA cases on summary judgment. This is consistent with what every other circuit to have addressed the question has found. *See, e.g.*, *Leibowitz v. Cornell Univ.*, 584 F.3d 487, 498 (2d Cir. 2009); *Velez v. Thermo King de P.R., Inc.*, 585 F.3d 441, 446–47 (1st Cir. 2009); *Connolly v. Pepsi Bottling Grp., LLC*, 347 F. App'x 757, 759-61 (3d Cir. 2009) (unpublished).

The 54-year-old plaintiff (Shelley) applied for a 120-day temporary position with the Army Corps of Engineers and was rejected in favor of a 42-year-old candidate named Marsh. A permanent position then opened up; Shelley applied for that, too, and the job again went to Marsh. Shelley was clearly able to establish a prima facie case of age discrimination under *McDonnell Douglas*—Shelley "was fifty-four at the relevant time, he was qualified for both the temporary and the permanent positions, he was denied both positions, and both went to a substantially younger candidate." *Shelley*, 666 F.3d at 609. To withstand summary judgment, Shelley only needed to raise a genuine issue of material fact that the agency's reason for picking Marsh was a pretext for age discrimination.

The majority identified as evidence of pretext the fact that two hiring committee members "inquired about the projected retirement dates for employees in the contracting divisions during the hiring period." *Id.* at 609. A reasonable "fact-finder could infer from this that they considered age and projected retirement relevant to the hiring decision." *Id.* In addition, the court noted that there was credible evidence that Shelley was more qualified than Marsh. Finally, the court was not persuaded by the agency's defense that the five other finalists for the permanent position were also protected-age employees: "Stacking the interview pool with older candidates does not immunize the decision to hire a younger one." *Id.* at 611.

Judge Bybee dissented. Although he agreed that the *McDonnell Douglas* framework applied in ADEA cases, he thought that presence of older finalists was dispositive under *Gross*: "[T]he only plausible conclusion from this set of facts is that some reason other than age caused the selection committee to decide not to interview Shelley. And if the committee had some reason other than age—indeed, if it had *any* other reason—then Shelley cannot satisfy *Gross'*s 'but-for' test." *Id.* at 615 (Bybee, J., dissenting).

5. Cat's Paw Liability

Lower courts have long recognized that an employer may be liable for employment discrimination when a final decision-maker relies on an improperly motivated subordinate's recommendation. This "cat's paw" theory of liability is premised on the principle that the subordinate acts as the firm's agent. The theory derives its name from a fable in which a monkey convinces an "intellectually challenged" cat to pull chestnuts out of a hot fire. *Cook v.*

IPC Int'l Corp., 673 F.3d 625, 628 (7th Cir. 2012). "As the cat scoops the chestnuts from the fire one by one, burning his paw in the process, the monkey eagerly gobbles them up, leaving none left for the cat." *EEOC v. BCI Coca–Cola Bottling Co. of L.A.*, 450 F.3d 476, 484 (10th Cir. 2006). In the law of employment discrimination, the "cat's paw" theory can apply when a biased subordinate who lacks decision-making power uses the formal decision-maker "as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Id.* Even Judge Posner, who imported the "cat's paw" metaphor to discrimination law in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), has noted that the doctrine has become a sort of "judicial attractive nuisance; because vague judicial terminology, such as 'motivating factor' . . . confuses judges, jurors, and lawyers alike." *Cook*, 673 F.3d at 628.

Recently, in *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1194 (2011), the U.S. Supreme Court confirmed that cat's paw liability may be imposed where "a supervisor performs an act motivated by [unlawful] animus that is *intended* by the supervisor to cause an adverse employment action, and … that act is a proximate cause of the ultimate employment action." The plaintiff in Staub proceeded under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The Supreme Court observed that the statute is very similar to Title VII. S*ee Staub*, 131 S. Ct. at 1191. Federal courts of appeals have also recognized post-*Staub* that the theory continues to apply in cases arising under Title VII and other statutes. *See, e.g.*, *Marez v. Saint-Gobain Containers Inc.*, 688 F.3d 958 (8th Cir. 2012) (liquidated damages may be awarded in an FMLA case premised on cat's paw liability); *Smith v. Bray*, 681 F.3d 888 (7th Cir. 2012) (subordinate employee with retaliatory motive may be held individually liable under 42 U.S.C. § 1981); *McKenna v. City of Philadelphia*, 649 F.3d 171, 180 n.10 3d Cri. 2011(city may be liable under Title VII for police captain's retaliatory bias against plaintiff officer even though adjudicatory panel conducted internal investigation and recommended discipline against plaintiff; "[e]ven if the City had proven that the PBI was a truly independent body, this alone would not undermine the jury's determination, based on all the evidence, that there was a causal connection between [the officer's] termination and his involvement in protected activity"); *Simmons v. Sykes Enters. Inc.*, 647 F.3d 943 (10th Cir. 2011) (cat's paw theory is actionable under ADEA but plaintiff must show that subordinate bias was a "but for" cause of the adverse employment action).

Washington courts have not yet recognized the cat's paw theory under WLAD. *See Felt v. City of Bellevue*, No. 61838-5-I, 2009 WL 1065877, at *3 (Wash. Ct. App. Apr. 20, 2009) (unpublished opinion) ("Washington courts have yet to rule upon the application or parameters of the subordinate bias theory."). Even so, it is extremely likely that cat's paw liability would be actionable in Washington, whose courts look to federal precedents "for guidance in employment discrimination cases." *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 481 n.2, *review denied*, 166 Wn.2d 1038 (2009).

So what should employers do to avoid getting burned by employees with unlawful motives? First, they should establish objective employment policies and procedures that insulate decision-makers from potentially biased subordinate employees. Before taking an adverse employment action, employers should ensure that a complete record has been established and that clear, legitimate grounds based on information from multiple independent sources exist to support that action. Supervisors should receiving training to evaluate and treat employees fairly using neutral standards. And employers should widely distribute antidiscrimination policies throughout the company workforce.

6. Seattle City Council Considers Proposal to Prohibit Discrimination Against Criminals

Just as employers are getting used to Seattle's new "sick and safe" leave law, the City Council is considering yet another new mandate: antidiscrimination provisions for employees and job applicants with criminal arrest and conviction records. The proposal, which isn't yet a formal proposed ordinance, is supported by the Seattle Office for Civil Rights and the Seattle Human Rights Commission and modeled after similar laws in New York and Wisconsin that prohibit discrimination on the basis of an arrest or conviction record when the record does not relate to the job or pose a safety threat to others. The rationale? A person is less likely to reoffend if they can get a job and support themselves. One study found that only 8 percent of offenders who work for a full year following their release from prison reoffend, compared to a 54 percent recidivism rate without steady employment.

