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Fall 2013 Labor and Employment Law Update Breakfast

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A. Introduction

This has been an exciting year in Labor and Employment law with many interesting developments in and changes to the law. These materials provide a snapshot of some of the most important changes throughout the year.

B. National Labor Relations Board Is Back to Full Strength: Now What?[1]

1. Full Strength

Last July, the United States Senate confirmed President Obama's nominees to the National Labor Relations Board ("Board"), bringing the five member Board to full strength for the first time in several years. Senate confirmation of the nominees ends the period of time when the President used "recess" appointments to maintain a quorum so that the Board could act.[2] Even more recently, the Senate confirmed the President's nominee for the Board's General Counsel post—the top official responsible for investigating and prosecuting unfair labor practices. With these positions filled, the Board is back operating on all cylinders.

2. What Can We Expect From the Newly Invigorated Board?

Although no one can predict with certainty, you will want to keep your eyes open for the following:

a. Continued Support of "Micro Units"

Under the National Labor Relations Act (NLRA), a union is entitled to represent a group of employees if they constitute "an appropriate bargaining unit." In *Specialty Healthcare*, the Board adopted a new approach that permits unions to win the right to represent smaller groups of employees. *In re Specialty Health Care & Rehabilitation Ctr.*, 357 NLRB No. 83 (2011). Last summer, the Sixth Circuit Court of Appeals upheld the Board's decision. *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). This trend is likely to continue. Cases presently pending before the Board, for example, include a collective bargaining unit limited to a small group of employees selling women's shoes in a large New York City department store. Another pending case found that a group of cosmetic and fragrance sales employees in a different department store was an appropriate unit.

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[1] We would like to thank Labor and Employment partner Bruce Cross for his contributions to this section. Bruce has over 40 years of experience in the areas of labor law and NLRB and labor relations, among other areas of expertise.

[2] The legality of recess appointments was challenged and the Court of Appeals for the District of Columbia Circuit ruled that they were not proper. *Canning v. NLRB*, 705 F.3d 490 (D.C. Cir.), *cert. granted*, 133 S. Ct. 2861 (2013). That decision is pending review by the United States Supreme Court and, if upheld, would mean that actions taken by the Board during that time were invalid. Whatever the outcome of that dispute, however, the current Board is properly constituted and now operating normally.

The significance of this development for employers is twofold: (1) the smaller the unit, the easier it is for a union to win majority support; and (2) it creates the possibility that workforces will be "Balkanized" by the creation of a number of separate units, each of which could be represented by a different union.

b. Possible Resurrection of the "Quickie Election" Rules

In June 2011, the Board 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 weeks.

These rules were enjoined because of a procedural question about how they were adopted. If they are upheld, or if the Board simply readopts them, they will greatly assist unions in gaining the right to represent employees. And it might get worse for employers because the 2011 rules were a watered-down version of the initial proposal, and it is also possible that, if the Board revisits them, even more far-reaching changes in the election rules would be adopted, benefiting unions even more.

c. Revisiting 3-2 Decisions of the Bush Board

During President Bush's term in office, the Board decided a number of cases by a 3-2 majority, split along party lines. Several of these may be likely candidates for reversal by the Obama Board. One is the decision that held that an employer may prohibit use of its email system for nonjob-related solicitations. *In re Guard Publ'g Co.*, 351 NLRB 1110 (2007). Another held that "Weingarten" rights to have a coworker present during investigatory interviews were limited to union-represented employees. *In re IBM Corp.*, 341 NLRB 1288 (2004). Either change would have far reaching effects on employers.

d. Continued Enforcement of "Section 7" Rights in Social Media, Rules of Conduct and Confidentiality Rules

As we discussed last year at this program, although it comes as a surprise to many employers, the NLRA is not limited to labor union activities or union-represented employees. It protects virtually all private-sector employees,[3] and these protections extend far beyond traditional union activities.

As a quick reminder, the core protections are in Section 7 of the NLRA:

> 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***

[3] Agricultural employers and very small employers are not within the jurisdiction of the Board. 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.

> 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. 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. Inc.*, 355 NLRB No. 85 (2010); *In re Teddi of Cal.*, 338 NLRB No. 157 (2003); *In re 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.*, 262 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 Am. Tissue Corp.*, 336 NLRB 435, 448-49 (2001); *Meyers Indust., Inc.*, 281 NLRB 882 (1986), *aff'd by Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), review denied, enforcement granted in part, 701 F.3d 710 (D.C. Cir. 2012).

- A broad invitation to report "harassment" may be unlawful, but invitations to report "threats or intimidation" are lawful. *In re Battle Creek Health Sys.*, 341 NLRB 119 (2004); *Liberty House 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 during nonwork time such as rest and meal breaks. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Costco Wholesale Corp.*, 358 NLRB No. 106 (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 for the purpose of engaging in protected activities. *Roomstores of Phoenix LLC*, 357 NLRB No. 143 (2011).

In years past, nonunion employees seldom were aware of their Section 7 rights. That is no longer the case. The Board has actively expanded its outreach efforts to educate employees about their Section 7 rights. Just last year, the Board 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.[4] And, as discussed below, there has been widespread publicity about employee rights. As a result, nonunion employees are becoming much more knowledgeable. More is sure to come!

(i) Developments in Social Media

The great expansion of Board involvement in social media started famously just three 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 coworkers, 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 Board 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 employees disciplined for social media comments will quickly and easily learn that they may have a remedy—and at no cost because there is no filing fee for unfair labor practice charges.

A recent Board decision is illustrative. In *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012), several off-duty employees, using their personal computers, posted complaints about another employee on her Facebook page about her comments that they were not doing their jobs properly. She complained to the employer about this "bullying and harassment," and the employer discharged the employees. The Board concluded that the employees' actions were protected and ordered that they be reinstated and made whole.

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

The Board's General Counsel has issued three helpful reports that summarize cutting-edge cases regarding employees' use of social media.[5] 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.

Suggestions for Drafting a Social Media Policy: In addition to looking at the policy approved by the Board's 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 probably pass muster, whereas a blanket statement against derogatory comments will not.

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

(ii) Rules of Conduct

Many Board cases have challenged garden-variety rules of conduct as interfering with Section 7 rights.

(a) 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 Board 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 *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.

[5] These memos can be accessed at http://www.nlrb.gov/reports-guidance/operations-management-memos by narrowing the drop-down menu to OM 12-xx and then scrolling through the documents for the following Operations-Management memo numbers: OM 12-59, OM 12-31, and OM 12-17.

(b) Politeness and Courtesy Rules

Employers may not insist that employees behave nicely when discussing employment issues. For example, in *Karl Knauz v. BMW Motors Inc.*, 358 NLRB No. 164 (2012), 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.

In reviewing this language, the Board 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 coworkers, 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.)

The most recent decision is *Quicken Loans, Inc.*, 359 NLRB No. 141 (2013). It found unlawful a nondisparagement rule that stated, in part, that employees will not "publicly criticize, ridicule, disparage or defame the Company or its products, services, policies . . . through any written or oral statement." The Board concluded that this language would be reasonably construed to prohibit protected activity.

In contrast, a contrary result was reached concerning one of the rules in the *Costco* case. That rule required employees to use "appropriate business decorum" in communicating with others. The Administrative Law Judge ("ALJ") hearing the case 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 Board agreed.

(c) 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 the recent *Quicken Loans* decision, the employer's confidentiality rule prohibited the disclosure of "proprietary and confidential information," and defined that information as including "non-public information relating to . . . the Company's business, personnel . . . all personnel lists, personal information of coworkers . . . personnel information such as home phone

numbers, cell phone numbers, addresses and email addresses." The ALJ hearing the case, affirmed by the Board, concluded that "there can be no doubt that these restrictions would substantially hinder employees in the exercise of their Section 7 rights." Accordingly it 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.

