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Technology Industry Employers Roundtable

May 21, 2014

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Technology Industry Employers Roundtable

May 21, 2014

Table of Contents

Agenda

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Technology Industry Employers Roundtable

May 21, 2014

Agenda

8:30 – 9:00 am	**Registration and Breakfast**
9:00 – 9:30 am	**Introduction and Your Top-of-Mind Questions**
9:30 – 10:45 am	**Counseling and Compliance Hot Topics** • Action items and new laws • Supreme Court cases to watch • Preventing and defending whistleblower claims • Incentive compensation plans
10:45 – 11:00 am	**Break**
11:00 – 11:30 am	**Counseling and Compliance Hot Topics (Continued)** • Arbitration developments • Workplace safety and domestic violence issues
11:30 am – 12:00 pm	**Ongoing and New Issues with Contingent Workers** • Designing policies to mitigate risk for your contingent worker program • Effectively integrating and managing contingent workers • Monitoring the cost/benefits of your contingent worker program
12:00 – 12:30 pm	**EEOC Initiatives and Class Discrimination Issues** • The EEOC's renewed attack on releases • The latest on criminal record checks • ADA pattern or practice investigations and lawsuits • Class discrimination cases: where do they stand now?
12:30 – 1:30 pm	**Potential Legislative Strategies for Technology Industry Employers** *Erika Frank* *Vice President, Legal Affairs, and General Counsel* *California Chamber of Commerce*
1:30 – 2:00 pm	**The Affordable Care Act – What Companies Need to Know** • Effective date—2015, 2016 or fractions thereof? • Who's full time? • Guarding against an inadvertent "pay" outcome • Reporting issues for 2015

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May 21, 2014

2:00 – 2:30 pm	**Leaves of Absence and Disability Leaves** • Can FMLA be forced? • New CFRA regulations • Developments regarding the interactive process • Pregnancy accommodation developments
2:30 – 3:00 pm	**Crossover Issues in Immigration and Employment** • Prehire, hiring, and termination concerns • Wage and hour concerns with different nonimmigrant visa categories • Applicability of whistleblower and discrimination protection statutes to foreign national workers • Employees working under a false name: potential issues
3:00 – 3:30 pm	**Privacy Issues in the United States and for the Global Workforce** • Drug testing and marijuana • Background checks • Electronic and physical searches
3:30 – 4:00 pm	**Open Forum and Recap**

Industry Participants

Technology Industry Employers Roundtable

May 21, 2014

Industry Participants

Technology Industry Employers Roundtable | May 21, 2014

Company	Name	Title
Actian Corporation	Diane Rigatuso	Vice President, Global Human Resources
Actiontec Electronics, Inc.	Trice Pierce	Director of Human Resources
Adobe Systems Incorporated	Melissa Davidson	Associate General Counsel, Director of Employment
AECOM	Teuila Hanson	Vice President, Diversity and Inclusion
Agilent Technologies Inc	Simone Schiller	Senior Counsel
Altera Corporation	Justin Walker	Corporate Counsel
Astreya Partners, Inc.	Mary Helen Waldo	Vice President, Human Resources
Building a Better Workplace	Geralynn Patellaro	Mediator, Workplace Investigator and Human Resources Consultant
Cisco Systems, Inc.	Nancy Paik	Senior Counsel
Dolby Laboratories Inc.	Sarah Jain	Legal Director, Employment
Electronic Arts Inc.	Russell Evans	Senior Counsel
	Adelmise Warner	Senior Counsel, Employment and Corporate Services
Facebook	Amira Dallafior	Lead Counsel, Labor & Employment
	Nadir Joshua	Lead Counsel, Labor & Employment
	Heidi Swartz	Associate General Counsel, Labor & Employment
Finisar Corporation	Shaila Ruparel	Associate General Counsel
Fujitsu America, Inc.	Mark Utley	Associate General Counsel
Futurewei Technologies	Stephanie Bradshaw	Senior Corporate Counsel, Labor and Employment
Gigamon	Elaine Llewelyn	Director, Legal
	Jennifer Miller	Vice President and Associate General Counsel
	Ana Pease	Sr. Human Resources Manager
Google, Inc	Jennifer Blackstone	Senior Counsel, Employment
	Amy Lambert	Associate General Counsel, Employment
	Michael Pfyl	Corporate Counsel
	Robyn Thomas	Senior Corporate Counsel
	Jade Wagner	Associate Corporate Counsel - Employment
Healthline Networks, Inc.	Park Allen	Director of Human Resources
Hitachi Data Systems	Dan Gallagher	Legal Director
Intel Corporation	Shannon Thorne	HR Legal Attorney/Investigations Manager

Intuit Inc.	Lara Strauss	Associate General Counsel, Employment
KLA-Tencor Corporation	Lynn Bersch	Assistant General Counsel, Senior Director, Employment Law
	Shweta Gera	Senior Corporate Counsel, Employment Law
McKesson Corporation	Karen Sullivan	Lead Counsel
NetApp, Inc.	Michele Babb	Employment Counsel
	Lisa Borgeson	Director, Legal, Worldwide Employment & Compliance
NVIDIA Corporation	Denise Morgan	Director of Human Resources
	David Shannon	Executive Vice President, General Counsel and Secretary
OnLive, Inc.	Ro Carbone	Senior Director, Human Resources
Pebble Technology Corp.	Jeff Hyman	General Counsel and Corporate Secretary
PMC-Sierra, Inc.	Hanna George	Director, Employment Law
Rambus Inc.	Trisha Chan	Senior Corporate Counsel
salesforce.com, inc.	Jorja Jackson	Senior Corporate Counsel
	Sue Walker	Senior Corporate Counsel, Global Labor and Employment
SAP America, Inc.	Isabelle Laprade-Finberg	Assistant General Counsel
SolarCity Corporation	Alicia Farquhar	Assistant General Counsel, Labor & Employment
	Larry Hecimovich	Senior Counsel
Splunk, Inc.	Denise Rocha	Senior Counsel
Symantec Corporation	Melynnie Rizvi	Director
Tencent America	Linda Lee	Corporate Counsel
	Kristy Simoukda	Payroll & Benefits Administrator
	Jia Yau	Legal Counsel
	Tracy VanDenBerg	Head of People Operations
Tesla Motors Inc.	Steven Cooper	Associate General Counsel
TIBCO Software Inc.	Gina Chang	Director, Employment and Litigation - Legal Department
	Michele Haddad	Vice President, Global Human Resources
	Laura Malinasky	Vice President, Legal Affairs & Assistant Secretary
VMware, Inc.	Sarah Whittle	Senior Corporate Counsel, Employment and Litigation
	Leslie Yuan	Senior Corporate Counsel
Yahoo! Inc.	Tram Frank	Sr. Legal Director, Employment Law
	Ron Johnstone	Vice President - Associate General Counsel, Employment
ZipRealty, Inc.	Samantha Harnett	Assistant General Counsel

Morgan Lewis Participants

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Andy R. Anderson
Chicago

Paul C. Evans
Philadelphia

Carol R. Freeman
Palo Alto

Malcolm K. Goeschl
San Francisco

Robert Jon "RJ" Hendricks
San Francisco

Daryl S. Landy
Irvine

Eric Meckley
San Francisco

Barbara J. Miller
Irvine

Melinda S. Riechert
Palo Alto

Michael D. Schlemmer
Palo Alto

Nick Thomas
London

Morgan Lewis

Andy R. Anderson

partner

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Andy R. Anderson is a partner in Morgan Lewis's Employee Benefits and Executive Compensation Practice.

Mr. Anderson has handled a variety of employee benefits matters, including government self-correction programs, cafeteria plans, health and welfare plans, VEBAs, and benefit plans for tax-exempt organizations and churches. He has worked with numerous Fortune 500 companies regarding the administration of employee benefits programs, with an emphasis on the administration of health and welfare plans. Mr. Anderson frequently counsels clients on regulatory compliance issues dealing with the Internal Revenue Code, ERISA, COBRA, HIPAA, Mental Health Parity, and Healthcare Reform.

Mr. Anderson's practice also focuses on outsourcing employee benefits issues in the areas of retirement plans, health and welfare plans, and payroll practices. Prior to joining Morgan Lewis, Mr. Anderson led the Hewitt Associates' legal group responsible for outsourcing employee benefits.

Mr. Anderson has commented on proposed regulations, testified at IRS hearings, and testified before the Senate Judiciary Committee on ERISA preemption. He also worked closely with several government agencies during the launch of the advance credit for the TAA tax credit.

Mr. Anderson has lectured extensively on the subject of employee benefits and outsourcing. He is a JCEB faculty member, where he teaches the cafeteria plan section for the ERISA Basics class. Mr. Anderson speaks regularly at meetings of the Tax Section of the American Bar Association and at numerous other national and regional conferences. He has been quoted in employee benefits articles for various publications, including *Forbes*, *CNN Money*, *Business Insurance*, *The New York Times*, *The Wall Street Journal*, *Law360*, *The Philadelphia Inquirer, Human Resource Executive Online*, *Corporate Counsel, Politico*, and *Bloomberg BNA*.

Mr. Anderson received his J.D. from the University of Illinois College of Law in 1984 and his B.A., summa cum laude, from MacMurray College in 1981. He is admitted to practice in Illinois.

practice areas

Employee Benefits & Executive Compensation
Information Technology Outsourcing
Outsourcing
Outsourcing in Life Sciences
Human Resources Outsourcing
Business Process Outsourcing
Outsourcing in Financial Services
Privacy
Health & Welfare Plans
Healthcare Technology, Privacy & Data Security
Life Sciences
Healthcare
HIPAA: Employee Benefits
Social Media Law
Advertising, Consumer Protection, & Privacy
Life Sciences and Healthcare

bar admissions

Illinois

practice accolades

Employee Benefits & Executive Compensation

Listed, Employee Benefits & Executive Compensation (Nationally) in *Chambers USA* (2013)

Listed, Labor and Employment: Employee Benefits & Executive Compensation in *The U.S. Legal 500* (2013)

honors + affiliations

Fellow, American College of Employee Benefits Counsel

Past Chair, Cafeteria Plans and Reimbursement Accounts Subcommittee, ABA Taxation Section/Employee Benefits Committee

Member, American Bar Association, Taxation Section

Member, Chicago Bar Association, Employee Benefits Committee

Listed, *The Best Lawyers in America* (2013–2014)

education

University of Illinois College of Law, 1984, J.D.

MacMurray College, 1981, B.S., Summa Cum Laude

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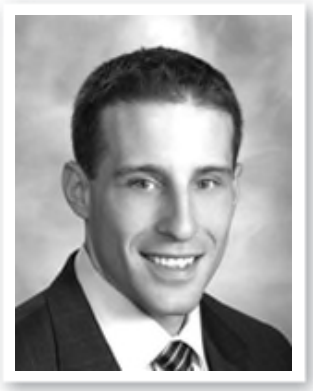

practice areas

Labor & Employment

Systemic Employment Litigation

Employment Counseling & Litigation

Noncompetition Agreements & Trade Secrets

bar admissions

Pennsylvania

New Jersey

Paul C. Evans

partner

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Paul C. Evans is a partner in Morgan Lewis's Labor and Employment Practice. Mr. Evans's federal and state court trial and appellate litigation practice focuses on the representation of employers in employment discrimination class actions, state and federal wage and hour cases, and multiplaintiff litigation, as well as cases challenging the use of employer-selection devices such as preemployment tests or credit/criminal record checks. He has represented employers in such actions in jurisdictions across the country in the entertainment, retail, telecommunications, technology, and insurance industries.

Mr. Evans also is actively engaged in employee benefits class actions in various jurisdictions, and represents employers in the full spectrum of labor and employment law matters, such as single-plaintiff discrimination, protection of trade secrets, and unfair competition and health and safety litigation.

In addition to his litigation practice, Mr. Evans counsels employers on diversity initiatives, workforce change matters, executive compensation, and succession planning issues, as well as day-to-day employment issues. He has conducted numerous comprehensive internal statistical and policy audits designed to aid in the avoidance of class actions, and has conducted annual compensation analyses for clients.

Mr. Evans is admitted to practice in Pennsylvania and New Jersey.

practice accolades

Labor & Employment

The American Lawyer Magazine's Litigation Department of the Year – Labor and Employment Law Finalist 2004, Winner 2006, Finalist 2008, Finalist 2010, and Finalist 2012

Listed in the highest tier for National Labor and Employment Practice in *Chambers USA 2013*

Named a top 5 firm for employment in BTI's Litigation Outlook 2014 report

Ranked in the top tier by *The Legal 500* for Labor and Employment Litigation, ERISA Litigation, Labor-Management Relations, and Workplace and Employment Counseling (2012)

Ranked, National Tier 1: Employment Law – Management, Labor Law – Management, and Litigation – Labor & Employment by *U.S. News* and *Best Lawyers* (2011-2012)

Ranked #1 for "Most Prestigious" Labor and Employment Practice, Vault 2012 Associate Survey

education

University of Virginia School of Law, 1999, J.D.

Allegheny College, 1996, B.A.

Morgan Lewis

practice areas

Labor & Employment

Employment Counseling & Litigation

California Employment Counseling

FLSA/Wage & Hour

Noncompetition Agreements & Trade Secrets

Life Sciences

Privacy

Technology Industry

Advertising, Consumer Protection, & Privacy

Life Sciences and Healthcare

bar admissions

California

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Carol R. Freeman is a partner in Morgan Lewis's Labor and Employment Practice. Ms. Freeman represents employers in employment law, labor relations, and related administrative claims and litigation. As part of her practice, Ms. Freeman provides advice to employers concerning personnel policies, wage and hour laws, EEO compliance, leaves of absences, hiring and firing issues, covenants not to compete, trade secrets and reductions in force. Ms. Freeman also has presented numerous seminars to employers on various employment topics, including managing within the law and contingent workforce issues.

Ms. Freeman is admitted to practice in California.

practice accolades

Labor & Employment

The American Lawyer Magazine's Litigation Department of the Year – Labor and Employment Law Finalist 2004, Winner 2006, Finalist 2008, Finalist 2010, and Finalist 2012

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Ranked #1 for "Most Prestigious" Labor and Employment Practice, Vault 2012 Associate Survey

honors + affiliations

Finalist, *The Recorder*'s Litigation Department of the Year – Labor and Employment (2013)

Commissioner, California Fair Employment and Housing Commission (2006–2009)

Listed, Northern California SuperLawyers

Noted in *The Legal 500* for Labor and Employment—Workplace and Employment Counseling (2008)

education

Columbia University, B.A., Academic Honors

University of San Francisco School of Law, J.D., Magna Cum Laude

Morgan Lewis

practice areas

Labor & Employment

Immigration & Nationality Services

Immigration Compliance

bar admissions

California

Malcolm K. Goeschl

partner

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Malcolm Goeschl is a partner in Morgan Lewis's Labor and Employment Practice. Mr. Goeschl concentrates his practice on business immigration law, with a particular focus on immigration-related challenges facing emerging businesses founded by, or seeking to employ, foreign talent. He has more than 14 years of immigration law experience involving a wide range of clients, including large multinationals and small start-ups.

Mr. Goeschl is a frequent speaker at leading professional and industry events and has recently been published in publications including *Interpreter Releases*, *Bender's Immigration Briefings*, *International Quarterly*, and *International HR Journal*. He is a member of the California Bar Association and the American Immigration Lawyers Association.

Prior to joining Morgan Lewis, Mr. Goeschl was the principal attorney at his own firm, Goeschl Law Corporation, which he founded in January 2005. Before that, he was a senior associate at an international law firm.

Mr. Goeschl earned his J.D. from the University of Washington School of Law in 1998 and his B.A. from the University of Washington in 1993.

Mr. Goeschl is admitted to practice in California.

practice accolades

Labor & Employment

The American Lawyer Magazine's Litigation Department of the Year – Labor and Employment Law Finalist 2004, Winner 2006, Finalist 2008, Finalist 2010, and Finalist 2012

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Ranked #1 for "Most Prestigious" Labor and Employment Practice, Vault 2012 Associate Survey

Immigration & Nationality Services

Recognized as leading firm for immigration law in *Chambers USA* (2011–2012)

honors + affiliations

Finalist, *The Recorder*'s Litigation Department of the Year – Labor and Employment (2013)

Member, California Bar Association

Member, American Immigration Lawyers Association

education

University of Washington School of Law, 1998, J.D.

University of Washington, 1993, B.A.

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practice areas

Labor & Employment

Systemic Employment Litigation

Employment Counseling & Litigation

FLSA/Wage & Hour

California Wage & Hour

Individual Employee Litigation and Arbitration

ADA Title II, Title III, and State Accessibility Law

bar admissions

California

Robert Jon Hendricks

partner

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Robert Jon Hendricks is a partner in Morgan Lewis's Labor and Employment Practice, with specific experience with the travel, hospitality, food service, entertainment and retail industries. Mr. Hendricks represents employers and management employees in matters arising under California and federal law, such as federal and state wage and hour law, federal and state anti-discrimination laws, the Family and Medical Leave Act, California Business and Professions Code Section 17200 et seq., the California Consumer Legal Remedies Act, California's Trade Secrets Act, and the Americans with Disabilities Act (ADA) (including Title III), as well as California's Unruh Civil Rights Act.

Mr. Hendricks has significant experience with labor and employment class actions. He has helped clients obtain settlement on favorable terms for wage and hour claims. And he has helped clients obtain complete dismissals of class claims.

- Defeated class certification in a putative wage and hour class action alleging meal and rest break violations on behalf of close to 1,000 call center agents of a major transportation industry employer.
- Defense of one of the largest class actions ever filed against a retailer. Plaintiffs claimed that a national retailer misled Californians by promoting its standards requiring the foreign companies it does business with to obey local labor laws and treat workers fairly. Successfully moved to dismiss the case, which had been watched closely by the U.S. Chamber of Commerce because of its potential impact on American companies' liability related to their foreign operation of factories and other businesses.
- Summary judgment for the defendant and a complete dismissal of a California wage and hour class action in which the plaintiff, seeking to represent a class of 6,500, alleged that the employer had violated California Labor Code Section 226 by failing to provide accurate wage statements.
- Obtained a complete dismissal at the pleading stage of a putative class action that challenged an employer's health benefit plan on Title VII and ADA grounds because it allegedly failed to provide coverage for infertility, pap smears, and other medical treatments.

Mr. Hendricks also has significant state, federal and administrative trial experience as lead counsel. Recent highlights include:

- Convinced the court to grant an anti-SLAPP motion and dismiss Plaintiff's claims in a defamation lawsuit filed by a former pilot following the employer's investigation related to airport safety and the ability of pilots to safely operate aircraft.
- Convinced the court to terminate a contentious litigation brought by a

former IT manager who claimed that over a ten-year period he was subject to sexual harassment and retaliation by his supervisor. We were able to demonstrate that Plaintiff had permanently destroyed tens of thousands of computer flies following a confidential arbitration, the result of which Plaintiff elected to reject, and extensive discovery disputes.

- Successful defense of an employment arbitration matter in which an employee challenged his termination for violation of a workplace environment rule prohibiting harassment or discrimination. Plaintiff claimed that the company was precluded from disciplining him for discriminatory remarks made against another employee on a union-controlled electronic bulletin board because the comments were made while plaintiff was off duty. Mr. Hendricks persuaded the arbitrator that there was sufficient nexus to the workplace because the author, the audience, and the victim of the post were all employees of the company, and that when an employee brought the matter to the company's attention, it was obligated to take action.
- A six-week jury trial in Los Angeles Superior Court, where he was lead counsel and obtained a complete defense verdict for all four defendants against a plaintiff who, in a must-win case for the company, alleged race, religious, and national origin discrimination and harassment, and retaliation over a five-year period of time.
- A three-week administrative hearing before the Department of Labor, where Mr. Hendricks also obtained a complete dismissal of a whistleblower claim claiming retaliation for complaining about safety. The decision was affirmed by the Ninth Circuit.
- An arbitration scheduled for seven days, which ended with an award for the defense after the claimant was examined by Mr. Hendricks and Mr. Hendricks began to present the defense case demonstrating that the claimant had lied about raising complaints of billing fraud and other matters.
- After two and a half days of deposition established that the plaintiff was not credible and had either welcomed or was not offended by the conduct raised in her complaint for sexual harassment and discrimination, the plaintiff stipulated to dismissal with prejudice of her claim against all defendants for a waiver of defense costs and fees.
- After nearly 10 years of litigation, achieved victory for a hotel chain in a case in which the plaintiff sought $100 million for racial discrimination, civil rights violations based on the hotel's failure to provide a certain facility for an event. After prior and repeated success before the district court on summary judgment and a motion challenging the plaintiff's standing to bring the action, a jury trial was held with the proper partnership plaintiff in 2013. The jury returned a verdict in favor of the defendant, finding no discrimination or civil rights violations.

Mr. Hendricks has also successfully briefed and argued several matters before the Ninth Circuit and California Courts of Appeal. In one such matter, Mr. Hendricks was able to obtain, via writ petition, a published decision establishing that union officials do not have a privilege to withhold from employers during litigation information known to them concerning harassment in the workplace and that, like employers, unions have obligations to prevent harassment in the workplace.

Mr. Hendricks is admitted to practice in California.

practice accolades

Labor & Employment

The American Lawyer Magazine's Litigation Department of the Year – Labor and Employment Law Finalist 2004, Winner 2006, Finalist 2008, Finalist 2010, and Finalist 2012

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Ranked #1 for "Most Prestigious" Labor and Employment Practice, Vault 2012 Associate Survey

honors + affiliations

Finalist, *The Recorder*'s Litigation Department of the Year – Labor and Employment (2013)

Member, Executive Committee, State Bar of California Labor and Employment Law Section

Recipient, Anthony F. Dragonette Memorial Award for Outstanding Achievement in Civil Litigation Trial Practice

Listed, *Southern California Super Lawyers*, six of the last seven years

Rated Among the 500 Leading Lawyers in America by *Lawdragon* Magazine (2007)

Editor-in-Chief, *Gadfly*

education

University of California, Berkeley, Boalt Hall School of Law, 1995, J.D.

University of California, Berkeley, 1990, A.B., With honors

Morgan Lewis

practice areas

Labor & Employment

Systemic Employment Litigation

FLSA/Wage & Hour

Employment Counseling & Litigation

Noncompetition Agreements & Trade Secrets

Securities Industry

Financial Services

Technology Industry

Individual Employee Litigation and Arbitration

bar admissions

California

court admissions

U.S. Court of Appeals for the Ninth Circuit

U.S. District Courts for the Northern, Central, Eastern, and Southern Districts of California

Daryl S. Landy

partner

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3000 El Camino Real, Suite 700
Palo Alto, CA 94306-2121
Phone: 650.843.7561
Fax: 650.843.4001

Daryl S. Landy is a partner in Morgan Lewis's Labor and Employment Practice. Mr. Landy's practice focuses on employment litigation and counseling, with a particular emphasis on the securities and financial services industry. He regularly represents well-known securities firms and other financial services companies, as well as companies from a variety of other industries, in a broad range of employment-related litigation, including single-plaintiff, multi-plaintiff and class action employment matters in federal and state courts, before administrative agencies and in various arbitration fora. In recent years, Mr. Landy has represented employers in more than 20 wage and hour class and collective actions. Mr. Landy also counsels employers regarding nearly all aspects of employment law, including matters concerning termination, discrimination, harassment, wage and hour laws, trade secrets and non-compete covenants. He is a frequent speaker on a wide range of labor and employment law issues.

Prior to joining Morgan Lewis, Mr. Landy was a shareholder in the main office of a prominent San Francisco-based firm, where he served as a member of the firm's management committee and as co-chair of the litigation department. Mr. Landy earned his J.D. from Boalt Hall School of Law (U.C. Berkeley) in 1988, where he was an associate editor of the *California Law Review*. He earned his B.A., with high honors, from the University of California, Davis in 1983.

Mr. Landy is admitted to practice in California and before the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Courts for the Northern, Central, Eastern, and Southern Districts of California.

practice accolades

Labor & Employment

The American Lawyer Magazine's Litigation Department of the Year – Labor and Employment Law Finalist 2004, Winner 2006, Finalist 2008, Finalist 2010, and Finalist 2012

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Ranked, National Tier 1: Employment Law – Management, Labor Law – Management, and Litigation – Labor & Employment by *U.S. News* and *Best Lawyers* (2011-2012)

Ranked #1 for "Most Prestigious" Labor and Employment Practice, Vault 2012 Associate Survey

honors + affiliations

Finalist, *The Recorder*'s Litigation Department of the Year – Labor and Employment (2013)

Member, Securities Industry Association, Legal and Compliance Division

Member, American Bar Association, Labor and Employment Law Section

Member, Bar Association of San Francisco, Labor and Employment Law Section

Associate Editor, *California Law Review*

education

University of California, Berkeley, 1988, J.D.

University of California, Davis, 1983, B.A.

Morgan Lewis

Eric Meckley

partner

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San Francisco
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Fax: 415.442.1001

Eric Meckley is a partner in Morgan Lewis's Labor and Employment Practice. Mr. Meckley focuses his practice on employment litigation in federal and state courts, in arbitration, and before various state and federal administrative agencies. Mr. Meckley represents employers in a broad range of employment matters, including California and FLSA wage-and-hour class and collective actions; discrimination, harassment, retaliation, failure to provide reasonable accommodation and other employment-related claims; and non-competition/employee raiding/trade secret issues.

Mr. Meckley has tried cases to verdict before juries, judges, and arbitrators. He has successfully fought and defeated class certification in several wage and hour lawsuits. He has also filed and won numerous motions for summary judgment in state and federal court and in arbitration. In addition to his litigation experience, Mr. Meckley regularly advises clients on California and federal employment laws and in connection with wage-and-hour compliance and audits.

Mr. Meckley earned his J.D. from the University of California at Berkeley School of Law, Boalt Hall in 1993 where he received several American Jurisprudence awards. He earned his B.A., Phi Beta Kappa, from Pennsylvania State University in 1990.

Mr. Meckley is admitted to practice in California and before the U.S. District Courts for the Northern, Eastern, and Central Districts of California, the U.S. District Court for the District of Colorado, and the U.S. Court of Appeals for the Ninth Circuit.

practice areas

Labor & Employment
FLSA/Wage & Hour
Systemic Employment Litigation
California Wage & Hour
California Employment Counseling
Noncompetition Agreements & Trade Secrets
Employment Counseling & Litigation
Technology Industry
Individual Employee Litigation and Arbitration

bar admissions

California

practice accolades

Labor & Employment

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honors + affiliations

Finalist, *The Recorder*'s Litigation Department of the Year – Labor and Employment (2013)

American Jurisprudence Award, Criminal Procedure

American Jurisprudence Award, Family Law

Prosser Award, Evidence Advocacy

Member, San Francisco Bar Association, Labor and Employment Law Section

Member, American Bar Association, Labor and Employment Law Section

education

University of California, Berkeley, Boalt Hall School of Law, 1993, J.D.

Pennsylvania State University, 1990, B.A., Phi Beta Kappa

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Barbara J. Miller

partner

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Barbara J. Miller is a partner in Morgan Lewis's Labor and Employment Practice and the leader of the Labor and Employment Practice in the Irvine office. Ms. Miller focuses her practice on employment litigation. Ms. Miller has experience representing employers in a broad range of employment matters including race, sex, and disability discrimination; harassment; wage and hour; wrongful discharge; and employment-related class actions. Ms. Miller has also counseled and trained employers on California's unique employment laws and has significant experience with wage-and-hour audits and class actions.

Prior to joining Morgan Lewis, Ms. Miller worked at another large international law firm in Orange County, where she focused on representing private employers in employment law.

Ms. Miller lectures on a variety of employment law topics, including wage-and-hour compliance, leaves of absence, preventing harassment, and protection of proprietary information issues.

Ms. Miller received her J.D., with high distinction, from the University of Kentucky College of Law in 1992 and her B.S. in industrial engineering from Stanford University in 1989.

Ms. Miller is admitted to practice in California and before the U.S. District Court for the Central District of California and the U.S. Court of Appeals for the Ninth Circuit.

practice areas

Labor & Employment

California Employment Counseling

California Wage & Hour

Technology Industry

bar admissions

California

court admissions

U.S. District Court for the Central District of California

U.S. Court of Appeals for the Ninth Circuit

practice accolades

Labor & Employment

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Ranked, National Tier 1: Employment Law – Management, Labor Law – Management, and Litigation – Labor & Employment by *U.S. News* and *Best Lawyers* (2011-2012)

Ranked #1 for "Most Prestigious" Labor and Employment Practice, Vault 2012 Associate Survey

honors + affiliations

Finalist, *The Recorder*'s Litigation Department of the Year – Labor and Employment (2013)

Member, American Bar Association

Member, State Bar of California

Member, Orange County Bar Association

education

University of Kentucky College of Law, 1992, J.D., With High Distinction

Stanford University, 1989, B.S.