The proposal would amend the City of Seattle's current antidiscrimination laws to limit the ways that an employer can use arrest or conviction records when deciding to hire, fire, promote or take other employment actions. Under the proposal, an employer could not deny employment or take adverse action against an employee based on an arrest or conviction record unless an exceptions applies. The four exceptions are:

- The crime for which the individual was convicted has a direct relationship to the job in question (for example, a DUI conviction for a truck driver or a theft conviction for a cashier);

- Employment would create a risk of substantial harm to property or safety;

- The job is in law enforcement and involves working with children or vulnerable adults and the criminal history relates to sexual abuse, neglect, exploitation of children or vulnerable adults or similar crimes; and

- State and federal laws regarding criminal background checks would still apply.

Importantly, lying about one's criminal record would still be grounds for discipline and discharge.

If an employer is sued, this proposal would require an employer to articulate a noncriminal record-related reason for not offering employment or taking adverse action against an employee, or to show that the adverse action fell under one of the exceptions. As drafted, this proposal would likely still allow employers to not hire or take adverse action against serious criminals because such employment may create a risk of substantial harm to property or safety.

What does this mean for employer liability to co-workers and the public? First, remember the exceptions – a person need not be hired if the employer believes that they would create a substantial risk of harm to property or safety, or if the crime has a direct relationship to the job. Second, considering that this proposal may prevent employers from rejecting ex-cons due to conviction records, it may actually shield employers from negligent hiring claims. How can you be accused of negligent hiring if the law prevents you from rejecting an ex-convict?

On the upside, this is not yet a formal proposed ordinance. Moreover, supporters note that similar laws have been enacted in other jurisdictions without adverse consequences to employers.

D. Class Action Update

Wal-Mart Stores, Inc. v. Dukes

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the U.S. Supreme Court shut down a class action sex discrimination lawsuit implicating the legal claims of perhaps as many as 1.5 million women. The most significant part of the ruling was the emphasis on Fed. R. Civ. P. 23's requirement of "commonality." The putative class members' claim was that Wal-Mart's "corporate culture" institutionalized a bias against female workers, "thereby making every woman at the company the victim of one common discriminatory practice." *Id.* at 2548.

The Court held, 5-4, that the women could not meet the commonality standard because they were suing "about literally millions of employment decisions at once." *Id.* at 2552. There was no common companywide policy to challenge in *Wal-Mart*; the only relevant corporate policies were a policy *forbidding* sex discrimination and a policy of delegating employment decisions to local managers. *Wal-Mart* articulated a more exacting standard for the commonality test, holding that class plaintiffs' "common contention" under Rule 23 "must be of such a nature that it is 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." *Id.* at 2551.

The *Wal-Mart* Court also ruled unanimously that class plaintiffs seeking injunctive and declaratory relief under Rule 23(b)(3) cannot recover damages for back pay, except where that kind of remedy is merely incidental to the type of court orders authorized by Rule 23. *See id.* at 2557-61.

Post-*Wal-Mart*

It was widely anticipated that *Wal-Mart* would make it significantly more difficult for plaintiffs to pursue large nationwide class actions against employers. But the results in the lower courts have been mixed, making it difficult to predict *Wal-Mart's* long-term impact on class litigation.

In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012), for example, the Seventh Circuit permitted a class made up of 700 African-American brokers at Merrill Lynch. The issue was whether Merrill Lynch's policy of allowing its advisors to form self-selecting teams had an adverse disparate impact on its African American financial advisors. Relying on *Wal-Mart*, the district court had denied class certification on the ground that the plaintiffs' theory turned on proof of individual acts of discrimination by the individual advisors who allegedly excluded blacks from their internal teams. The Seventh Circuit reversed the denial. In an opinion by Judge Posner, the court observed that the crucial point in *Dukes* was that the plaintiffs' theory of liability was premised on the absence of a uniform policy; the plaintiffs alleged that individual managers intentionally discriminated against women in violation of Wal-Mart policy, and that the employer should have exercised more direct control. By contrast, in *McReynolds*, the plaintiffs challenged the effect of the teaming policy itself, which allegedly led to the formation of insular—and racially discriminatory—"fraternities" within the company. 672 F.3d at 489. Last month, the Supreme Court denied Merrill Lynch's petition for certiorari. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Reynolds, 2012 WL 3061874 (U.S. Oct. 1, 2012).

But in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011), the Ninth Circuit sent a gender discrimination class action back to the lower court to reevaluate if the class was properly

certified in light of *Wal-Mart*. The plaintiffs alleged that Costco failed to promote hundreds of female employees to management positions nationwide. One of Costco's experts testified that any gender disparities that existed were confined to two regions. *Id.* at 984. The Ninth Circuit held that the lower court "failed to resolve th[ese] critical factual disputes centering around the national versus regional nature of the alleged discrimination." Vacating the district court's certification of the class, the circuit court remanded and noted that the common questions among the putative class members must produce common answers and "connect many individual promotional decisions to their claim for class relief." *Id.* at 981.

The upshot of *Wal-Mart*, then, is somewhat uncertain, but by no means the unequivocal boon for employers that was initially anticipated. While it is unlikely that such unwieldy classes as the one proposed in *Wal-Mart* will go forward, the decision is also unlikely to significantly thwart the certification of smaller classes where each member was affected by a discernible company policy. Instead it appears, as was the case pre-*Wal-Mart*, that common policies similarly impacting groups of employees will often be sufficient to merit class treatment, while the mere absence of a policy will not.

E. Wage and Hour Update

1. Pharmaceutical Sales Representatives Are "Outside Salesmen"

The question before the Supreme Court in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), was whether pharmaceutical sales representatives, or "detailers," fall under the "outside salesman" exemption to the Fair Labor Standards Act (FLSA) and are therefore not entitled to overtime wages. The Court took the case to resolve a circuit split: the Second Circuit had said "no"; the Ninth Circuit said "yes." The Supreme Court, in a 5-4 opinion authored by Justice Alito, agreed with the Ninth Circuit that the detailers were exempt "outside salesmen."