(d) 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. *Roomstores of Phoenix LLC*, 357 NLRB No. 143. Similarly, a rule prohibiting "negative conversations" about employees or managers was found unlawful in *KSL Claremont Resort, Inc.*, 344 NLRB 832 (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 Am. Shipping Agency, Inc.*, 357 NLRB No. 80 (2011).

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.

e. 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 Board's General Counsel, however, those statements can be illegal if they go too far. For example in February 2012, an 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. *Am. Red Cross Ariz.*, Case No. 28-CA-23443 (2012). The case settled thereafter.

At about the same time, the Board's 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.

More recently, however, 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: Be careful not to ask employees to waive their Section 7 rights when signing at-will statements.

f. Instructing Employees Not to Discuss a Workplace Investigation

In *Banner Health Systems*, 358 NLRB No. 93 (2012), the Board concluded that an employer committed an unfair labor practice by uniformly instructing complaining employees not to talk to coworkers 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 coworkers pending completion of the investigation. Her purpose in doing so was to preserve the integrity of the investigation. However, the Board concluded that

employees have a Section 7 right to talk to their coworkers about work-related complaints and a generalized concern about the "integrity" of investigations could not overcome those rights. Instead, according to the Board, 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*, 356 NLRB No. 87 (2011).

The Board reiterated this position in a more recent case, *Fresenius USA Mfg., Inc.*, 358 NLRB No. 138 (2012). And in January 2013, the General Counsel found the following language to be illegal:

> [The Company] has a compelling interest in protecting the integrity of its investigations. In every investigation, [the Company] has a strong desire . . . to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. To assist [the Company] in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

NLRB Advice Memorandum, Case 30-CA-089350 (Jan. 29, 2013). The General Counsel noted, however, that the first two sentences were lawful and the remainder of the language would be lawful if it were modified to say:

> [The Company] may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If [the Company] reasonably imposes such a requirement and we

do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

Take Away: 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.

g. Negative Reactions to *In re D.R. Horton, Inc.*

In 2012, the Board found illegal an employment agreement that required employees to pursue claims through arbitration and waive the right to pursue class actions because it interferes with the employees' right to engage in collective activity. *In re D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). According to the Board, an employer with a mandatory arbitration program for employment claims has two alternatives: (a) allow class actions to be pursued through the program to arbitration or (b) allow employees to pursue class or collective actions in court. The Board also concluded that an employer cannot insist that employees waive their right to file charges with the Board. Therefore, an arbitration program that requires all claims to be submitted to arbitration is unlawful on its face, according to the Board, because it would preclude employees from filing unfair labor practice charges with the Board. As remedies, the NLRB may order the employer to reimburse employees for the expenses they incurred resisting judicial action by the employer seeking to enforce the waiver and may order the employer to file a motion with the court to vacate any order compelling individualized arbitration.

D.R. Horton is currently pending on appeal before the Fifth Circuit Court of Appeals, and things are not looking good for the NLRB's position. Various district courts and three circuit courts, the Second, Eight, and Ninth, have already rejected *D.R. Horton* as inconsistent with the Supreme Court's interpretation of the Federal Arbitration Act ("FAA"). *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *Sutherland v. Ernst &Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Richards v. Ernst & Young LLP*, No. 11-17530, 2013 WL 4437601 (9th Cir. Aug. 21, 2013). One of the key cases advancing the Supreme Court's interpretation of the FAA is *AT&T Mobility LLC v. Concepcion*, which held 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. 131 S. Ct. 1740 (2011). Another is *American Express Co. v. Italian Colors Restaurant*, which is discussed below. 133 S. Ct. 2304 (2013).

C. Developments in Arbitration on Both the Federal and State Levels

This past year, both the United States Supreme Court and Washington Supreme Court have decided important arbitration cases that are important to consider before entering into any arbitration agreements.

1. Arbitration in Federal Court

a. *Oxford Health Plans LLC v. Sutter*

In *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), the United States Supreme Court once again considered the Federal Arbitration Act (FAA). The unanimous decision reiterated the FAA's highly deferential standard for judicial review of arbitrator decisions and refused to disturb an arbitration interpretation of a contract to permit class-wide arbitration. *Id*. at 2066. Under the FAA, "courts may vacate an arbitrator's decision only in very unusual circumstances." *Id*. at 2068 (internal quotation marks and citations omitted). The decision emphasizes that federal courts are largely powerless to relieve parties from an arbitrator's substantive interpretation of a contract's terms, even if that interpretation is wrong.

The parties had agreed to a relatively straightforward arbitration agreement requiring all disputes to be submitted to final and binding arbitration. *Id*. at 2067. The agreement said nothing about the availability of class arbitration. When the issue arose, the parties agreed that it should be decided by the arbitrator, who promptly decided that since (a) the arbitration agreement foreclosed all "civil actions" and required them to be arbitrated, and (b) class action litigation was a form of a civil action, therefore (c) the contract authorized class arbitration. *Id*.

The Court rejected the challenge to the arbitrator's decision. Because the arbitrator based his decision on the language of the contract, the Court refused to substitute its judgment for that of the arbitrator. In so doing, the Court emphasized the exceedingly narrow scope of review:

> All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was "arguably construing" the contract—which this one was—a court may not correct his mistakes under § 10(a)(4). The potential for those mistakes is the price of agreeing to arbitration. . . . The arbitrator's construction holds, however good, bad, or ugly.

Id. at 2070 (citation omitted).

Interestingly, the Court went out of its way to note that the parties had stipulated to put the decision of the availability of class arbitration to the arbitrator. *Id*. at 2068 n.2. If instead Oxford had argued that the availability of class arbitration was a "question of arbitrability," it would have invited judicial review regarding the scope and enforceability of the arbitration agreement. Courts presumptively decide such issues on a de novo

basis. *See id*. It remains an open question whether the availability of class arbitration is a "question of arbitrability," but the parties' agreement to have the arbitrator decide the issue foreclosed the issue on appeal. *Id*.

Take Away: Employers should keep this decision in mind when considering an arbitration agreement. Remember that when you choose arbitration, you choose to live with the arbitrator's decision. If you do not want class arbitration, the arbitration agreement must say so expressly. For agreements that are silent on whether class arbitration is intended, consider arguing that the availability of class arbitration is a "question of arbitrability" to be decided by the court whose decision is subject to de novo review.

b. *American Express Co. v. Italian Colors Restaurant*

In *American Express Co. v. Italian Colors Restaurant*, the Supreme Court continued its line of arbitration-friendly decisions. 133 S. Ct. 2304 (2013). The parties had signed an arbitration agreement stating that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis." *Id*. at 2308. Despite this provision, Petitioner Italian Colors Restaurant brought a class action against American Express, alleging violations of federal antitrust laws. *Id*. The district court granted American Express's motion and dismissed the suit, but the Second Circuit Court of Appeals reversed and remanded based on the prohibitive costs of individual arbitration. *Id*.

The Court held that a contractual waiver of class arbitration was enforceable under the FAA even when the cost to the plaintiff of individually arbitrating its federal statutory claim exceeded the potential recovery. *Id*. at 2307. To support this conclusion, the Court determined that "[n]o contrary congressional command" required rejection of the waiver of class arbitration. *Id*. at 2309. It then concluded that the judicially created "effective vindication" exception, which has been used in other cases to invalidate arbitration agreements that operate as a waiver of a party's right to pursue statutory remedies, did not apply to situations where the expense of proving a statutory remedy was more than the possible award. *Id*. at 2310-11.