Morgan Lewis

practice areas

Labor & Employment

Employment Counseling & Litigation

Retail

Technology Industry

Individual Employee Litigation and Arbitration

Social Media Law

bar admissions

California

court admissions

U.S. Circuit Courts for the Sixth and Ninth Circuits

U.S. District Courts for the Northern, Central, and Eastern Districts of California

Melinda S. Riechert

partner

Email: mriechert@morganlewis.com

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Palo Alto, CA 94306-2121
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Fax: 650.843.4001

Melinda Riechert is a partner in Morgan Lewis's Labor and Employment Practice. Ms. Riechert specializes in litigation and arbitration of employment disputes for a number of major high-technology and other companies, including defending companies in wage and hour, wrongful termination, discrimination, and sexual harassment disputes. She also counsels employers on how to avoid litigation.

From 2007 through 2013, Ms. Riechert has been named one of the leading U.S. lawyers for employment law by *Chambers USA*, based on the views of clients, peers, and other industry professionals. *Chambers* acknowledged Ms. Riechert's "straightforward courtroom style which endears her to juries." Ms. Riechert was named one of California's "Top Labor and Employment Lawyers" in 2010 and 2012 and one of its "Top Women Litigators" by *The Daily Journal* in 2010 and 2012. She was also named one of the *San Francisco Business Times*' "Top 10 Rainmakers."

Ms. Riechert is admitted to practice in California and before the U.S. Circuit Courts for the Sixth and Ninth Circuits, and the U.S. District Courts for the Northern, Central, and Eastern Districts of California.

RECENT LITIGATION EXPERIENCE

- Won summary judgment in lawsuit pending in the Eastern District of California (Sacramento) alleging termination in violation of public policy and unfair competition (March 2014)
- Won dismissal of lawsuit pending in Alameda County Superior Court alleging disability discrimination (March 2014)
- Won summary judgment in lawsuit filed in San Francisco Superior Court alleging breach of contract, fraud, extortion and violation of the Unruh Act. (February 2014)
- Won arbitration for medical device company in claim by former senior executive asserting breach of employment agreement by failing to pay severance and bonuses. Obtained award of attorneys' fees for client. (October 2013)
- Won summary judgment in lawsuit filed in Kansas federal court by employee alleging wrongful termination for filing EEOC charge. (April 2013) Affirmed by Tenth Circuit. (August 2013)
- Prevailed on arbitration claim alleging breach of contract and negligent misrepresentation in action by former employee alleging he moved to California based on misrepresentations regarding the nature of the position. (February 2013)
- Won summary judgment in lawsuit brought in Santa Clara County Superior Court alleging sexual harassment, hostile work

environment, constructive discharge in violation of public policy, and failure to investigate a hostile work environment. (September 2011) Affirmed by Ninth Circuit on appeal. (September 2013) Rehearing and Rehearing en banc denied. (October 2013)

- Won summary judgment for major technology company in lawsuit filed in the Northern District of California and brought by former employees on behalf of themselves and a nationwide class, alleging failure to pay all commissions due. Summary judgment was granted prior to hearing on class certification motion. (August 2011); affirmed by 9th Circuit (August 2013); rehearing and rehearing en banc denied (October 2013)
- Won summary judgment in lawsuit brought in Santa Clara Superior Court alleging discrimination and harassment based on national origin and religion. (April 2011)
- Won summary judgment for technology industry employer in a lawsuit pending in the Santa Clara Superior Court in which the plaintiff claimed that her employment was terminated because she required an accommodation for her disability. (September 2010) Affirmed on appeal. (2011)
- Won arbitration award for technology industry employer in action brought by former senior vice president asserting claims for severance pay, with arbitrator finding that employer was justified in terminating severance benefits following claimant's violation of a noncompetition agreement. (July 2010)
- Won arbitration award for client in a former senior executive's challenge to the company's long-term incentive plan and claims for recovery of severance payments under the company's ERISA severance plan. (May 2010)
- Resolved on an individual basis a class action brought under California law related to reimbursement of business expenses. (September 2009)
- Resolved on an individual basis a California wage and hour class action alleging misclassification of sales representatives. (December 2008)
- Resolved on an individual basis a class action brought under California law alleging misclassification of financial advisors. (July 2008)
- Won summary judgment in class action by pharmaceutical sales representatives alleging that they were misclassified as exempt filed in the U.S. District Court for the Central District of California. (October 2007) Affirmed by the Ninth Circuit. (2012)
- Won arbitration on claims of sex and age discrimination before American Arbitration Association. (August 2007)
- Won trial in Santa Clara County Superior Court in race discrimination case. (August 2006) Listed as one of *The Daily Journal*'s Top Defense Verdicts of 2006.
- Won summary judgment in San Mateo County Superior Court on whistleblower claim. (January 2005) Affirmed on appeal. (June 2006)
- Won summary judgment in disability discrimination, harassment and retaliation case in Santa Clara County Superior Court. (July 2005)
- Won summary judgment in wrongful termination/whistleblower claim in Santa Clara County Superior Court. (February 2005) Appeal dismissed. (January 2006)
- Won summary judgment in multimillion dollar stock option litigation in United States District Court, Northern District of California (San Jose Division). (August 2004)
- Won summary judgment on claim involving failure to timely exercise

stock options. (June 2004)

- Obtained dismissal of military discrimination case in Santa Clara County Superior Court. (June 2004)
- Prevailed in arbitration on amount of severance due to former employee under employment agreement. (April 2004)
- Prevailed at administrative hearing on claim of age discrimination. (December 2003)
- Won summary judgment on discrimination/harassment claim in San Diego Superior Court. (October 2003)
- Won jury verdict in favor of our client on all claims in a suit alleging pregnancy discrimination, retaliation (by terminating plaintiff's employment following the filing of discrimination and wage claims), and breach of a settlement agreement, following a 5-week jury trial in San Mateo County Superior Court. (December 2002) Affirmed on appeal. (June 2005)
- Won summary judgment in sexual harassment case on finding of no severe or pervasive harassment. (March 2002)
- Won arbitration award of $9.6 million in favor of our client on a claim that a former employee had taken kickbacks from customers and resellers during his employment. (December 2001)
- Won summary judgment in favor of our client in Federal Court in Columbus, Ohio on a defamation claim. Affirmed by the Sixth Circuit. (August 2001)
- Won arbitration in Connecticut in favor of our client on an employee's claims that he was discriminated against because of his age and constructively discharged, following a 5-day hearing. (January 2001)
- Won summary judgment in favor of our client and members of its board of directors on claims that false promises were made to induce the employee/shareholder of the acquired company to take stock in the acquiring company. Affirmed on appeal. (December 2000)
- Won summary judgment in sexual harassment and retaliation case on finding of no severe or pervasive harassment and no retaliation. (June 2000)
- Won summary judgment in a case by a former employee for breach of contract and fraud involving promises allegedly made to the employee to induce him to come to work at the company. (May 2000)
- Won unanimous jury verdict in favor of our clients on all claims in a suit alleging sexual harassment and retaliation following a 7-1/2 week jury trial in the San Mateo County Superior Court. (December 1999)
- Plaintiff claimed that her employment was terminated because of her sex, and that she was libeled. Following an 11-day jury trial, the jury returned a verdict in favor of our client on the sex discrimination claim, and did not award emotional distress or punitive damages. Although the jury awarded plaintiff damages for libel, the trial court overturned the verdict on a motion for judgment as a matter of law, resulting in a zero award to plaintiff. The case was settled following an appeal to the Ninth Circuit. (March 1999)
- Won a two-day court trial in the Bankruptcy Court for the Northern District of California in Oakland, recovering $60,000 borrowed by a former employee who claimed he had been constructively discharged, plus interest and all attorneys fees incurred. The decision was affirmed on appeal. (December 1998)
- Won defense verdict on all claims following two-week court trial in Santa Clara County Superior Court in a suit alleging national origin

and gender discrimination and retaliation against our client and two of its managers. (June 1998)

- Won jury verdict on all claims for client in Santa Clara County Superior Court on wrongful termination whistleblower claim seeking $1 million in damages. (April 1998)
- Won age and disability discrimination court trial in favor of client on all claims before Judge James Ware in the United States District Court in San Jose. (January 1998)
- Won jury verdict in favor of client on all claims following a two-week jury trial in Santa Clara County Superior Court alleging race harassment and retaliation. (September 1997)
- Won jury verdict in favor of our client on all claims following a two-week jury trial in Santa Clara County Superior Court alleging race harassment and retaliation. (August 1997)
- Won arbitration award on all claims in our client's favor in a suit alleging racial discrimination and retaliation. (November 1996)

SPEAKING ENGAGEMENTS

- Elimination of Bias in the Legal Profession (Funky Credits Day, 2014)
- Elimination of Bias in the Legal Profession (WILBA December meeting, 2013)
- California Employment Law (Morgan Lewis West Meets East, 2013)
- California New Laws and Developments for 2014 (Silicon Valley Association of General Counsel monthly meeting, 2013)
- Managing Accommodations and Leaves of Absence (Silicon Valley Association of General Counsel annual Meeting, 2012)
- Social Media in the Workplace (SHRM Annual Meeting, 2011)
- Top 10 things employers need to know (Monthly Meeting, 2011)
- Winning Employment Cases (CELC Meeting, 2011)
- Wage and Hour laws in the Technology Industry (Silicon Valley Association of General Counsel Annual Meeting, 2007)
- Mediating a sexual harassment case (San Francisco Bar Association, 2007)
- California Employment Law for Non-Profits (ACCA Pro Bono Clinic, 2006)
- New Developments in Employment Law (Silicon Valley Association of General Counsel Annual Meeting, 2005)
- Top 10 Wage and Hour Issues (ACCA Meeting, 2005)
- Hot topics in Employment Law (Palo Alto Paralegal Association monthly meeting, 2004)

practice accolades

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honors + affiliations

Finalist, *The Recorder*'s Litigation Department of the Year – Labor and Employment (2013)

Fellow, College of Labor and Employment Lawyers

Listed*, Chambers USA: America's Leading Lawyers for Business* (2007–2013)

Listed, California's Top Labor and Employment Lawyers, *The Daily Journal* (2010, 2012)

Listed, California's Top Women Litigators, *The Daily Journal* (2010, 2012)

Listed, *The Best Lawyers in America* (2007–2013)

Listed, *Northern California Super Lawyers* (2005–2013)

Noted in *The Legal 500* for Labor and Employment—Employment Law Counseling (2007)

Member, California State Bar Association

Member, San Mateo County Bar Association

education

Stanford Law School, 1975, J.D., Order of the Coif

University College, London University, 1973, LL.B., First In Class

Morgan Lewis

practice areas

Labor & Employment

bar admissions

California

court admissions

U.S. District Courts for the Northern and Eastern Districts of California

Michael D. Schlemmer

associate

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Fax: 650.843.4001

Michael D. Schlemmer is an associate in Morgan Lewis's Labor and Employment Practice. Mr. Schlemmer focuses his practice on employment litigation in federal and state courts, in arbitration, and before various state and federal administrative agencies. He represents employers in a broad range of employment matters, including wage-and-hour class and collective actions; discrimination, harassment, retaliation, failure to provide reasonable accommodation, and other employment-related claims; and non-competition, employee raiding, and trade secret issues. Mr. Schlemmer also regularly advises clients regarding employment law concerns, including matters involving termination, discrimination, harassment, wage and hour laws, trade secrets, and non-compete covenants. In addition, he provides employment-related guidance in mergers and acquisitions, and provides trainings on employment-law compliance.

Prior to joining Morgan Lewis, Mr. Schlemmer was an associate in the labor and employment practice of an international law firm, where he provided extensive litigation, counseling, transactional, and training services to high-technology and life sciences companies.

Mr. Schlemmer earned his J.D., with a certificate in law and technology, from the University of California, Berkeley, Boalt Hall School of Law in 2006. While in law school, he received the Prosser Prize in both "Legal Professions–Private Practice" and "Representing Low-Wage Workers." Mr. Schlemmer also participated on the *Berkeley Technology Law Journal* and externed with the Law and Motions Department of the San Francisco Superior Court. Prior to attending law school, he spent five years as a social worker, focusing on foster youth emancipation concerns. Mr. Schlemmer earned a B.A. in molecular, cellular, and developmental biology and a B.A. in psychology from the University of California, Santa Cruz in 1998.

Mr. Schlemmer is admitted to practice in California and before the U.S. District Courts for the Northern and Eastern Districts of California.

practice accolades

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honors + affiliations

Finalist, *The Recorder*'s Litigation Department of the Year – Labor and Employment (2013)

education

University of California, Berkeley, Boalt Hall School of Law, 2006, J.D.

University of California, Santa Cruz, 1998, B.A. (Molecular, Cellular, and Developmental Biology)

University of California, Santa Cruz, 1998, B.A. (Psychology)

Morgan Lewis

practice areas

Labor & Employment

International Labor and Employment

Social Media Law

Labor-Management Relations & Labor Disputes

bar admissions

England & Wales (Solicitor)

Nick Thomas

partner

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Fax: +44 (0)20 3201 5001

Nick Thomas is a partner in Morgan Lewis's Labour and Employment Practice. Nick advises on all aspects of employment law, including day-to-day human resources matters, data privacy, complex restructurings and reorganizations, and employee disputes. He has worked with clients across a wide range of sectors, including finance, private equity, insurance, information technology, transportation, power, facilities management, communications, and manufacturing.

Nick regularly advises on all employment aspects of complex acquisitions and outsourcing projects, often involving several jurisdictions. He has also been involved in a number of high-profile transactions related to distressed businesses.

He has a particular focus on labour relations issues, advising a range of clients on collective bargaining, industrial disputes (both domestic and international) and European Works Council issues.

Nick has litigation experience in both the High Court and the Employment Tribunal and has worked on several high-profile discrimination claims. His reported cases include the Court of Appeal decisions in *Redfearn v. Serco* and *Ministry of Sounds (Holdings) Limited v. Cook*. Nick has also been involved in a number of applications for injunctive relief, both in the context of team moves/restrictive covenant issues and to prevent unlawful industrial action.

He is regularly invited to speak on a range of labour and employment law topics, both in the UK and internationally, and has recently presented at conferences in the United States, Spain, Poland, and Belgium in addition to a number of London based events.

Prior to joining Morgan Lewis, Nick was a partner in the employment practice of another international law firm, resident in London.

Nick earned his LPC from Nottingham Law School, England, in 1998 and his LLB from the University of Nottingham, England, in 1996.

Nick is admitted to practice in England and Wales as a Solicitor.

practice accolades

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honors + affiliations

Listed, *Chambers UK: A Client's Guide to the UK Legal Profession* (2014)

Listed, *Legal 500 UK* (2013)

Member, Employment Lawyers Association

education

Nottingham Law School, England, 1998, LPC

University of Nottingham, England, 1996, LLB

Guest Speaker

Erika Frank
Vice President, Legal Affairs, and General Counsel

Erika Frank was named vice president of legal affairs in 2009. She joined the CalChamber in April 2004 as a policy advocate and began serving as general counsel shortly thereafter, leveraging her 10 years of combined legal, governmental and legislative experience.

Before assuming full-time general counsel responsibilities in late 2005, Frank also lobbied the legislative and executive branches on taxation, civil litigation and lawsuit abuse issues.

Frank leads CalChamber's Legal Affairs Department, which participates in court cases having a broad impact on California's economy and business climate—including workers' compensation reform, labor and employment, taxation, litigation reform and commercial free speech.

As CalChamber's subject matter expert on California and federal employment law, she oversees and contributes to CalChamber's labor law and human resources compliance publications; co-produces and presents webinars and seminars; and heads the Labor Law Helpline.

Through their active involvement on the front lines of California's legal and labor law compliance scene, Frank and her team are first to know when and how changes in law affect employers. She uses her employment law expertise to develop and facilitate training courses for HR professionals, and is a sought-after speaker at industry events.

Frank holds a B.A. in political science from the University of California, Santa Barbara, and received her J.D. from McGeorge School of Law, University of the Pacific.

Program Materials

Tab 1

Tab A

Hot Topics: Action Items and New Laws

Morgan Lewis
technology
may-rathon

presenter
Barbara J. Miller

May 21, 2014

Introduction

- Wage and Hour
  - AB 10: Minimum wage
  - AB 374: Domestic workers
  - AB 442: Penalties for minimum wage violations
  - AB 1386: Lien for DLSE award
  - SB 227: Penalties for failure to remit withholdings
  - SB 435: Premium for failure to provide "recovery period"
  - SB 462: Employers cannot recover attorneys fees
  - SB 776: Credits for public work projects
  - On-call pay: *Molina v. CPS Security Solutions*
  - Exempt status: *Heyen v. Safeway*
  - Independent contractors: *Jacques v. Farmers*
  - Vacation benefits: *Choate v. Celite Corp.*
  - Piece rate/commission pay: *Gonzales v. Downtown Motors*

Morgan Lewis

Introduction

- Leaves
  - SB 770: Expanded paid family leave
  - AB 11: Leaves for volunteer services
  - SB 288: Expanded protections for crime victims
  - San Francisco Family Friendly Workplace Ordinance
  - Pregnancy protections: *Sanchez v. Swissport*
- Discrimination and Retaliation
  - AB 556: Military and veteran statuses are protected
  - SB 400: Protection for victims of stalking or domestic violence
  - SB 530: Prohibits use of judicially dismissed or sealed records
  - SB 292: Sex harassment need not be motivated by sexual desire
  - Disability essential job functions: *Furtado v. State Personnel Board*
  - Mixed motive: *Harris v. City of Santa Monica*

Introduction

- Immigration Status Protections and More
  - AB 263: Omnibus set of protections
  - SB 666: More protections
  - AB 60: Drivers' licenses and more protections
- Arbitration Update
- Miscellaneous
  - SB 362: No state taxes on benefits for domestic partners
  - AB 1392: Expanded work sharing
  - SB 54: Prevailing wage for certain operators of stationary sources
  - AB 1384: Penalties for garment manufacturers for signage violations
  - AB 1136: Changes to prevailing wage laws
  - When are "gripes" protected?
  - Beware of retaliation: *Westendorf v. West Coast Contractors*
  - Beware of "zero tolerance" policies: *Brockbank v. U.S. Bancorp*

Introduction

- California Supreme Court Tracker
  - *Iskanian v. CLS Transportation*
  - *Salas v. Sierra*
  - *Duran v. U.S. Bank*
  - *Peabody v. Time Warner*
  - *Richey v. Autonation*

Wage and Hour

- AB 10: Minimum Wage
  - July 1, 2014: $9.00 per hour
    - *White collar exemptions: $720 per week; $37,440 per year*
  - January 1, 2016: $10.00 per hour
    - *White collar exemptions: $800 per week; $41,600 per year*
  - Computer Professionals
    - *January 1, 2013 (rounded up):*
      - $39.90 per hour; $83,133 per year; $6,928 per month
    - *January 1, 2014 (rounded up):*
      - $40.38 per hour; $84,131 per year; $7,011 per month
- Action Items
  - Implement process to increase pay on specified dates
  - Check computer professionals

Wage and Hour

- AB 241: Domestic Work Employees
  - Domestic work employees: People who work in private households, not residential care facilities or child care centers
  - Do not include casual babysitters or babysitters under 18 years old
  - Domestic work employers: People, including corporate officers or executives, who employ or exercise control over the wages, hours, or working conditions of domestic work employees
  - Personal attendants: People who spend 80% or more of their time caring for another person
  - Overtime required for personal attendants working more than 9 hours in a day or 45 hours in a week

Wage and Hour

- AB 442: Penalties for Minimum Wage Violations
  - Expanded penalties for the DLSE to collect
  - Applies to employers and other persons "acting individually, or as an officer, agent, or employee of another"
  - Applies where the person "pays or causes to be paid to any employee a wage less than the minimum"
  - Penalties
    - *Old – amount not paid plus $100 or $250 per pay period*
    - *New – old plus liquidated damages equal to amount not paid*
  - Recoverable by Labor Commissioner

Wage and Hour

- AB 1386: Liens for Labor Commissioner Awards
  - Amends Labor Code Section 98.3(g) to allow Labor Commissioner to record a lien on real property in connection with a final order
  - Can file the lien in any county where employer's real property may be located
  - Lien stays in place for 10 years or until the order amount is paid

Wage and Hour

- SB 390: Penalties for Failure to Remit Withholdings
  - Unlawful for employer to willfully, or with intent to, defraud
    - *Fail to remit withholdings or make payments required by an agreement*
  - Applies to the following types of withholdings
    - *Withholdings pursuant to applicable law (e.g., taxes)*
    - *Payments to health or welfare fund, pension fund, or vacation plan*
    - *Other plans for the benefit of the employees*
    - *Withholdings pursuant to collective bargaining agreement*
  - Penalties
    - *Imprisonment for failure to remit withholdings more than $500*
    - *$1,000 fine*
    - *Less than $500 is a misdemeanor*

Wage and Hour

- SB 435: Protection for "Recovery Period"
  - Amends Labor Code Section 226.7
  - Prohibits an employer from requiring an employee to work during a "recovery period"
  - Creates a one-hour premium for failure to provide recovery periods
  - Defines a recovery period: "[A] cooldown period afforded an employee to prevent heat illness"
  - Heat Illness Prevention (Title 8 C.C.R. 3395)
    - *When the outdoor temperature > 85°F, employers must provide employees who work outside access to a shaded area*

Wage and Hour

  - Heat Illness Prevention (cont.)
    - *Outside employees must have opportunity to take a cooldown rest in the shade of not less than 5 minutes to protect from overheating*
    - *Other than in the agriculture industry, cooling measures other than shade (e.g., misting machines) may be provided instead of shade*
- Action Items (for Employers with Outdoor Employees)
  - Read and become familiar with regulations
  - Implement processes to make sure employees get recovery periods
  - Implement processes for employees to report inability to take recovery periods
  - Revise rest policies and make sure they are distributed/communicated

Wage and Hour

- SB 462: No Attorneys' Fees for Employers
  - Amends Labor Code Section 218.5
  - If "prevailing party" is not an employee, court can award attorneys' fees only if it finds that employee brought the court action in bad faith
  - Employees may recover fees if they win regardless
- SB 776: Prevailing Wage Employer Payment Credits
  - Existing law allows for credits against prevailing wage obligations for certain contributions to specified plans, funds, or programs
  - New law allows for credits even if payments not made during same pay periods in which credits are taken

Wage and Hour

- *Mendiola v. CPS Security Solutions, Inc.*, 217 Cal. App. 4th 851 (2013).
  - Security guards at construction sites were required to be on call while they slept in a residential trailer at the site.
  - CPS only paid for on-call time spent actively investigating suspicious activity during the night.
  - Held that on-call hours were spent on the job site during the week.
  - CPS has sufficient control over the guards and just their presence deters theft/vandalism.
- But, CPS may deduct eight hours of uninterrupted "sleep time" from 24-hour shifts that guards work on weekends.
  - Employees are presumed to be sleeping for a portion of the 24-hour shift, and overtime adequately compensates for "waking" hours.

Wage and Hour

- Exempt Status: *Heyen v. Safeway Inc.*, 26 Cal. App. 4th 795 (2013).
  - In a misclassification case, an employee argued that the time he spent simultaneously performing nonexempt and exempt tasks should be counted as exempt.
  - Trial court gave the instruction that "if employee is engaged in concurrent performance of exempt and non-exempt work, you must consider it exempt or non-exempt based on primary purpose of the activity."
  - Court of appeal approved the jury instruction.

Wage and Hour

- Independent Contractors: *Beaumont-Jacques v. Farmers Group, Inc.*, 217 Cal. App. 4th 1138 (2013).
  - Plaintiff entered into an independent contractor (IC) agreement with the company. Following plaintiff's voluntary departure from the company, she filed a lawsuit against the company. Liability hinged on whether she was an IC or an employee.
  - Plaintiff had to conform to the company's regulations, operations, and standards. The company expected business plans and attendance at regular meetings, and had final authority to hire and dismiss any agent in plaintiff's district. But plaintiff exercised "meaningful discretion" in recruiting and training agents. She determined her own hours and vacation schedule, and supervised her own staff.
  - Held: The company did not have sufficient "control over the details" to establish an employment relationship.

Wage and Hour

- Salary Basis: *Negri v. Koning & Assocs.*, 216 Cal. App. 4th 392 (2013).
  - Plaintiff was a claims adjuster who was paid $29 per hour with no minimum guarantee, but he always worked at least 40 hours a week.
  - To qualify for the administrative exemption, employees must be engaged in specified duties and be paid on a salary basis.
  - Employer stipulated that it "never paid [plaintiff] a guaranteed salary"; rather, he was paid on an hourly rate of $29 per hour per claim basis.
  - Held: Plaintiff did not qualify for administrative exemption because plaintiff was not paid a "predetermined amount" and his pay was subject to reduction based on the "quantity of work performed." (Reductions based on quantity or quality of work not permitted.)
  - Court acknowledged that an exempt employee may be paid extra for extra work without losing the exemption, but the employer must pay a guaranteed minimum to qualify.

Wage and Hour

- Waiver of Vacation Benefits: *Choate v. Celite Corp.*, 215 Cal. App. 4th 1460 (2013).
  - Collective bargaining agreement (CBA) waiver of vested vacation pursuant to Labor Code Section 227.3 must be clear and unmistakable.
  - Waiting time penalties not proper because standard for waiver had not been previously addressed by court.

Wage and Hour

- Incentive Compensation – Minimum Wage Plus
  - *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 3d 36 (2013).
    - *Need to make sure that minimum wage is paid for nonproductive time.*
  - *Bluford v. Safeway Inc.*, 216 Cal. App. 4th 864 (2013).
    - *Need to make sure that minimum wage is paid for rest breaks.*
  - Currently, any type of incentive compensation pay scheme that is not minimum wage plus incentive is risky.

Leaves of Absence

- SB 770: Expanded Paid Family Leave (PFL)
  - Takes effect July 1, 2014
  - Expands PFL to cover paid leave for caring for the following seriously ill family members:
    - *Grandparent, grandchild, sibling, and a broad range of "parents"*
    - *Parent = biological, foster, or adoptive parent; parent-in-law (parent of a spouse or domestic partner); stepparent; legal guardian; or other person who stood* in loco parentis *to the employee when the employee was a child*
    - *A grandparent is the parent of the employee's parent*
      - Joe's partner is Kevin. Kevin's stepfather is Rick. Rick is married to Sue. Sue was raised by her aunt, Kim (who never actually adopted her or was appointed her legal guardian). Does Joe get benefits to care for Kim?
    - *Sibling = a person related to another by blood, adoption, or affinity through a common legal or biological parent*

Leaves of Absence

- SB 770 Action Items
  - Make sure to provide PFL brochure in the expanded situation.
  - Revise handbook/policies if they refer to old PFL coverage.
  - Make no guarantees (pro/con) whether someone will get benefits from the EDD.
  - Decide what kind of leave (if any) an employer will grant to someone who is not otherwise entitled to a leave, e.g., if an employee wants to take two months to take care of a dying sibling. Make sure to not discriminate as to whom employer grants/denies leave.