The FLSA requires employers to provide overtime wages to nonexempt employees when they work over 40 hours per week. The detailers argued that they were entitled to overtime because they did not technically sell any pharmaceutical products. Instead of actually selling the prescription drugs—because it is illegal for them to do so—the detailers call on physicians, seeking to get them to make a "nonbinding commitment" to prescribe, in appropriate cases, the drugs sold by the detailers' employer. 132 S. Ct. at 2170. Each week, the detailers spent approximately 40 hours in the field calling on physicians, plus another 10 to 20 hours attending events and engaging in other ancillary tasks. They were paid a base salary, plus incentives that were based on the sales of drugs in their territories, but they were not paid overtime wages.

The Department of Labor (DOL) filed an amicus brief with the Supreme Court arguing that the detailers did not make sales under its regulations. All members of the Court agreed that no special deference (known as *Auer*, or *Seminole Rock*, deference) was owed to the DOL's interpretation of its own regulation. The Court observed that the agency's position had changed over time: although it argued in the lower courts that a "sale" for purposes of the "outside salesman" exemption required a "consummated transaction," it abandoned that test in the Supreme Court and instead took the position that an employee does not make a sale unless he transfers title. *Id.* at 2166. The Court emphasized that the agency's new interpretation did not give the pharmaceutical industry "fair warning" that detailers fell outside the exemption. As for the merits of the DOL's "transfer of title" interpretation, the Court deemed it "quite unpersuasive," and "plainly lack[ing] the hallmarks of thorough consideration." *Id.* at 2169. The Court found the DOL's position "flatly inconsistent" with the language of the FLSA, which states

that a sale can include a "consignment for sale"—which does not involve a transfer of title. *Id.* at 2169.

All members of the Court agreed that it had to interpret the regulations de novo to determine whether the detailers fell within the exemption. The majority focused on the language of the FLSA, which exempts anyone employed "in the capacity of [an] outside salesman." 29 U.S.C. § 213(a)(1). The emphasis on "capacity," the majority thought, favored a "functional, rather than a formal inquiry," involving an analysis of the history and context of the particular industry. The exemption covers "those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity." 132 S. Ct. at 2170. 2171-72. The detailers' obtainment of a nonbinding commitment from physicians to prescribe their company's drugs was tantamount to a sale in the pharmaceutical industry. The majority also emphasized that detailers "bear all the external indicia of salesmen": they are trained to close each sales call by seeking a physician's nonbinding commitment; they work on the road, away from their employer's home office, with minimal supervision; and they receive incentive compensation based on sales within a particular detailer's territory. *Id.* at 2172. Finally, the majority noted that treating detailers as salesmen was consistent with the purpose of the FLSA exemption: outside salesmen are typically compensated well above the minimum wage, and their job functions do not easily lend themselves to a standard 40 hour workweek.

Writing for the dissenters, Justice Breyer would have held that the detailers were not outside salesmen. Their primary duties, he noted, did not involve making sales, which came about only after a long chain of preconditions were fulfilled: "A detailer might convince a doctor to prescribe a drug for a particular kind of patient. If the doctor encounters such a patient, he might prescribe the drug." The patient "might take the prescription to a pharmacist and ask the pharmacist to fill the prescription. If so, the pharmacist might sell the manufacturer's drug to the patient, or might substitute a generic version." *Id.* at 2176 (Breyer, J., dissenting). The dissent gave little weight to the idea that detailers sought to convince physicians to make a “nonbinding commitment"—an oxymoronic concept like a "definite maybe," an "impossible solution," or a "theoretical experience." *Id.* at 2176-2177 (Breyer, J., dissenting). Instead, the work of detailers was more akin to that of a promoter, who engages in activities to stimulate sales by someone else.

2. Regional Sales "Managers" Not Exempt Under Washington Minimum Wage Age

If *Christopher* shows that someone who does not actually make sales can qualify as a salesman, *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325 (2012), shows that an employee who does make sales may not "promote sales" for the purposes of the Washington Minimum Wage Act (MWA).

Plaintiff Fiore held the position of "Territory Manager" with defendant PPG, which sells paints and stains (among other products) to Lowe's home improvement stores. Fiore was responsible for servicing eleven Lowe's stores. In the course of his visits, he spent many hours driving to, from, and between these stores. Before and after his visits, he also had to review and respond to emails and voicemails from management and to submit reports to his manager. Fiore received a salary, and PPG did not compensate Fiore for this drive time and administrative time.

Following his termination, Fiore filed a complaint contending that PPG had failed to pay him overtime wages in violation of the MWA. PPG argued that Fiore was an administrative employee pursuant to the MWA and thus exempt from the act's overtime wage protections.

PPG transferred the case to arbitration and prevailed, after which Fiore sought trial de novo and both sides moved for summary judgment. The trial court granted partial summary judgment to Fiore, holding that he was not an administratively exempt employee. The court also found that PPG's withholding of overtime was "willful" and imposed treble damages. The court also awarded attorney fees and costs in the amount of $596,000 after applying a .25 multiplier on account of the "extraordinary risk" plaintiff's counsel took in seeking trial de novo.

The court of appeals affirmed the trial court's decision that Fiore was not an administratively exempt employee, but reversed in part in the attorney fees calculation. The court agreed that PPG could not show that Fiore's primary duty was administrative. Rather, he "spent the vast majority of his time performing manual labor at Lowe's stores and making individual retail sales to Lowe's customers and contractors." 169 Wn. App. at 336. The court also noted that Fiore's duties, as a member of the "Lowe's National Olympic Field Sales Team," were largely selling. He had no involvement in advertising or promotional campaigns, and could not change promotional displays, negotiate prices, sign documents, or formulate new procedures. The court rejected the argument that Fiore "promoted sales" within the meaning of the administrative exception because his job was to make sales rather than to promote them. "Retail sales work . . . does not constitute 'promoting sales' for the purposes of the administrative exemption to the MWA's overtime wage requirements." *Id.* at 342. The court also noted that Fiore's work did not require 'the exercise of discretion and independent judgment,' lending further support to its conclusion that he was not an administrative employee. *Id.* at 342 (quoting WAC 296–128–520(4)(b)).

The court also affirmed the trial court's calculation of the value of Fiore's overtime wage claim. PPG asserted that the court erred in utilizing the "time-and-a-half" calculation method and instead should have employed the "fluctuating workweek" doctrine. An employee is paid for a "fluctuating workweek" when the employee is paid a fixed salary and "'it is clearly understood and agreed upon by both employer and employee that the hours will fluctuate from week to week and that the fixed salary constitutes straight-time pay for all hours of work.'" *Id.* at 344 (quoting Wash. Dep't of Labor & Indus., Administrative Policy, ES.A.8.1, at 5 (issued Nov. 6, 2006)). In such circumstances, because it was understood that all hours worked were paid by the salary, the employee is entitled to "one-half hour's pay for each hour over 40 in the work week." *Id.* (quoting Administrative Policy, ES.A.8.1, at 5). In this case, because PPG has not established "a specified number of hours per week for which the salary is intended to compensate the worker," and because Fiore was not paid overtime wages contemporaneously with the overtime work, the fluctuating workweek method was inapplicable. *Id.* at 347.