Three Justices dissented, arguing that the majority decision ignores the principle behind the "effective vindication" exception that"[a]n arbitration clause may not thwart federal law, irrespective of exactly how it does so." *Id*. at 2313. The dissent went on to emphasize the purpose behind the FAA, stating that while the FAA prefers arbitration over litigation it does not support de facto immunity, which, according to the dissent, is the result of the majority's holding. *Id*. at 2315-17.

Take Away: The Supreme Court continues to reject challenges to enforcing arbitration agreements based on public policy arguments. Unless Congress has clearly mandated otherwise, courts will not read a right to bring claims as a class into federal statutes. Further, "Effective vindication" of federal statutory rights is not a viable challenge to the enforceability of an arbitration agreement with a class action waiver—even if, as a practical matter, enforcement means meritorious claims will not be pursued because the cost of doing so as an individual is prohibitive.

c. *Chavarria v. Ralphs Grocery Co.*

Just the other day, the Ninth Circuit Court of Appeals (which governs Washington) weighed in with an arbitration decision of its own. In a unanimous panel decision, the Ninth Circuit decided that Ralphs Grocery Company could not require a worker to arbitrate her claims due to the lop-sided advantage Ralphs had under its program. *Chavarria v. Ralphs Grocery Co.*, No. 11-56673, 2013 WL 5779332 (9th Cir. Oct. 28, 2013).

The plaintiff, Zenia Chavarria, worked as a deli clerk for Ralphs. *Id*. at *1. When she applied for the job, she signed the application form stating any employment claims would be subject to Ralphs' arbitration program. *Id*. After only about six months, Chavarria left her job and filed a lawsuit against Ralphs. *Id*. The action, on her own behalf and a class of other employees, claimed that Ralphs had violated the California Labor Code. *Id*. Ralphs immediately asked the trial court to order Chavarria to pursue her claims in arbitration, as she had agreed to do when she was hired. *Id*. Chavarria countered that the underlying agreement was unconscionable under California law. *Id*. In other words, the program was so unfair—both in the manner it had been imposed and in the terms it prescribed—that a court should not make her submit to it.

Ralphs had required Chavarria (and every other applicant) to sign onto its arbitration program as part of the application process. *Id*. Even if an applicant did not sign the agreement, by its terms, she was nonetheless bound by it if she accepted employment. *Id*. Although applicants affirmed that they had reviewed the program, details were not provided until later, after employment had begun. *Id*. at *4. The fine print included imposition of significant arbitration costs on the worker and an arbitrator selection process that would often favor Ralphs. The trial court agreed with Chavarria's argument and refused to require arbitration. *Id*. at *2. Ralphs appealed. *Id*.

The Ninth Circuit took a fresh look at Ralphs' arbitration program. Did applicants have any choice about accepting it? Did the program offer workers a way to fairly present any employment claims? Or did it instead discourage pursuit of work-related issues that, without the program, they could present in court?

The court first tackled the question of whether and how Ralphs' agreement was negotiated. *Id*. at * 3-4. If the weaker party—in this case, an applicant for employment—has no real choice in the matter and is told to "take it or leave it," imposition of the terms is legally oppressive. (The court did not buy Ralphs' argument that inclusion of the words, "Please sign," above the applicant's signature line meant acceptance was truly voluntary.). *Id*. a *4. In addition, not only did Ralphs require agreement by all applicants for work in one of its stores, it also did not reveal the specific provisions of what they were agreeing to until *after* they were already on the job. This surprise element also was unfair. *Id*.

Next, the court examined the terms of Ralphs' arbitration program. The program expressly excluded arbitrators from the American Arbitration Association and the Judicial Arbitration and Mediation Services. *Id*. at *5. Instead, the parties would each suggest the names of three retired judges, then—beginning with the party that had not demanded arbitration—they would alternately strike names till just one was left. *Id*. at *5-*6. The Ninth Circuit concluded that the employee would in most cases be the party demanding arbitration, meaning that Ralphs would typically have the final choice of the arbitrator. *Id*. at *6.

The arbitration program required the selected arbitrator to apportion arbitration costs at the outset, with the worker having to bear costs that could run into thousands of dollars. *Id*. at *6. It also contemplated that the parties would each cover their own attorneys' fees and other costs. *Id*. Although an arbitrator might reallocate some of these costs to a prevailing worker, the up-front burden would likely prevent many workers from pursuing a claim in the first place. *Id*. at *6-*7.

The Ninth Circuit had no trouble after reviewing these issues in deciding that Ralphs' arbitration program was unconscionable under California law. *Id*. at *7. But, by its terms, it was to be interpreted under the FAA, which favors arbitration of disputes. *Id*. Would the FAA overcome California's doctrine of unconscionability? In these circumstances, the answer was no. *Id*. at *8. The federal interest in arbitration of private disputes does not prevent states from imposing basic fairness requirements. *Id*. at *9. Chavarria could proceed in federal court with her claims.

Take Away: Be cautious about arbitration agreements. The various decisions evaluating arbitration agreements can be confusing and sometimes may seem contradictory. If your organization is considering adopting an arbitration program for employment disputes, be sure to get sound legal advice. Or, if you already have such a program, you may want to compare it to the one examined in this case. Arbitration will not be a speedier or less costly remedy if you have to litigate over its validity.

2. Arbitration in State Court

The Washington Supreme Court has also been busy with its own arbitration decisions. Like the Ninth Circuit, the Washington Supreme Court is willing to strike down mandatory arbitration agreements on unconscionability grounds.

a. *Hill v. Garda CL Northwest, Inc.*

Most recently, *Hill v. Garda CL Northwest, Inc*. concerned a wage and hour class action suit brought against Garda, in which employees alleged violations of the Washington Industrial Welfare Act and the Washington Minimum Wage Act. 308 P.3d 635 (Wash. 2013). Garda moved to compel arbitration pursuant to the terms of a labor agreement negotiated by an employee association, which is not a traditional union, and signed by all employees. *Id*. at 637. The trial court granted the motion and the court of appeals affirmed. *Id*. The court of appeals, however, mandated that the employees had to arbitrate individually, not as a class, even though the class was certified. *Id*.

Although the court of appeals did not reach the issue, the main issue on appeal was whether the terms of the arbitration clause were unconscionable. The Washington Supreme Court concluded that the issue was properly before it because the employees' had preserved their unconscionability argument and because unconscionability is a "gateway dispute" that must be resolved before an arbitration agreement can be enforced. *Id*. at 638. This last part is significant because it allows parties to immediately appeal lower court decisions that either compel or refuse to compel arbitration. Previously, Washington law only clearly allowed the immediate appeal of trial court decisions declining to compel arbitration. *Id*.; *see also Stein v. Geonerco, Inc*., 105 Wn. App. 41, 44 (2001). Moreover, in so holding, the Washington Supreme Court reiterated its narrow interpretation of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), by stating that determinations of the "validity of a contract are preserved for judicial determination, as opposed to arbitrator determination, unless the parties' agreement clearly and unmistakably provides otherwise." Hill, 308 P.3d at 637-38.

The Washington Supreme Court then held that the arbitration clause was unenforceable because several terms were substantively unconscionable. *Id*. at 638. First, the court found the arbitration clause's limitations provision unconscionable because it shortened the limitation period from the statutory three years to just fourteen days. *Id*. at 639. Second, the court concluded that the clause's limitation on back-page damages that would otherwise be available was unconscionable because it unfairly favored Garda by significantly decreasing what an employee could recover under the agreement compared to what could be recovered under Washington law. *Id*. at 639. Third, the fee-sharing provision of the arbitration agreement was unconscionable because the employees met their burden to show the arbitration costs they would be required to share and why those fees would prohibit them from bringing their claims. *Id*. at 639. Here, the employees presented evidence that individual arbitration would be prohibitively expensive, especially in light of the limited resources of the representative plaintiffs and employee union. *Id*. at 639-40.