Leaves of Absence

- SB 288: Expanded Leave for Crime Victims (Including Victim's Spouse, Parents, Children, Siblings, or Guardians)
  - Victims may take leave to appear in court at any proceeding where a right of the victim is at issue (plea, sentencing, release decision, etc.)
  - Defined list of 11 different types of crimes whose victims are protected
  - Reasonable advance notice required unless not feasible
  - Employee has a reasonable time after unscheduled absence to provide certification of the protected reason for the absence
  - Employer must maintain confidentiality "to the extent allowed by law"
  - Employee may use vacation, PTO, or other available leave
- No Retaliation or Discrimination for Taking Time Off
  - Reinstatement and reimbursement of lost wages and benefits
  - Potential misdemeanor

Leaves of Absence

- AB 11: Reserve Peace Officers and Emergency Rescue
  - Currently, employers of 50 or more employees must provide 14 days of leave per calendar year to volunteer firefighters to engage in fire or law enforcement training
  - AB 11 expands the law to reserve peace officers and emergency rescue personnel
  - Allows 14 days of leave for the purpose of engaging in fire, law enforcement, or emergency rescue training
    - *Continues to apply only to employers with 50 or more employees*
- SB 288 and AB 11 Action Items
  - Update policies and handbook, if applicable
  - Implement procedures to grant protected leaves

Leaves of Absence

- *Sanchez v. Swissport*, 213 Cal. App. 4th 1331 (2013)
  - An employee with a high-risk pregnancy exhausted her CFRA and PDL before she gave birth. Her employer discharged her for failure to return to work
  - The employee sued, claiming pregnancy and disability discrimination, as well as failure to accommodate
  - The trial court sustained a demurrer finding that the employee could not work at all; thus no accommodation existed
  - The court of appeal reversed
    - *A leave is a reasonable accommodation if it does not impose an undue hardship*
    - *Leaves for disability related to pregnancy are not limited by the PDL or CFRA*
- Action Item: Make sure reasonable accommodation procedure contemplates leaves and does not cut them off automatically

Discrimination/Retaliation/Harassment

- SB 292: Sexual Harassment Defined
  - Amends the definition of "harassment" because of sex stated at Gov't Code Section 12940(j)(4)(C)
  - New definition states that "Sexually harassing conduct need not be motivated by sexual desire"
- AB 556: Military and Veteran Protection
  - Adds military status and veteran status to the list of protected classes under Gov't Code Section 12940(a)
  - Defined as a member or veteran of the U.S. Armed Forces, U.S. Armed Forces Reserve, U.S. National Guard, and California National Guard
- Action Items
  - Update policies and handbook

Discrimination/Retaliation/Harassment

- SB 530: Rehabilitation of Criminal Offenders
  - Prohibits employer from asking an applicant about past convictions or using such convictions as a factor in determining any condition of employment
    - *Includes convictions that have been judicially dismissed or ordered sealed pursuant to Penal Code Sections 1203.4, 1203.4a, 1203.45, and 1210.1*
  - Prohibition does not apply to jobs where
    - *The employer is required by law to obtain conviction information*
    - *The applicant would be required to possess or use a firearm in the course of his or her employment*
    - *The individual is prohibited by law from holding the position sought regardless of whether the conviction has been dismissed or sealed*
    - *The law prohibits the employer from hiring an applicant who has been convicted of a crime*
  - Action Item: Update all versions of job applications and postings

Discrimination/Retaliation/Harassment

- SB 400: Protections for Domestic Violence Victims
  - Prohibits an employer from discharging, discriminating, or retaliating against an employee who is a victim of
    - *Domestic violence (current law)*
    - *Sexual assault (current law)*
    - *Stalking (new law)*
  - Permits time off from work to obtain or attempt to obtain help to ensure the health, safety, or welfare of the employee or his or her child (current law – added stalking)
  - Prohibits discharge, discrimination, or retaliation because of employee's status as a victim of domestic violence, sexual assault, or stalking if:
    - *Employee provides notice of status, or*
    - *Employer has actual notice of status*

Discrimination/Retaliation/Harassment

- SB 400: Protections for Domestic Violence Victims (cont.)
  - Requires reasonable accommodation for safety of victim while at work
    - *Transfers, reassignments, schedule changes, new contact information, new workstations, locks, assistance in documenting the issues, safety procedures, adjustments to job structure, workplace facility modifications*
    - *Do not need to accommodate employees who have not disclosed status*
    - *In determining reasonableness, need to consider exigent circumstances or danger to employee*
    - *Long set of accommodation requirements and processes*
  - Adds "stalking" to the types of victims who can get time off pursuant to 230.1

Discrimination/Retaliation/Harassment

- SB 400 Action Items
  - Develop action plan to address domestic violence, stalking, or sexual assault
  - Cannot address safety issues to other employees by removing "victim" from the workplace
  - Update reasonable accommodation procedures to include employee safety and other issues relating to victim status
  - Implement process to address safety issues relating to domestic violence, sexual assault, or stalking
  - Make sure that procedures include "stalking" in list of reasons an employee can take protected leave

Discrimination/Retaliation/Harassment

- *Furtado v. State Personnel Board*, 212 Cal. App. 4th 729 (2013).
  - A job function can be "essential" even if rarely performed
  - Furtado was a peace officer required to obtain an annual certification for use of a baton
  - Furtado suffered injuries that left him unable to use a baton
  - The court found that use of a baton was an essential job function, even if the baton was, in practice, rarely used
- Important to effectively identify essential job functions before an employee becomes disabled

Discrimination/Retaliation/Harassment

- *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013).
  - Bus driver alleged that she was fired because of her pregnancy
  - City requested mixed-motive jury instruction, but the court refused and jury returned substantial verdict for employee
  - Court of appeal: Mixed-motive instruction was legally correct and refusal to give it was prejudicial error
- California Supreme Court: If employer would have made the same decision absent discrimination . . .
  - Court cannot award damages
  - Court cannot award back pay
  - Court cannot order reinstatement
  - But, plaintiff may still be entitled to injunctive relief, if appropriate, and may still be eligible to collect attorneys' fees and costs

Immigration-Related Protections

- Prohibits an employer from retaliating or taking adverse action because the employee or applicant complained about his or her wages or working conditions
  - Requesting more or different documents than are required by the federal government
  - Using the federal e-Verify system to check the employment authorization status of a person at a time or in a manner not required by the federal government
  - Threatening to file or filing a false police report
  - Threatening to contact or contacting immigration authorities
- Does not include conduct undertaken at the express and specific direction or request of the federal government

Immigration-Related Protections

- Prohibits an employer from taking any adverse action against an employee because he or she updates or attempts to update his or her personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job
  - If an employee provides a new or updated Social Security Number, the employer cannot fire, discriminate against, retaliate against, or take any adverse action against that employee

Immigration-Related Protections

- Provides that engaging in an unfair immigration-related practice against a person within 90 days of the person's exercise of rights protected under the Labor Code or local ordinance shall raise a rebuttable presumption of retaliation.

Immigration-Related Protections Remedies

- Private right of action
- Recovery of up to $10,000 penalty
- Recovery of attorneys' fees and costs
- Suspension or revocation of an employer's business license
- Disbarment of attorneys who engage in prohibited conduct against parties or witnesses in a lawsuit
- Criminal extortion

Immigration-Related Protections

- Allows undocumented immigrants to obtain drivers' licenses provided that they meet all other licensing requirements and can provide satisfactory proof of their identity and California residency
  - These licenses will have a special marking and notice on the front
- Prohibits discrimination against an individual who holds or presents one of these new licenses
- These licensing changes are operative on January 1, 2015 or on the date the DMV director executes a specified declaration, whichever is sooner
- Caution: Cannot use these licenses for I-9 purposes!

San Francisco Family-Friendly Workplace Ordinance

- Gives employee caregivers the right to request a change to their working arrangements.
  - An employee must have worked six months and as few as eight hours/week.
  - Applies to any employer who regularly employs 20 or more employees and to the employer's agents; unclear whether this counts San Francisco–based employees only.
  - Request must be in writing and explain how change will meet caregiving responsibilities.

San Francisco Family-Friendly Workplace Ordinance

- Employer obligations
  - Meet with the employee within 21 days and respond in writing within 21 days of meeting.
- Undue hardship: request can be denied based on the following:
  - Increase in costs;
  - Inability to organize work among remaining employees or meet customer demands; and
  - Insufficiency of work during the time requested by an employee.

San Francisco Family-Friendly Workplace Ordinance

- Employer denial
  - Must be in writing and explain the reason for denial; and
  - Must notify the employee of his/her right to request reconsideration.
- Reconsideration
  - The employee must seek reconsideration within 30 days of a denied request.
  - The employer must meet again with the employee within 21 days of his/her request for reconsideration and respond in writing within 21 days of that second meeting to discuss request.

Arbitration Single-Plaintiff

- California courts remain reluctant to enforce arbitration agreements but will do so unless they contain "unconscionable provisions"
  - Must be mutual (no exclusion for IP or trade secrets)
  - Neutral arbitrator
  - No limits on statute of limitations
  - No limits on remedies
  - Employer must pay costs of arbitration

Arbitration
Class/Collective/PAGA Waivers

- Class and collective action waivers are enforceable under federal law
- We are waiting for the California Supreme Court to decide if class/collective action waivers are enforceable in California
- We are waiting for the California Supreme Court to decide if class/collective action waivers apply to claims under the Private Attorneys General Act (PAGA)

Employer Liable for "Off Duty" Conduct
Purton v. Marriott Int'l, Inc., 218 Cal. App. 4th 499 (2013)

- Employee became intoxicated at Marriott's annual holiday party. Marriott attempted to limit alcohol consumption but limits were not strictly enforced. The employee arrived home safely from the party, but then left his house to drive a co-worker home and struck another car, killing its driver.
  - The court of appeal held that a jury could find Marriott liable because the proximate cause of the injury (alcohol consumption) occurred within the scope of employment (a party held to increase employee morale where Marriott permitted and failed to control alcohol consumption).

Employer Liability for "Off-Duty" Conduct
Moradi v. Marsh USA, Inc., 219 Cal. App. 4th 886 (2013)

- Employee used her personal vehicle both to commute and to make client sales calls and presentations
- On her way home from work she decided to stop for frozen yogurt and a yoga class
- She had an automobile accident turning into the parking lot to the yogurt shop
- The court held that the employer will be liable for automobile accidents in a personal car used for work purposes in the course of the employee's engaging in foreseeable, minor personal errand deviations from the employee's commute to and from work

Areas to Watch

- Independent Contractors
- Unpaid interns
- Work hours
  - Logging on and off of computers
  - Undergoing bag checks at end of shift
  - Changing into work clothes or putting on protective equipment
  - Traveling between work locations
  - Undergoing security screening

Areas to Watch

- Make sure your paychecks and paystubs comply with California law
  - Employer must keep exact duplicate of paystub
- Make sure your handbooks comply with California law or that you have California supplements
- Make sure you pay employees correctly and when due
  - Commissions on termination
  - Paycards
  - No mandatory direct deposit

Areas to Watch

- BYOD
- Reimbursement of reasonable and necessary business expenses
- Commission plans
  - Must comply with California's commission plan requirements
- Floating holidays
- Suitable seats

Areas to Watch

- Make sure you are complying with California's new pregnancy and disability regulations and giving out the new certification forms and Notices A and B

Wage and Hour Class Actions Typical Claims

- Regular rate (bonuses, extra payments)
- Rounding
- Timing of payment (incentive compensation)
- Failure to pay minimum wage (incentive compensation systems)
- Off the clock
- Meal and rest periods
- Misclassification
- Wage statements

Tab B

Supreme Court Cases to Watch

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presenter
RJ Hendricks

May 21, 2014

Iskanian v. CLS Transportation

- Court of appeal affirmed trial court's order compelling individual arbitration on the grounds that the U.S. Supreme Court decision in *Concepcion* "conclusively invalidates the *Gentry* test" regarding class action waivers and rejected application of NLRB's decision in *D.R. Horton* prohibiting class and collective action waivers as violating employees' Section 7 rights.
- Are the *Gentry* limitations on class and representative waivers valid after *Concepcion*?
- Does *D.R. Horton* create a "public policy" basis to not enforce class or representative waivers?

Morgan Lewis

Salas v. Sierra

- Court of Appeal affirmed summary judgment in favor of employer in FEHA disability discrimination/failure to accommodate action on grounds of after-acquired evidence and unclean hands, based on plaintiff's use of false I-9 documentation (social security card) to obtain employment in the first instance.
  - Use of false SS card "went to the heart of the employment relationship."
  - Because Salas was not lawfully qualified for job, "cannot complain that he was not hired."

Salas v. Sierra

  - Senate Bill 1818 provision (Labor Code Section 1171.5) that undocumented workers are entitled to "all protections, rights, and remedies available under state law" does not require a different result because existing law precluded an employee who misrepresented a job qualification imposed by the federal government, such that he or she was not lawfully qualified for the job, from maintaining a claim for wrongful termination or failure to hire.
- Will the impact of this ruling would so undermine the purposes of the FEHA that some public policy exception should be made to after-acquired evidence and unclean hands defenses?

Duran v. U.S. Bank

- Court of appeal reversed $15 milion judgment in plaintiff's favor on grounds that "trial plan was fatally flawed" and also reversed order certifying class.
  - Sampling used by court was not random and resulted in 43.3 percent margin of error.
  - Defendant precluded from presenting evidence as to 239 absent class members who were not a part of the 21-person sample approved in the court's trial plan.

Duran v. U.S. Bank

- In a wage and hour misclassification class action, does the defendant have a due process right to assert its affirmative defense against every class member, and if so, can a plaintiff ever satisfy the requirements for class certification?
- Can statistical sampling, surveys, and other forms of representative evidence be used to prove classwide liability in a wage and hour misclassification case?
- In wage and hour class action, can *liability* be determined by "trial by formula?"

Peabody v. Time Warner

- On appeal from district court order granting summary judgment in employer's favor, Ninth Circuit Court of Appeals certified the following question to the California Supreme Court:
  - To satisfy California's compensation requirements, can an employer average an employee's commission payments over certain pay periods when it is equitable and reasonable for the employer to do so?

Peabody v. Time Warner

- Plaintiff made $20k base, plus commissions (actually paid nearly $75k over 10-month employment), and argued that "the minimum wage threshold must be earned within each workweek and paid within the corresponding pay period for which the exemption is claimed." This would result in the "commission paid exemption" applying only in those pay periods where commission was actually paid.
- However, if earnings are calculated based on the period in which they were earned rather than actually paid, then exemption easily applied throughout plaintiff's employment.

Richey v. Autonation

- Court of appeal vacated trial court's confirmation of arbitrator's award in favor of employer who terminated an employee on California Family Rights Act leave based on the employer's honest belief that employee was violating company policy and abusing medical leave.
- Does the "honest belief defense" provide a complete defense to the employee's claim that the employer violated the CFRA (Gov't. Code §§ 12945.1, 12945.2)?
- What is the proper standard of judicial review of an arbitration award involving an employee's "unwaivable rights?"

Kilby v. CVS Pharmacy Inc.

- On appeal from district court order granting summary judgment to employer in a "seating" case, the Ninth Circuit Court of Appeals certified the following questions to the California Supreme Court:
  - Does the phrase "nature of the work" refer to individual tasks an employee performs during the day, or should it be construed "holistically" to cover the entire range of an employee's duties?
  - Should an employer's business judgment, the physical layout of the workplace, or the physical characteristics of the employee be considered when determining whether the nature of the work "reasonably permits" the use of a seat?
  - Does a plaintiff need to prove what could constitute "suitable seats" to show the employer has violated the law?

Baltazar v. Forever 21, Inc.

- Court of appeal reversed trial court's denial of motion to compel arbitration, where mandatory arbitration clause in an employment application that provided as a condition to employment: "I agree to submit to binding arbitration all disputes and claims arising out of the submission of this application"
- Is such an agreement unenforceable as substantively unconscionable for lack of mutuality, or does the language create a mutual agreement to arbitrate all such disputes?

Patterson v. Domino's Pizza

- Court of appeal reversed summary judgment in favor of franchisor Domino's on grounds that Domino's requirement that franchisee use its training system and manager reference guide, and Domino's ability to control franchisee's hours of operation, among other things, created a triable issue of fact as to whether franchisee was Domino's agent despite language in franchise agreement.
- Does practical control over a franchisee's operations make a defendant franchisor vicariously liable for tortious conduct by a supervising employee of a franchisee where there is no contractual control over the employee?

Tab C

Preventing and Defending Whistleblower Claims

Morgan Lewis
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presenters
Daryl S. Landy
Eric Meckley

May 21, 2014

The Rise of Whistleblower Claims

- California and federal whistleblower claims continue to increase
  - Whistleblower claims under Cal. Lab. Code § 1102.5 as reported by the DLSE:
    - *2005 → 88 complaints*
    - *2012 → 445 complaints*
  - According to OSHA statistics, federal whistleblower claims have been steadily increasing since 2009
  - The Securities and Exchange Commission's (SEC's) Office of the Whistleblower reports that California is one of the primary states from which whistleblowing tips have originated

Morgan Lewis

The Rise of Whistleblower Claims

- Jury verdicts and settlements continue to trend toward large payouts.
  - $1.9 million settlement in April 2014 by five California masonry companies and two individuals in a federal False Claims Act suit, brought by a former employee, alleging that defendants filed fraudulent claims to subcontract on projects at U.S. Marine Corps facilities.
  - $6 million verdict in March 2014 in California federal district court for a Playboy Enterprises accounting executive who alleged that she was fired in retaliation for refusing to accrue bonuses for top executives because the board had not approved them and for reporting actual and suspected frauds and improprieties in violation of the Sarbanes-Oxley Act (SOX).
  - $1 million verdict in February 2014 for a Napa County Hospital psychiatrist who alleged violations of Cal. Lab. Code § 1102.5 based on her termination following her complaints regarding the hospital's policy of using questionable methods to declare mentally ill patients competent for trial.

California's Many Whistleblower Statutes

- Numerous Provisions Provide Protections to Whistleblowers.
  - Cal. Lab. Code § 1102.5 – California's primary whistleblower protection provision that was amended in 2014 to expand protections.
  - Cal. Lab. Code § 98.6 – Protects employees who have claims prosecuted by the Labor Commissioner, file with the DFEH, institute a proceeding, or testify in such a proceeding.
  - Cal. Lab. Code §§ 6310 and 6399.7 – Prohibit discharge of or discrimination against employees who engage in protected conduct regarding occupational safety.
  - Cal. Gov. Code § 9414(a)(2) and (b) – Unlawful to discharge, threaten to discharge or harass an employee because he/she may become a witness before a committee of the legislature.
  - Cal. Gov. Code § 8547 (California Whistleblower Protection Act) – Protects state government employee whistleblowers from retaliation by their employers.
  - Cal. Health & Saf. Code § 1278.5 and Cal. Lab. Code §§ 6303, 6310, and 6311 – Healthcare industry–specific whistleblower provisions.
  - Cal. Fin. Code § 6530 – "Savings Association"–specific whistleblower provision.

California Labor Code § 1102.5

- Cal. Lab. Code § 1102.5 – Covers public and private employers and, before the S.B. 496 amendment, provided generally:
  - No retaliation against an employee for reporting to a government or law enforcement agency if the employee has reasonable cause to believe that the information discloses a statutory violation
  - No retaliation against an employee for refusing to participate in an activity that would result in a violation of state or federal law

S.B. 496 – Purpose of Amendments

- Public policy rationale behind S.B. 496 (effective 1/1/2014).
  - Explicitly designed to expand protections for whistleblowers in the public and private sectors by closing loopholes and clarifying rules and procedures in filing a claim and seeking redress in a civil action.
  - Legislature intended to improve protections by clarifying rights under the California Whistleblower Protection Act.
  - Gives greater guidance to employers, administrative agencies, and courts.

S.B. 496 – Amendments to § 1102.5

- Expanded § 1102.5 to include internal reporting.
  - Employers are now prohibited from retaliating against employees who internally report conduct they suspect is illegal. Previously, this prohibition only applied when employees reported the suspected violation to external authorities.
- Provides protection to employees who reasonably believe and report violations of *local* laws, rules, or regulations.
  - § 1102.5 previously covered violations of only state or federal laws, rules, or regulations.
- Added protection prohibiting employers from engaging in anticipatory retaliation.
  - An employer cannot take action against an employee based on the belief that he/she might report suspected illegal activity.

S.B. 496 – Amendments to § 1102.5 (cont'd)

- The amendment also expanded the cast of characters prohibited from retaliating against employees.
  - Any person acting on an employer's behalf will be prohibited from retaliating against an employee who engaged in protected whistleblower activity.
- Covers employees whose job duties include disclosing or reporting suspected violations.
  - E.g., compliance officers.

Protected Conduct Under § 1102.5

- Disclosures of reasonably based suspicions of illegal activity
  - Disclosure may be internal or external
    - ***Internal*** *disclosures include those to a person with authority over the employee or with authority to investigate, discover, or correct violations or noncompliance*
    - ***External*** *disclosures include those to a government or law enforcement agency*
  - Violation may be of federal, state, or local laws, rules, or regulations
- Testifying before any public body conducting an investigation, hearing, or inquiry
- Discouraging an employee from, or retaliating against an employee for, disclosing information
  - Applies where the employee has "reasonable cause to believe" that the information discloses a violation of a local, state or federal statute, rule, or regulation or when the employee refuses to participate in an activity that would result in a violation of the same.

Exhaustion of Administrative Remedies

- Is administrative exhaustion required?
  - In the past, California appellate courts have disagreed over whether administrative exhaustion by filing with the Labor Commissioner is required prior to filing a suit for damages under § 1102.5.
    - *In* MacDonald v. State of California*, 219 Cal. App. 4th 67 (3d Dist. 2013), the court held that before filing suit in Superior Court for retaliatory discharge in violation of § 1102.5, an employee must first exhaust administrative remedies set forth in Cal. Lab. Code § 98.7. However, this opinion was ordered depublished (not citable).* Cf. Lloyd v. County of Los Angeles*, 172 Cal. App. 4th 320 (2009) (administrative exhaustion not required).*
  - Federal district courts in California also have disagreed regarding exhaustion under § 1102.5.
    - See, e.g., Neveu v. City of Fresno*, 392 F. Supp. 2d 1159 (E.D. Cal. 2005) (administrative exhaustion required);* but cf. Turner v. City & County of San Francisco*, 892 F. Supp. 2d 1188 (N.D. Cal. 2012) (administrative exhaustion not required).*

Exhaustion of Administrative Remedies (cont'd)

- Is administrative exhaustion required?
  - The disagreement regarding exhaustion may be moot because as of January 1, 2014 Cal. Lab. Code § 244 provides that "[a]n individual is not required to exhaust administrative remedies or procedures in order to bring a civil action under any provision of [the Labor] [C]ode, unless that section under which the action is brought expressly requires exhaustion of an administrative remedy."
    - See, e.g., Stone v. Walgreen Co., *2014 WL 1289470 (S.D. Cal. Mar. 26, 2014) (finding that Cal. Lab. Code § 244 unequivocally clarified that exhaustion is not required before filing a § 1102.5 claim, and that § 244 applies retroactively to claims filed prior to its implementation).*
  - However, there are cases that continue to read an exhaustion requirement into § 1102.5.
    - See, e.g., Quinlan v. Power-One, Inc., *2014 WL 129226 (N.D. Cal. Jan. 14, 2014) (granting motion for judgment on the pleadings where the plaintiff failed to exhaust administrative remedies under Cal. Lab. Code § 98.7 before filing a claim pursuant to § 1102.5).*

Remedies and Penalties

- An employer may be ordered to –
  - Pay actual damages (Cal. Lab. Code § 1105).
  - Reinstate the employee with backpay and benefits (Cal. Lab. Code § 98.6(b)) and/or pay a civil penalty of up to $10,000 for each violation if the employer is a corporation or limited liability company (Cal. Lab. Code § 1102.5(f)).
- Because wrongful termination in violation of public policy claims are tort actions, additional remedies, such as punitive damages, are also potentially available.
- Criminal penalties against an employer "or any other person or entity that violates" § 1102.5 include a misdemeanor conviction punishable by up to one year in prison or a fine of up to $1,000 or both for individuals and a fine of up to $5,000 for a corporation. Cal. Lab. Code § 1103.
  - An employer is also responsible for the acts of all of its managers, officers, agents, and employees. Cal. Lab. Code § 1104.

Remedies and Penalties (cont'd)

- Employees may also bring derivative claims under the Private Attorneys General Act (Cal. Lab. Code § 2699)
  - Empowers "aggrieved employees," after complying with statutory prerequisites, to sue their employer to recover civil penalties for California Labor Code violations on behalf of themselves and other employees against whom the alleged violations were committed. Cal. Lab. Code § 2699.
- And under the California Unfair Competition Law (Cal. Bus. & Prof. Code § 17200)
  - Makes it unlawful to engage in an "unlawful, unfair or fraudulent business act or practice," which arguably includes when a business has engaged in an unlawful practice of retaliating against whistleblowers. The UCL statute of limitations is four years after the cause of action accrues. Cal. Bus. & Prof. Code § 17208.

California Whistleblower Developments

- *Howard v. Contra Costa County*, 2014 WL 824218 (N.D. Cal. Feb. 28, 2014).
  - Plaintiff, an employee of the County Sheriff's Office, alleged that he was retaliated against in violation of § 1102.5 after he reported misconduct by a fellow deputy that led to the deputy's criminal prosecution.
  - The court denied a motion to dismiss plaintiff's § 1102.5 claim, (1) finding that no administrative exhaustion was required, and (2) rejecting the argument that plaintiff's alleged whistleblowing activity was within his general job duties. The court noted in a footnote the recent amendment to § 1102.5 regarding performance of job duties.

California Whistleblower Developments (cont'd)

- *Thomas v. Costco Wholesale Corp.*, 2014 WL 819396 (C.D. Cal. Mar. 3, 2014).
  - A former pharmacy technician at Costco alleged violations of § 1102.5 after he was terminated nearly two years after filing reports of suspected misconduct to the Bureau of Narcotic Enforcement and Drug Enforcement Agency.
  - In denying defendant Costco's motion for summary judgment, the court held that the mere absence of temporal proximity between activity protected by § 1102.5 and the alleged retaliatory conduct does not negate the existence of the causal connection necessary to establish a prima facie claim of whistleblowing under § 1102.5.

California Whistleblower Developments (cont'd)

- *Stanley v. Bobo Construction, Inc.*, 2014 WL 1400957 (E.D. Cal. Apr. 10, 2014).
  - Independent contractor brought claims alleging that he was discharged as a subcontractor because he complained about potentially hazardous and toxic contaminants at the project site and requested protective measures.
  - The court dismissed plaintiff's claim for interference with prospective economic advantage based on a violation of § 1102.5 as the required independently wrongful conduct on the grounds that § 1102.5 does not afford protections to independent contractors.

California Whistleblower Developments (cont'd)

- *Love v. Permanente Medical Group*, 2013 WL 6731463 (N.D. Cal. Dec. 19, 2013).
  - Plaintiff, a clinical social worker, alleged that she was discharged for complaining about the hospital's failure to provide a safe environment after a patient made death threats against her.
  - The court held that she failed to state a claim under Cal. Health & Saf. Code § 1278.5 because her complaints pertained only to her employer's alleged failure to protect her own safety, and not generally to "quality of care, services, or conditions at the facility."

Additional California Law Claims

- Common law claims
  - Wrongful termination in violation of public policy (tort claim)
- California False Claims Act
  - Cal. Gov. Code § 12653 – Prohibits retaliation for disclosing information about false claims made to the government
    - *Employers are prohibited from adopting any rule or policy that prevents employees from disclosing information to a government or law enforcement agency, or in furthering a false claims action under Cal. Gov. Code § 12652*
    - *Also protects employees from discrimination or retaliation for engaging in such activities in the terms and conditions of their employment*
    - *Amended effective in 2013 to include agents and contractors*

Claims Under Federal Law

- Whistleblower Laws
  - Dodd-Frank Wall Street Reform Act (2010)
  - SOX (2002)
- False Claims Act/Qui Tam (31 U.S.C. §§ 3729 et seq.)
- Antiretaliation Provisions in Employment Laws
  - E.g., FLSA, 29 U.S.C. § 215(a)(3); Title VII, 42 U.S.C. § 2003(a); ERISA, 29 U.S.C. §§ 1132(a), 1140
- Traditional Labor Laws

Dodd-Frank and SOX Developments in California

- *Banko v. Apple, Inc.*, 2013 WL 7394596 (N.D. Cal. Sept. 27, 2013)
  - Plaintiff brought claims under the Dodd-Frank Act based on a private claim for relief granted by SOX and Cal. Lab. Code § 1102.5 alleging that he was terminated in retaliation for reporting instances of fraud and embezzlement that he believed violated Dodd-Frank and SOX.
  - The court found that the plaintiff did not state a claim under Dodd-Frank because he did not file a complaint with the SEC, and thus was not a "whistleblower" subject to protection under Dodd-Frank.
    - *Likewise, the court also dismissed plaintiff's claim under § 1102.5 to the extent it was based on alleged violations of Dodd-Frank and SOX.*

Federal False Claims Act Developments in California

- *Driscoll v. Superior Court*, No. MCV057183 (Cal. Ct. App., 5th App. Dist. Jan. 30, 2014).
  - Plaintiff sought to bring a federal False Claims Act claim in California state court based on allegations that he was demoted and then terminated because of his complaints about billing practices that he believed were fraudulent against Medicare and Medi-Cal.
  - The court refused to dismiss the cause of action on jurisdictional grounds, finding that state courts hold concurrent jurisdiction over claims under the federal False Claims Act.

Best Practices to Prevent and Defend Against Whistleblower Claims

- Revise internal policies to align with amendments to § 1102.5.
  - Who is covered, what conduct is prohibited, to whom they can complain to be protected.
- Recognize when an employee is reporting unlawful activity, and be alert to issues relating to:
  - Potential violations of law (e.g., sales practices, rules and reporting obligations, mail or wire fraud).
  - Accounting, bookkeeping, and recording.
  - Potential violations of the company's corporate compliance, code of conduct, or ethics program.
- Consider the protected status of an employee who takes confidential documents or information.
  - Is he/she a potential whistleblower? What documents or data did he/she take, and why?
- Consider reports to agencies other than the SEC or federal criminal authorities.
- Employee relations issues often mask broader issues.
- Employees facing investigation or discipline are encouraged to report issues that may protect them as whistleblowers.

Best Practices to Prevent and Defend Against Whistleblower Claims (cont'd)

- Train and educate managers and supervisors to be able to identify complaints.
- Train and educate managers and supervisors about proper procedures when a worker makes a complaint.
- Follow up on complaints, including conducting a fair and thorough investigation of whether there is any violation of federal, state, or local laws, rules, or regulations.
- Maintain good records and documentation of employee performance from the outset.