Finally, however, the court of appeals held that the trial court erred in awarding a .25 multiplier based on the high risk of prosecuting the case. A risk multiplier is warranted only when the lodestar figure does not adequately account for the high risk nature of a case. The court of appeals concluded that the litigation was not high risk, calling it instead "a straightforward wage and hour case" that was "properly resolved on summary judgment." *Id.* at 357. The complexity of the case was adequately accounted for in the lodestar amount. It was also improper to reward a multiplier for the increased risk of pursuing a trial de novo following the adverse arbitration decision because the legislature seeks to discourage appeals from arbitration decisions.

3. FedEx Drivers Are Not "Independent Contractors"

In *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851 (2012), a class of 320 FedEx delivery drivers sought overtime wages under the MWA. The drivers had signed a contractor

agreement with FedEx and handled a single route. The question presented was whether the drivers were employees and therefore eligible for overtime pay or rather independent contractors and therefore ineligible for overtime. The answer to that question turned on the appropriate test for assessing whether a worker is an independent contractor. FedEx argued for the common law right-to-control standard while the drivers contended that the FLSA economic-dependence test was controlling. The trial court gave a hybrid instruction, focusing the inquiry on FedEx's right to control in light of the economic-dependence factors. The jury determined that the drivers were independent contractors. The court of appeals reversed, vacated the verdict, and remanded. The supreme court affirmed, agreeing with the court of appeals that the FLSA economic-dependence test applied.

The majority's main reasoning was that the MWA was based on the FLSA, and that the relevant definitions of "employee" and "employ" are "functionally identical under the two acts." 174 Wn.2d at 868. "At the time that Washington adopted the MWA, the federal courts had rejected the right-to-control test for determining employee status under the FLSA." *Id.* at 868. Instead, employees under the FLSA are those 'who as a matter of economic reality are dependent upon the business to which they render service.' *Id.* at 869 (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)). "The legislature's nearly verbatim adoption in the MWA of the FLSA language with respect to the definition of 'employee' evidences legislative intent to adopt the federal standards in effect at the time." *Id.*

Because the trial court's jury instruction was governed by a single determination—"whether FedEx Ground controlled or had the right to control, the details of the class members' performance of the work"—the instruction was clearly erroneous. *Id.* at 871.

Justices Johnson dissented, contending that the majority's adoption of the "economic dependence" test not only "changes the law," but also "sweeps" so "broadly" that its "unworkable" test "could arguably be applied to almost any work performed by one person on behalf of another." *Id*. at 877-78 (C. Johnson, J., dissenting, joined by J. Johnson, J.).

4. Audit Associates May Be Exempt "Professional Employees"

In *Litchfield v. KPMG, LLC*, 285 P.3d 172 (Wash. Ct. App. 2012), the Washington Court of Appeals held that audit associates at an accounting firm may be exempt from overtime pay even if they lack the education and experience necessary to qualify for a CPA license.

Litchfield worked in KPMG's Seattle office in 2003 and 2004 as an entry-level audit associate. To qualify for this position, an individual must ordinarily possess a college degree with an accounting concentration. In contrast, under the Public Accountancy Act (PAA), a CPA license requires 2000 hours of on-the-job training in addition to an accounting degree. Litchfield held a bachelor's degree in accounting but lacked the hours to apply for a CPA license. As a salaried employee, he did not receive overtime pay.

Litchfield sued KPMG on behalf of a class under the MWA. He urged the court to adopt a bright-line rule that audit associates lacking the qualifications for a CPA license cannot be "exempt professionals" under the MWA, and are therefore always eligible for overtime pay. The trial court, then-Judge Gonzalez, agreed with Litchfield and held that audit associates lacking the education and experience necessary for a CPA license are eligible for overtime pay.

The court of appeals reversed. The court noted that the PAA establishes the criteria to become a licensed auditor but does not supply the standard for whether employees are entitled to

overtime pay under the MWA. Interpreting that statute falls instead to the Department of Labor and Industries, whose regulations provide that employees are "bona fide professionals" when they (1) earn more than $250 a week; (2) perform work requiring "advanced knowledge" through a prolonged course of study; and (3) consistently exercise discretion while performing their duties. 285 P.3d at 177. On the record before it, the court of appeals could not determine whether audit associates use advanced knowledge and exercise discretion while performing their job. Consequently, the court remanded the case to the trial court to gather more evidence and to make that determination in the first instance using the appropriate standard.

5. Mortgage Bankers Can Be "Administrative Employees" Under FLSA

In the long-running case of *Henry v. Quicken Loans, Inc.*, ___ F.3d ___, No. 11-2125, 2012 WL 5259000 (6th Cir. 2012), mortgage banker Ryan Henry joined with 445 other current and former Quicken employees in a lawsuit alleging the company misclassified its mortgage bankers as FLSA-exempt and failed to provide them with overtime pay from 2003 to 2007. Quicken argued that the bankers fell within the administrative employee exemption to the FLSA, describing the bankers as the "quarterback[s]" of the lending process. *Id.* at *1 "The mortgage bankers by contrast insist they are glorified salesmen" who followed company instructions on developing business. *Id.* After a five-week trial, the jury returned a verdict for Quicken. The Sixth Circuit affirmed.

In an opinion by Judge Sutton, the Sixth Circuit held that the jury's determination that the plaintiffs were administrative employees was not erroneous as a matter of law. "It may be true," the court noted, "that courts can resolve many of these cases as a matter of law. This simply is not one of them." *Id.* at *3. The case before it "implicated several relevant fact disputes—namely, what the Quicken mortgage bankers did from day to day and whether those activities involved management-like responsibilities, discretion and independent judgment." *Id.* at *4. Such "fact disputes fall within the jury's domain." *Id.*

F. Discovery

1. Hide-the-Ball Discovery Tactics May Cost You (and Your Lawyers) Greatly

In September 2010, Fry's Electronics was sued by the EEOC and two former employees of the Renton, Washington location after the employees were allegedly fired for complaining about sexual harassment. According to the plaintiffs, Mr. Lam, a supervisor, reported what he perceived as sexual harassment of one of his subordinate employees, Ms. Rios. Ms. Rios had allegedly received several sexually harassing text messages from Mr. Ibrahim, the assistant store manager. Mr. Lam reported his concerns to corporate headquarters and Ms. Rios also claimed that she complained to several company managers.