In reaching its decision, the court noted that Washington recognizes that arbitration is favored as a matter of policy under the FAA. *Id*. However, the court also emphasized that, as a matter of contract law, a party cannot be required to submit a dispute to arbitration if that party did not agree to it. *Id*. at 637.

b. Gandee v. LDL Freedom Enterprises, Inc.

Hill relied heavily on the Washington Supreme Court's opinion in *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598 (2013), decided in February. In that case, the trial court denied the defendant's motion to compel arbitration because it was untimely and because the arbitration clause was unconscionable. *Id*. at 601. The Washington Supreme Court affirmed, concluding that the arbitration clause was permeated with unconscionable provisions. *Id*. at 610. Those provisions included (1) a venue provision requiring arbitration to take place in Orange County, California, *id*. at 604; (2) a "loser pays" provision that required the losing party to pay attorneys' fees and other legal fees and costs, *id*. at 605-06; and (3) a provision requiring all disputes

between the parties to be submitted to arbitration within 30 days, *id*. at 601, 606-07. The court then rejected Freedom Enterprises' argument that the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), preempted the Washington Supreme Court's review of the arbitration clause at issue. *Gandee*, 116 Wn.2d at 609. The Washington Supreme Court distinguished *Concepcion* because it invalidated a California decisional rule that made most-class action waivers in adhesion contracts invalid, even when consumers would be better off under the terms of the arbitration agreement than through class litigation. *Id*. In contrast, the arbitration agreement between Gandee and Freedom contained numerous unconscionable provisions that severely disadvantaged the consumer. *Id*. at 610. Where such unconscionable provisions exist, "*Concepcion* provides no basis for preempting our relevant case law nor does it require the enforcement of Freedom's arbitration clause." *Id*.

Take Away: The Washington Supreme Court has significantly narrowed the scope of *Concepcion* where plaintiffs assert that an arbitration agreement is unconscionable. This means that arbitration agreements are far more likely to be subject to judicial review in state court than in federal court regardless of whether the trial court compels arbitration or refuses to do so. Also keep in mind that the Washington Supreme Court is not fond of arbitration provisions that significantly reduce the limitations period for asserting a claim or fee-sharing provisions that require the loser to pay legal costs and attorneys' fees.

D. Recent Developments Nationally

1. Compliance with the Affordable Care Act

The Affordable Care Act ("ACA") has received a lot of press since the October 1 health exchange rollout. But what does all of this mean for employers? And what else is on the horizon? Here are a few things that you should know.

a. Notice to Employees

October 1, 2013 was the deadline for employers to notify their employees about (1) the Health Insurance Marketplace, (2) potential tax credits for purchasing coverage through the market place, and (3) the risk of losing their employer contribution to health plans offered by the employer. For new employees, both full- and part-time, the ACA requires employers to provide this notice at the time of hire. This notice requirement applies to employers that are subject to the Fair Labor Standards Act. Notice can be delivered by first-class mail, in person, or electronically under the Department of Labor's Electronic Disclosure Safe Harbor Rule. Although employers are required to give this information, the ACA does not impose a fine or penalty for employers who fail to give notice.

b. Pay or Play

The ACA's employer shared responsibility provisions, sometimes referred to as pay or play, will take effect on January 1, 2015. Employers should take action now to make sure they will be ready.

First , employers should determine whether they will be subject to the pay-or-play provision, which only applies to an employer that has an average of 50 or more full-time employees. To calculate the number of full-time employees, employers will need to identify their controlled group. This may include certain related companies and must account for full-time equivalents, based on a specified formula. Employers should identify controlled groups now so they can keep appropriate records during 2014. These records should be specific and detailed to ensure accurate calculation of the number of full-time equivalents and full-time employees. Some employers may need to alter their current recordkeeping systems. Get started now by determining your controlled group makeup and by making sure your 2014 records procedures will capture all the necessary information.

Second, you should start to think about your plan for determining full-time employees. Typically, we think of a 40-hour average workweek as constituting "full time." Under the ACA, however, an employee who works an average of 30 hours per week meets the full-time requirement. This means that employers who have 50 or more full-time employees must offer affordable health care to a wider range of employees. If an employer fails to do so, it will be on the hook for ACA penalties. To avoid these penalties, some employers many need to renegotiate collective bargaining agreements to ensure that employees receive compliant health care coverage.

Employers will also have to be diligent about determining who is a full-time employee. This will require a measurement period, an administrative period, and a stability period. During the measurement period, the employer will gather the necessary data over 3 to 12 months. The optional administrative period follows, allowing employers to process this data and offer coverage to full-time employees. Next comes the stability period, which is just what it sounds like—a time when an employee's status will not change for benefits purposes regardless of the employee's number of hours of service during the stability period, as long as he or she remains an employee. The law imposes some complex requirements on how long these periods can last, so employers should seek professional advice before designing a measurement and stability period approach.

c. Reporting Requirements

Starting in 2015, employers with 50 or more full-time employees will be required to report to the federal government about the health coverage that they offer. The IRS has issued a proposed rule on the reporting requirements, but much could change before the rule becomes final. As written, the proposed rule would require employers to file a special return with the IRS for each full-time employee explaining whether the employer offered health care coverage, and if so, providing certain details of the coverage. The rule could change a lot between now and implementation, but it is important to be aware that this reporting requirement, in some form, will go into effect in a little over a year.

d. Increased Benefit to Wellness Programs

On January 1, 2014, new incentives to promote employer wellness programs will go into effect. The ACA increases the maximum reward available to employers that use a

health-contingent wellness program from 20 percent to 30 percent of the cost of health coverage. If the program is designed to prevent or reduce tobacco use, the maximum reward reaches 50 percent.

Take Away: Employers should prepare now for changes and new responsibilities in 2014 and 2015. Keep track of regulations and changes as they develop. This is a vast law and these materials only cover a portion of the information and changes that will affect employers. Please contact us if you would like to discuss your company's compliance with the ACA.

2. The Impact of the Supreme Court's Same-Sex Marriage Decisions on Employer-Sponsored Health Plans

This summer the Supreme Court handed down two landmark cases concerning same-sex marriage at both the state and federal levels. These decisions can mean some big changes for employers, so it is important to know how these decisions impact benefits and other aspects of the employer-employee relationship.

a. *Hollingsworth v. Perry*

Hollingsworth v. Perry arose out of California after state voters approved Proposition 8 ("Prop 8"). Prop 8 was a ballot initiative that amended the California Constitution to limit marriage to heterosexual couples. The proposition was a response to a California Supreme Court decision holding that banning same-sex marriage violated the California Constitution. Opponents challenged Prop 8 in federal court, and the state of California refused to defend it. The federal district court allowed official proponents of Prop 8 to intervene and defend the initiative's validity. The district court then found the proposition unconstitutional. When the State refused to appeal, Prop 8 proponents did so. The Ninth Circuit affirmed the district court's ruling.

In a much-anticipated decision, the Supreme Court concluded that the Prop 8 proponents lacked standing to appeal the case under Article III of the U.S. Constitution. The principle of standing requires the party bringing a suit to have a sufficient, particularized interest in the controversy. The Supreme Court vacated and remanded the case and the district court's decision finding Proposition 8 unconstitutional still stands.