Tab D

Incentive Compensation Plans

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May 21, 2014

California Labor Code § 2751

Morgan Lewis

Requirements

- Requirements apply "where the contemplated method of payment of the employee involves commissions."
  - Must be in writing.
  - Must "set forth the method by which the commissions shall be computed and paid."
  - Employer must sign.
  - Employer must give signed copy to employee and obtain signed acknowledgment of receipt.
  - If term of plan expires and parties continue to work, all existing terms remain in effect until plan is superseded or employment is terminated.

Applicability

- Section 2751 applies only to "commissions."
- Defines "commissions" by citation to Section 204.1:
  - "Commission wages are compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof."
- Can be a percentage (5% of sales) or fixed amount ($150 per sale).
- Excludes "[t]emporary, variable incentive payments that increase, but do not decrease, payment under the written contract."

Changes in the Commission Plan

- Update agreements in advance, if possible.
- If the contract expires without a new signed agreement, the terms of the old agreement could remain in force unless the employer expressly states otherwise.
  - "In the case of a contract that expires and where the parties nevertheless continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party."

Commission Plan Expires

- What do you do if the plan year has expired and you are not ready to roll out the new plan?
- Send email/notice to plan participants:
  - "As stated in your sales plan, the plan term expires effective December 31, 20__. No commissions will accrue under that plan after the expiration date. The new sales plan will be distributed in [March 20__]. No commissions are capable of calculation or of being earned until after the new plan is in effect. Until a new plan is distributed, you will be paid a fixed draw each month that constitutes an unearned advance on commissions. After the new plan becomes effective, any over-payments to you during the draw period will be reconciled against future commission payments."

Signatures

- Hard-Copy Signatures
  - Add signature and date lines to commission plans
  - Incorporate acknowledgment language (e.g., “I acknowledge that I have received a fully executed copy of this Plan.”)
- Electronic Signatures
  - Prudent to comply with Uniform Electronic Transaction Act (UETA)

What Happens if the Employee Refuses to Sign the Commission Plan?

- OK not to pay commissions, provided that:
  - Employee receives minimum wage if nonexempt
  - Employee receives twice the minimum wage if exempt (unless the employee is truly covered by the outside sales exemption)

Key Terms in a Commission Plan

- Time period of plan
- Who is eligible?
- Specific goals, assignments, rates, and products
- When and how can the plan be changed?
  - Are retroactive changes permissible?
- When are payments earned?
- What happens if more than one employee works on the sale?
- What happens when an employee leaves?
- When must commission be paid?

When Are Commissions Earned?

- Orders submitted
- Orders accepted
- Orders shipped
- Revenue recognized
- Revenue received

- Plus: employment at time commission is earned
- Otherwise commissions are “advances”

Consequences of Commissions Being Earned

- Cannot be divested
- No charge-backs
- Wage laws apply
- Must be paid on termination

How to Avoid the Windfall Payment to the Employee

- Reserve the right to change the terms of the plan in the plan documents
- Change the terms of the plan before the commission is earned
- Put a cap on commissions that can be paid
- Include a “windfall” provision in the plan that kicks in if employee is at 200% or 250% of TIA, and allows lowering of commissions by decision of committee or designated employee

Sample Windfall Clause

- "The Company reserves the right to limit a Participant's Commission, Milestone, or MBO payments to avoid a windfall. When a Participant's Goal attainment exceeds X%, the Governance Committee will review the Participant's bookings to determine whether a windfall has occurred. If the Governance Committee determines that a windfall has occurred, the Company reserves the right to limit a Participant's Commission payment to the extent permitted by applicable law. In the case of a windfall, a Participant may receive a lower Commission payment than the amount provided for in the Participant's Plan Acknowledgment Form."

Sample Windfall Clause

- "In the event that any single deal results in a payout in excess of X% of Participant's TIC or retires more than X% of an individual's quota, the 'Large Deal' provision will be triggered. The deal will be reviewed by the Governance Committee for the purpose of determining quota credit and compensation treatment. Under this provision, the Governance Committee, in its sole discretion, reserves the right to adjust quota or an incentive payment based on numerous factors, including but not limited to the following: (1) market conditions, (2) windfalls or shortfalls as determined by the Governance Committee, (3) transactions that are disproportionate when compared with the territory opportunity or quota size, or (4) incentive payments that are disproportionate when compared with the individual's performance contribution toward the transaction."

Attorneys' Fee Provision

- With the change to Labor Code § 218.5 (employee gets fees on a wage claim, employers do not unless brought in bad faith), do you include an attorneys' fee provision in the commission plan documents?

Can Changes to Commission Plans Be Made Retroactively?

- Not after the commission is "earned"
- Even if the employee does not have the right to compensation under the plan, the employee may still have a claim under quantum meruit/unjust enrichment

Sample Language on Right to Change Plan

- "None of the contents in this Plan shall be construed to imply the creation or existence of a contract between Company and any participant or a promise to make monetary distribution under it."
- "Company shall make the final and binding determination of any amounts payable under the Plan. Company reserves the right to change the terms of the Plan at any time prior to the payment being earned, as defined in the Plan, without notice to Participant."

How to Deal with Fraud by a Participant

- The plan disqualifies an employee from participation in the plan if the employee engages in conduct that violates some law or company policy, regardless of when the company learns of the disqualifying conduct, and/or
- The plan defines sales for which a participant can receive/earn commission as sales meeting certain requirements that include being procured in compliance with all applicable laws and company policies.

Can Employers Condition Payment on Employment at Time Commission Is Earned?

- Has the employee done everything that the employee needs to do to "earn" the commission?
  - If additional actions are required **by the employee,** then can condition on being employed.
  - But if the employee has done everything that the employee needs to do (but is awaiting, e.g., payment by customer, installation by another employee), then likely cannot condition payment on the employee's being employed.
- Incentive compensation and bonuses are different.
  - The employer can condition payment on a retention component.

Can Employers Condition Payment on Employment at Time Commission Is Earned?

- Should not distinguish between reasons for exit from plan participation
- Exit clause should not operate to achieve a forfeiture
  - What else remains to be done for the company to obtain money from the sale?
  - Who, if anyone else, will receive the commission on the sale?

When Must Commissions Be Paid?

- Timing of post-termination payments
  - Must pay on termination if capable of being calculated
  - Must pay as soon as capable of being calculated
  - As soon as “earned” versus on regular commission payment schedule

Sign-on Bonuses

- Don’t call them sign-on bonuses!
- Call them advances
- They are not earned until time period has run
- They are subject to repayment (in full or prorated) if employee leaves before time period ends
- Provide for payment of interest and attorneys’ fees if not repaid

Sign-on Bonus Language

- "You will be eligible to receive a one-time bonus of $_____ (less all federal, state, and local tax withholdings). This bonus is expressly conditioned on your continued employment with the company for a period of 12 months from your date of hire. However, this bonus will be paid in advance to you in the first payroll cycle after the commencement of employment. If you resign or otherwise voluntarily terminate your employment with the company within 12 months of your date of hire, you will repay this bonus in full, plus interest and attorneys' fees incurred to collect payment of the bonus."

Issues with Global Commission Plans

Global Commission Plans

- Must the plan be signed by the employee and the company?
- Is acceptance of payment under the plan sufficient to accept the terms of the plan?
- What happens if the employee refuses to accept the terms of the plan?
  - Can employment be terminated?
  - Can the company refuse to pay commissions?

Global Commission Plans

- Must the amount of commissions be included in calculating vacation/holiday pay?
- Can the company cut off payments once employment ends?
- Can the company cut off payments when the employee is on a leave of absence (e.g., maternity, sickness, garden leave)?
- Can the company make changes to the plan during the term of the plan?
  - If so, is advance notice to the participants/local works council required, and how much notice is required?

Global Commission Plans

- Can commissions be taken away if the employee is subject to disciplinary action?
- Must commissions be taken into account in calculating severance pay?
- Must participants be given reasonable time to review the plan documents?
- Must the plan documents be translated into the local language?
- Are severability clauses enforceable?
- Are arbitration provisions enforceable?

Global Commission Plan Terms

- Not a contract of employment
- Not binding and does not create a right to future entitlements
- Subject to the company's right to modify
- Only valid for the term of the plan
- Does not create vested rights
- No right to prorated payments

Global Commission Plans

- Are specific terms required by the laws of each country?

Tab E

Arbitration Developments

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May 21, 2014

Class/Collective Action Waivers in the Employment Context

- Many employers' arbitration agreements expressly prohibit employees from maintaining or participating in class or collective actions, and the federal courts of appeals have consistently upheld these provisions as enforceable.
- Indeed, even where an arbitration agreement is silent regarding the ability to bring a class or collective arbitration, the law is now clear that class or collective arbitration is prohibited. *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).
- Thus, arbitration agreements can be immensely helpful to employers in avoiding class and collective action litigation driven largely by plaintiffs' counsel and in resolving real employee disputes in a prompt and cost-efficient manner.

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The Supreme Court's Decision in *Stolt-Neilson*

- *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).
  - The Supreme Court considered whether agreement to arbitrate on a classwide basis could be inferred where the arbitration agreement was silent on the issue.
  - The court concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."
  - Because class action arbitration "changes the nature of arbitration to such a degree," an "implicit agreement to authorize class-action arbitration" is not a term "that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate."
  - Thus, the Court held that class arbitration cannot take place where there is no evidence that the parties agreed to class arbitration.

The Supreme Court's Decision in *Sutter*

- *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064 (2013).
  - The Supreme Court considered whether *an arbitrator* may infer that an agreement to arbitrate may proceed on a classwide basis where the agreement was silent.
  - The arbitrator held that silence permitted class arbitration and the Third Circuit upheld on the basis of limited review of arbitration awards.
  - Supreme Court affirmed 9-0.

The Supreme Court's Decision in *Sutter* (cont'd)

- The Court concluded that by submitting the class action question to the arbitrator (twice), the defendant acknowledged this was not a "gateway" question of arbitrability and one of contract construction instead, and therefore conceded that questions of arbitrability are subject to de novo review.
- The Court concluded, however, that questions of contract construction are not subject to de novo review and held that only the narrow scope of review of the merits of an award applied.
- The Court distinguished *Stolt-Nielsen* as a case where the parties stipulated there was no meeting of the minds on class arbitration.
- To the contrary, here there was some evidence of intent from the contract language and, thus, some basis for the arbitrator's award.
- Justice Alito, joined by Justice Thomas, raised the interesting question (in a concurring opinion) of whether absentee class members would be bound by an award (even with actual notice).

The Supreme Court's Decision in *Sutter* (cont'd)

- How to avoid the result in *Sutter*?
  - Make it explicit that class arbitration is precluded.
  - Make it explicit that the arbitrator has no authority to entertain class proceedings or to consolidate cases.
  - Make it explicit that the availability of class procedures is a threshold question of arbitrability that is subject to de novo judicial review.

The Supreme Court's Decision in *Concepcion*

- *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
  - The underlying class claim was that AT&T charged sales tax on phones that were advertised as "free."
  - The plaintiffs' contract with AT&T provided for arbitration of all disputes between the parties, and required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."
  - The arbitration agreement was "consumer friendly":
    - *AT&T pays all arbitration costs of nonfrivolous claims;*
    - *Success kicker if award is higher than last offer.*
  - The Supreme Court found that the Federal Arbitration Act (FAA) preempts state laws precluding arbitration.

The Supreme Court's Decision in *Concepcion* (Cont'd)

- Majority opinion (5-4) holds that California's *Discover Bank* Rule is preempted by the FAA.
  - *Discover Bank* Rule: Class arbitration waiver is unconscionable where (1) the waiver is in a consumer contract of adhesion; (2) small dollar claims are at issue; and (3) an allegation is made that the party with superior bargaining power "engaged in a scheme" to deliberately cheat consumers.
- Section 2 of the FAA provides that arbitration clauses are enforceable "save upon grounds as exist at law or in equity for the revocation of any contract."
- Arbitration agreements cannot be invalidated by defenses that apply only to arbitration or that derive meaning from the fact that an agreement to arbitrate is at issue.
- The Court notes that the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."

Vindication of Statutory Rights: The Supreme Court's Decision in *American Express*

- *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).
  - Plaintiffs in an antitrust action sought to avoid a class action waiver by introducing extensive, unrebutted evidence that the cost of proceeding in arbitration on an individual basis was prohibitive due to the small recovery in the case.
  - The case was remanded twice by the Supreme Court for reevaluation.
  - In *American Express*, the Second Circuit affirmed its initial ruling:
    - *"[W]e do not conclude here that class action waivers in arbitration agreements are per se unenforceable. We also do not hold that they are per se unenforceable in the context of antitrust actions. Rather, we hold that each case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits, governed with a healthy regard for the fact that the FAA 'is a congressional declaration of a liberal federal policy favoring arbitration agreements.'"*

Vindication of Statutory Rights: The Supreme Court's Decision in *American Express* (Cont'd)

- Supreme Court reversed 5-3 (Sotomayor did not participate).
  - The majority held that unavailability of class action did not preclude enforcement of an otherwise valid arbitration agreement.
  - Reaffirmed the basic proposition that arbitration agreements must be enforced as written.
  - Nothing in the antitrust laws precludes application of normal arbitration law to antitrust claims, or requires class actions for enforcing rights under that statute.
  - Congress did not mandate that class action procedures are always available, even if they make it easier or less expensive to enforce statutory rights.

Vindication of Statutory Rights: The Supreme Court's Decision in *American Express* (Cont'd)

- The Court rejected the "vindication of rights" theory.
  - The Court held that this theory only applies where an arbitration agreement specifically precludes the enforcement of a statutory right.
  - Here, however, all of the plaintiffs alleged that it is more expensive to enforce such rights, which they can still assert in arbitration.
  - The situation is no different now than it was before the enactment of Rule 23 in 1966, when an individual lawsuit was the only way to enforce a statutory right.
  - Justice Kagan issued a dissent, claiming that by outlawing class procedures in arbitration, American Express effectively insulated itself from antitrust liability, no less than if it precluded the assertion of antitrust claims under the arbitration clause.
  - The vindication of rights theory is designed to prevent just such a result.

Vindication of Statutory Rights After *American Express*

- Is there anything left of the vindication of statutory rights theory? Or, in California, of *Gentry v. Superior Court*?
  - Limitations on certain types of claims are likely unenforceable.
  - A truly excessive filing fee is likely unenforceable.
  - Probably not possible to create limits on full statutory recovery.
  - Probably not possible to create limits on statute of limitations beyond what can be done in court.

Collective Action Waivers and the FLSA

- Do these principles apply to Fair Labor Standards Act (FLSA) claims?
- Yes, the Second Circuit held in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).
  - The court considered whether Congress decreed that collective actions are required for FLSA claims.
  - Plaintiffs claimed that Section 216(b) collective actions are prescribed statutory procedures and thus evidence of a congressional command not to allow class action waivers.
  - The court concluded that while Congress authorized FLSA collective actions, it did not require them and did not foreclose an individual waiver of them.
  - Applying *American Express*, the Second Circuit rejected the "effective vindication argument."
  - The Second Circuit reached the same conclusion in *Raniere v. Citigroup*, 2013 WL 4046278 (2d Cir. Aug. 12, 2013).

Arbitration of Pattern or Practice Claims: *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483 (2d Cir. 2013)

- Plaintiffs brought a putative gender discrimination class action in the Southern District of New York alleging that Goldman engaged in a pattern or practice of sex discrimination.
- Plaintiffs had arbitration agreements with class/collective action waivers.
- District court determined that enforcement of arbitration agreements would interfere with federal substantive right because pattern or practice theories of discrimination can only be brought as class actions.
- Second Circuit unanimously reversed.
- Second Circuit held that "there is no substantive statutory right to pursue a pattern or practice claim."
- Rather, pattern or practice merely refers to a method of proof and does not create a separate cause of action.
- Accordingly, the same principles apply as in any other arbitration context, and a plaintiff can introduce evidence of a companywide pattern or practice of discrimination in an individual arbitration.

Arbitration of Pattern or Practice Claims: *Karp v. CIGNA Healthcare, Inc.*, 882 F. Supp. 2d 199 (D. Mass. 2012)

- Plaintiff brought a putative Title VII gender discrimination class action in the District of Massachusetts alleging systemic discrimination based on the pattern or practice theory.
- Plaintiff had a signed arbitration agreement with a class action waiver.
- Court granted the motion to compel arbitration.
- Court held that pattern or practice is a method of proof, not a cause of action.
- A plaintiff can introduce evidence of a companywide pattern or practice of discrimination in an individual arbitration.

Circuit Court Decisions Upholding Class/Collective Action Waivers in the Employment Context

- *Horenstein v. Mortg. Market, Inc.*, 9 F. App'x 618 (9th Cir. 2001) (enforcing arbitration agreement with class and collective waivers and explaining that "[al]though plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute").
- *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002) (compelling arbitration of wage and hour claims and holding that there is no "suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under [the FLSA]" and plaintiff's "inability to bring a class action, therefore, cannot by itself suffice to defeat the strong congressional preference for an arbitral forum").
- *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004) (compelling arbitration of individual FLSA overtime claim and rejecting claim that "inability to proceed collectively deprives [employees] of substantive rights under the FLSA").

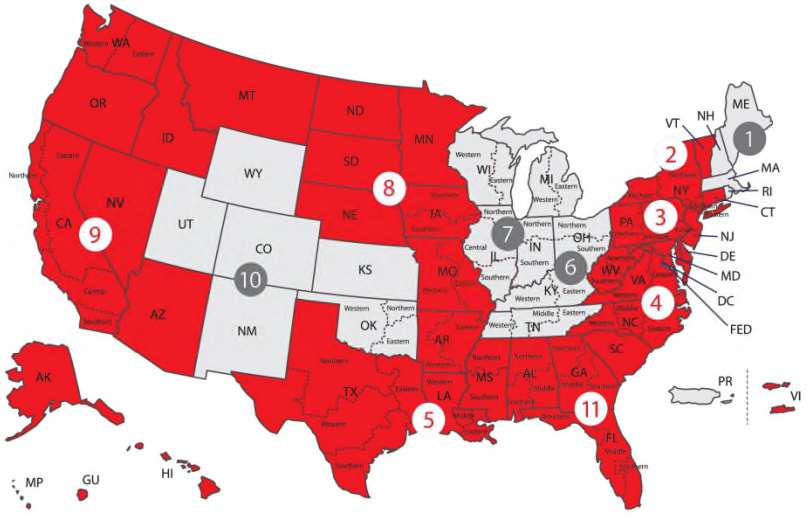
Circuit Court Decisions Upholding Class/Collective Action Waivers in the Employment Context (Cont'd)

- *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011) (enforcing a class action waiver pursuant to *Concepcion* even where the waiver would otherwise be invalid under state law).
- *Vilches v. Travelers Cos.*, 413 F. App'x 487 (3d Cir. 2011) (enforcing collective action waiver and compelling arbitration of plaintiff's individual FLSA overtime claim and holding "there is no 'suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to class action under that statute'").
- *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012) (reversing district court's decision to deny defendant's motion to compel arbitration because *Concepcion* should be read broadly and the FAA preempted state law invalidating class action waivers).

Circuit Court Decisions Upholding Class/Collective Action Waivers in the Employment Context (Cont'd)

- *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (upholding class/collective action waiver in arbitration agreement).
- *Raniere v. Citigroup, Inc.*, 2013 WL 4046278 (2d Cir. Aug. 12, 2013) (reversing district court decision that a waiver of right to proceed collectively under FLSA is unenforceable as a matter of law).
- *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (holding that while Congress authorized FLSA collective actions, it did not require them and did not foreclose individual waiver).
- *Richards v. Ernst & Young LLP*, 2013 WL 4437601 (9th Cir. Aug. 21, 2013) (reversing a district court order denying the defendant's motion to compel arbitration in context of a class action).
- *Walthour v. Chipio Windshield Repair, LLC*, 2014 WL 1099286 (11th Cir. Mar. 21, 2014) (affirming district court's decision that provision in arbitration agreement waiving ability to bring collective action was enforceable).

Federal Circuit Courts Upholding Class/Collective Action Waivers in the Employment Context



Arbitration Agreements in California

- California reluctantly allows them
- To challenge arbitration agreement, employee must demonstrate both *procedural* and *substantive* unconscionability (*Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83 (2000))
- Must be a two-way street
- Must not limit remedies or statute of limitations
- Must not carve out trade secret or IP claims
- Employer must pay all arbitration fees
- Unclear whether class action waivers are legal; less clear if PAGA/representative action waivers are legal

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Chavarria v. Ralphs Grocery Store

F.3d No. 11-56673 (9th Cir. Oct. 28, 2013)

- Held Ralph's arbitration agreement was unconscionable, affirming the district court's refusal to enforce it.
- Some factors that the court found to be unconscionable, when taken together:
  - employees were not required to sign the agreement;
  - terms of the arbitration agreement were not provided to employees;
  - arbitrators had to be retired judges but could not be from JAMS and AAA (which the court interpreted to unjustly favor employers);
  - arbitrator selection process was unfairly "rigged" to favor employers;
  - allows for unilateral modification without notice; and
  - arbitration fees must be split evenly between the parties "unless a decision from the U.S. Supreme Court directly addressing the issue requires that they be apportioned differently."

Arbitration
Single Plaintiff

- ***Sonic-Calabasas A, Inc. v. Moreno*** (Cal. S. Ct. Oct. 17. 2013) (arbitration agreements waiving administrative proceedings by the Labor Commissioner are not "categorically" unconscionable)
- ***Bueche v. Fidelity Nat'l Mgmt. Servs., LLC***, 2013 WL 3283508 (E.D. Cal., June 27, 2013) (denying motion to compel arbitration where employment contract containing **arbitration provision had expired** and contract did not contain language that arbitration agreement would continue after expiration of contract)
- ***Peng v. First Republic Bank***, 2013 WL 5375491 (1st Dist. Aug. 29, 2013, as modified Oct. 2, 2013) (reversing trial court's denial of motion to compel arbitration because **not attaching arbitration rules** and including **unilateral modification provisions did not render the agreement unconscionable**)
- ***Mendez v. Mid-Wilshire Health Care Center***, 2013 WL 5309920 (Cal. Ct. App. 2 Dist., Sept. 23, 2013 (unpublished) (denying arbitration of wrongful termination action where CBA **was not "clear and unmistakable"** in requiring such claims be arbitrated)
- ***Serpa v. California Surety Investigations, Inc.***, 215 Cal. App. 4th 695 (2d Dist. Mar. 21, 2013) (reversing denial of motion to compel arbitration because, inter alia, **waiver of right to attorney fees under FEHA was severable**)
- ***Harris v. Bingham McCutchen LLP***, 214 Cal. App. 4th 1399 (2d Dist. Mar. 29, 2013) (affirming denial of motion to compel arbitration because arbitration clause **did not "clearly and specifically" refer to statutory discrimination claims** as required by Massachusetts law)

Arbitration
Class/Collective/PAGA Waivers

- ***Richards v. Ernst & Young, LLP***, 2013 WL 4437601 (9th Cir. Aug. 21, 2013) (rejecting NLRA and the NLRB's decision in *D.R. Horton* as grounds to invalidate arbitration agreement with class action waiver)
- ***Miguel v. JPMorgan Chase Bank, N.A.***, 2013 WL 452418 (C.D. Cal. Feb. 5, 2013) (compelling individual arbitration of Labor Code claims and PAGA claims)
- ***Andrade v. P.F. Chang's China Bistro, Inc.***, 2013 WL 5472589, (S.D. Cal. Aug. 9, 2013) (same)
- ***Velazquez v. Sears, Roebuck and Co.***, 2013 WL 4525581 (S.D. Cal. Aug. 26, 2013) (same)
- ***Parvataneni v. E*Trade Fin. Corp.***, 2013 WL 5340473, N.D. Cal., Sept. 24, 2013) (compelling individual arbitration of PAGA claims).
- ***Cunningham v. Leslie's Poolmart, Inc.***, 2013 WL 3233211, (C.D. Cal., June 25, 2013) (compelling individual arbitration of Labor Code claims, *but* ordering arbitration of PAGA claims on a representative basis)

Arbitration
Class/Collective/PAGA Waivers (Cont'd)

- ***Avery v. Integrated Healthcare Holdings, Inc.***, 218 Cal. App. 4th 50 (June 27, 2013) (class action waiver not enforceable when added to arbitration agreement after claims accrued)
- ***Gomez v. Marukai Corp.***, 2013 WL 492544 (Cal. Ct. App. 2d Dist. Feb. 11, 2013) (unpublished) (severing PAGA claims from arbitration but otherwise compelling arbitration of plaintiff's individual claims)
- ***Harvey v. Yellowpages.com***, 2013 WL 3808191 (Cal. Ct. App. 2d Dist. July 22, 2013) (unpublished) (holding that PAGA claims cannot be compelled to arbitration)
- ***Arroyo v. Riverside Auto Holdings, Inc.***, 2013 WL 4997488 (Cal. Ct. App. 4th Dist. Sept. 3, 2013) (unpublished) (reversing trial court and compelling individual arbitration of wage and hour claims)

Arbitration
Class/Collective/PAGA Waivers (Cont'd)

- Key Case: *Iskanian v. CLS Transp. Los Angeles, LLC* – Court of Appeal disagreed with majority holding in *Brown v. Ralphs Grocery Co.* that *Concepcion* does not apply to PAGA claims.
  - Held *Concepcion* directly applicable and enforced arbitration agreement to preclude plaintiff from pursuing UCL or PAGA representative claims.
  - Appealed to California Supreme Court, where issues are:
    - *Whether* Concepcion *impliedly overruled California state law with respect to contractual class action waivers in the context of nonwaivable labor law rights; and*
    - *Whether* Concepcion *permits arbitration agreements to override the statutory right to bring a PAGA representative claim.*
  - Oral argument heard on April 3, 2014 (decision expected within approximately 90 days - July 2, 2014).

Class Action Waivers:
Fifth Circuit Rejects NLRB's *D.R. Horton* Decision

- In a decision issued on January 3, 2012, two members of the NLRB ruled that the NLRA prohibits employers from requiring employees to waive their rights to maintain class or collective actions in both judicial and arbitral forums. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012).
- On December 3, 2013, the Fifth Circuit rejected the NLRB's ban on class action waivers, but nevertheless enforced the NLRB's order that D.R. Horton revise the arbitration agreement to clarify that it does not preclude employees from filing unfair labor practice charges with the NLRB when they believe their rights under Section 7 of the NLRA have been violated.

Class Action Waivers: Fifth Circuit's Decision in *D.R. Horton*

- Fifth Circuit acknowledged that the NLRB appeared to be correct in holding that Section 7 of the NLRA protects employees who seek to engage in class or collective actions to adjudicate employment-related claims.
  - However, the Fifth Circuit explained that such agreements "must be enforced according to their terms." Only when an arbitration agreement is unenforceable "upon such grounds as exist at law or in equity," or when Congress has given a clear command in another statute to override the FAA, should an arbitration agreement not be enforced by the federal courts.
- The Fifth Circuit found no clear basis in the NLRA to override the FAA, and the court recognized that the NLRA itself is silent as to arbitration agreements between employers and employees as well as whether such agreements lawfully can waive rights to class or collective actions.
  - The court also found nothing in the NLRA's legislative history to justify displacing the clear FAA directive to enforce arbitration agreements as written.
- While the Fifth Circuit denied enforcement as related to the arbitration agreement's ban on class or collective actions, the court upheld the NLRB's finding that other language in the agreement violated Section 8(a)(1) of the NLRA.
  - Specifically, the Fifth Circuit agreed that the arbitration agreement contained ambiguous language as to whether employees still had the right to file unfair labor practice charges with the NLRB. The arbitration agreement provided that all disputes would be resolved through arbitration, and, although the agreement contained a list of four exceptions, none of these exceptions referred to unfair labor practice claims.

Class Action Waivers: Impact of Fifth Circuit's Decision in *D.R. Horton*

- The Fifth Circuit's decision is consistent with many other federal court decisions that have rejected the NLRB's attempt to regulate arbitration agreements with class/collective action waivers.
- Despite the Fifth Circuit's decision, and the many other federal court decisions rejecting *D.R. Horton*, the NLRB may maintain that its position is correct and may continue to prosecute claims involving similar arbitration agreements, including agreements that are not a condition of employment.
  - Therefore, employers should be prepared to defend against such claims.
- Employers should also ensure that their arbitration agreements do not contain language that could be read to preclude employees from filing unfair labor practice charges with the NLRB.

Pending Litigation

- ***Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02 (1981)** – Employer entered into a conciliation agreement with the EEOC covering black and female employees, and sent notices to affected employees that they were eligible for back pay in exchange for signing a release.
- After the conciliation agreement was signed, a putative class action was filed by several individuals on behalf of the black employees. Plaintiffs and their counsel wanted to communicate with putative class members, including to send a notice urging class members to speak with a lawyer before signing the releases sent by the employer.
- The district court entered an order prohibiting the parties and their counsel from communicating with putative class members absent court approval, subject to certain exceptions.