Headquarters asked the store manager to investigate. The plaintiffs claimed the investigation was futile because the store manager and the alleged harasser were friends. Mr. Lam was allegedly told his job performance was not up to standard, the first time Mr. Lam had received such feedback, and that his job was in jeopardy. Fry's discharged Mr. Lam in May 2007 and Ms. Rios in February 2008. Fry's defended each termination on the grounds that the employees were underperforming.

The EEOC investigated the terminations and concluded that Fry's justification for discharge did not pass the smell test. The EEOC filed suit and Mr. Lam and Ms. Rios joined the suit as intervener plaintiffs.

During discovery, the plaintiffs had to file several motions to compel disclosure of documents, and eventually filed a motion for sanctions against Fry's for willful spoliation of evidence. The plaintiffs alleged that Mr. Lam uttered "EEOC" as he left the termination meeting, which was enough to trigger Fry's duty to preserve records in anticipation of litigation.

Plaintiffs claimed that Fry's destroyed three types of evidence: (1) sales information from Mr. Lam's and Ms. Rios's department; (2) formal department reviews during the relevant time period; and (3) the hard drives of two computers that were used to create documents concerning employee discipline, termination, and complaints of harassment, discrimination and retaliation. Counsel for Fry's opposed the plaintiffs' motion for sanctions, claiming that Fry's did not have a duty to preserve evidence until it received a letter from the EEOC in August 2010, years after it had destroyed the records in question.

The court ruled for the plaintiffs, holding that Fry's was put on notice of a potential retaliation claim when it terminated Mr. Lam's employment in May 2007, in part because of Mr. Lam's utterance of "EEOC." The court found that this was enough for a "sophisticated corporate employer" to be put on notice. The date of Mr. Lam's firing was the trigger date, not the date the company learned of the EEOC investigation.

The consequence for Fry's was not as bad as it could have been. The court declined to award terminating sanctions, although the decision was a "very close call." Instead, the court decided that the jury would be instructed to draw an adverse inference against Fry's regarding the validity of its sales-related justification for Mr. Lam's termination, and plaintiffs would be allowed considerable leeway in arguing what information could have been found on the missing hard drives.

Much to the chagrin of the plaintiffs and judge, more "lost" information would soon be discovered during a deposition of one of Fry's officers. The deponent informed the plaintiffs about a prior investigation into allegations of sexual harassment against Mr. Ibrahim, Ms. Rios' alleged harasser. The plaintiffs filed a motion for leave to supplement the record, and the defense counsel responded with more "hide the ball tactics."

The judge issued an order to show cause why sanctions, including dismissal should not be entered against Fry's. In the end, the judge ruled that the defendant's affirmative defenses were stricken and documents and testimony were presumptively admissible at trial. He also awarded $100,000 to offset costs, punish unacceptable behavior, and deter future bad conduct. Lastly, the judge stayed the case until prior discovery requests could be certified, and appointed a special master to review the defendant's document retention, search and disclosure activities through the litigation.

Judge Lasnik's message here was clear: you will pay, both monetarily and in evidentiary sanctions, if you hide the ball or practice evasive discovery tactics.

G. Arbitration Update

1. Nineteen Months of Litigation Does Not Necessarily Waive the Right to Compel Arbitration

In *Hill v. Garda CL NW. Inc.*, Wn. App. (No. 66137 July 30, 2012), Division I addressed the question of whether pursuing litigation for 19 months waived an employer's right to compel arbitration. In this case, the defendant employer filed an answer and both parties engaged in

discovery for several months. When the employees moved for class certification, the employer moved to compel arbitration. The superior court certified the class and ordered the case to proceed in class arbitration. On appeal, Division I held that the employer's right to compel arbitration was not waived because the delay in filing the motion to compel arbitration resulted in part from an effort to resolve the case without resorting to litigation or arbitration. However, holding that class arbitration was not permitted under U.S. Supreme Court precedent, the appellate court remanded the case for individual arbitration.

This case suggests that, so long as an employer asserts its arbitration rights in its answer, those rights are not waived, even if the parties engage in discovery and pretrial motions. It thus seems that employers may pursue at least some discovery before arbitration.

H. Weed in the Workplace

1. Marijuana Use and the ADA

Marijuana is a hot topic particularly after last week's passage of Initiative 502 that legalized marijuana possession and use under state law. This result has no impact on the federal government's classification of marijuana as a controlled substance. We will keep our clients updated on how this law affects the workplace.

For now, the Ninth Circuit held in *James v. City of Costa Mesa*, 684 F.3d 825 (9th Cir. 2012), that the illegal use exception to the ADA's definition of an "individual with a disability" requires both that the drug be taken under the supervision of a licensed health care practitioner *and* authorized by some provision of federal law. In this case, although medical marijuana is legal in California, its use is not authorized under federal law. The plaintiffs thus could not obtain an injunction prohibiting discrimination in public services for closing medical marijuana facilities because plaintiffs were not, technically, disabled, and could not bring an ADA claim.

2. Washington's Medical Use of Marijuana Act (MUMA) Does Not Provide a Private Cause of Action

Employers will be relieved to learn that the Washington Supreme Court held that MUMA does not provide a private cause of action against an employer who discharges an employee for authorized medical marijuana use. Further, MUMA does not create a clear public policy that would support a claim for wrongful discharge in violation of such a policy. *Roe v. Teletech Customer Care Mgmt.*, 171 Wn.2d 736 (2011).

I. Handbook Claims, Revisited

When do "handbook claims," statements in employee manuals or handbooks, amount to a specific promise that an employee may enforce against the employer?

In *Quedado v. Boeing Co.*, 168 Wn. App. 363 (2012) the appellate court confronted this issue. The plaintiff in this case was demoted from management from allegedly using his influence to help a relative get hired, and sued Boeing, alleging wrongful demotion in violation of an implied contract and a violation of specific promises concerning employee discipline. Division I first reaffirmed the at-will employment doctrine, and noted the exception that an employer's employment policies and procedures can alter the employment relationship by forming an implied employment contract or creating enforceable promises about employment terms.