So What Does this Mean for Employers? The impact of *Hollingsworth* is limited because the case was decided on the threshold issue of standing. The Supreme Court did not reach the merits of the case, which questioned whether a state violates the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment by restricting same-sex marriage. So, the case's impact is minimal. However, in the wake of the decision, California now recognizes same-sex marriages.

b. *United States v. Windsor*

The Supreme Court's other same-sex marriage decision has a much broader impact because it struck down a federal statute, impacting all 50 states. In *United States v.*

Windsor, the Supreme Court held that section 3 of the Defense of Marriage Act ("DOMA"), enacted in 1996, violated "basic due process and equal protection principles applicable to the Federal Government" pursuant to the Fifth Amendment to the U.S. Constitution. 133 S. Ct. 2675, 2693 (2013). Section 3 of DOMA stated, in part, that for purposes of determining marriage at the federal level, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

Edith Windsor challenged this provision after the IRS denied her the marital exemption from the federal estate tax. Windsor had lawfully married her same-sex partner Thea Spyer in 2007 in Ontario, Canada. The two lived in New York, which recognized valid same-sex marriages from other jurisdictions. When Spyer died in 2009, she left her entire estate to Windsor. Windsor was forced to pay over $300,000 in estate taxes because the IRS did not recognize her as legally married to Spyer for purposes of the marital exemption to the estate tax.

In striking down DOMA's definition of marriage, the Supreme Court emphasized that regulation of domestic relations is the province of the states, not the federal government. In essence, DOMA interfered with this power of the states by making a subset of state-sanctioned marriages unequal. Notably, the Supreme Court did not conclude that a state's denial of same-sex marriage violates the U.S. Constitution, and it did not address the validity of DOMA's section 2, which allows states to refuse to recognize same-sex marriages legally performed in other states. The decision, therefore, may have varying impacts in different states, depending on what the state recognizes as a valid marriage.

<u>So How Does This Decision Impact Employers</u>? Again, that depends on the state of employment. Impacts may vary depending on whether a state recognizes same-sex marriage, the terms used in the federal statute at issue, and how an employer benefits plan defines spouse. Washington recognizes same-sex marriages performed in this state or another jurisdiction. Because of the varying impacts in different states, we focus below on the effects here in Washington.

Here are a few example of how the Supreme Court's decision could impact you and your employees:

- Under the Family and Medical Leave Act ("FMLA"), same-sex spouses now have the legal rights of spouses. This corrects the former inconsistency between Washington leave laws, which recognized the rights of same-sex spouses, and FMLA, which did not.

- *Windsor* determined that a same-sex spouse must be recognized as a spouse under federal law, but it does not necessarily change the meaning of terms in employer benefits plans. Employers should review their plan documents to ensure that the definition of "spouse" used reflects their intent.

- Health care premiums and benefits provided to employees and their spouses are tax-free under the Internal Revenue Code. Formerly, a same-sex spouse did not receive this tax-free status, but after *Windsor*, these premiums and benefits for same-sex spouses are eligible.

- Both COBRA and HIPPA extend some benefits to spouses, such as eligibility to elect continuation of coverage or to change enrollment. Any reference to spouse in these statutes now applies to same-sex spouses.

3. Supreme Court Update

In addition to the same-sex marriage cases, the Supreme Court decided two important cases for employment law in June 2013. These cases address who is a "supervisor" for purposes of Title VII claims and the causation standard for proving Title VII retaliation claims.

a. *University of Texas Southwest Medical Center v. Nassar*

Naiel Nassar is a medical doctor of Middle Eastern descent who worked for the University of Texas Southwestern Medical Center as faculty and a staff physician. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013). He brought a Title VII action against the University alleging a constructive discharge claim and a separate retaliation claim. *Id*. at 2524. A jury found in his favor on both claims, and the Fifth Circuit affirmed on his retaliation claim concluding that Nassar had to show only that retaliation was a motivating factor for an adverse employment action not its but-for cause. *Id*. The Supreme Court disagreed. A majority of the court held that Title VII's text and structure required applying a "but-for" causation standard to retaliation claims. *Id*. at 2532-33, 2534. The "but-for" causation standard requires a plaintiff to show that absent the defendant's conduct the harm would not have occurred. *Id*. at 2525. In contrast, the "motivating factor" standard demands only that the plaintiff show that retaliation was a factor in the employer's decision. *Id*. at 2526. As in *Vance*, the majority rejected federal guidance that supported applying the motivating factor standard. *Id*. at 2533-34. The dissent strongly disagreed with the majority's reading of Title VII and Congress's intent and would have held that the motivating factor standard applied to retaliation claims just as it applied to other claims under Title VII because of the close bond between retaliation and status-based discrimination. *Id*. at 2539-40.

Nassar's holding is significant because it requires a plaintiff to meet a higher standard for showing that an employer's adverse action was taken in response to the plaintiff's protected act. This means that it could be easier for employers to get rid of some Title VII retaliation claims at the summary judgment stage instead of proceeding to trial. In fact, the Supreme Court emphasized this as one of the benefits of its holding. *See id*. at 2532 (noting that the motivating-factor standard raises the financial and reputational costs on employers whose actions were not the result of retaliatory intent). But note that this holding does not change the application of the motivating-factor standard in Title VII claims for discrimination based on race, color, religion, gender, or national

origin. The dissent expressed concern that these dueling standards will make things more difficult for trial judges and more confusing for jurors. *Id*. at 2535.

b. *Vance v. Ball State University*

In *Vance v. Ball State University*, the Supreme Court clarified who qualifies as a "supervisor" for purposes of Title VII claims for workplace harassment. 133 S. Ct. 2434, 2439 (2013). The Court held that only employees with the authority to hire, fire, discipline, reassign, or promote others should count as supervisors in Title VII harassment suits for purposes of vicarious liability. *Id*. at 2439, 2444. Notably, the key term at issue in *Vance*—"supervisor"—is not used or defined in Title VII, so the Court relied on its previous cases establishing vicarious employer liability to determine the proper definition. *Id*. at 2446. In doing so, the Court chose to adopt a definition that fit within "the highly structured framework that those cases adopted" and rejected EEOC guidance on the definition of "supervisor" as too ambiguous and murky. *Id*. at 2446, 2449. The Court emphasized that its adopted definition of supervisor could be "readily applied" to determine supervisor status as a matter of law before trial. *Id*. at 2449. Four justices dissented, stating that they would adopt the EEOC definition of supervisor and hold that supervisors include those with authority to direct an employee's daily activities. *Id*. at 2455.

Although the definition of a single word sounds like a small issue, it can mean big things for employers. This is because employer liability in harassment suits varies depending on the status of the harasser. *Id*. at 2439. If the harasser is merely the victim's coworker, the employer will only be liable to the victim if the employer was negligent in responding to the offensive behavior. *Id*. at 2441. But, if the harasser is a supervisor, then the employer will be strictly liable if the supervisor's harassment leads to a tangible employment action, such as hiring or firing the victim. *Id*. With this recent decision, employers will no longer be subject to vicarious liability for employee claims of harassment based on the behavior of team leaders.

c. Coming Up This Term

One case to watch this term is *Young v. United Parcel Service, Inc*., which currently has a pending a petition for writ of certiorari with the Supreme Court. 707 F.3d 437 (4th Cir. 2013). Peggy Young seeks review of the Fourth Circuit Court of Appeals' decision dismissing her pregnancy discrimination claims on summary judgment. The issue to be considered is whether, and in what circumstances, the Pregnancy Discrimination Act ("PDA") requires an employer that provides work accommodations to nonpregnant employees to provide work accommodations to pregnant employees who are "similar in their ability or inability to work." Before the Fourth Circuit, Young contended that UPS's policy, which states that a pregnant woman is ineligible for light duty work for any limitation arising solely from her pregnancy, violates the PDA. *Id*. at 446. During her pregnancy, Young had a 20-pound lifting restriction and UPS told her that she could not work with that restriction because its employees were required to lift 70 pounds. *Id*. at 440-41. Adopting a narrow reading of the PDA, the Fourth Circuit held that the PDA

requires only that employers treat pregnant employees equally and does not require employers to provide additional accommodations. *Id*. at 451.