Pending Litigation (Cont'd)

- *Barnard* (cont'd) – The Supreme Court reversed, ruling that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Id.* at 101.
- "[S]uch a weighing – identifying the potential abuses being addressed – should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances." *Id.* at 102.
- The Court found that the order at issue improperly interfered with the plaintiffs' efforts to communicate with putative class members, particularly about the pending offers of back pay in exchange for a release: "The order interfered with their efforts to inform potential class members of the existence of this lawsuit, and may have been particularly injurious – not only to [plaintiffs] but to the class as a whole – because the employees at that time were being pressed to decide whether to accept a backpay offer from Gulf that required them to sign a full release of all liability for discriminatory acts." *Id.* at 101.

Pending Litigation (Cont'd)

- Although the FLSA does not expressly provide courts with authority to regulate communications with putative class members, district courts have the power to authorize notice to putative plaintiffs to provide notice of the action and to prevent misleading communications.
  - *See Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989) ("We have recognized that a trial court has a substantial interest in communications that are mailed for single actions involving multiple parties."). As a result, a district court has authority to govern the conduct of counsel and parties in collective actions as long as the court maintains its neutrality. *Sperling*, 493 U.S. at 171-72, 174 (citing *Bernard*, 452 U.S. at 101).
- The Second Circuit's ruling in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972), suggests that a defendant in a class action has a right to settle claims with putative class members precertification without the approval by the court of the settlement.

Pending Litigation (Cont'd)

- *Compare Diense v. McKenzie*, 2000 WL 34511333, *8 (E.D. Wis. 2000) (enforcing arbitration agreement and class waiver that was implemented after the filing of the putative class action involving the lending practices of a payday lender, and excluding those who had signed the agreement from the class (which it otherwise certified)) with *Billingsley v. Citi Trends, Inc.*, 2014 WL 1199501, *7 (11th Cir. Mar. 25, 2014) (affirming the denial of the enforcement of an arbitration agreement with a collective action waiver for certain store managers where the court found that meetings the company held with employees after the lawsuit was filed represented a coercion of the putative class members into signing away their rights).

Class Waivers Outside of Arbitration Agreements

- Some employers choose to have class and collective action waivers without an arbitration agreement.
- Some courts have found freestanding class action waivers to be enforceable independent of arbitration agreements. *Killion v. KeHE Distributors*, 885 F. Supp. 2d 874, 882 (N.D. Ohio 2012) ("The enforceability of a collective waiver does not change outside the arbitration context."); *Lu v. AT&T Services, Inc.*, 2011 WL 2470268 (N.D. Cal. June 21, 2011) (severance and release agreement); *Birdsong v. AT&T Corp.*, 2013 WL 1120783 (N.D. Cal. Mar. 18, 2013) (release agreement); *Palmer v. Convergys Corp.,* 2012 WL 425256 (M.D. Ga. Feb. 9, 2012) (employment application); *Mazurkiewicz v. Clayton Homes, Inc.*, 2013 WL 3992248 (S.D. Tex. Aug. 2, 2013) (employment application and agreement).
- *But see Grant v. Convergys Corp.*, 2013 WL 781898 (E.D. Mo. Mar. 1, 2013) (where class action waiver agreements were not contained in an arbitration clause and the FAA was not implicated, the waiver agreements violated the NLRA and were unenforceable).

Practical Considerations for Arbitration Agreements

- Has the time come to implement arbitration agreements that include a class/collective action waiver?
- Should only new employees be required to sign the agreements?
- What if current employees refuse to sign the agreements?
- Should "consideration" be provided or is continuing employment enough?
- Should choice of law be specified in the agreements? If so, state or federal? We recommend express application of the FAA.
- What arbitration forum/entity should be selected?
- Should you include a waiver of collective action claims?
- Should you include a waiver of representative claims?
- Should you include a waiver of administrative (Berman hearing) claims? Or expressly allow/exclude them from the agreements?

Practical Considerations: Using Predispute Arbitration Agreements

- What are the most common types of litigation faced by the company?
- Risks and uncertainties of jury trial.
- Is jury trial waiver a viable option?
- A class/collective action waiver, if enforced, may significantly reduce potential exposure to claims.
- However, potential for having to defend multiple individual claims in arbitration with risk of collateral estoppel being given to any bad decision.
- Difficulty in winning summary judgment in arbitration.
- Costs of paying arbitration/forum costs and arbitrator fees.
- Cost of defending multiple individual actions in arbitration and paying arbitrator fees for each.

Elements of an Effective Arbitration Agreement

- Class/collective/representative action waivers should be conspicuously and clearly displayed in writing.
- No shortening of statute of limitations.
- No imposition of fees greater than that of bringing court action.
- Mutually binding (on employer as well as employees).
- No carve-out for employer-only claims.
- No preclusion of filing charges with administrative agencies except, if desired, preclusion of Berman hearings before DLSE (under California law).
- Limit employer's ability to unilaterally modify terms of agreement and require advance notice to employees of any modification.
- Include express language picking up existing claims (i.e., arising, or that arose).
- If applying certain rules (e.g., AAA or JAMS rules), include website reference to underlying rules.

Elements of an Effective Arbitration Agreement (Cont'd)

- Signed acknowledgment of employee's agreement to arbitrate.
- Consideration other than employment/continued employment (such as inclusion in compensation plan).
- Class/collective actions proceed in court if waiver unenforceable.
- Include choice of forum/venue provision.
- Ensure neither Employee Handbook nor any other related document provides that arbitration agreement is not contract.
- Provide that court decides enforceability of class waiver.
- Provide that agreement's terms control over forum rules.
- Allow for all remedies court can award.
- Consider retroactivity of provision.

Tab F

Workplace Safety and Domestic Violence Issues

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May 21, 2014

Introduction

- Effective January 1, 2014, SB 400 amended California Labor Code sections 230 and 230.1 to extend the prohibitions against discharging, discriminating against, or retaliating against employees who are known or suspected victims of domestic violence or sexual assault, to employees who are **victims of stalking**.

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Introduction (Cont'd)

- SB 400 also adds a provision to Labor Code section 230 that requires employers to provide **reasonable accommodations** to victims of domestic violence, sexual assault, and stalking.

Why Is This Significant?

- 2011 Seal Beach Hair Salon Massacre. Shooter's former wife was employed at the salon; eight people killed. Employees' personal lives can spill dangerously over into their workplaces.
- Not just California law. EEOC Fact Sheet: http://www1.eeoc.gov/eeoc/publications/upload/qa_domestic_violence.pdf.
- EEOC states three ways that employment decisions about *applicants* or employees who experience domestic or dating violence, sexual assault, or stalking could violate Title VII: **Disparate treatment**; **Harassment**; **Retaliation**.

Why Is This Significant? (Cont'd)

- Example: Female employee reports that a supervisor sexually assaulted her on a business trip, and in response, she is reassigned to less favorable accounts.

Steps for Employers to Take

1. **Reasonable accommodation.** Employer must engage in a "timely, good faith, and interactive process with the employee to determine the effective reasonable accommodations" such as:
   - Transfer, reassign, or modify the employee's schedule;
   - Change the employee's work telephone and/or workstation;
   - Install a lock;
   - Assist the employee with documenting the domestic violence, sexual assault, or stalking that occurs at the workplace;
   - Implement new safety procedures;
   - Make adjustments to the job structure, workplace facility, or work requirement in response to the domestic violence, sexual assault, or stalking; and
   - Refer the employee to a victim assistance organization.
- **VAGUE requirements.** How does employer know/prove that it needs to accommodate? What if employee asks to work from home or different state? What do the examples mean—lock; new safety procedures?

Steps for Employers to Take (Cont'd)

2. **Revise antidiscrimination, harassment, and retaliation policy.** Include a provision that explicitly prohibits threatening to discharge, discharging, discriminating against, or retaliating against any employee who is a victim of domestic violence, sexual assault, or stalking, based on that status, or for taking time off from work to obtain legal or nonlegal assistance or services to ensure the health, safety, or welfare of the employee and/or his or her child.
3. **Policy on protocols for requesting accommodation and engaging in the interactive process**
4. **Train human resources and managers**

U.S. Equal Employment Opportunity Commission

QUESTIONS AND ANSWERS

Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on race, color, sex, religion, or national origin, and the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability.[1] Because these federal EEO laws do not prohibit discrimination against applicants or employees who experience domestic or dating violence, sexual assault, or stalking as such,[2] potential employment discrimination and retaliation against these individuals may be overlooked. The examples provided in this publication illustrate how Title VII and the ADA may apply to employment situations involving applicants and employees who experience domestic or dating violence, sexual assault, or stalking. However, whether discrimination has actually occurred in a particular instance must be determined through an investigation of the facts alleged. Information on how to file an employment discrimination claim may be found at the end of this document.

Q: What are some examples of employment decisions that may violate Title VII and involve applicants or employees who experience domestic or dating violence, sexual assault, or stalking?

A: Title VII prohibits disparate treatment based on sex, which may include treatment based on sex-based stereotypes. For example:

- An employer terminates an employee after learning she has been subjected to domestic violence, saying he fears the potential "drama battered women bring to the workplace."
- A hiring manager, believing that only women can be true victims of domestic violence because men should be able to protect themselves, does not select a male applicant when he learns that the applicant obtained a restraining order against a male domestic partner.
- An employer allows a male employee to use unpaid leave for a court appearance in the criminal prosecution of an assault, but does not allow a similarly situated female employee to use equivalent leave to testify in the criminal prosecution of domestic violence she experienced. The employer says that the assault by a stranger is a "real crime," whereas domestic violence is "just a marital problem" and "women think everything is domestic violence."

FIND THIS ARTICLE ON THE WEB AT:
www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm

SEE ALSO:
www.eeoc.gov/laws/types/sex.cfm
www.eeoc.gov/laws/types/disability.cfm

Title VII prohibits sexual or sex-based harassment. Harassment may violate Title VII if it is sufficiently frequent or severe to create a hostile work environment, or if it results in a "tangible employment action," such as refusal to hire or promote, firing, or demotion.[3] For example:

- An employee's co-worker sits uncomfortably close to her in meetings, and has made suggestive comments. He waits for her in the dark outside the women's bathroom and in the parking lot outside of work, and blocks her passage in the hallway in a threatening manner. He also repeatedly telephones her after hours, sends personal e-mails, and shows up outside her apartment building at night. She reports these incidents to management and complains that she feels unsafe and afraid working nearby him. In response, management transfers him to another area of the building, but he continues to subject her to sexual advances and stalking.[4] She notifies management but no further action is taken.

- A seasonal farmworker's supervisor learns that she has recently been subject to domestic abuse, and is now living in a shelter. Viewing her as vulnerable, he makes sexual advances, and when she refuses he terminates her.

Title VII prohibits retaliation for protected activity. Protected activity can include actions such as filing a charge of discrimination, complaining to one's employer about job discrimination, requesting accommodation under the EEO laws, participating in an EEO investigation, or otherwise opposing discrimination. For example:

- An employee files a complaint with her employer's human resources department alleging that she was raped by a prominent company manager while on a business trip. In response, other company managers reassign her to less favorable projects, stop including her in meetings, and tell co-workers not to speak with her.

Q: What are some examples of employment decisions that may violate the Americans with Disabilities Act (ADA) and involve applicants or employees who experience domestic or dating violence, sexual assault or stalking?

A: The ADA prohibits different treatment or harassment at work based on an actual or perceived impairment, which could include impairments resulting from domestic or dating violence, sexual assault or stalking.[5] For example:

- An employer searches an applicant's name online and learns that she was a complaining witness in a rape prosecution and received counseling for depression. The employer decides not to hire her based on a concern that she may require future time off for continuing symptoms or further treatment of depression.

- An employee has facial scarring from skin grafts, which were necessary after she was badly burned in an attack by a former domestic partner. When she returns to work after a lengthy hospitalization, co-workers subject her to frequent abusive comments about the skin graft scars, and her manager fails to take any action to stop the harassment.

The ADA may require employers to provide reasonable accommodation requested for an actual disability or a "record of" a disability.[6] An actual disability is a physical or mental impairment that substantially limits one or more major life activities (which include major bodily functions). A "record of" a disability is a past history of a substantially limiting impairment. An impairment does not need to result in a high degree of functional limitation in order to be "substantially limiting."[7] A reasonable accommodation is a change in the workplace or in the way things are usually done

that an individual needs because of a disability and may include time off for treatment, modified work schedules, and reassignment to a vacant position. For example:

- An employee who has no accrued sick leave and whose employer is not covered by the FMLA requests a schedule change or unpaid leave to get treatment for depression and anxiety following a sexual assault by an intruder in her home. The employer denies the request because it "applies leave and attendance policies the same way to all employees."

- In the aftermath of stalking by an ex-boyfriend who works in the same building, an employee develops major depression that her doctor states is exacerbated by continuing to work in the same location as the ex-boyfriend. As a reasonable accommodation for her disability, the employee requests reassignment to an available vacant position for which she is qualified at a different location operated by the employer. The employer denies the request, citing its "no transfer" policy.

The ADA prohibits disclosure of confidential medical information.[8]

- An employee who is being treated for post-traumatic stress disorder (PTSD) resulting from incest requests reasonable accommodation. Her supervisor then tells the employee's co-workers about her medical condition.

The ADA prohibits retaliation or interference with an employee's exercise of his or her rights under the statute.[9]

- In the prior example, the employee tells the supervisor she intends to complain to human resources about his unlawful disclosure of confidential medical information. The supervisor warns that if she complains, he will deny her the pay raise she is due to receive later that year.

Q: What is the legal process for filing claims of discrimination?

A: The process is different depending on the type of employer:

Private Sector Employers and State and Local Government Employers

A private sector or state or local government applicant or employee who believes that his or her Title VII or ADA employment rights have been violated and wants to make a claim against an employer must file a "charge of discrimination" with the EEOC. For a detailed description of the EEOC charge process, including instructions for filing a charge, refer to the EEOC website at www.eeoc.gov/employees/howtofile.cfm or call 1-800-669-4000/ 1-800-669-6820 (TTY).

Federal Government Employers

A federal government applicant or employee who believes that his or her employment rights have been violated under Title VII or the ADA and wants to make a claim against a federal agency must file an "EEO complaint" with that agency. For more information concerning enforcement procedures for federal applicants and employees, visit the EEOC website at www.eeoc.gov/federal/fed_employees/index.cfm.

[1] Title VII and the ADA apply to employers (including employment agencies and unions) with 15 or more employees, and to federal, state, and local governments. An employer may have additional obligations under other federal statutes, such as the Family and Medical Leave Act, or under state or local anti-discrimination laws that contain broader protections than the federal EEO laws. For example, some state and local non-discrimination laws apply to smaller employers, and some states have laws expressly prohibiting discrimination against victims of domestic violence, and requiring employers to provide a certain amount of unpaid leave for related circumstances, including seeking medical care or legal assistance and attending court.

[2] The U.S. Department of Justice defines these terms as follows:

Domestic violence: "…a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone."

Dating violence: "Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim."

Sexual assault: "Sexual assault is any type of sexual contact or behavior that occurs without the explicit consent of the recipient."

Stalking: "Stalking is a pattern of repeated and unwanted attention, harassment, contact, or any other course of conduct directed at a specific person that would cause a reasonable person to feel fear." Stalking can include: Repeated, unwanted, intrusive, and frightening communications from the perpetrator by phone, mail, and/or email[;] [r]epeatedly leaving or sending victim unwanted items, presents, or flowers[;] [f]ollowing or laying in wait for the victim at places such as home, school, work, or recreation place[;] [m]aking direct or indirect threats to harm the victim, the victim's children, relatives, friends, or pets[;] [d]amaging or threatening to damage the victim's property[;] [h]arassing victim through the internet[;] [p]osting information or spreading rumors about the victim on the internet, in a public place, or by word of mouth[;] [or] [o]btaining personal information about the victim by accessing public records, using internet search services, hiring private investigators, going through the victim's garbage, following the victim, contacting victim's friends, family work, or neighbors, etc."

For more information, see www.ovw.usdoj.gov/domviolence.htm.

[3] An employer is always responsible for harassment by a supervisor that culminated in a tangible employment action, such as discipline or termination. If the supervisor's harassment did not lead to a tangible employment action, the employer is liable unless it proves that: (1) it exercised reasonable care to prevent and correct promptly any harassment; and (2) the employee unreasonably failed to complain to management or to avoid harm otherwise. An employer is liable for harassment by a co-worker or by a third party over whom the employer has control if the employer knew or should have known of the conduct, unless it can show that it took prompt and appropriate corrective action upon learning of the harassment. For more information, see *Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors*, www.eeoc.gov/policy/docs/harassment-facts.html; *Policy Guidance on Current Issues of Sexual Harassment*, www.eeoc.gov/policy/docs/currentissues.html.

[4] These facts are based on a Title VII sexual harassment case in which EEOC filed an amicus brief. *Crowley v. LL Bean, Inc.*, No. 01-2732 (1st Cir. June 2, 2002) (brief available at www.eeoc.gov/eeoc/litigation/briefs/crowle.txt).

[5] The ADA prohibits discrimination based on an actual, history of, or perceived disability, including disparate treatment or harassment. Under the ADA as amended effective January 1, 2009, applicants and employees are protected if an employer treats them differently or harasses them based on an actual or perceived impairment that is not transitory and minor. Such individuals need not have an impairment that substantially limits a major life activity, or that is perceived to do so, in order to be protected from disparate treatment or harassment under the ADA.

[6] Qualified individuals with an impairment that substantially limits a major life activity or a record thereof may be entitled to requested reasonable accommodation absent undue hardship on the employer. For more information, see *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, www.eeoc.gov/policy/docs/accommodation.html; *Small Employers and Reasonable Accommodation*, www.eeoc.gov/facts/accommodation.html.

[7] Under the ADA, as amended, the term "substantially limits" is to be construed broadly in favor of expansive coverage. For more information, see *Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008*, www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm.

[8] *Enforcement Guidance: Disability-Related Inquiries & Medical Examinations of Employees Under the ADA* (7/27/00), www.eeoc.gov/policy/docs/guidance-inquiries.html.

[9] The ADA protects all applicants or employees, whether or not they are individuals with a disability, from retaliation for protected activity, interference with the exercise of rights under the ADA, disability-related inquiries and medical examinations that are not job-related and consistent with business necessity, and improper disclosure of confidential medical information. For more information about these and other provisions of the ADA, go to www.eeoc.gov/laws/types/disability.cfm.

Tab 2

Ongoing and New Issues with Contingent Workers

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May 21, 2014

Factors for Determining Employee vs. Independent Contractor Status

- Key California Supreme Court decision: *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (deciding independent contractor status for coverage under Worker's Compensation Act).
- Principal test: The right to control the means and manner of accomplishing the desired result is generally the most important consideration. *Borrello*; *see also* DLSE 2002 Enforcement Policies & Interpretations Manual § 28.3.2.1.

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Relevant Indicia of "Control"

- Is worker required to follow instructions as to when, where and how she/he is to work;
- Is worker required to undergo company-sponsored training to any significant extent;
- Is worker required to adhere to work hours set by the company or work exclusively for the company;
- Does company require that work be performed on company's premises, especially if the work could be performed elsewhere—employee status may exist;
- Does company require that work be performed in a certain order or sequence established by the company.

Secondary Factors for Determining Employee vs. Independent Contractor Status

Secondary, relevant factors:

- Whether person performing services is engaged in a distinct occupation or business;
- The requisite (or special) skills for performing the work;
- Who supplies the instrumentalities, tools, and place of work;
- Length of time for which the services are performed (degree of permanence of the relationship);
- Whether payment is by time or by job/project;
- Whether the work performed is an integral part of the employer's regular business operations;

Secondary Factors for Determining Employee vs. Independent Contractor Status (Cont'd)

Secondary, relevant factors:

- Whether the parties believe they are creating an employee-employer relationship—is there a contract specifying the nature of the relationship;
- The person's opportunity for profit or loss depending on his/her skill in performing the services;
- The person's investment in equipment or materials required for the task;
- Other indicia of employment (does the person have company email address, telephone line, etc.);
- Right to discharge at will;

Secondary Factors for Determining Employee vs. Independent Contractor Status (Cont'd)

Secondary, relevant factors:

- Whether the type of work performed is usually done under the direction of the principal or by a specialist without supervision;
- Whether the independent contractor classification is bona fide or a subterfuge to avoid employee status;
- Whether the person holds himself/herself out to be in business, or has an independent business license;
- Whether the person hires employees or helpers; and
- Whether the person has other clients (nonexclusive to employer).

Definition of an "Employer" for Labor Code Claims

- In *Martinez v. Combs* (2010) 49 Cal.4th 35, California Supreme Court clarified the definition of an employer applicable to claims brought under the Industrial Welfare Commission's Wage Orders to mean any person who directly or indirectly:
  - Exercises control over wages, hours, or working conditions;
  - Suffers or permits the relevant work; or
  - Engages in a common law employment relationship

Independent Contractor Class Action Decisions

- *Networkers International LLC v. Les Bradley, et al.* (2012) 211 Cal.App.4th 1129—granted certification of a class composed of workers providing technical support to telecommunications industry.
- *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639—denied certification of a class of newspaper delivery carriers.
- *Ayala v. Antelope Valley Newspapers, Inc.* (2012) 210 Cal.App.4th 77—denied certification of a class of newspaper home delivery carriers) —Supreme Court granted review (January 30, 2013)

Designing Policies to Mitigate Risk

- How are you classifying contingent workers, e.g., using one category, or do you have several potential options (independent contractor; temporary worker—direct retention or via temp agency; leased employee; outsourced services)?
- Do you have/use a checklist to determine appropriate status as employee versus contingent worker?
- Time limits on service for the company—monitoring/flagging process
  - No bright line cut-off. Agencies (EEOC/DFEH) may take position that joint employment exists after only a few weeks. Creates difficult issues in areas such as reasonable accommodation/good-faith interactive process.

Designing Policies to Mitigate Risk (Cont'd)

- Policy to retain contingent workers only through third-party entity (no individual independent contractor rule)?
- Prohibit payment of hourly rate of pay by agency/third party: if joint employment status found, no argument re: exemption from overtime pay because not paid a salary.
- Plan Benefits
  - Must ensure all company benefit plans (health/medical benefits, etc.) have been adequately drafted to exclude contingent workers
  - *Vizcaino v. Microsoft* issues.

Effectively Integrating and Managing Contingent Workers

- Are you giving your contingent workers any of the following:
  - Company email address or telephone number.
  - Company business cards or stationery.
  - Company credit cards.
  - Letters of recommendation.
  - Office or cubicle name plates.

Effectively Integrating and Managing Contingent Workers

- Should contingent workers be invited to or allowed to participate in recreational or social activities
  - Can they use the company cafeteria, gym, etc., or go on team-building events?
- How do you handle performance feedback, discipline?
- Do contingent workers receive company training? What if contingent workers manage other employees—CA harassment training issues!

Effectively Integrating and Managing Contingent Workers (Cont'd)

- Psychological/morale considerations – the "second class citizen" phenomenon
  - Issues for employee team members
  - Issues for contingent worker
- Length of the relationship may create expectations regarding employment status and/or entitlement to being hired if opening exists

Monitoring the Costs and Benefits of Contingent Workers

- Do you have a contractual indemnity provision?
- How strong is the indemnity provision, e.g., "worth the paper it is printed on"?
- Business analysis of monetary costs:
  - Headcount issues
  - Salary/benefits vs. payments to contractor/vendor/agency; at what point does it cease to make sense to have person remain a contingent worker?
  - Ensure that any financial analysis of costs is subject to attorney-client privilege and work product protection

Tab 3

EEOC Initiatives and Class Discrimination Issues

Morgan Lewis technology may-rathon

presenter
Paul C. Evans

May 21, 2014

Overview

- Update Pending Private Class Action Landscape
- EEOC – Update and Focus
- Preemptive Measures:
  - Effective Diversity and Inclusion
- Diversity Initiatives

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Private Class Actions

In the News

- *Sampling of recent headlines*
  - *Technology's Man Problem*, N.Y. Times, 4/5/14
  - *Sexism a problem in Silicon Valley, critics say,* L.A. Times, 10/24/13
- *The plaintiffs' bar is paying attention*
  - *Continuing Sexism in the Tech Industry* http://www.lieffcabraser.com/Case-Center/Continuing-Sexism-in-the-Tech-Industry.shtml
  - "We are actively reviewing complaints from female tech employees who complain about unequal pay, lack of promotional opportunities, hiring discrimination, harassment, or retaliation on the job."

Types of Discrimination Class Claims

- Equal Pay Act
  - Conditional vs. class certification
- Title VII
  - Gender; pregnancy/caregiver; retaliation
  - Pattern or practice; disparate impact
- FMLA
- State law claims
  - Naming of individual defendants
  - Impact on venue

Typical Allegations

- In the wake of *Dukes v. Wal-Mart*, plaintiffs have focused on a narrower group of decisionmakers:
  - Centralized decisionmaking by small management committees or teams
- Plaintiffs also point to allegedly identifiable company policies/practices:
  - Compensation:
    - *Challenges to sales incentive plans*
    - *"Carrying forward" allegedly discriminatory initial pay decisions through merit increase and bonus policies that are expressed as a percentage of base pay*
    - *Use of "forced" performance rating distributions*
    - *Painting calibration of ratings as decisions made by small group of executives*

Typical Allegations

- Promotions:
  - *Deficient job posting/bidding policies*
  - *Focus on "work/life" balance policies, such as job share and leave policies*
  - *Denial of training opportunities/participation in management development programs*
  - *Challenge to succession planning and talent management systems*
  - *Alleged "glass ceiling" bar to women entering management roles*
- Heavy emphasis on allegedly "weak" HR function (e.g., insufficient internal complaint processes)

Plaintiffs' Litigation Tactics

- Companywide data requests
  - W-2s
  - HRIS
  - Applicant flow
- Seek broad eDiscovery
  - Email
  - Hard drives
  - Share drives
  - Instant messages
  - Broad keywords
  - Inordinate numbers of custodians, often including high-level executives/attorneys
- Other discovery
  - Self-critical analyses
  - Diversity efforts
  - Class contact information
  - Internal complaints of discrimination
  - Discovery from foreign entities
  - Broad 30(b)(6) notices

Defense Litigation Considerations

- Early motion to dismiss/strike?
- Obtaining favorable scheduling order
  - Bifurcating class and merits discovery
  - Holding absent class member discovery in abeyance
- Data collection/analysis
- Policy evaluation

Defense Litigation Considerations

- Assessment of levels at which decisions are made
- Differences in business lines/divisions
- Early discovery of named plaintiff claims
- Preemptive motions (e.g., summary judgment, striking class allegations)

EEOC

Overview

- EEOC Statistics
- Focus on Systemic Matters
- Conciliation Cases
- Subpoena Enforcement Actions
- Areas of Focus
  - Criminal Background Checks
  - Releases
  - ADA/ADAAA Challenges
  - Religious Garb in the Workplace

EEOC FY 2013 Charge Statistics

- EEOC Charges for FY 2013:
  - EEOC received 93,727 charges, a decrease of nearly 6% from FY 2012, with the most frequent charges being:
    - *Retaliation – 38,539 (vs. 22,690 in 2003)*
    - *Race – 33,068 (vs. 28,526 in 2003)*
    - *Sex/Sexual Harassment – 27,687 (vs. 24,362 in 2003)*
    - *Disability – 25,957 (vs. 15,377 in 2003)*
    - *Age – 21,396 (vs. 19,124 in 2003)*

EEOC FY 2013 Systemic Statistics

- Investigations:
  - EEOC conducted 300 systemic investigations in FY 2013, with 63 predetermination settlements or conciliations
    - *EEOC recovered $40 million as a result of these settlements and conciliations*
  - EEOC issued cause findings in 106 systemic investigations (an increase from 94 in FY 2012)

EEOC FY 2013 Systemic Statistics (Cont'd)

- Litigation:
  - At the end of FY 2013, EEOC was pursuing 54 systemic cases nationwide
    - *These represent 23% of all active cases, an increase from 20% in FY 2012*
    - *Although the number of systemic cases decreased slightly (from 62 in FY 2012), they constitute the greatest percentage of merit cases since EEOC began tracking such information in 2006*
  - In FY 2013, EEOC filed 131 merit lawsuits, 21 of which (16%) were systemic cases

EEOC's Focus on Systemic Matters

- In its Strategic Enforcement Plan, EEOC emphasized that it would focus its resources on systemic investigations and enforcement actions

EEOC's Focus on Systemic Matters (Cont'd)

- Issues unique to the EEOC:
  - EEOC is not required to meet the stringent requirements of Rule 23 when it files class or "pattern or practice" claims
  - EEOC is more willing to litigate cases involving only injunctive relief and limited monetary damages
  - Although not unlimited, EEOC has very broad investigatory and subpoena powers
  - Although it has suffered some high-profile losses, EEOC can still win the right case, as proven by the recent $240 million verdict it obtained on behalf of 32 mentally disabled former employees of Hill Country Farms

EEOC's Strategic Plan for 2012-2016

- On February 22, 2012, EEOC issued its Strategic Plan for 2012-2016, with key priorities including:
  - Three objectives: enforcement, education, and outreach
  - "Eliminating systemic barriers in recruitment and hiring"
  - Addressing emerging issues, including:
    - *ADAAA issues*
    - *LGBT coverage under Title VII*
    - *Pregnancy accommodations*
  - "Preserving access to the legal system"
  - Combating harassment through education

EEOC's Strategic Enforcement Plan

- On December 18, 2012, EEOC approved its Strategic Enforcement Plan (SEP), which includes the following guiding principles:
  - A targeted approach to preventing and remedying discriminatory practices in the workplace
  - An integrated approach involving greater collaboration and coordination among staff, offices, and program areas
  - Accountability to ensure consistent standards of quality and service

EEOC's Strategic Enforcement Plan (Cont'd)

- EEOC's nationwide priorities under the SEP:
  - Eliminating systemic barriers in recruitment and hiring
  - Protecting immigrant, migrant, and other vulnerable workers
  - Addressing emerging issues
  - Enforcing equal pay laws
  - Preserving access to the legal system
  - Combating harassment through systemic enforcement
- EEOC also will continue to challenge hiring, pay, and promotion policies that are alleged to have a disparate impact on protected groups

I'm Not Doing Anything Wrong, So That Won't Impact Me, Right? Wrong.