The court went on to hold that "[w]here an employment manual gives the employer discretion in applying the discipline procedures, courts have held as a matter of law that the manual does not provide a promise of specific treatment in a specific circumstance." *Id.* at 372 (quotations and citations omitted) The court noted that specific representations include "employment manuals that provide exclusive lists of reasons for discharge; a listing of detailed procedures and specific grounds for discharge; and detailed disciplinary policies including descriptions of certain conduct for which termination would be immediate and other circumstances in which warnings would be provided before discharge." *Id.* at 375 (emphasis, quotations and citations omitted).

It might be worthwhile to review your company's employment manuals and handbooks to see if the company has unknowingly made any such enforceable promises.

J. Computer Fraud and Abuse Act

The Computer Fraud and Abuse Act (CFAA) provides civil relief to those whose electronically stored information has been improperly used, damaged or disclosed. 18 U.S.C. § 1030(g). The CFAA also makes it a federal crime to access a computer without authorization or to exceed authorized access from a protected computer. 18 U.S.C. § 1030(a)(4).

In April 2012, the Ninth Circuit Court of Appeals held that disloyal employees who accessed workplace computers in violation of corporate policy did not violate the CFAA. In *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (en banc), an ex-employee of an executive recruiting firm was prosecuted on the theory that he induced current company employees to use their legitimate credentials to access the company's proprietary database and provide him with information in violation of corporate computer-use policy. The government claimed that the violation of this private policy was a violation of the CFAA. The district court dismissed the CFAA counts, ruling that violations of corporate policy are not equivalent to violations of federal computer crime law.

The government appealed to the Ninth Circuit, a panel of which reversed the district court and held that an employee violates the CFAA when she uses a computer in way that violates an employer's restrictions. The full court granted rehearing en banc and ruled 9-2 that "the government's interpretation would transform the CFAA from an anti-hacking statute into an expansive misappropriation statute." *Id.* at 857. The decision limited the scope of the "exceeds authorized access" language in the CFAA to apply only to violations of restrictions on access to information, not restrictions on its use. To hold otherwise, the court reasoned, would criminalize even casual violations of terms of service imposed by social networking sites, online retailers, and search engines. Chief Judge Kozinski colorfully wrote for the en banc majority:

> Minds have wandered since the beginning of time and the computer gives employees new ways to procrastinate, by g-chatting with friends, playing games, shopping or watching sports highlights. Such activities are routinely prohibited by many computer-use policies, although employees are seldom disciplined for occasional use of work computers for personal purposes. Nevertheless, under the broad interpretation of the CFAA, such minor dalliances would become federal crimes. While it's unlikely that you'll be prosecuted for watching Reason.TV on your work computer, you could be. Employers wanting to rid themselves of troublesome employees without following proper procedures could threaten to report them to the FBI unless they quit. Ubiquitous,

> seldom-prosecuted crimes invite arbitrary and discriminatory enforcement.
>
> Employer-employee and company-consumer relationships are traditionally governed by tort and contract law; the government's proposed interpretation of the CFAA allows private parties to manipulate their computer-use and personnel policies so as to turn these relationships into ones policed by the criminal law. Significant notice problems arise if we allow criminal liability to turn on the vagaries of private polices that are lengthy, opaque, subject to change and seldom read. Consider the typical corporate policy that computers can be used only for business purposes. What exactly is a "nonbusiness purpose"? If you use the computer to check the weather report for a business trip? For the company softball game? For your vacation to Hawaii? And if minor personal uses are tolerated, how can an employee be on notice of what constitutes a violation sufficient to trigger criminal liability?
>
> Basing criminal liability on violations of private computer use polices can transform whole categories of otherwise innocuous behavior into federal crimes simply because a computer is involved. Employees who call family members from their work phones will become criminals if they send an email instead. Employees can sneak in the sports section of the *New York Times* to read at work, but they'd better not visit ESPN.com. And sudoku enthusiasts should stick to the printed puzzles, because visiting www.dailysudoku.com from their work computers might give them more than enough time to hone their sudoku skills behind bars.

Id. at 860 (emphasis and footnote omitted).

Judge Silverman, joined by Judge Tallman, dissented. The dissent accused the majority of construing the CFAA in a "hyper-complicated way that distorts the obvious intent of Congress." *Id.* at 864. The dissent argued that the court should have focused on the serious crimes committed by the defendant and his former colleagues, rather than deciding the case based on "far-fetched hypotheticals involving neither theft nor intentional fraudulent conduct." *Id.*

The decision is significant because it creates a circuit split. Three circuit courts—the Fifth, Seventh, and Eleventh—have interpreted the CFAA broadly to cover violations of corporate computer use restrictions or violations of a duty of loyalty. *See United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010); *United States v. John*, 597 F.3d 263 (5th Cir. 2010); *Int'l Airport Ctrs., LLC v. Citrin*, 440 F.3d 418 (7th Cir. 2006). The Fourth Circuit is in accord with the Ninth. *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199 (4th Cir. 2012). This circuit split may well be crying out for the Supreme Court to review the scope of the "exceeds authorized access" provision of the CFAA.

K. Seattle Paid Sick/Safe Time: Ten Tips and Traps[4]

Starting September 1, 2012, a Seattle ordinance requires all but the very smallest employers to provide their employees who work in Seattle a minimum amount of paid sick and safe time (PSST). Stated most broadly, an employee who is entitled to use PSST may use it for absences because of:

- an illness, injury or health condition or the need to obtain preventive care (in each case, relating to either the employee or the employee's partner or family members);
- certain reasons related to domestic violence, sexual assault or stalking; or
- a school or workplace/daycare closure ordered by a public official to limit health hazards.

The theory behind the ordinance is that workers who have no paid time off are more likely to come to work when they or their family members are sick, thereby spreading disease and prolonging illnesses and injuries. The "safe leave" provisions of the ordinance recognize that workers without paid time off find it more difficult to obtain legal, medical and other services relating to domestic violence, sexual assault and stalking.

The ordinance is codified as Chapter 14.16 of the Seattle Municipal Code. The Seattle Office for Civil Rights has issued a set of interpretive rules and other materials that answer some of the questions that the ordinance leaves open.

Important Note: *This discussion highlights some of the compliance issues that might surprise employers. It is not a complete discussion of the potential compliance issues that a given employer might face.*

1. Employer Location Is Irrelevant

The ordinance requires that PSST be provided to employees who perform work in Seattle. The ordinance does not distinguish between employees based on where their employer is located. In fact, under the rules, an employer's obligations begin even before any of its employees perform work in Seattle; one rule requires employers to provide notice to employees who sometimes work in Seattle "reasonably in advance of their first period of work in Seattle."