4. Unpaid Interns

Over the past few months, disgruntled interns have filed wage and hour lawsuits against several high-profile media companies. These lawsuits, filed as class actions, allege that the companies' policies of hiring unpaid interns violate the Fair Labor Standards Act ("FLSA") by failing to pay interns the statutory minimum wage for their services.

Six-Factor Test

In 2010, with the number of unpaid internships allegedly on the rise, the Department of Labor published Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act. Fact Sheet #71 sets forth six factors for assessing whether private, for-profit companies may forgo paying interns wages, all of which must be met. All six factors must be met for a company to hire interns without paying them. The factors are:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #71 (2010).

Recent Cases

In June 2013, a federal district court judge in New York conditionally certified both a class action and a collective action brought by a group of interns against Fox Searchlight Pictures, Inc. who alleged that Fox Searchlight owed them wages for their work on the movie *Black Swan*. Although the scope of the class action was subsequently narrowed, the judge held that the unpaid interns were employees. Fox Searchlight is appealing the order.

Shortly after a class was certified in the Fox Searchlight case, other interns jumped on the bandwagon: putative class actions were filed against Conde Nast, Madison Square Garden, and Pittsburg Power, an arena football league. Each of these putative class actions alleges that the interns should have been compensated for the hours worked for the companies. The plaintiffs are seeking millions of dollars in damages.

Take Away: Dealing with a lawsuit from an unpaid intern or two might seem inconvenient, but opposing a putative wage and hour class action is a whole different beast. Recent cases have sought damages in the millions of dollars. These cases should serve as a good reminder to for-profit private companies who hire unpaid interns to assess their internship programs. Any unpaid internship must meet the six criteria identified in Fact Sheet #71 to avoid facing a potential wage and hour lawsuit. If the internship program does not fit neatly into the Department of Labor's definition, the employer may want to consider paying interns minimum wage for their services.

E. Important Changes to Washington and Seattle Employment Law

1. Washington's Social Media Law

Effective July 28, 2013, Washington became the eighth state to enact legislation limiting employer access to employee and prospective employee social media accounts. It is in good company—the National Conference of State Legislatures reports that thirty-three states are considering similar bills. And the federal government may not be too far behind.

The new Washington law prohibits employers and potential employers from requesting social media passwords of current or prospective employees. The law also restricts employers from requiring employees or applicants to log into their social media profiles in their employer's presence or compelling current or prospective employees to add the employer or other employees to their social networking accounts. Under the law, employers are also prohibited from taking adverse action against an employee or applicant who refuses to provide the employer with access to his or her social networking account. If an employer violates the law, an aggrieved employee or applicant may bring a civil action to recover actual damages, a $500 penalty, and reasonable attorneys' fees and costs.

Employers still have some access to social media profiles of employees and prospective employees when it relates to internal investigations. The law carves out significant exceptions for internal investigations regarding work-related employee misconduct, compliance with laws and regulations, and potential leaks of confidential employer information or intellectual property. However, employers' requests for this information are simply requests; the law does not obligate employees to divulge such information even in these limited circumstances. The law also carves out social networks or intranets intended to facilitate work-related communication or collaboration.

Take Away: In practice, the new law should not change employers' practices. Social media websites such as Facebook and Twitter contain "protected class" information that

could expose employers and potential employers to discrimination claims. Even before this law, it was risky business for employers to view employees' and applicants' social media profiles. After all, what an employer does not know can't be held against it.

You can access the new law online as Chapter 330, Laws of 2013 or Substitute Senate Bill 5211. Eventually, it will be codified under RCW 49.44. For now, just remember, employees are employees, not "friends."

2. Developments in Claims for Wrongful Termination in Violation of Public Policy

Notwithstanding the limits that the Washington State Legislature drafts into some of its laws, such as exemptions for small employers and limited remedies, Washington courts have created a cause of action for "wrongful termination in violation of public policy" ("public policy claim"). The public policy claim has traditionally been recognized as a "narrow exception," and courts have been admonished to "proceed cautiously" with such claims. But this claim can expose small employers and others to significant liability. To prevail on a public policy claim, a plaintiff must prove four things:

1. The existence of a "clear public policy" ("clarity" element);

2. Whether discouraging the conduct in which the employee engaged would jeopardize the public policy ("jeopardy" element);

3. Whether the public-policy-linked conduct caused the discharge ("causation" element); and

4. Whether the employer is able to offer an overriding justification for the discharge ("absence of justification" element).

Two recent Washington court opinions bear on the jeopardy element of the public policy claim—one, a Washington Supreme Court case, muddied the water regarding the jeopardy element, while the other, a case out of the Division III Court of Appeals recognizes appropriate limits to the jeopardy element.

In *Piel v. City of Federal Way*, No. 83882-8 (Wash. June 27, 2013), the Washington Supreme Court addressed a public policy claim in the context of the Public Employment Relations Commission ("PERC"). The plaintiff alleged that he was fired for engaging in protected union-organizing activities, and that the remedies available through PERC did not adequately protect the public policy in favor of union organizing. The Washington Supreme Court agreed, holding that PERC's administrative remedy was inadequate to protect the public policy. As a result, the existence of a remedy through PERC did not prevent the plaintiff from satisfying the jeopardy element of the wrongful discharge claim. The court held that a statement that administrative remedies are meant to be additional to other remedies "is the strongest possible evidence that the statutory remedies are not adequate to vindicate a violation of public policy." *Piel*, No. 83882-8, at 14.

Conversely, in *Worley v. Providence Physician Services Co*., No. 30950-9-III (Wash. Ct. App. July 23, 2013), the court of appeals rejected a public policy claim for retaliation for whistleblowing. The court emphasized that public policy claims should be a narrow exception to the general rule, and that courts must proceed cautiously when considering such claims. The court found that the plaintiff could not meet the jeopardy element's "high bar" because the Washington Health Care Act provided whistleblower protection and other comprehensive remedies to protect the plaintiff's asserted public policies of promoting workplace safety, maintaining the standard of care in the health care field, preventing billing fraud, and protecting against retaliation for reporting such violations.

So What Does This Mean for Employers? The public policy cause of action has been a roller coaster in the Washington courts. Two years ago, when the Washington Supreme Court rejected a public policy claim based on reporting drunk driving, it looked like the cause of action had been decisively narrowed. The *Piel* case throws the door back open, at least to some extent. The *Worley* case, however, went in the other direction, respecting the limited circumstances in which a public policy claim may be brought and holding that statutory whistleblower protections sufficiently protect an employee from retaliation. These opinions make clear that courts will entertain public policy claims under the right circumstances.

3. Minimum Wage

a. *Becerra v. Expert Janitorial, LLC* and the "Economic Reality" Test

In a matter of first impression, the Division I Court of Appeals recently held that the proper test for determining whether a company is a "joint employer" for purposes of liability under Washington's Minimum Wage Act ("MWA") is the same "economic reality" test applied under the Fair Labor Standards Act ("FLSA"). *Becerra v. Expert Janitorial, LLC*, 309 P.3d 711, 712, 714 (Wash. Ct. of App. 2013). The FLSA is the federal equivalent of the MWA, and Washington courts frequently look to federal case law in interpreting the MWA. *Id*. at 714-15. This case was no exception, with the court of appeals adopting the federal standard for determining who is a joint employer.