- EEOC is launching far-reaching investigations, sometimes based on a single charge or unrelated charges
- EEOC's investigations increasingly involve:
  - Requests for statewide or nationwide data and documentation
  - Requests for eDiscovery, ESI, and HRIS data
  - Extensive use of subpoenas and enforcement actions
- Before turning over HRIS data: Negotiate with EEOC re: scope of the data, and use an expert to analyze data to determine if there are any potential risk areas
  - Remember that plaintiffs' counsel likely will be able to obtain such data via an FOIA request

The "Good Faith" Conciliation Battle

- *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013)
  - Court held that EEOC's conciliation efforts are not subject to **any** judicial review
  - Effectively guts conciliation requirement in Title VII
- Expect the EEOC to try similar arguments in other jurisdictions

The "Good Faith" Conciliation Battle (Cont'd)

- Where its efforts are reviewed, EEOC has mixed success:
  - *EEOC v. Bloomberg, L.P.*, No. 07-civ-8383, 2013 WL 4799161, 119 Fair Empl. Prac. Cas. (BNA) 1577 (S.D.N.Y. Sept. 9, 2013) (EEOC failed to conciliate in good faith by failing to identify potential claimants)
  - *EEOC v. La Rana Haw., LLC*, 888 F. Supp. 2d 1019 (D. Haw. 2012) (EEOC failed to conciliate in good faith by failing to provide defendant with enough information to evaluate EEOC's claims)

The "Good Faith" Conciliation Battle (Cont'd)

- *EEOC v. Evans Fruit Co.*, 872 F. Supp. 2d 1107 (E.D. Wash. 2012) (EEOC failed to conciliate in good faith by failing to provide adequate information to assess $1 million settlement demand)
- *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012) (because EEOC did not adequately investigate the class allegations prior to litigation, employer was not given sufficient notice of the charges lodged against it and, therefore, had no meaningful opportunity to conciliate)

EEOC Subpoena Enforcement Actions

- EEOC increasingly relies on, and seeks enforcement of, administrative subpoenas with mixed results
  - *EEOC v. HomeNurse, Inc.*, No. 13-cv-2927, 2013 WL 5779046 (N.D. Ga. Sept. 30, 2013) (denial of enforcement of a subpoena for three years' worth of application packets because the individual retaliation charge did not support the broad, classwide investigation)

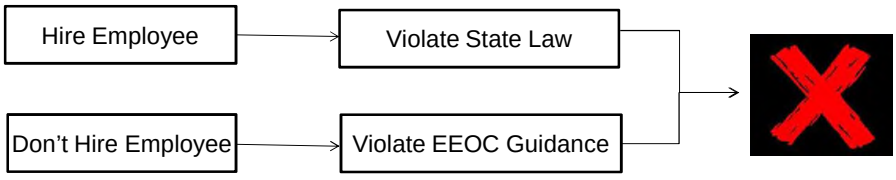
EEOC Subpoena Enforcement Actions (Cont'd)

- *EEOC v. Farmer's Pride, Inc.*, No. 12-MC-148, 2012 WL 5363145 (E.D. Pa. Oct. 31, 2012), *recons. denied,* No. 12-MC-148, 2014 WL 1053482 (E.D. Pa. Mar. 18, 2014) (enforcing subpoena seeking all sexual harassment complaints at a facility and contact information for all employees)
- *EEOC v. Randstad*, 685 F.3d 433 (4th Cir. 2012) (reversing denial of enforcement of a subpoena seeking "documents or a data compilation setting forth all position assignments made by [13 offices in Virginia] during the period January 1, 2005, through the present")
- *EEOC v. Burlington N. Santa Fe Ry. Co.*, 669 F.3d 1154 (10th Cir. 2012) (affirming denial of enforcement of a subpoena for nationwide employment records as not being relevant to two claims of disability discrimination)

The EEOC's Background Check Crusade

- April 2012 Background Check "Guidance"
  - Did not go through official rulemaking; EEOC admits it "does not determine rights or obligations"
  - Presumes adverse impact
  - Requires individualized assessment
  - Prohibits use of arrest records and/or pending convictions
- On March 10, 2014, the EEOC and FTC offered "joint tips" on the use of employment background checks
  - Very basic summary of EEOC's position

State Law Requirements? That's Your Problem.



- *See State of Texas v. EEOC*, No. 13-CV-00255 (N.D. Tex.): Texas sued the EEOC alleging that the Guidance impermissibly purports to preempt Texas state laws that preclude the hiring of felons for certain state positions. The EEOC's motion to dismiss is pending.

EEOC's Failed Attempts to Challenge Background Checks

- *EEOC v. Kaplan Higher Learning Educ. Corp.*, No. 10-cv-2882, 2013 WL 1891365 (N.D. Ohio Jan. 28, 2013), *recons*. *denied*, No. 10-cv-2882, 2013 WL 1891365 (N.D. Ohio May 6, 2013) (granting summary judgment to employer where expert's use of "race raters" to determine applicants' races fails to meet the standards of FRE 702)
- *EEOC v. Peoplemark Inc.*, 732 F.3d 584 (6th Cir. 2013) (affirming award of $751,942 to employer after dismissal of EEOC's claims where EEOC alleged a blanket companywide policy of denying employment to people with felony records, yet undisputed facts demonstrated no such policy ever existed)
- *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. 2013) (granting summary judgment to employer where EEOC's expert cherry-picked individuals to include in the data set, omitted data, and improperly used national data to support claim; expert also failed to isolate a specific employment practice that caused a disparate impact)

If at First You Don't Succeed . . .

- In June 2013, the EEOC sued both BMW and Dollar General, challenging their background screening procedures
- The EEOC accompanied those filings with a press release and public statements from EEOC General Counsel David Lopez, resulting in the story being widely reported in the mainstream press
- Cases are currently pending, but represent that the EEOC will continue to challenge background check procedures

What to Do?

"Are you hiring?"

- **Hypo:** Company X has a matrix that for each job family, felonies committed by applications within the last seven years will preclude employment. Lawful?
- **Hypo:** "Sue" is promoted to a manager position. While her criminal background was not job related for her old role, the company believes that it is for her new role. Can she be denied the promotion based upon a criminal record the company knew she had when it hired her?
- **Hypo:** "Randy," a current employee, is arrested for domestic assault. He is out of jail pending adjudication of the charges and wants to come back to work. Can the company stop him?

The EEOC Thinks Your Releases Are Invalid

"Sign here"

- *EEOC v. CVS Pharmacy, Inc.*, No.14-cv-863 (N.D. Ill. Feb. 7, 2014)
  - CVS used a "five-page single spaced" separation agreement
  - The EEOC's press release and complaint, including the challenged severance agreement, are attached hereto as Exhibit A
  - EEOC argues the release is overly broad and chills cooperation
  - EEOC attacks the following provisions: **General Release** (including all discrimination claims); **Confidentiality**; **Non-Disparagement**; **Covenant Not to Sue** (with carve-out for EEOC actions); and **Attorneys' Fees Provision** (for breach by either party)

The EEOC Thinks Your Releases Are Invalid (Cont'd)

"Sign here"

- *EEOC v. CVS Pharmacy, Inc.*, No.14-cv-863 (N.D. Ill. Feb. 7, 2014)
  - But wait, CVS tried to address this: Nothing in the covenant not to sue was "intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation"

The EEOC Thinks Your Releases Are Invalid

- The EEOC's Chicago Office has since sent letters to employers seeking publicly filed consent decrees related to similar charges; an example is set forth in Exhibit B
- EEOC seeks agreement that future releases:
  - Will explicitly state not only that the employee has the right to file a charge with the EEOC, but also that the employee can recover monetary relief in an action brought on his or her behalf by the EEOC
  - Explicitly state that the employee need not cooperate with the company in an action brought by the EEOC
  - Explicitly state that the employee can cooperate with the EEOC without violating any confidentiality or nondisparagement provision
  - Provide employees who signed the current version of the release an additional 300 days to file charges with the EEOC

EEOC Targets Leave Policies and Practices

- Policies and practices the EEOC will challenge as violating the ADA/ADAAA:
  - *Maximum leave policies (e.g., 6 mos., 12 mos.)*
  - *No-fault absenteeism policies*
  - *Reliance on third-party administrators to oversee leave (STD, LTD, workers' compensation, FMLA, etc.)*
  - *Failure to consider other positions within the organization as a reasonable accommodation*

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EEOC's March 6, 2014 Technical Assistance on Religious Garb and Grooming

- Very limited circumstances in which EEOC will challenge the sincerity of stated religious beliefs
  - Employee who has worked Sundays for 10 years suddenly asks for Sundays off due to religious beliefs. What if he was recently married? Recently converted?
- EEOC will almost always find that religious beliefs should be accommodated (i.e., good luck proving "undue hardship")
  - Customer preferences and co-worker disgruntlement are not undue hardships

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Preemptive Measures: Diversity and Inclusion

Why Review Diversity (Demographic/Pay) Data?

- Diversity Is a Best Practice
  - Diversity is essential to recruiting and retaining a talented workforce
  - Companies are constantly evaluated based upon their commitment to diversity
- Good-Faith Efforts to Comply with Federal Law
  - Companies may rely on their diversity efforts when defending against litigation

What Can Be Done? Proactive Risk Assessment

- Review/refine existing policies to mitigate class action risk:
  - Confirm that existing policies are consistent with business necessity
  - Consider whether any component of a policy may be subject to a disparate impact challenge
- Determine compliance with existing policies:
  - Audit effectiveness of policies and impact
  - Hold managers accountable for implementing policies

What Can Be Done? Proactive Risk Assessment

- Conduct internal audits:
  - Review data to identify whether any statistically significant discrepancies exist.
    - *Hiring, promotions, performance evaluations, etc.*
    - *Make sure employees are paid within range.*
- Determine if data systems capture variables that impact hiring pay and promotion decisions.
- Maintain robust applicant flow data.
- Develop a clear system for setting compensation.
  - Determine abilities and behaviors to reward and incentivize employees.
  - Determine how to best assess these abilities and behaviors within your work environment:
    - *Objective criteria provide uniformity in application and transparency for employees and reduce risk because they are the most defensible.*
    - *Provide managers with concrete, if not validated, criteria to make reasoned employment and pay decisions.*

Risks of Reviewing Diversity Data

- Certain demographic materials relating to diversity initiatives may be discoverable—including materials that reflect diversity concerns
- Objective is to protect as much of the analysis of your company's relevant data as possible

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Types of Affirmative Action and/or Diversity Programs

Initiative	Legality
Remedial Preferences – Race/gender decisive factor in selection decisions	Can be lawful **only** to remedy **actual discrimination**
Voluntary AA/Diversity Goals – Race/gender only one factor in selection decisions	Can be lawful **only** where there is a **manifest imbalance in traditionally segregated jobs**
OFCCP Affirmative Action Plans (AAPs) (required as federal contractor)	Lawful (race/gender **cannot** play role in decisions)
Aspirational Goals	Lawful (race/gender **cannot** play role in decisions)

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Legal Restrictions on Diversity Goals

- Need legal basis to implement goals if race or gender will be a factor in decisions
  - Remedy actual past discrimination
    - *Race/gender can be the decisive factor*
  - Remedy manifest imbalance in traditionally segregated jobs
    - *Race/gender can be a factor but not the decisive factor*
- Race/gender cannot be a factor for OFCCP AAPs and aspirational goals

Legal Risks of Aspirational Goals

- Unrealistic goals will be used in litigation to argue lack of true commitment to diversity
- Failure to meet specific targets (realistic or not) can be used as evidence of discrimination in a class action
- Failure to meet specific targets can be used as evidence of the company's knowledge of discrimination
- Use of terms such as "shortfalls" and identification of "comparators" can be used against the company in litigation

Identifying the Right Initiatives

- Companies should review diversity demographic data to identify where opportunities may exist for their workforces:
  - Consider whether hiring opportunities are internal, external, or both
  - Consider whether external hiring opportunities are entry level, midcareer, etc.
  - Analyze positions for which diverse slates were unavailable

Tracking Results

- Implement systems and software to track information relating to diversity initiatives and capture data that can be used to measure progress
- Analyze demographic data annually to assess year-over-year performance (pay data)
- Consider sharing data with managers

Relevant Protections

- Attorney-Client Privilege
- Work Product Privilege
- Self-Critical-Analysis Privilege

Attorney-Client Privilege

- For the attorney-client privilege to apply:
  - Counsel must be acting as an attorney giving legal advice (as opposed to business or management advice);
  - The communication must be between the attorney and client; and
  - The communication must have been made and maintained in confidence.

Attorney-Client Privilege (Cont'd)

- Whether the attorney-client privilege applies often turns on whether the analysis is done for business or legal reasons.
  - *See Gillard v. AIG Ins. Co.*, 15 A.3d 44, 52 n.8 (Pa. 2011) (acknowledging that the attorney-client privilege protects only legal advice, not business advice or factual investigations); *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 117 (E.D. Pa. 2011) (same).
- It is imperative that counsel document the reason for conducting the analysis in a manner that ensures that business leaders understand the limited purpose of the study.

Work Product Privilege

- Protects confidential information that an attorney has obtained or prepared in anticipation of litigation
- Two types of work product:
  - Opinion work product – attorney's mental impressions, conclusions, opinions, or legal theories
  - Fact work product – factual, nonopinion material gathered in preparation for a lawsuit

Self-Critical-Analysis Privilege

- The privilege protects information where:
  - The information sought is the result of a critical self-analysis undertaken by the party seeking protection;
  - There is a strong public interest in preserving the free flow of the type of information sought;
  - The information sought is of the type whose flow would be curtailed if discovery were permitted;
  - The information sought was prepared with the expectation that it would be kept confidential; and
  - The information sought is subjective analysis designed to have a positive societal effect.

Taking Steps to Preserve Privilege

- Taking these steps *before the analysis* is conducted will increase the likelihood of protecting it from disclosure:
  - Determine who will conduct the analysis
  - Define the purpose of the analysis in advance, in writing
  - Control those involved in the collection of data and the review of the results of the analysis
  - Confirm that the information in question is confidential
  - Ensure that the results of the analysis are not used for ordinary business purposes

Determining Who Will Conduct the Analysis

- In-house versus outside counsel
  - In-house counsel will likely be more cost effective but it will be less clear whether they are acting in a legal or a business capacity

Defining the Purpose

- Before undertaking any data collection or analysis, there should be clear communication to all involved that the analysis is being done for *legal purposes*
- Legal purposes include (but are not limited to) mitigating liability risks and assessing compliance with legal requirements

Control Involvement

- Participation should be limited
- As the number of individuals involved increases, the likelihood that the analyses will be protected decreases

Identifying Information as Confidential

- All communications during the audit should be clearly marked as confidential and privileged
- Individuals who will participate in the audit in any capacity should be given explicit notice that all communications, information and data gathered, and analyses conducted, are confidential and privileged

Controlling Results

- Using audit reports in the regular course of business and/or disseminating them beyond the control group may waive any applicable privilege
- The content of the final report should be limited to factual information and analysis and include a follow-up section detailing the next steps that will be taken

EEOC News

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FOR IMMEDIATE RELEASE
February 7, 2014

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EEOC SUES CVS TO PRESERVE EMPLOYEE ACCESS TO THE LEGAL SYSTEM

Federal Agency Takes Action to Ensure That Employees Retain the Right to File Discrimination Charges and Communicate With the EEOC

CHICAGO – CVS, the nation's largest integrated provider of prescriptions and health-related services, unlawfully violated employees' right to communicate with the Equal Employment Opportunity Commission (EEOC) and file discrimination charges, the federal agency claimed in a lawsuit filed today.

According to the EEOC, CVS conditioned the receipt of severance benefits for certain employees on an overly broad severance agreement set forth in five pages of small print. The agreement interfered with employees' right to file discrimination charges and/or communicate and cooperate with the EEOC, the agency said.

Interfering with these employee rights violates Section 707 of Title VII of the Civil Rights Act of 1964, which prohibits employer conduct that constitutes a pattern or practice of resistance to the rights protected by Title VII, the EEOC said. Section 707 permits the agency to seek immediate relief without the same pre-suit administrative process that is required under Section 706 of Title VII, and does not require that the agency's suit arise from a discrimination charge.

The EEOC filed suit in U.S. District Court for the Northern District of Illinois in Chicago (*EEOC v. CVS Pharmacy, Inc.*, Civil Action No. 14 C 0863). The suit has been assigned to U.S. District Judge John W. Darrah. Regional Attorney John C. Hendrickson will lead the agency's litigation effort, along with Supervisory Trial Attorney Gregory Gochanour, and Trial Attorneys Deborah Hamilton and Laura Feldman.

- more –

"Charges and communication with employees play a critical role in the EEOC's enforcement process because they inform the agency of employer practices that might violate the law," explained Hendrickson. "For this reason, the right to communicate with the EEOC is a right that is protected by federal law. When an employer attempts to limit that communication, the employer effectively is attempting to buy employee silence about potential violations of the law. Put simply, that is a deal that employers cannot lawfully make."

EEOC District Director Jack Rowe added, "The agency's most recent Strategic Enforcement Plan identified 'preserving access to the legal system' as one of the EEOC's six strategic enforcement priorities. That was no accident. The importance of employees' ability to participate in the agency's process, free from fear of adverse consequences, cannot be overstated. It is always difficult for an employee to report employer discrimination to federal law enforcement officials. Anything that makes that communication harder increases the risk that discrimination will go unremedied."

Gochanour said, "This statutory mechanism gives the agency the ability to take action even where an employee might not have been able to reach out to the agency and file a charge. In this case, the EEOC believes that numerous employees were subject to the overly broad release, and we are seeking to end these unlawful practices – as well as ensure the necessary safeguards to prevent further wrongdoing."

The EEOC's Chicago District Office is responsible for investigating and resolving charges of discrimination, administrative enforcement and the conduct of agency litigation in Illinois, Wisconsin, Minnesota, Iowa and North and South Dakota, with Area Offices in Milwaukee and Minneapolis.

The EEOC is responsible for enforcing federal laws prohibiting employment discrimination. Further information about the EEOC is available on its website at www.eeoc.gov.

###

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)	CIVIL ACTION NO. 1:14-CV-863
v.	)	COMPLAINT
CVS PHARMACY, INC. Defendant	)	

NATURE OF THE ACTION

1. This is an action under Title VII of the Civil Rights Act of 1964, as amended ("Title VII") to correct a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII in violation of Section 707(a) of Title VII. Specifically, as alleged with greater detail below, since at least August 2011, CVS Pharmacy, Inc. ("CVS") conditioned non-store FLSA exempt employees' receipt of severance pay on an overly broad, misleading and unenforceable Separation Agreement ("Separation Agreement") that interferes with its employees' right to file charges with the U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") and Fair Employment Practices Agencies ("FEPAs") and communicate voluntarily with and participate in the proceedings conducted by the EEOC and FEPAs.

JURISDICTION AND VENUE

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1345. This action is authorized and instituted pursuant to Section 707(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-6 ("Section 707").

3. The alleged unlawful employment practices were and are now being committed within the jurisdiction of the United States District Court for the Northern District of Illinois.

PARTIES

4. Plaintiff EEOC is the agency of the United States of America charged with the administration, interpretation, and enforcement of Title VII and is authorized to bring this action by Section 707(a) of Title VII, 42 U.S.C. § 2000e-6.
5. At all relevant times, Defendant has continuously been a corporation under the laws of the State of Delaware, doing business in the city of Chicago, IL, having its headquarters and registered office at One CVS Drive, Woonsocket, RI 02895.
6. Defendant is a person within the meaning of 42 U.S.C. § 2000e(a).

STATEMENT OF CLAIMS

7. During the time period from at least August 2011 to the present, Defendant has been engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII, in violation of Section 707. This pattern or practice of resistance includes conditioning the receipt of severance benefits on FLSA exempt non-store employees' agreement to a Separation Agreement that deters the filing of charges and interferes with employees' ability to communicate voluntarily with the EEOC and FEPAs.
8. Among other things, the *five-page single spaced* Separation Agreement (attached as Exhibit A with identifying information for the affected employee redacted) states:
   a. **Cooperation.** "In the event Employee receives a subpoena, deposition notice, interview request, or another inquiry, process or order relating to any civil, criminal or *administrative investigation*, suit, proceeding or other legal matter relating to the Corporation from *any investigator*, attorney, or any other third party, *Employee agrees to*

promptly notify the Company's General Counsel by telephone and in writing." (emphasis added)

b. **Non-Disparagement**. "Employee will not make any statements that disparage the business or reputation of the Corporation, and/or any officer, director, or employee of the Corporation."

c. **Non-Disclosure of Confidential Information.** "Employee shall not disclose to any third party or use for himself or anyone else Confidential information without the prior written authorization of CVS Caremark's Chief Human Resources Officer." Such information includes "information concerning the Corporation's personnel, including the skills, abilities, and duties of the Corporation's employees, wages and benefit structures, succession plans, information concerning affirmative action plans or planning . . ."

d. **General Release of Claims.** "Employee hereby releases and forever discharges CVS Caremark Corporation . . . from any and all causes of action, lawsuits, proceedings, complaints, *charges*, debts contracts, judgments, damages, claims, and attorneys fees against the Released Parties, whether known or unknown, which Employee has ever had, now has or which the Employee . . . may have prior to the date [of] this Agreement . . . . *The Released Claims include . . . any claim of unlawful discrimination of any kind . . . .*" (emphasis added) .

e. **No Pending Actions; Covenant Not to Sue.** "Employee represents that as of the date Employee signs this Agreement, Employee has not filed or initiated, or caused to be filed, or initiated, any *complaint*, claim, action or lawsuit of any kind against any of the Related parties in any federal, state, or local court, or *agency*. Employee agrees *not to initiate or file, or cause to be initiated or file, any action, lawsuit, complaint or proceeding*

asserting any of the Released Claims against any of the Released Parties. . . . Employee agrees to promptly reimburse the Company for any legal fees that the Company incurs as a result of any breach of this paragraph by Employee."

f. The preceding paragraph entitled "No Pending Actions; Covenant Not to Sue" contains a single qualifying sentence that is not repeated anywhere else in the Agreement (though the other limitations are contained in separate paragraphs), noting that "[n]othing in this paragraph is intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation."

g. If the Employee breaches CVS's Separation Agreement, the Agreement requires that the "Employee acknowledges that a breach . . . will result in irreparable injury to some or all of the Corporation . . . . In the event that a court issues a temporary restraining order, preliminary injunction, permanent injunction, or issues any other similar order enjoining Employee from breaching this Agreement, or awards CVS any damages due to Employee's breach of this Agreement, Employee agrees to promptly reimburse the Company for all reasonable attorneys fees incurred by CVS . . . ."

9. Defendant reported that more than 650 employees entered into Separation Agreements based on the attached form in 2012.

10. The use of this Separation Agreement constitutes resistance to the full enjoyment of rights secured by Title VII because the Separation Agreement interferes with an employee's right to file a charge with the EEOC or FEPAs, and to participate and cooperate with an investigation conducted by the EEOC or FEPAs.

11. CVS, through its pattern or practice of using this Separation Agreement with non-store employees, has intended to deny the full exercise of these Title VII rights. Limiting employees' right to file charges and participate and cooperate with the EEOC and FEPAs interferes with the EEOC and the FEPAs' statutorily assigned responsibility to investigate charges of discrimination.

12. All conditions precedent to the filing of this lawsuit have been met.

PRAYER FOR RELIEF

Therefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, successors, assigns, and all persons in active concert or participation with it, from engaging in a pattern or practice of resistance to the right to file a charge and participate and cooperate with investigations by the EEOC or FEPAs including but not limited to enjoining Defendant from using the current version of its Separation Agreement described in this Complaint (or any substantially equivalent Release) or from prohibiting employees from filing charges with or cooperating with EEOC or FEPAs.

B. Order Defendant to reform its Separation Agreement consistent with the provisions of Section 707 of Title VII both as to employees who are subject to the Agreement and as to any future Agreements.

C. Order Defendant to institute and carry out policies, practices, and programs that provide for the full exercise of the right to file a charge and participate and cooperate with the EEOC and FEPAs, including but not limited to a corrective communication with the Company's workforce informing all employees that they retain the right to file a charge

of discrimination and to initiate and respond to communication with the EEOC and state FEPAs and are not required to keep certain information confidential in those communications or to notify the Company's Human Resources Department or General Counsel about such communications and the addition of the same language to the Company's anti-discrimination policy; and training for the Company's human resources and management personnel and any personnel who write, negotiate or execute Employment Agreements about employees' right to file charges and communicate with the EEOC and state FEPAs:

D. Provide three-hundred days to file a charge of discrimination with EEOC or a FEPA for any former employee who was subject to the Separation Agreement described in this Complaint (or any substantially equivalent Release).

E. Grant such further relief as the Court deems necessary and proper in the public interest.

F. Award the Commission its costs in this action.

Dated: February 7, 2014

Respectfully submitted,

s/P. David Lopez

P. David Lopez
General Counsel

James L. Lee
Deputy General Counsel

Gwendolyn Young Reams
Associate General Counsel

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
131 M Street, N.E.
Washington, D.C. 20507

s/John Hendrickson

John Hendrickson
Regional Attorney

s/Gregory Gochanour

Gregory Gochanour
Supervisory Trial Attorney

s/Deborah Hamilton

Deborah Hamilton, No. 6269891
Trial Attorney

s/Laura Feldman, No. 6296356

Laura Feldman
Trial Attorney

SEPARATION AGREEMENT

This Separation Agreement ("Agreement") between or "Employee") and CVS Pharmacy, Inc. ("CVS Caremark" or the "Company") shall be effective as of the end of the Revocation Period defined below (the "Effective Date"), so long as the Agreement is also signed by an authorized representative of the Company.

WHEREAS, Employee has been employed by CVS Caremark or one of its subsidiaries;

WHEREAS, Employee and CVS Caremark desire to enter into an agreement setting forth the terms of Employee's separation from the Company;

WHEREAS, Employee has thoroughly reviewed this Agreement, has entered into it voluntarily, and has had the opportunity to consult with legal counsel of Employee's choice before signing this Agreement.

NOW THEREFORE, in consideration of the covenants below, including but not limited to the General Release of Claims, and for other good and valuable consideration as set forth in this Agreement Employee and the Company agree as follows:

1. **TERMINATION OF EMPLOYMENT.**
Employee's last date of employment with the Company (the "Separation Date") shall be Promptly following the Separation Date, CVS Caremark shall pay Employee any remaining accrued but unused vacation time or paid time off to which Employee may be entitled in accordance with CVS Caremark policy.

2. **SALARY CONTINUATION PAYMENTS.**
Subject to Employee's compliance with the obligations hereunder, CVS Caremark agrees to pay Employee at the rate of per month during the "Severance Period", which is the eight (8) week period beginning immediately after the Separation Date. The final day of the Severance Period shall be referred to as the "Severance End Date".