Telecommuters who perform their work from Seattle are also covered by the ordinance, even if their employer is located outside of the city. Conversely, the ordinance does not cover telecommuters who perform their work outside of Seattle for an employer located in the city (unless the telecommuters sometimes enter the city to work, in which case these individuals might be covered as "occasional" employees, as described in section 3).

2. Employer Size Is Highly Relevant

The size of the employer determines the rate at which PSST accrues for eligible employees and the amount of PSST that the employer must allow employees to use and carry over each calendar year.

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[4] This discussion is based on Andrew Moriarty's August 27, 2012 Client Update.

Employer Size	Accrual Rate	Use Per Calendar Year	Carryover to Next Calendar Year
Tier One more than 4 but fewer than 50 FTEs	1 hour PSST / 40 hours worked	40 hours	40 hours
Tier Two at least 50 but fewer than 250 FTEs	1 hour PSST / 40 hours worked	56 hours	56 hours
Tier Three 250 or more FTEs	1 hour PSST / 30 hours worked	72 hours (if separate sick leave and vacation banks) 108 hours (if combined or universal leave policy)	72 hours (if separate sick leave and vacation banks) 108 hours (if combined or universal leave policy)

Determining an employer's size for purposes of the ordinance involves some unusual counting rules.

Size is determined by full-time equivalent (FTE) not by the number of individual distinct employees. Thus, an employer with 10 employees, each of whom works 20 hours per week, has five FTEs if, at that employer, "FTE" means "40 hours per work week." FTE does not, however, always signify "40 hours per work week." The rules state:

- "Full-time" means an eight-hour day and a five-day week or as full-time is defined, in writing or practice, by the employer. There is no minimum number of hours for full-time; it is an employer-specific determination. An employer may define full-time differently for exempt and nonexempt employees.

- "Full-time equivalent" shall mean the number of hours worked for compensation that add up to one full-time employee, based either on an eight-hour day and a five-day week or as full-time is defined, in writing or in practice, by the employer.

For benefits eligibility or other purposes, some employers define "full-time" as less than 40 hours per work week. Such a definition will not affect the tier placement of large employers, but could affect a smaller employer's "size" for purposes of the ordinance.

"Hours worked" also has a specific meaning under the rules: "time that an employee performs work for the employer." It does not include paid or unpaid leave. It does include overtime worked by nonexempt employees. Salaried exempt employees' hours are determined based on the "normal work week" for each employee.

All compensated hours that employees work for the employer count for purposes of tier placement, including hours worked by

- employees who do not work in Seattle;
- temporary agency employees;
- employees of other entities (if two or more entities form an "integrated enterprise"); and
- employees as to whom a business is a "joint employer" (except for certain employee leasing or payroll administration arrangements).

Tier size for a given year is based on "the average number of full-time equivalents paid per calendar week during the preceding calendar year for any and all weeks during which at least one employee worked for compensation."

3. Any Employee Who Works in Seattle at All Is Potentially Covered

At many employers, paid leave policies do not cover certain part-time employees; for example, paid time off might be offered only to employees who work 20 hours or more per week. The ordinance does not permit such exclusions; even an employee working in Seattle for 10 hours a week or less can accrue PSST.

Also, an employee need not regularly work in Seattle to be covered by the ordinance. Employees who work in Seattle on an occasional basis are covered if they perform more than 240 hours of work in Seattle in a calendar year.

Note that "occasionally in Seattle" employees, who must work 240 hours in Seattle in a year in order to obtain coverage, are distinct from employees who work less than 240 hours but only work in Seattle. An employee who works exclusively in Seattle is covered by the ordinance, even if he or she doesn't work much in a calendar year.

4. PSST Accrues Differently Than Paid Leave Accrues Under Some Employer Policies

Many employer policies do not provide paid leave to employees until they have worked for the employer for a certain amount of time. PSST, however, begins accruing as soon as an employee starts working. (The employer can, however, require employees to wait until their 180th day of employment to begin using their accrued PSST.)

Employer-defined paid leave policies commonly provide a fixed amount of paid leave to full-time employees and a prorated amount to part-time employees. PSST, however, accrues based on the number of hours worked, not on "full-time" or other status. Employers who "frontload" an employee's leave bank by providing a block of leave time at the start of a calendar year will have to monitor the hours that their employees work to ensure that the frontloaded amount provides each employee with all of the PSST to which he or she is entitled (one hour of PSST per 30 or 40 hours worked, depending on an employer's tier size).

Caps on PSST accruals appear to be prohibited, even if employees end up "accruing" PSST that they can neither use nor carry over to the following year. Employers can, however, limit the use and carryover of PSST in amounts that vary depending on the employer's tier placement.

5. There Are Rules About Using PSST

As noted, employers can limit the amount of PSST that an employee can use in a given calendar year, for example, to 40 hours in Tier One, 56 hours in Tier Two, and either 72 or 108 hours in Tier Three (depending on whether the employer has a combined or universal leave policy).

Importantly, the relevant year for PSST purposes is the calendar year—January 1 through December 31—not any other 12-month period. This is true even if the employer normally grants paid time off on an employee's anniversary date, uses a rolling 12-month period for Family and Medical Leave Act (FMLA) leave tracking, etc.

Under the rules, employees are entitled to use their PSST during times that they are scheduled to perform work in Seattle. It appears, therefore, that an employer could adopt a policy permitting only such use. In many cases, however, this would create daunting logistical obstacles when enforcing the policy for "occasional" Seattle employees.

Because employees are entitled to use PSST in circumstances that an employer's attendance and leave policies might not otherwise cover, employers should educate themselves and their management teams on the broad range of circumstances in which an employee can use PSST. For example, the ordinance entitles employees to use paid sick leave "to provide care of a family member . . . who needs preventive medical care." "Family member" includes parents-in-law. Unlike the Washington Family Care Act, which entitles employees to time off for a parent-in-law only when the parent-in-law has a serious health condition or an emergency condition, the Seattle ordinance does not always require the parent-in-law to be suffering from a current medical condition for the employee use his or her PSST.

6. There Are Rules About Pay During PSST

The general principle is that an employee is entitled to be paid while using PSST at the rate at which the employee would have been paid had he or she worked as scheduled. Initially, the Office for Civil Rights proposed that an employee would also receive any overtime or other premium that the employee would have earned during the lost time. The final rule, however, states "For nonexempt employees who use paid sick/safe time for hours that would have been overtime hours if worked, employers are not required to apply overtime standards to an employee's hourly rate of pay."