The case arose when Becerra and several other janitors filed a wage and hour action against Expert Janitorial, LLC, Fred Meyer, All Janitorial, and several others. *Id*. at 713-14. The plaintiffs claimed that the defendants failed to pay them minimum wage and overtime and failed to provide rest and meal breaks while they cleaned Washington Fred Meyer stores. *Id*. at 714. All Janitorial was plaintiff's direct employer, but All Janitorial served as a subcontractor for Expert Janitorial who, in turn, contracted with Fred Meyer to provide janitorial services. *Id*. Thus, liability depended on the nature of the employment relationship between Expert Janitorial and the plaintiffs and Fred Meyer and the plaintiffs.

Under the FLSA, and now the MWA, a single employee can be employed by more than one employer. *Id*. at 716. This is where the "economic reality" test comes in to determine whether an entity is actually an employer based on a variety of factors. *Id*.

At its base, this test is about "whether a worker is economically dependent on the alleged joint employer." *Id*. at 718 (internal quotation marks and citations omitted). In *Becerra*, the parties disputed just what factors make up that test. *Id*. at 716. The trial court had considered just four factors adopted from *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). *See Becerra*, 309 P.3d at 718. These factors are: whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of payment, (3) determined the rate and method of payment, and (4) maintained employment records. *Id*. The court of appeals held that this was reversible error because the trial court did not consider "all relevant factors that may reveal the economic reality of the employment relationship." *Id*. at 720.

So what are these factors? The court of appeals enumerated a nonexhaustive list of thirteen factors adopted from the Ninth Circuit's decision in *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997). These factors are: (1) the nature and degree of control of the workers; (2) the degree of supervision of the work; (3) the power to determine the pay rates or the methods of payment of the workers; (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; (5) the preparation of payroll and payment of wages; (6) the specialty nature of the work; (7) the degree to which responsibility between a labor contractor and an employer passes from one labor contractor to another without material change; (8) the use of the alleged employer's premises and equipment; (9) the piecemeal nature of the work; (10) the employee's opportunity for profit or loss depending on his or her managerial skill; (11) the degree of permanence in the working relationship; (12) the importance of the service rendered to the alleged employer's business; and (13) the degree to which the employees had a business organization that could shift as a unit between worksites. *Becerra*, 309 P.3d at 717-18. Additionally, the court of appeals noted that other evidence presented may be relevant to a court's determination of the "economic-reality" test. *Id*. at 722.

Take Away: The FLSA "economic reality" test is now a reality of Washington law. Businesses should assess their relationships with contractors and subcontractors and the employees of those contractors to ensure that the business is not exposed to additional liability as a joint employer. This can mean either ensuring that the divisions required to prevent joint-employer status or, if joint-employer status exists, ensuring that contractors comply with the MWA. It may be wise to consult counsel before entering into any new contractor relationships.

b. 13 Cent Increase in January

Washington's Department of Labor & Industries adjusts the state's minimum wage each year based on the Consumer Price Index for Urban Wage Earners and Clerical Workers. The Index adjusts each year based on the average price urban wage earners and clerical workers pay for goods and services such as food, clothing, shelter, and fuel. This year, Washington's minimum wage will increase by 13 cents on January 1, 2014 to $9.32 per hour.

F. Employee Background and Credit Checks—What Employers Should Know

Checking into a prospective employees past might seem like a good idea, but employer should be careful before conducting criminal background and credit checks. The Equal Employment Opportunity Commission ("EEOC") has begun targeting these practices at the national level, and a new Seattle ordinance prohibits employers from requiring potential employees to disclose criminal backgrounds at the initial stages of the application process.

1. EEOC Campaign Against Criminal Background and Credit Checks

a. Criminal Background Checks

No federal law prohibits employers from asking employees or prospective employees about arrest and conviction records. But, according to the EEOC these checks can have a discriminatory impact based on the higher rate at which minorities, especially African-American and Latino men, are arrested or convicted of crimes. In 2012, the EEOC released extensive guidance on how employers should limit and narrowly tailor any use of criminal background checks. U.S. Equal Emp't Opportunity Comm'n, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, No. 915.002 (2012). It followed this guidance with two lawsuits.

The EEOC guidance recommends that employers develop a written policy for procedures for screening applicants and employees for criminal conduct. The policy should be narrowly tailored and should be coupled with training for managers, hiring personnel, and other decisionmakers on implementing the policy consistent with Title VII. The EEOC recommends that the policy identify essential job requirements, determine specific offenses that may demonstrate unfitness for the job, determine the duration of exclusions for criminal conduct, state the justifications for the policy and procedures, ensure the confidentiality of criminal records, and keep a record of consultations and research. Actions taken pursuant to the policy should include an individualized assessment of the applicant. This means that an employer informs the applicant or employee that an action may be taken because of past criminal conduct, provides the person an opportunity to show why that action should not apply to him or her (i.e., by explaining the circumstances surrounding the offense, the age at the time of the incident, any rehabilitation or education, character references, etc.), and considers this additional information.

Additionally, the EEOC has filed two suits in federal court against Dolgencorp, doing business as Dollar General, and BMW Manufacturing Co., alleging that the employers' use of generally applicable criminal background checks in the hiring process violated Title VII.

Attorneys General from nine states, including Montana, Colorado, and Utah, sent a letter to the EEOC in July 2013, expressing concern with these lawsuits and calling the EEOC's guidance "a quintessential example of gross federal overreach." Letter from

Patrick Morrisey, Att'y Gen., State of W. Va. to U.S. Equal Emp't Opportunity Comm'n 1–2 (July 24, 2013). The Attorneys General argued that the policy guidance and the lawsuits incorrectly apply Title VII and cases interpreting its application to expand the protections of Title VII to protect former criminals "under the pretext of preventing racial discrimination." *Id*. at 3-4. The letter also expressed concern for the additional burden placed on employers in conducting individualized assessments. *Id*. at 4-5.

EEOC responded to the letter, defending its authority and basis for the Guidance. U.S. Equal Emp't Opportunity Comm'n, What You Should Know: EEOC's Response to Letter from State Attorneys General on Use of Criminal Background Checks in Employment (Aug. 29, 2013). The letter argued that EEOC's disparate impact analysis as applied to criminal background checks is grounded in Supreme Court and other federal decisions. It also clarified its Guidance, explaining that the EEOC encourages a two-step process wherein employer would first use a targeted screen of criminal records and then engage in an individual assessment for those people who are screened out.

So far, the EEOC's position has not been well-received by the courts. In August, a federal district court judge in Maryland dismissed the EEOC's suit against Freeman, which alleged that Freeman's hiring process had a discriminatory impact on African-American and male applicants. *EEOC v. Freeman*, No. RWT 09cv2573, 2013 WL 4464553, at *1 (D. Md. Aug. 9, 2013). The court noted that the mere use of criminal or credit history is not a matter of concern under Title VII but what information is used and how is the key issue—does it show a disparate impact? *Id*. at *2. Here, the answer to that question was no. The court threw out the EEOC's two expert reports as untimely, unreliable, inaccurate, and inadmissible, and went on to conclude that national statistics alone were insufficient. *Id*. at *7, *13. Moreover, even with these expert reports, the EEOC's claim was insufficient because it did not identify the specific policy causing the alleged disparate impact. *Id*. at *14. The court concluded by calling out the EEOC's action as placing

> many employers in the "Hobson's choice" of ignoring criminal history and credit background thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers. Something more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history and credit checks. To require less, would be to condemn the use of common sense, and this is simply not what the discrimination laws of this country require.

Id. at 18.