3. **BENEFITS.**
Effective immediately after the Separation Date, Employee may elect to continue Employee's Medical (including prescription), Dental, and/or Vision coverage in effect as of the Separation Date pursuant to COBRA. If Employee elects to continue health care coverage under COBRA by completing the required COBRA documents, CVS Caremark shall subsidize such coverage by paying the health insurance provider an amount equal to the current Company contribution for active employees for coverage during the Severance Period or the date on which Employee becomes eligible for health care coverage from another employer, whichever is earlier. After the end of the Severance Period or after Employee becomes eligible for health care coverage from another employer, whichever is earlier, Employee shall be solely responsible for any health insurance Employee elects to obtain, and, if eligible, Employee may continue coverage at the full premium rate plus a 2% administrative fee to the extent permitted under COBRA. Employee understands and agrees that CVS Caremark may modify its premium structure, the terms of its Plans, and the coverage of the Plans at any time subject only to applicable law.

4. **STOCK OPTIONS.**
The terms and conditions of Employee's previously-granted stock options shall be governed by the applicable CVS Caremark Corporation Incentive Compensation Plan (the "ICP") and the applicable Stock Option Agreements with Employee.

5. **OUTPLACEMENT ASSISTANCE.**
As part of its severance benefits to Employee, CVS Caremark will provide Employee with 2 months of outplacement assistance.

6. **NO OTHER PAY OR BENEFITS; SUFFICIENCY OF CONSIDERATION.**
Except as specifically set forth in this Agreement, Employee shall be entitled to no other wages, salary, vacation pay, bonuses, incentive awards, commissions, benefits, stock, restricted stock units, stock options, or any other compensation of any kind, except as required by law. Employee acknowledges that the severance pay and benefits subsidy described in this Agreement are in excess of any earned wages and any other amounts due and owing to Employee, and are good and valuable consideration for the general release of claims and the other covenants and terms in this Agreement.

7. GENERAL RELEASE OF CLAIMS.
Employee hereby releases and forever discharges CVS Caremark Corporation and each of its divisions, affiliates, subsidiaries and operating companies, and the respective officers, directors, employees, agents and affiliates of each of them (collectively, the "Released Parties") from any and all causes of action, lawsuits, proceedings, complaints, charges, debts, contracts, judgments, damages, claims, and attorneys fees against the Released Parties, whether known or unknown, which Employee ever had, now has or which Employee or Employee's heirs, executors, administrators, successors or assigns may have prior to the date this Agreement is signed by Employee, due to any matter whatsoever relating to Employee's employment, compensation, benefits, and/or termination of Employee's employment with CVS Caremark (collectively, the "Released Claims"). The Released Claims include, but are not limited to, any claim that any of the Released Parties violated the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, Sections 1981 through 1988 of Title 42 of the United States Code, the Employee Retirement Income Security Act, the Immigration Reform and Control Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, and/or the Occupational Safety and Health Act; any claim that any of the Released Parties violated any other federal, state or local statute, law, regulation or ordinance; any claim of unlawful discrimination of any kind; any public policy, contract, tort, or common law claim; and any claim for costs, fees, or other expenses including attorney's fees incurred in these matters. For the avoidance of doubt, this release includes any claims by Employee under the following laws: the West Virginia Human Rights Act, the New Jersey Law Against Discrimination, or the New Jersey Conscientious Employee Protection Act. Notwithstanding the foregoing, this release does not include any rights that Employee cannot lawfully waive, and will not release any rights Employee has to (a) defense and indemnification from CVS Caremark or its insurers for actions taken by Employee in the course and scope of Employee's employment with CVS Caremark; (b) claims, actions, or rights arising under or to enforce the terms of this Agreement; and/or (c) vested benefits under any retirement or pension plan and/or deferred compensation plan.

8. NO PENDING ACTIONS; COVENANT NOT TO SUE.
Employee represents that as of the date Employee signs this Agreement, Employee has not filed or initiated, or caused to be filed or initiated, any complaint, claim, action or lawsuit of any kind against any of the Related Parties in any federal, state, or local court or agency. Employee agrees not to initiate or file, or cause to be initiated or filed, any action, lawsuit, complaint or proceeding asserting any of the Released Claims against any of the Released Parties. Employee further agrees not to be a member of any class or collective action in any court or in any arbitration proceeding seeking relief against the Released Parties based on claims released by this Agreement, and that even if a court or arbitrator rules that Employee may not waive a claim released by this Agreement, Employee will not accept any money damages or other relief. Employee agrees to promptly reimburse the Company for any legal fees that the Company incurs as a result of any breach of this paragraph by Employee. Nothing in this Agreement is intended to or shall interfere with Employee's right to challenge the Company's compliance with the waiver requirements of the Age Discrimination Act, as amended by the Older Workers Benefit Protection Act. Moreover, nothing in this paragraph is intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation. Employee shall not, however, be entitled to receive any relief, recovery or monies in connection with any Released Claim brought against any of the Released Parties, regardless of who filed or initiated any such complaint, charge or proceeding.

9. NO FMLA OR FLSA CLAIMS.
Employee acknowledges that the Company has provided Employee with any leave to which Employee may be or may have been entitled under the Family and Medical Leave Act. Employee represents that Employee is not aware of any facts that would support a claim by Employee against any of the Released Parties for any violation of the Family and Medical Leave Act. Employee further acknowledges that Employee has been properly paid for all time worked and is unaware of any facts that would support a claim by Employee against any of the Released Parties for any claim of unpaid overtime or any other violation of the Fair Labor Standards Act.

10. UNDERSTANDING OF AGREEMENT; ADVICE OF COUNSEL.
Employee acknowledges and confirms that Employee has entered into this Agreement of Employee's own free will, without duress or coercion. Employee acknowledges that Employee has read and fully understands the meaning and intent of this Agreement and is competent to execute it. The Company hereby advises Employee to seek the advice of legal counsel concerning this Agreement before signing this Agreement, and Employee represents that Employee has had the opportunity to do so prior to signing this Agreement.

11. TIME TO CONSIDER AND REVOKE AGREEMENT.
Employee shall have twenty-one (21) days from the date of receipt (the "Consideration Period") to consider whether to enter into this Agreement. Any modifications to this Agreement, whether material or immaterial, will not restart the Consideration Period. If Employee chooses to sign and thereby accept this Agreement, Employee may revoke the acceptance within seven (7) calendar days of the date on which Employee signed the Agreement (the "Revocation Period"). To revoke the acceptance of the Agreement, Employee must send written notice stating that "I revoke my acceptance of the Separation Agreement," or words to that effect, to Mr. David L. Casey, Vice President Human Resources, or his successor, at the address listed below, before the end of the Revocation Period. This Agreement shall take effect on the day following the expiration of the Revocation Period (the "Effective Date"). Employee agrees that, promptly after signing this Agreement, Employee shall send the entire original signed agreement to Mr. David L. Casey, VP Human Resources, One CVS Drive, Woonsocket, RI 02895.

12. **OLDER WORKERS BENEFIT PROTECTION ACT INFORMATION.**

(a) In the Company's desire to be in compliance with the Older Workers Benefit Protection Act ("OWBPA"), the Company advises Employee as follows. Employee has the opportunity to evaluate the terms of this Agreement for not less than 21 days prior to Employee's execution of this Agreement. Should Employee decide not to use the full 21 days, then Employee knowingly and voluntarily waives any claim that Employee was not given that period of time or did not use the entire 21 days to consult an attorney or consider this Agreement. Employee is hereby advised to consult with an attorney prior to executing this Agreement. This Agreement constitutes written notice that the Employee has been advised to consult with an attorney prior to executing this Agreement and that the Employee has carefully considered other alternatives to executing this Agreement.

(b) By signing this Agreement, Employee represents and certifies that:

i) Employee is relying solely upon the contents of this Agreement and is not relying on any other representations whatsoever of the Released Parties as an inducement to enter into this Agreement.

ii) Employee's execution of this Agreement is a representation that Employee (A) has read this Release, (B) has been provided a full and ample opportunity to study it, including a period of at least 21 days within which to consider it, (C) has been advised in writing to consult with an attorney prior to signing it, and (D) is signing it voluntarily with full knowledge that it is intended, to the maximum extent permitted by law, as a complete release and waiver of any and all claims.

iii) Without limiting the scope of this Agreement in any way, this Agreement constitutes a knowing and voluntary waiver of any and all rights or claims that exist or that Employee has or may claim to have under the Federal Age Discrimination in Employment Act ("ADEA"), as amended by the Older Workers Benefit Protection Act of 1990 ("OWBPA"), which is set forth at 29 U.S.C. § 621, et seq. This Agreement does not govern any rights or claims that may arise under the ADEA after the date this Agreement is signed by Employee.

13. **EMPLOYEE COVENANTS.**
Employee acknowledges, represents and agrees as follows:

(a) **NON-DISCLOSURE OF CONFIDENTIAL INFORMATION.**
During the course of Employee's employment with CVS Caremark or any of its subsidiaries or affiliates, Employee has learned and had access to valuable non-public information concerning CVS Caremark Corporation and its predecessors, related entities, operating companies, subsidiaries, and affiliates (such entities hereafter referred to as the "Corporation") (such information, "Confidential Information"). For purposes of this Agreement, Confidential Information includes, but is not limited to, the Corporation's business plans, real estate plans and strategies, contracts, financial information, sales and marketing information, pharmacy policies and practices, information concerning the Corporation's personnel, including the skills, abilities and duties of the Corporation's employees, wage and benefit structures, succession plans, information concerning affirmative action plans or planning, information concerning vendors and suppliers, information pertaining to lawsuits and charges, IS programs, applications, strategic plans and information, trade secrets, and other information which could affect the Corporation's business. Employee has not, as of the date Employee signs this Agreement, disclosed to any third party or used, except as required in the course of performing work for CVS Caremark, any Confidential Information. Employee shall not disclose to any third party or use for himself/herself or anyone else any Confidential Information without the prior written authorization of CVS Caremark's Chief Human Resources Officer ("CHRO").

(b) **NON-SOLICITATION AND NON-HIRE OF EMPLOYEES.**
Employee will not, directly or indirectly, for 12 months following the Separation Date: (i) solicit, cause, induce, or encourage, or attempt to solicit, cause, induce, or encourage, any then-current employee of the Corporation to leave his or her employment; (ii) hire or otherwise engage the services of any then current employee of the Corporation or any individual who was employed by the Corporation in the six (6) months preceding the termination of Employee's employment; or (iii) assist, cause, induce or encourage, or attempt to assist, cause, induce or encourage, any third party to take any of the actions described in subsections (i) or (ii) above.

(c) **RETURN OF PROPERTY.**
On or before the Separation Date Employee shall return to CVS Caremark all property of the Corporation in Employee's control or possession, including but not limited to the originals and copies of any information provided to or acquired by Employee in connection with the performance of work for the Corporation, including but not limited to all files, correspondence, communications, memoranda, e-mails, slides, records, and all other documents, no matter how produced or reproduced, all computer equipment, programs and files, and all office keys and access cards, it being hereby acknowledged that all of said items are the sole and exclusive property of the Corporation.

(d) NON-DISPARAGEMENT.
Employee will not make any statements that disparage the business or reputation of the Corporation, and/or any officer, director or employee of the Corporation. Notwithstanding the foregoing, nothing in this Agreement shall prohibit Employee from (i) making truthful statements or disclosures that are required by applicable law, regulation or legal process; or (ii) requesting or receiving confidential legal advice.

(e) COOPERATION.

i) In the event Employee receives a subpoena, deposition notice, interview request, or any other inquiry, process or order relating to any civil, criminal or administrative investigation, suit, proceeding or other legal matter relating to the Corporation from any investigator, attorney or any other third party, Employee agrees to promptly notify the Company's General Counsel by telephone and in writing. Without limiting the generality of the preceding sentence, in the event Employee receives a subpoena, deposition notice, interview request, or any other inquiry, process or order which requires or may reasonably be construed to require Employee to produce Confidential Information, Employee shall promptly: (a) notify the Company's General Counsel of the item, document, or information sought by such subpoena, deposition notice, interview request, or other inquiry, process or order; (b) furnish the Company's General Counsel with a copy of said subpoena, deposition notice, interview request, or other inquiry, process or order; and (c) provide reasonable cooperation with respect to any procedure that the Company may initiate to protect Confidential Information or other interests. If the Company objects to the subpoena, deposition notice, interview request, inquiry, process, or order, Employee shall cooperate to ensure that there shall be no disclosure until the court or other applicable entity has ruled upon the objection, and then only in accordance with the ruling so made. Nothing in this Agreement shall be construed to prohibit Employee from testifying truthfully in any legal proceeding.

ii) Employee shall cooperate fully with the Corporation and its legal counsel in connection with any action, proceeding, or dispute arising out of matters with which Employee was directly or indirectly involved while serving as an employee of the Corporation. This cooperation shall include, but shall not be limited to, meeting with, and providing information to, the Corporation and its legal counsel, maintaining the confidentiality of any past or future privileged communications with the Corporation's legal counsel (outside and in-house), and making himself/herself available to testify truthfully by affidavit, in depositions, or in any other forum on behalf of the Corporation. CVS Caremark agrees to reimburse Employee for any reasonable and necessary out-of-pocket costs associated with such cooperation.

14. BREACH OF EMPLOYEE COVENANTS AND INJUNCTIVE RELIEF.
Without limiting the remedies available to CVS Caremark, Employee acknowledges that a breach by Employee of any of the covenants set forth above in the section entitled Employee Covenants will result in irreparable injury to some or all of the Corporation for which there is no adequate remedy at law, that monetary relief will be inadequate, and that, in the event of such a material breach or threat thereof, CVS Caremark shall be entitled to obtain, in addition to any other relief that may be available, a temporary restraining order and/or a preliminary or permanent injunction, restraining Employee from engaging in activities prohibited by any of the sections of this Agreement identified in this paragraph, as well as such other relief as may be required specifically to enforce any of the sections of this Agreement identified in this paragraph, without the payment of any bond. In the event that a court issues a temporary restraining order, preliminary injunction, permanent injunction, or issues any other similar order enjoining Employee from breaching this Agreement, or awards CVS any damages due to Employee's breach of this Agreement, Employee agrees promptly to reimburse the Company for all reasonable attorneys fees incurred by CVS in connection with obtaining such equitable relief or damages.

15. NONADMISSION OF WRONGDOING.
Employee and CVS Caremark agree that neither this Agreement nor the furnishing of consideration hereunder shall be deemed or construed at any time for any purpose as an admission by either party of any liability, wrongdoing or unlawful conduct, and Employee and CVS Caremark expressly deny any such liability, wrongdoing or unlawful conduct.

16. GOVERNING LAW.
This Agreement shall be governed by and conformed in accordance with the laws of the State of Rhode Island without regard to its conflict of laws provisions. Any actions brought to enforce the terms of this Agreement shall be brought in a court of competent jurisdiction located in the State of Rhode Island.

17. JURY TRIAL WAIVER.
Employee and CVS Caremark irrevocably and unconditionally waive the right to a trial by jury in any action or proceeding seeking to enforce, or alleging the breach of, any provision of this Agreement.

18. COUNTERPARTS.
This Agreement may be executed in counterparts and each counterpart will be deemed an original.

19. SECTION HEADINGS.
Section headings contained in this Agreement are for convenience of reference only and shall not affect the meaning of any provision herein.

20. **SEVERABILITY.**
If any of the provisions of the section entitled Employee Covenants are deemed unenforceable by a court of competent jurisdiction because they are overly broad, then the court shall have the ability to modify the offending provision in order to make it enforceable. Should any term or provision of this Agreement be declared illegal, invalid or unenforceable by any court of competent jurisdiction and if such provision cannot be modified to be enforceable, such provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against either of the parties.

21. **RESPONSIBILITY FOR TAXES.**
All payments set forth in this Agreement are subject to applicable withholdings and deductions. Employee acknowledges and agrees that Employee is solely responsible for all taxes on the payments and benefits described in this Agreement. The parties intend for the terms of this Agreement to be paid in such a manner to be compliant with Section 409A of the Internal Revenue Code of 1986, as amended ("Code Section 409A"), or, as applicable, to be exempt from Code Section 409A (including as necessary for the salary continuation payments to satisfy the involuntary separation pay exception set forth in Treasury Regulation Section 1.409A-1(b)(9)). Notwithstanding the foregoing, CVS Caremark makes no representations or guarantees with respect to the taxation of any of the payments or benefits set forth herein, including taxation pursuant to Code Section 409A.

22. **DEBTS TO THE COMPANY.**
Employee acknowledges that, in the event Employee is indebted to the Company or an affiliate thereof, the severance payments provided for in the Agreement may be reduced, offset, withheld or forfeited up to the amount of the debt.

23. **ENTIRE AGREEMENT.**
This Agreement; the ICP; and any compensation, equity or benefit plan or agreement referred to herein set forth the entire agreement between the parties hereto and fully supersede any and all prior and/or supplemental understandings, whether written or oral, between the parties concerning the subject matter of this Agreement. Employee has not relied on any representations, promises or agreements of any kind made to Employee in connection with Employee's decision to accept the terms of this Agreement, except for the representations, promises and agreements herein. Any modification to this Agreement must be in writing and signed by Employee and CVS Caremark's CHRO or her authorized representative.

IN WITNESS WHEREOF, the parties knowingly and voluntarily executed this Separation Agreement as of the dates set forth below.

CVS PHARMACY, INC.

By: _____
David L. Casey
Vice President, Human Resources

Date: 7/27/11

Date: 8/4/2011

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Chicago District Office

500 West Madison Street, Suite 2000
Chicago, IL 60661
Intake Information Group: (800) 669-4000
Intake Information Group: (800) 669-6820
Chicago Direct Dial: (312) 869-8000
Chicago TTY: (312) 869-8001
Administration Fax: (312) 869-8077
Enforcement/File Disclosure Fax: (312) 869-8220
Federal Sector Fax: (312) 869-8125
Legal Fax: (312) 869-8124
Mediation Fax: (312) 869-8060

April 14, 2014

REDACTED

Dear REDACTED

The Commission is concerned that REDACTED or the "Company") may be engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII of the Civil Rights Act of 1964 and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights described in Title VII in violation of Section 707(a) of Title VII.

It appears that REDACTED has conditioned employees' receipt of severance pay on an overly broad, misleading, and unenforceable Employment Separation Agreement and Release ("Separation Agreement") that illegally bars employees from filing charges with the EEOC and state and local Fair Employment Practices Agencies ("FEPAs"), interferes with separating employees' rights to communicate with the EEOC and FEPAs, and participate in EEOC and FEPA investigations and enforcement actions.

Without in any way indicating that communications with the EEOC are not covered, the Company's Separation Agreement requires that the employee waive the right to assert any all legal claims against the Company including any form of a charge; prohibits statements that are disparaging or adverse to the Company and prohibits any conduct that could harm the reputation of the Company; requires that the employee cooperate with the Company in connection with any claims or actions brought against the Company; mandates the employee inform the Company if the employee is contacted by any person or entity who may be adverse to the Company; and imposes on the employee the responsibility for pays all fees or costs associated with any breach of the Agreement including attorneys' fees.

In order to rectify this practice, please inform the EEOC within fourteen (14) days of receipt of this letter whether REDACTED will agree to the following terms as part of a Consent Decree to be filed with the court:

1) An immediate end to the Company's use of the current version of its Separation Agreement;

2) Future Employment Agreements (including Separation Agreements, severance agreements, employee arbitration agreements, last chance agreement, employment contacts or settlement agreements) offered or entered into by REDACTED will explicitly state that employees retain the right to file charges with the EEOC and FEPAs, cooperate with EEOC or FEPA investigations, and to recover monetary relief or other relief (including reinstatement) in any action by the EEOC or a FEPA at the discretion of the Agency and will not contain language suggesting the contrary;

3) Future Employment Agreements offered or entered into by REDACTED will state that employees retain the right to communicate with the EEOC and FEPAs and that such communication can be initiated by the employee or in response to the government and is not limited by any non-disparagement or confidentiality obligation under the Employment Agreement and will not contain language suggesting the contrary;

4) Future Employment Agreements offered or entered into by REDACTED will make clear that employees are not required to notify the Company regarding any communication from the EEOC or FEPA even if EEOC or the FEPA is adverse to the Company.

5) Future Employment Agreements offered or entered into by REDACTED will make clear that employees are not required to cooperate with the Company in any matter pending with the EEOC or a FEPA or in which EEOC or a FEPA is a party.

6) Future Employment Agreements offered or entered into by REDACTED will make clear that an employee is not subject to any risk of legal action by the Company for breach of the Separation Agreement if the employee communicates with the EEOC or a FEPA or participates in an EEOC or FEPA action.

7) The tolling of the 300-day charge filing period for any employee who signed the current version of the Company's Separation Agreement from June 18, 2013 to the present in order that such employees can be informed that they retain the right to file a charge, participate fully in any resulting investigation, cooperate with EEOC or a FEPA in one of its investigations, and that the Company will not object to any resulting charges on the basis that they are untimely;

8) A corrective communication with the Company's workforce signed by the Company's General Counsel and the EEOC informing all employees that they retain the right to file a charge of discrimination and to initiate and respond to communication with the EEOC and FEPAs and are not required to keep certain information confidential in those communications or to notify the Company about such communications and the addition of the same language to the Company's anti-discrimination policy; and

9) Training for the Company's human resources and management personnel and any personnel who write, negotiate or execute Employment Agreements about employees' right to file charges and communicate with the EEOC and FEPAs.

In order to ensure that any resolution between parties includes an enforcement mechanism, it is necessary that the resolution take the form of a Consent Decree, which can be filed jointly by the Commission and the Company in federal district court immediately after the Commission files a Complaint against the Company.

If the Company takes the position that it has not entered into Separation Agreements that contain any of the provisions noted above or that its use of any such language in Separation Agreements has been isolated and limited, please provide any such evidence to the EEOC within fourteen (14) days, including (i) the number of Separation Agreements that the Company entered into in the past two years; and (ii) the number that contain any limitation on charge filing and disparagement of the Company or that require confidentiality and communications to the Company regarding any contact with a party adverse to the Company but do not contain a specific exception for the EEOC and FEPAs. If the Company has specifically excepted the right to file a charge of discrimination with the EEOC or FEPAs from any release of claims, please provide copies of all such agreements. If the Company has specifically excepted the right to communicate with the EEOC or FEPAs from confidentiality or non-disparagement obligations, please provide copies of all such agreements. The absence of such a submission will be taken as evidence that the Company's use of these provisions in its Separation Agreement has been routine.

We appreciate your immediate attention to this matter and would be happy to discuss it with you. Please feel free to call or email Deborah Hamilton, at (312) 869-8110 or Deborah.Hamilton@EEOC.gov , a trial attorney in our office here in Chicago.

Sincerely,

John C. Hendrickson
Regional Attorney

Tab 4

The Affordable Care Act: What Companies Need to Know

Morgan Lewis technology may-rathon

presenter
Andy R. Anderson

May 21, 2014

Final Shared Responsibility Rules

- Released 2.10.2014
  - Prior day (2.9.2014) was a key date in numerous transition rules
  - Finalizes proposed rules from late 2012
- Key concepts:
  - Very similar in scope and content to proposed rules
    - *Retains and expands proposed transition rules*
    - *Retains and expands full-time employee determinations*
    - *Retains and clarifies affordability safe harbors*

Morgan Lewis

Final Shared Responsibility Rules (Cont'd)

- Confirms 2015 Shared Responsibility effective date for large (100 or more FTE/FTeq) employers
  - *Expands proposed 95/5% "offer" rule to 70/30% for 2015, but can still lead to "inadequate coverage" penalty*
  - *The 70% expansion creates new planning opportunities*
- Delays Shared Responsibility effective date until 2016 for midsize employers (50 to 99 FTE/FTeq)
  - *Numerous requirements and a necessary certification in order to qualify*
  - *Places new emphasis on when an employer is "small" enough to escape Shared Responsibility rules for 2015*

Final Shared Responsibility Rules (Cont'd)

- Lots (and lots and lots) of small detail changes that are grounded in comments to the proposed rules and special interest lobbying
- Final Regulations are generally "clean" for 2016 and beyond
  - *Special rules, transition relief, etc. are found in the preamble to the final rules, the preamble to the proposed rules, and releases that predate the proposed rules*
    - Must, as a result, check multiple sources, particularly for 2015 specifics

Final Shared Responsibility Rules (Cont'd)

- Preamble nice overview of law, prior guidance, and proposed rules
- See also new Q&As on IRS website:
  - *http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act*
- Imbedded expectation for more "subregulatory" guidance in a number of areas
  - *Such as additional FAQs, Q&As, etc.*
- Next up: Reporting Rules

Prior/Future Material

- ACA considerations for employers
  - http://www.morganlewis.com/index.cfm/publicationID/8CD8F0A9-4F6B-4170-A73A-3451008094D6/fuseaction/publication.detail
- ACA considerations for group health plans
  - http://www.morganlewis.com/index.cfm/publicationID/F5C8601D-373C-4E4A-9850-671BB3B82499/fuseaction/publication.detail
- ACA considerations for individuals
  - http://www.morganlewis.com/index.cfm/publicationID/04845943-61B7-49DE-BB0E-BAF9D3403D4E/fuseaction/publication.detail
- Companion LawFlash to Final Rules is in the pipeline

Who Is Subject to the Shared Responsibility Rules in 2015?

- Only employers with 100 or more FT/FTeq employees
  - On average, at least 100 FT/FTeq employees on business days during the previous calendar year (initially 2014)
    - *Six-consecutive-month transition rule for 2014*
  - Determine if "large" by adding together:
    - *FT employees*
      - 30 hours per week (or 130 hours per month)
    - *FT employee equivalents*
      - Total hours worked by all PT employees divided by 120
    - *From all controlled group employers*
      - Reserved for government and church employers

Who Is Subject to the Shared Responsibility Rules in 2015? (Cont'd)

  - Special rules for:
    - *Seasonal employees (reasonable good-faith definition)*
    - *New employers (look at reasonable expectation for current year)*
    - *Counts all employees—even those eligible for Medicare, Medicaid, or other employer coverage*
    - *Exempts most overseas employees*
    - *Predecessor employers (still reserved for future guidance)*
- Most employers will know, well in advance of 2015, whether they are subject to the employer mandate

Who Is Subject to the Shared Responsibility Rules in 2016?

- Expanded to include employers with 50 to 99 FT employees
  - Applied the same as 2015 rules for larger employers
  - Measured on the basis of 2014 workforce
    - *Must maintain size and hours of workforce for period from 2.9.2014 to 12.31.2015*
    - *Must maintain previously offered coverage (if any) from 2.9.2014*
    - *Must certify compliance as part of Section 6056 reporting*
      - Which apparently will apply to such employers for 2015
    - *Does not generally carry over other 2015 transition rules*

Non–Calendar Year Plans

- There are revised and new (but still limited) delayed effective date rules for non–calendar year plans existing (and not modified) after 12.27.2012
  - Delayed until start of non–calendar year for any employee eligible to participate 2.9.2014
  - Delayed until start of non–calendar year for all employees (whether previously eligible or not) if:
    - *Offered plan to at least 1/3 of all employees at most recent OE before 2.9.2014; or*
    - *Covered at least 1/4 of all employees on a day in 12-month period ending 2.9.2014*

Non–Calendar Year Plans (Cont'd)

- Delayed until start of non–calendar year for FT employees (whether previously eligible or not) if:
  - *Offered plan to at least 1/2 of ACA FT employees at most recent OE before 2.9.2014; or*
  - *Covered at least 1/3 of ACA FT employees on a day in 12-month period ending 2.9.2014*
    - Useful for employers with a significant percentage of employees who will not become ACA FT employees
- Also applies to 2016 delay for smaller employers
- Regardless, must do Section 6056 reporting for all of 2015

Shared Responsibility Basics

No-Coverage Penalty	Inadequate-Coverage Penalty
If employer does not offer Minimum Essential Coverage to 95% of its FT employees	If employer offers coverage to its FT employees, but the coverage is not Affordable and/or does not provide Minimum Value
AND One FT employee enrolls in an Exchange and receives a subsidy	
Employer must pay penalty of: $2,000 (indexed) for all FT employees (less 30) (including those receiving coverage)	Employer must pay penalty of: $3,000 (indexed) for each FT employee receiving a subsidy (capped at the maximum No-Coverage Penalty)

No-Coverage Penalty

- Offer
  - At least 95% of all FT employees (and their children in 2016) or at least 70% for 2015
    - *FT employee = 30+ hours per week (130+ hours per month)*
    - *Treasury refused to increase above 30 hours*
    - *"Children" now excludes foster children and stepchildren*
      - Must offer coverage through end of month in which child attains age 26
      - Excludes children who are not citizens or residents of the United States
        - » But includes children resident in Canada or Mexico
  - Qualifying coverage . . .
    - *"Minimum Essential Coverage" (basically any ER-sponsored plan)*

No-Coverage Penalty (Cont'd)

- Or pay No-Coverage Penalty
  - $2,000 multiplied by the number of FT employees (minus 30; 80 for 2015 only)
    - *Note: employers who have fewer than 30 FT employees (or 80 for 2015) will pay no penalty*
- Only applies if one FT employee enrolls in Exchange and receives a subsidy (tax credit or cost-sharing reduction, called a "Section 1411 Certification")
    - *No subsidy available if:*
      - Eligible for Medicaid (100%-133% of federal poverty level)
      - Household income is more than 400% of federal poverty level

No-Coverage Penalty (Cont'd)

- Calculated on ALL FT employees of each controlled group member separately
  - *30/80 employee reduction apportioned across controlled group members*

- Offer includes offer of coverage from:
  - Multiemployer/single-employer Taft-Hartley plans
    - *Additional interim guidance for near future*
  - PEOs (if client pays more for the offered coverage)
  - MEWAs

No-Coverage Penalty (Cont'd)

- Includes Evergreen offers
- Offer by one controlled group member satisfies obligation for all members
  - *Useful for large single plan across the entire controlled group*
- No specific rules for demonstrating that an offer was made
  - *Limited "no offer" opportunity for coverage providing minimum value that is free or meets federal poverty level affordability safe harbor*

Inadequate-Coverage Penalty

- Offer
  - To all FT employees (and their children in 2016)—or fail to offer to up to 5% of FT employees (up to 30% in 2015)
    - *FT employee = 30+ hours per week (130+ hours per month)*
    - *"Children" now excludes foster children and stepchildren*
      - Must offer coverage through end of month in which child attains age 26
      - Excludes children who are not citizens or residents of the United States
        - » But includes children resident in Canada or Mexico

Inadequate-Coverage Penalty (Cont'd)

- Offer
  - Qualifying coverage
    - *Is "Minimum Essential Coverage" and*
    - *Provides "Minimum Value"*
  - That is affordable
    - *Not more than 9.5% of household income for employee-only coverage*
    - *Safe harbors (discussed later)*

Inadequate-Coverage Penalty (Cont'd)

- Or pay Inadequate-Coverage Penalty
  - $3,000 per FT employee who receives subsidy (Section 1411 Certification) for Exchange coverage (capped at maximum No-Coverage Penalty)
  - No subsidy available if:
    - *Eligible for Medicaid (100%-133% of federal poverty level)*
    - *Household income is more than 400% of federal poverty level*
  - Applied separately to each controlled group member
    - *Limits scope of penalty to only part of controlled group*

Who Is a Full-Time Employee?