The ordinance says that employees are not entitled to lost tips or commissions during PSST usage. The rules, however, require that tipped employees and employees who are compensated on a piecework or commission basis must, during PSST, be paid at the greater of their base pay rate (if any) or the state minimum wage rate.

Note that the ordinance requires employers to pay an employee during PSST only for the time that the employee was scheduled to work. (Special rules apply to indefinite shifts and on-call time.)

7. Attendance Policies Do Not Apply to PSST

The ordinance and rules make it clear that an absence that qualifies as PSST cannot be the basis for an adverse action against the employee, even if the employer has a so-called "no fault" attendance policy.

8. Most Reasonable Notice Requirements Are Permissible

Borrowing conceptually from the FMLA, the ordinance permits employers to require compliance with their usual and customary notice requirements for absences if the requirements are not unduly burdensome and don't interfere with the purposes for which PSST is taken. The rules distinguish between foreseeable and unforeseeable leave and generally require employees to provide as much advance notice as possible under the circumstances. However,

- an employer can make inquiries to determine whether an absence qualifies as PSST and can require employees to state whether they are using time off for PSST purposes, but the employer can't insist that the employee describe the nature of the illness or other condition necessitating the absence;

- 10 days' advance notice arguably is the maximum amount of notice that an employer can require for any PSST absence; and

- the employer must make exceptions to its notice rules if circumstances prevent an employee from complying with the employer's usual and customary notice procedures.

9. Some Normal Documentation Requirements Are Not Permissible

Employers who habitually ask for documentation confirming the need for sick leave will have to rethink their practices. The ordinance prohibits employers from requiring employees to provide documentary proof of their need for PSST until they have been absent for three consecutive days. (The rules recognize a necessary exception for clear instances or patterns of abuse.)

An employer who does not offer health insurance to an employee must pay for part of the cost of obtaining any required documentation.

Documentation suffices under the ordinance if it states that time off is needed for a purpose covered by the ordinance. There are very few situations where the employer can require additional details. The employer can, however, ask for additional detail if another law authorizes such inquiry. (The FMLA, for example, often would permit the inquiry.) According to the rules, if the employee refuses to respond to such a request, the employee's entitlement to the benefits of the other law may be affected. The employee would, however, still be entitled to the benefits of the Seattle ordinance.

10. Tier Three Employers Must Evaluate Potential PTO Policies

The ordinance imposes a rather dramatic penalty on Tier Three employers who offer paid time off that can be used for any purpose, as opposed to the more traditional separate sick leave and vacation banks. These employers must allow 108 hours of PSST usage and 108 hours of PSST carryover per year—50% more than Tier Three employers who have separate sick leave and vacation policies. In fact, a Tier Three employer who offered its Seattle employees 100 hours of PTO (useable for any purpose) would be out of compliance with the ordinance, but it could comply by changing its policy to offer a smaller amount (72 hours) of less flexible sick leave (useable only for sick/safe purposes as defined by the ordinance).

L. NLRB's General Counsel Reports

The NLRB's General Counsel has issued several helpful reports that summarize cutting-edge cases regarding employees' use of social media. They are must reads for anyone concerned about employee use of social media. The most recent report includes a complete social media policy that is lawful—a good model to follow.

http://www.nlrb.gov/publications/operations-management-memos

In the search field on the NLRB Website, search for the following:

Memo Number: OM 12-59 (Updated rules through May 30, 2012)

Report of the Acting General Counsel Concerning Social Media Cases
OFFICE OF THE GENERAL COUNSEL Division of Operations-Management MEMORANDUM OM 12-59 May 30, 2012 TO: All Regional Directors, Officers-in-Charge and Resident Officers FROM: Anne Purcell, Associate General Counsel SUBJECT: Report of the Acting General Counsel Concerning Social Media Cases Attached is an updated report from the Acting General Counsel
Memo Date: May 30, 2012

- Social Media and Communicating Confidential Information
- Overbroad Social Media Policies
- Privacy Information and Online Tone
- Protecting Information and Expressing Opinions; Bullying
- Unsolicited Electronic Communications; Unauthorized Postings
- Contact with Media and Government
- Example of Lawful Social Media Policy

Memo Number: OM 12-31 (Updated rules through January 24, 2012)

Report of the Acting General Counsel Concerning Social Media Cases
OFFICE OF THE GENERAL COUNSEL Division of Operations-Management MEMORANDUM OM 12-31 January 24, 2012 To: All Regional Directors, Officers-in-Charge, and Resident Officers From: Anne Purcell, Associate General Counsel Subject: Report of the Acting General Counsel Concerning Social Media Cases Attached is an updated report from the Acting General Counsel concerning
Memo Date: January 24, 2012

Job Performance and Staffing: Concerted Activity

- Internet and Blogging Standards
- Concerns over Commissions: Concerted Activity
- Tax Withholding Practices: Concerted Activity
- Offensive Tweets: Not Concerted Activity
- Employer's Tipping Policy: Not Concerted Activity
- Comments on Senator's Facebook Wall: Not Concerted Activity
- Mentally Disabled Clients: Not Concerted Activity
- Gripes about Manager: Not Concerted Activity
- Posting Interrogation Video Violated Section 8(b)(1)(A)
- Overbroad Social Media Policies
- Lawful Restrictions on Contacts with Media

Memo Number: OM 11-74 (Updated rules through August 18, 2011)
Report of the Acting General Counsel Concerning Social Media Cases
OFFICE OF THE GENERAL COUNSEL Division of Operations-Management MEMORANDUM OM 11-74 August 18, 2011 To: All Regional Directors, Officers-in-Charge, and Resident Officers From: Anne Purcell, Associate General Counsel Subject: Report of the Acting General Counsel Concerning Social Media Cases Attached is a report of the Acting General Counsel concerning social media
Memo Date: August 18, 2011

- Unlawful Discharge for Violation of Social Media Policy
- Lawful Discharge for Violation of Social Media Policy
- Overbroad Policy but Lawful Discharge
- Overbroad Policy but Unprotected Posts
- Overbroad Communications Systems Policy
- Lawful Amended Social Media Policy
- Drugstore's Social Media Policy Withstand Scrutiny
- Lawful Discharge for Complaint about Reprimand
- Supervisor and Promotion Selection: Concerted Activity
- Manager's Attitude and Style: Concerted Activity
- Critical Online Postings: Concerted Activity
- Irritating Coworker and Workplace Incident: Not Concerted Activity
- Truck Driver Not Constructively Discharged
- Criticism of Supervisor: Not Concerted Activity