Take Away: It is not clear whether the EEOC's interpretation will gain footing with the courts, but early indications suggest that the EEOC will have to do much more to bolster

its claims of discrimination. Employers, however, should protect themselves from any outcome by reassessing their use of criminal background checks in the hiring process. How do you screen out individuals? Are your screening practices related to the job's requirements? Do you have any method for individually assessing applicants that are screened out? Consider consulting legal counsel to help you assess and revise your hiring process to ensure compliance with Title VII.

b. Credit Checks

The EEOC also advises employers to avoid inquiring into an applicant's current or past assets, liabilities, or credit rating because such information tends to have an adverse impact on minorities and women.

In December 2010, the EEOC sued Kaplan Higher Education Corporation ("Kaplan"), alleging that its practice of conducting credit history checks on job applicants had a disparate impact on African-American applicants. In other words, the EEOC claimed that Kaplan's use of credit histories, while not discriminatory on its face, had a disproportionate effect of screening out African-American applicants. Kaplan defended its use of credit checks in its hiring process. As an educational institution that is regulated by the U.S. Department of Education ("DOE"), Kaplan must comply with the DOE's policy that requires Kaplan, and other participants, to institute quality controls limiting access to student and parent financial information.

The lawsuit was eventually dismissed, but the credit check issue is far from settled. The merits of the EEOC's claim of discrimination were not decided. This means that the EEOC is free to file another lawsuit against another employer, presumably where they have more evidence of discrimination. Based on the EEOC's recent strategy and approach, the EEOC is likely to pursue its cause against the use of credit histories in employment decisions.

Some states have taken up the cause, too. A 2010 Oregon law prohibits most credit checks for employment purposes, but contains important exceptions for the financial sector and state law enforcement, as well as an exception that allows credit checks if the information is "substantially job-related." Hawaii passed a similar law in 2009, and Illinois followed on Oregon's heels with a similar law in 2010. Employers in Washington face a watered-down version of these laws. A 2007 Washington law forbids employers from obtaining a credit report on applicants or employees unless the information is either substantially related to the job and the employer's reasons for the use of such information is disclosed in writing to the applicant, or the information is required by law.

Take Away: Employers in Washington may still obtain credit histories for job applicants and employees, so long as the employers comply with the Fair Credit Reporting Act ("FCRA") and Washington law. In short, employers must:

- Only obtain credit reports for those applicants and employees for whom their credit history is substantially related to their jobs, or otherwise required by law;

- Provide to the applicant or employee a "clear and conspicuous disclosure," in a separate written document, of the employer's intention to obtain a credit report;
- Obtain written consent from the applicant or employee;
- Certify to the credit reporting agency that the disclosure was made to the applicant or employee, the applicant or employee gave written consent, the report will not be used illegally, and the employer will abide by the FCRA requirements before taking adverse action; and
- Before taking adverse action based on the credit report, the employer must provide both a copy of the credit report and a statement of the applicant or employee's rights under the FCRA to the applicant or employee.

c. Seattle's New Job Assistance Ordinance

Regardless of what is happening on the national level, Seattle employers must comply with Seattle's new Job Assistance Ordinance. As of November 1, 2013, Seattle employers must follow new restrictions on the use of criminal background checks for employment purposes. The Job Assistance Ordinance forbids employers from requiring job applicants to disclose arrest and/or conviction records as a part of initial applications, and restricts how employers may use criminal arrest and conviction records that are disclosed. Below are a few suggestions to ensure that your workplace's applications and hiring procedures comply with the new law.

- Determine which employees or positions fall under the Job Assistance Ordinance. Only those employees or positions who work 50% or more of their time in Seattle are subject to the new law.

- Determine if any positions are excluded under the Job Assistance Ordinance. The new law does not apply to law enforcement, policing, crime prevention, security, criminal justice, private investigation and positions that involve unsupervised access to children younger than 16, vulnerable adults or developmentally disabled persons.

- For those positions to which the Job Assistance Ordinance applies, remove the question "Have you ever been arrested or convicted of a crime?" and similar inquiries on job applications. The Job Assistance Ordinance prohibits employers from seeking information about an applicant's arrest and/or conviction record—including both check boxes and space for narrative explanations—before the employer has completed an initial screening of applications to eliminate unqualified applicants.

- Edit your job postings and advertisements to remove the phrase "felons need not apply" and similar exclusionary language. The Job Assistance Ordinance forbids employers from categorically excluding individuals with arrest or conviction records from consideration. An employer may, however, advertise and inform employees and applicants that, after initial screening, the employer will conduct a criminal background check.

- Only after completing an initial screening to eliminate unqualified applicants, or making a conditional offer of employment, may you then ask the applicant or employee about his or her criminal history, or run a background check.

- Consider if there are legitimate business reasons to exclude applicants or employees with certain criminal records from particular positions or from employment generally.

- "Legitimate business reason" is defined by the Job Assistance Ordinance as a good faith belief that the nature of the criminal conduct will negatively impact the applicant's or employee's fitness to perform the position sought or held or will harm or injure people, property, business reputation or business assets, and you have considered the conviction(s) or pending criminal charge(s) in light of several factors. These factors include:

    - the seriousness of the conviction or charge;
    - the number and type of convictions or charges;
    - the amount of time elapsed since the conviction or charge;
    - verifiable rehabilitation or good conduct information regarding the applicant or employee;
    - the duties and responsibilities of the position; and
    - the place and manner in which the position is performed.

- Before rejecting an otherwise qualified applicant or employee based on criminal history, you must inform the applicant or employee of the criminal history information upon which you base the rejection, and give the applicant or employee an opportunity to explain or correct that information. After supplying this notice, you must hold the position open for at least two business days to allow the applicant or employee to explain or correct the criminal history information.

- Before rejecting an applicant or employee because a criminal history report reveals information that is inconsistent with information given to you by an employee or applicant, you must inform the employee or applicant of the criminal history information upon which you base the rejection, and give the employee or applicant at least two business days to correct any errors in the criminal history report. This opportunity to correct errors in the criminal history report is not available if the employee or applicant has intentionally misrepresented information to you.

- Establish record-keeping procedures to memorialize your consideration of the above factors and the applicant's or employee's opportunity to explain the conviction or charge, or correct the record.

- Ask for an extension of time if you need more time to make changes to your recruiting systems and forms in order to comply with the Job Assistance Ordinance. Upon the written request of an employer, the director of the Seattle

Office of Civil Rights (SOCR) has the authority to extend the implementation date of the Job Assistance Ordinance for a reasonable amount of time, in order to allow an employer to make necessary changes to its systems and forms. So if you need more time, ask for it.

d. Background Checks and Class Actions

The background check issue is heating up in other states as well. Just the other day, a group of rejected job applicants filed a pair of putative class actions in California Superior Court against the Walt Disney Company and First Choice Background Screening Inc. The first suit claims that Disney violated the Fair Credit Reporting Act by making employment decisions without giving employees copies of their background checks. According to the complaint, this deprived the employees of the opportunity to challenge inaccuracies in the report. In the second suit, the complaint alleges that First Choice violated the FRCA by not informing employees that an employer intends to obtain a background check and not ensuring that information is accurate.

Take Away: The recent focus on background checks is likely to continue in the future. Both the EEOC and private parties are poised to bring claims, and Seattle's Job Assistance Ordinance shows that local governments are willing to consider changing hiring practices through new laws. Wise employers should take a look at their use of background and credit checks to ensure compliance with the FRCA and Seattle's Job Assistance Ordinance.

G. Conclusion

This past year has seen several big changes in labor and employment law, ranging from implementation of the ACA to court decisions regarding arbitration agreements. These update materials provide a brief overview of many of the key changes of 2013. Please feel free to contact us at any time with questions about these materials or any other labor- or employment-related questions you may have. Thank you again for joining us this morning.