- Average 30 hours of service/week
  - For nonhourly employees, 8 hours/day or 40 hours/week equivalencies
  - 130 hours/month can be used
- Different from large employer determination
  - No need to combine PT employees into full-time equivalents
- Determined on a controlled group basis
  - Very challenging for transfers within a controlled group

Who Is a Full-Time Employee? (Cont'd)

- Determination of FT status
  - Under statute, this is determined monthly on an ongoing basis
    - *Final rules contain new details and procedures for determining status on a monthly basis*
      - Plugs some of the prior holes applicable to monthly determinations
      - Very complicated new final rules for when individuals move between different methods of determining status over their careers
        - » Special phased retirement (and similar situations) rule
    - *Employees whose status is clearly full time when hired must be offered coverage within three months of hire*

Who Is a Full-Time Employee? (Cont'd)

  - Voluntary safe harbor method for new variable hour, seasonal, and part-time employees
    - *Permits employers to calculate employee hours during an initial measurement period (3-12 months after employment) and lock in the resulting status for the following stability period (6-12 months)*
    - *Employer can define periods, subject to consistency, based on categories of employees (i.e., salaried/hourly, union/nonunion, different entities, different states)*
    - *Short (less than 2 months) administration period to start coverage if use full initial measurement period*
    - *Will be complicated to track and implement*
      - Note new part-time requirements!!

Who Is a Full-Time Employee? (Cont'd)

- Voluntary safe harbor method for ongoing employees
  - *Permits employers to calculate employee hours during a consistent ongoing measurement period (3-12 months) and lock in the resulting status for the following stability period (6-12 months)*
  - *Employer can define periods, subject to consistency, based on categories of employees (i.e., salaried/hourly, union/nonunion, different entities, different states)*
  - *Expected to be tied to open enrollment process and timing*
  - *90-day administration period to start coverage*
  - *Must transition new variable hour, seasonal, and part-time employees to this ongoing measurement process*

Who Is a Full-Time Employee? (Cont'd)

- Special rules for:
  - *Seasonal employees (six-month rule)*
  - *Volunteers*
  - *Schools*
  - *Adjunct faculty (new 2-1/2 hour equivalency)*
  - *Rehired employees (now 13 consecutive weeks—still 26 for educational organizations)*
  - *International employees and transfers*
  - *Temporary staffing firms*
  - *Section 3508 employees*
  - *Cruise ships*

Who Is a Full-Time Employee? (Cont'd)

- *U.S. territories*
- *Student work-study*
- *On-call hours*
- *Layover hours*
- *Religious orders*
- *Home healthcare workers*

When Is Coverage Affordable?

- Necessary to avoid Inadequate-Coverage Penalty
- Premium for cheapest employee-only coverage must be less than 9.5% of household income
  - No cap on spouse/children premiums
    - *May be up to COBRA cost of coverage*
- Three optional safe harbors remain and are clarified:
  - W-2: Premium cannot exceed 9.5% of the employee's W-2 wages from the employer for that year
    - *New special rules for partial years*

When Is Coverage Affordable? (Cont'd)

- Rate of Pay – Premium cannot exceed 9.5% of an amount equal to 130 hours multiplied by the lower of the hourly rate of pay on the first day of coverage or the lowest hourly rate of pay during each month (if reduced)
  - *Alternate is monthly salary on the first day of the coverage period—which cannot be reduced*
- Federal Poverty Line – Premium cannot exceed 9.5% of an amount equal to the federal poverty line for the year divided by 12
  - *Can use the most recently published guidelines in effect six months prior to the beginning of the plan year*

Lingering Concerns

- Nondiscrimination rules
  - Particularly worrisome if employer has different health coverage across its controlled group
- ERISA Section 510 claims
- ACA Whistleblower claims
- Cadillac Tax
  - Some coverage may be too rich for 2018
    - *Is 2015/2016 the time to cut back?*

Tab 5

Leaves of Absence and Disability Leave

Morgan Lewis
technology
may-rathon

Presenter
Carol Freeman

May 21, 2014

Hot Issues and Legal Developments

- Part 1: FMLA Hot Issues and Legal Developments
- Part 2: ADA/FEHA Hot Issues and Legal Developments
- Part 3: State Law and Other Legal Obligations

Morgan Lewis

Hot Issue #1: Implications of *Windsor*

- The FMLA is one of the employment statutes impacted by *United States v. Windsor*, 133 S. Ct. 2675 (2013)
- Before *Windsor*, in a 1998 Opinion Letter, the DOL considered itself bound by DOMA's definition of "spouse" and therefore only recognized opposite-sex marriages of couples.
- Employees who are married to a same-sex spouse and who:
  - Live in a same-sex marriage state should be eligible for FMLA spousal leave even if they work in a state that does not recognize the marriage
    - *Ex.: an employee in a same-sex marriage who lives in DE, but works in PA*
    - *Ex.: an employee in a same-sex marriage who lives in IA, but telecommutes to a worksite in TX*
  - Live in a state that does not recognize same-sex marriage—including states with civil union statutes—may not be eligible for FMLA spousal-related leave, regardless of the state in which they work

Hot Issue #1: Implications of *Windsor* (Cont'd)

- As we await guidance, some things to consider:
  - If an employer follows the plain language of the regulations, some employees who work in the same worksite may be eligible for FMLA leave and some may not—depending on where they live
  - Employers should carefully consider how to implement and communicate these differences
  - Employers could see lawsuits in states with laws against discrimination
  - Employers that decide to grant FMLA leave for a same-sex spouse of an employee living in a state where the marriage is not recognized should be aware of the risk of "double dipping"
  - The employee may technically be eligible for another 12 weeks of FMLA leave for a different qualifying event

Hot Issue #2: Curbing Intermittent Leave Abuse – What Kind of Proof Is Acceptable?

- *Hansen v. Fincantieri Marine Grp.*, LLC, No. 12-C-032, 2013 WL 2918329 (E.D. Wis. June 14, 2013):
  - Employee terminated for violating attendance policy after taking more leave than estimated; employee did not provide recertification justifying additional absences, but employer did not ask for it
  - Court found that employer's failure to follow FMLA procedure to request recertification precluded it from obtaining summary judgment
  - Court noted that employer had the right to request recertification if it doubted legitimacy of absence but that employee is only required to provide recertification if requested by employer

Hot Issue #2: Curbing Intermittent Leave Abuse – What Kind of Proof Is Acceptable? (Cont'd)

- *Jackson v. Jernberg Indus., Inc.*, 677 F. Supp. 2d 1042 (N.D. Ill. 2010):
  - Employee, already on certified FMLA leave for a wrist condition, was required by employer to provide a doctor's note substantiating each absence
  - Employer terminated employee after he failed to provide doctor's notes for several absences and tardiness
  - Employee claimed that his termination violated the FMLA as an impermissible recertification; employer argued that the doctor's notes served a different purpose than recertification by ensuring that a particular day's absence was related to an FMLA condition
  - Court held that the requirement for notes constituted impermissible interference, noting (1) the absence of DOL regulations permitting such intermittent verifications outside of the recertification context; (2) the practical difficulty of obtaining doctor's notes so frequently; and (3) the fact that the employer had no particular suspicion that the employee was abusing leave

Hot Issue #3: May an Employer Always Designate Leave as FMLA Leave If It Knows It Is FMLA Qualifying?

- *Escriba v. Foster Poultry Farms, Inc.*, No. 11-17608, 2014 WL 715547 (9th Cir. Feb. 25, 2014):
  - Employee was terminated after violating employer's "three day no-show no-call" policy; employee requested vacation leave to visit sick father, but did not expressly request FMLA leave
  - Employee sued, arguing that her employer was required to designate her leave as FMLA-protected because an employee is not able to decline FMLA protection
  - The Ninth Circuit ruled in favor of the employer, stating that an employee can decline to take advantage of FMLA leave even if the reasons for requesting leave would have invoked FMLA protection

Hot Issue #3: May an Employer Always Designate Leave as FMLA Leave If It Knows It Is FMLA Qualifying? (Cont'd)

- But see:
  - U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook 39g01(a) (Mar. 1, 2013) ("The employer is responsible in all circumstances for designating leave as FMLA-qualifying once the employer has knowledge that the leave is being taken for an FMLA-qualifying reason.")
  - *Harvender v. Norton Co.*, No. 96-CV-653 (LEK/RWS),1997 WL 793085, at *7 (N.D.N.Y. Dec. 15, 1997) (ruling that the employer did not violate the employee's rights by placing her on unrequested FMLA leave because her pregnancy constituted a qualifying condition for leave and "[n]owhere in the Act does it provide that FMLA leave must be granted only when the employee wishes it to be granted")
  - *Thorson v. Gemini, Inc.*, 205 F.3d 370, 381 (8th Cir. 2000) (noting that where employee was absent for more than three days with notes from her doctor, the employer became "obligated" to either count the absence as FMLA leave, or to follow the statutory and regulatory procedures designed to prevent employee abuse of FMLA leave)

ADA/FEHA Hot Topics

Hot Issue #1: Extended Leave Requests – Reasonable Accommodation or Undue Hardship?

- Extended Leave Requests
- Clear leave over and above FMLA leave may have to be provided
- Reinstatement obligations may apply
- Indefinite leave is not considered a “reasonable” request

Hot Issue #1: Extended Leave Requests – Reasonable Accommodation or Undue Hardship? (Cont'd)

- Leave is "indefinite" when the employee cannot show that he/she can return to perform the essential functions of the job at some reasonably identifiable point in the near future
- Indefinite leave is different from an approximate date of return that has been found to be reasonable (i.e., "employee will need to be out of work an additional 2-3 months"), especially at the beginning of leave
- If employee cannot provide a fixed date of return, employer retains the right to require employee to provide periodic updates on his or her condition and possible date of return
- What is clear is that an automatic cutoff (e.g., six months or one year in all cases) will be subject to a challenge under the ADA. *See* Enforcement Guidance: Reasonable Accommodation & Undue Hardship Under the Americans with Disabilities Act, 2002 WL 31994335, at *14 (E.E.O.C. Guidance Oct. 17, 2002)

Hot Issue #1: Extended Leave Requests – Reasonable Accommodation or Undue Hardship? (Cont'd)

- *E.E.O.C. v. AT&T Corp.*, 1:12-CV-00402-TWP, 2013 WL 6154563 (S.D. Ind. Nov. 20, 2013):
  - Call center employee, who had exhausted her FMLA leave, brought suit after she was terminated for excessive absenteeism following her return from short-term disability leave
  - Employer argued that (1) it was not required to accommodate the employee's excessive absenteeism because attendance was an essential function of her job, and (2) the employee's leave was not protected by the ADA because it was too long, and therefore was unreasonable or an undue hardship
  - Court ruled that it was an issue of material fact whether attendance was an essential job function because evidence showed that employees in the call center were allowed to be absent for many reasons
  - There was also an additional issue of whether leave was reasonable or an undue hardship when the employer had not hired anyone to fill in for the employee during her leave

Hot Issue #1: Extended Leave Requests – Reasonable Accommodation or Undue Hardship? (Cont'd)

- *E.E.O.C. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 1:11-CV-1703-WTL-DML, 2013 WL 2389856 (S.D. Ind. May 30, 2013):
  - Employee requested an additional 30-day leave for post-partum issues
  - Employer terminated employee a few weeks before employee's scheduled return, citing workflow issues in her absence and lack of certainty that she would actually return; however, her replacement did not start until two months after she would have returned from leave
  - Employee claimed that her employer failed to accommodate her disability
  - Court stated that the determination of whether a lengthy leave of absence is "reasonable accommodation" is fact-specific
  - Court denied the employer's motion for summary judgment, finding that a jury could reasonably discredit the employer's assertion that attendance was an essential function of the job due to the employer's "lack of urgency" in obtaining a replacement

Hot Issue #1: Extended Leave Requests – Reasonable Accommodation or Undue Hardship? (Cont'd)

- *Kitchen v. Summers Continuous Care Ctr., LLC*, 552 F. Supp. 2d 589 (S.D. W.Va. 2008):
  - Employee exhausted all of her FMLA leave after being involved in a car accident which resulted in the amputation of her dominant arm
  - Employee presented a doctor's note stating that she was not fit to return to work and requested an additional 90 days off
  - Her employer denied the request for additional medical leave, terminated the employee and invited her to reapply once she was released by her doctor
  - Employee filed suit arguing that her request for additional medical leave was a reasonable accommodation under the ADA
  - Court ruled the employee's request for additional leave was not a reasonable accommodation because there was no evidence that she would have been able to perform the essential functions of her job after the additional 90-day period had ended

Hot Issue #1: Extended Leave Requests – Reasonable Accommodation or Undue Hardship? (Cont'd)

- *E.E.O.C. v. United Parcel Serv., Inc.*, 09 C 5291, 2014 WL 538577 (N.D. Ill. Feb. 11, 2014):
  - Court denied UPS's motion to dismiss, allowing EEOC's lawsuit on behalf of class of former UPS employees to continue
  - EEOC is alleging that UPS's leave policy that mandates that employees be administratively separated after 12 months of leave violates the ADA's prohibition against using qualification standards to screen out employees with disabilities
  - UPS argued that the an employee's ability to regularly attend work is an essential job function
  - Court dismissed UPS's motion, stating that the EEOC's allegations are not based on attendance, but rather on the argument that UPS's policy imposes a "100% healed requirement" for individuals seeking to return to work

Hot Issue #1: Extended Leave Requests – Reasonable Accommodation or Undue Hardship? (Cont'd)

- *Sanchez v. Swissport, Inc.*
  - An employee who was disabled as a result of her pregnancy and had exhausted all leave under the California Pregnancy Disability Leave Law ("PDL") and the California Family Rights Act ("CFRA") was entitled to additional leave as a reasonable accommodation under the California Fair Employment and Housing Act ("FEHA")
  - The Court also noted that its ruling was supported by the new Pregnancy Disability Leave Regulations, effective December 30, 2012, which provide that the "right to take pregnancy disability leave under Government Code section 12945 and these regulations **is separate and distinct** from the right to take a leave of absence as a form of reasonable accommodation under Government Code section 12940

Hot Issue #1: Extended Leave Requests – Reasonable Accommodation or Undue Hardship? (Cont'd)

- What about CFRA? If the baby has not been born after four months, should an employee be forced to use CFRA?
- CFRA Regulation: Where an employee has utilized four months of pregnancy disability leave prior to the birth of her child, and her health care provider determines that a continuation of the leave is medically necessary, **an employer may, but is not required to, allow an eligible employee to utilize CFRA leave prior to the birth of her child.** No employer shall, however, be required to provide more CFRA leave than the amount to which the employee is otherwise entitled, but this does not excuse the employer's other obligations under the FEHA, such as the obligation to provide reasonable accommodation under the disability provisions, where applicable

Hot Issue #2: Reassignment to a Vacant Position as Reasonable Accommodation

- If an employee requests to be reassigned, according to the EEOC, the employer should check if it has a vacant equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship, or, absent an equivalent position, a vacant position at a lower level
- **Permitting an employee to compete for a vacant position does not meet the accommodation prong of the ADA; if an individual is qualified for the position, he/she gets the position, according to the EEOC**
- In practice, courts are split on whether a disabled employee should be automatically reassigned to a vacant position for which he/she qualifies, or be allowed to compete for that position
- The Eighth Circuit has rejected the EEOC's position, holding that if the employer has a policy of hiring the most qualified candidate (as opposed to, e.g., the first applicant), then the employer need not violate that policy to accommodate the disabled employee
  - *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007)

Hot Issue #2: Reassignment to a Vacant Position as Reasonable Accommodation (Cont'd)

- The Seventh and Tenth Circuits have held that an employee has a right to be reassigned to a vacant position for which he/she is qualified and does not have to be the best-qualified employee for the job, so long as the reassignment does not violate other important, nondiscriminatory employer policies, such as protecting the seniority rights of other employees
  - *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc)
  - *E.E.O.C. v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012) *cert. denied*, 133 S. Ct. 2734, 186 L. Ed. 2d 192 (U.S. 2013)

Hot Issue #2: Reassignment to a Vacant Position as Reasonable Accommodation (Cont'd)

- The D.C. Circuit has taken the position that the ADA permits more consideration of a disabled employee seeking reassignment than ordinary applicants, without deciding whether the employee is entitled to an absolute preference
  - *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir.1998) (en banc)

Hot Issue #3: Attendance as an Essential Function

- What is an essential function?
- The "essential functions" of a job are defined as the "fundamental job duties," not including "the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1)
- **Traditionally, attendance was assumed to be an essential function of all jobs.**
- Employees who could not regularly and predictably come to work were deemed "not qualified" for their job under the meaning of the ADA. Courts rarely questioned an employer-defendant's representation that attendance was an essential function of a plaintiff's job
  - "[A] basic function of any full time job is showing up for work." *Rodriguez v. Loctite Puerto Rico, Inc.*, 967 F. Supp. 653, 661 (D.P.R. 1997).
  - It is a "rather common-sense idea ... that if one is not able to be at work, one cannot be a qualified individual." *Waggoner v. Olin Corp.*, 169 F.3d 481, 482 (7th Cir. 1999).
  - "In addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis." *Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal.*, 31 F.3d 209, 213 (4th Cir. 1994).

The EEOC's Changed Position on Attendance as an Essential Function

- **The EEOC now believes that attendance is not necessarily an essential function of all jobs.**
- According to the EEOC, essential functions must be actual job duties to be performed
- See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA (http://www.eeoc.gov/policy/docs/accommodation.html).
- EEOC guidelines state that inflexible attendance policies may violate the ADA
- "If an employee with a disability needs leave or a modified schedule beyond that provided for under an employer's benefits program, the employer may have to grant the request as a reasonable accommodation if there is no undue hardship."
- EEOC's ADA Performance and Conduct Standards (http://www.eeoc.gov/facts/performance-conduct.html).
- That said, the Commission does recognize that:
  - Attendance is "relevant to job performance";
  - An employer does not have to accommodate an "open-ended schedule" that permits an employee to come and go as he pleases; and an employer is not required to accept "unreliable attendance."

Hot Issue #4: Telecommuting

- The EEOC is skeptical that an employee's physical presence in the office is always an essential job function
- The Commission believes that employers may be required to accommodate a disabled employee's need to work from home, even if this is otherwise a violation of Company policy
- **The Commission believes that regular "team meetings" are insufficient to make physical presence an essential function of a job**
- The EEOC believes that the list of jobs for which physical presence is critical is very narrow, including only jobs like food servers, cashiers, and truck drivers
- For most other jobs, the Commission believes that physical presence at the worksite is less crucial
- See EEOC roundtable on Telecommuting: http://www.eeoc.gov/eeoc/meetings/6-8-11/index.cfm

Hot Issue #4: Telecommuting (Cont'd)

- Technological Advances Support the EEOC's Position
  - 1995: "Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today." *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995) (Posner, J.)
  - 2014: "When we first developed the principle that attendance is an essential requirement of most jobs, technology was such that the workplace and an employer's brick-and-mortar location were synonymous. However, as technology has advanced in the intervening decades, and an ever-greater number of employers and employees utilize remote work arrangements, attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location. Instead, the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the "workplace" is anywhere that an employee can perform her job duties." *EEOC v. Ford Motor Co.*, No. 12-2484 at *10 (6th Cir. Apr. 22, 2014)

Hot Issue #4: Telecommuting (Cont'd)

- ***EEOC v. Ford Motor Co.*, No. 12-2484 (6th Cir. 2014)**
  - The plaintiff worked as a resale buyer at Ford. The "essence of the job was group problem solving." Ford managers believed group meetings were most productive if everyone were physically present. Also, plaintiff's coworker believed she would not be able to effectively do her job from home.
  - The plaintiff had Irritable Bowel Syndrome and requested that she be permitted to telecommute as needed. This request was denied.
  - The district court granted summary judgment to the employer, holding that the plaintiff was not a "qualified" individual under the ADA because her proposed accommodation would not allow her to participate in team meetings – an essential job function in the eyes of her employer.
  - The Sixth Circuit reversed, finding that the question of whether "physical presence . . . [is] truly essential" was a question for the jury.
  - "While we do not allow plaintiffs to redefine the essential functions of their jobs based on their personal beliefs about job requirements, neither should we allow employers to redefine the essential functions of an employee's position to serve their own interests. Rather, we should carefully consider all of the relevant factors, of which the employer's business judgment is only one."

Hot Issue #5: Reasonable Accommodation

- EEOC February 25, 2014 Opinion Letter commenting on a sample reasonable accommodation policy purportedly submitted by the public.
- The letter is available at http://www.eeoc.gov/eeoc/foia/letters/2014/ada_reasonable_accommodation_02_25.html.
- The EEOC criticized the sample policy, writing:
  - "The sample policy states that an employer is not required to permit 'unscheduled (or erratic, unpredictable, intermittent) or excessive absenteeism or tardiness as a reasonable accommodation.' This . . . could lead to the inappropriate denial of a reasonable accommodation. . . . It is highly unlikely that an employer could deny unscheduled leave in all cases."
  - "The sample policy states that working from home is 'generally' not a reasonable accommodation 'except in extraordinary circumstances.' While we are aware that some courts have found a legal obligation to provide telework as a reasonable accommodation to be limited, the law is far from settled. . . . T]he suggestion that working from home is not required except in extraordinary circumstances may lead an employer to violate the ADA. . . . The employer and employee should determine whether it would enable performance of the job's essential functions."

Hot Issue #5: Reasonable Accommodation (Cont'd)

- The EEOC also criticized the sample Accommodation Request form:
  - Employers are permitted as part of the interactive process to ask disability-related questions if they are necessary to establish that the person has a disability and/or needs a reasonable accommodation, [but] this does not entitle the employer to obtain any medical information it wants. First, if a disability is obvious (e.g., blindness, deafness, missing limb), an employer may not ask questions to establish if the person's impairment is a disability. Even when the disability or need for accommodation is not obvious, the ADA prohibits employers from asking disability-related questions . . . unless they are job-related and consistent with business necessity. . . We strongly disagree with the practice of routinely asking a person . . . to describe 'your treatment plan in detail.'"
  - "Employers should consider the purpose behind each question on a form …. Employers also may wish to have an appropriate management official handling the request (e.g., an HR director) review the form before giving it to a particular applicant or employee to determine if certain questions should be eliminated as irrelevant to the particular request and/or whether other questions should be asked."

Hot Issue #5: Reasonable Accommodation (Cont'd)

- **Hypothetical**: A manager's starting time is 8 a.m., but due to medication side effects, he often arrives at 9 a.m. The manager's late arrival results in a verbal warning, prompting him to request that his schedule be shifted from 8 a.m.-to-5 p.m. to 9 a.m.-to-6 p.m. The manager's position description explains that "timely, regular, and predictable attendance is essential." The position description also describes multiple duties that require managers to get to work by 8 a.m. to complete required paperwork and host daily staff meetings before the company opens at 9:00 a.m. However, other managers have said that most of these duties can be done from home, albeit less efficiently. How should the requested accommodation be handled?

State Law and Other Legal Obligations

Leave Rights and Considerations Are Not Just About the FMLA and ADA….

- State leave laws may have differences including different eligibility criteria, coverage, notice and certification requirements
- Paid sick leave laws may mandate that an employer provide paid sick leave in certain circumstances—amount and criteria can vary
- Workers' compensation laws
- State disability benefit mandates
- HIPAA/GINA
- FLSA and state wage and hour rules
- Interaction with Company policies and voluntary disability plans

State Paid Sick Leave Mandates

- Require employers to grant to employees minimum amounts of paid sick leave to be used for qualifying reasons
- Vary by jurisdiction on eligibility, accrual, amount of entitlement, notice provisions, certification requirements, and covered reasons
- But there are some geographic similarities
  - Mandatory paid sick leave laws in effect in:
    - *Connecticut; Washington, D.C., Jersey City, New Jersey; Newark, New Jersey; New York City; Portland; San Francisco; Seattle*
  - Mandatory paid sick leave legislation has been introduced in jurisdictions including:
    - *Arizona; California; Florida; Hawaii; Illinois; Iowa; Maine; Maryland; Massachusetts; Michigan; Minnesota; Nebraska; New Jersey; New York; North Carolina; Oregon; Pennsylvania; Tacoma, Washington; Vermont; Washington*

Proposed Amendments to CFRA Regulations

- On February 21, 2014, the FEHC published proposed amendments to the CFRA Regulations.
- Stated purpose: further supplement existing rules, clarify confusing rules, adopt/make consistent with recently updated parallel FMLA regs, and propose technical amendments
- The proposed amendments cover 11 sections:
  - Definitions
  - Right to CFRA Leave
  - Right to Reinstatement
  - Computation of Time Periods
  - Requests for CFRA Leave
  - Terms of CFRA Leave
  - Relationship Between CFRA Leave and PDL
  - Retaliation and Protection from Interference with CFRA Rights
  - Notice of Right to Request CFRA Leave
  - Relationship with FMLA Regulations
  - Certification Form

Proposed Amendments to CFRA Regulations (Cont'd)

- Many proposed revisions are technical, but many are substantive and/or significant clarifications, e.g.:
  - Same-sex spouses are covered under CFRA
  - Group health benefits are required while on both PDL and FMLA/CFRA leave
  - Lists ways to recoup premiums when CFRA leave is unpaid
  - "Key employee" exception only applies to employees paid on salary basis and in top 10% – must be both
  - "Serious health condition" includes substance abuse treatment
  - Requirement to inform employee of guaranteed reinstatement upon granting leave
  - Expanded prohibition on retaliation and interference with employees' CFRA rights
  - Employer's burden to "establish" reason if it doubts medical certification
- Proposed regulations provide a sample medical certification

Proposed Amendments to CFRA Regulations (Cont'd)

- Comment period ends June 2, 2014
- Submit comments to FEHC either by mail:
  - Fair Employment and Housing Council
    c/o Phyllis W. Cheng, Director
    Dept. of Fair Employment and Housing
    2218 Kausen Drive, Suite 100
    Elk Grove, CA 95758
- Or by email:
  - FEHCCouncil@dfeh.ca.gov

SB 770/Unemployment Insurance Code Amendments for Expanded Paid Family Leave (PFL)

- Takes effect July 1, 2014
- Expands PFL to cover paid leave for caring for the following seriously ill family members:
  - Grandparent, grandchild, sibling, and a broad range of "parents"
  - "Parent" = biological, foster, or adoptive parent; parent-in-law (parent of a spouse or domestic partner); stepparent; legal guardian; or other person who stood *in loco parentis* to the employee when the employee was a child

SB 770 Action Items

- Make sure to provide PFL brochure in the expanded situation
- Revise handbook/policies if they refer to old PFL coverage
- Make no guarantees (pro/con) whether someone will get benefits from the EDD
- Decide what kind of leave (if any) the employer will grant to someone who is not otherwise entitled to a leave, e.g., if an employee wants to take two months to take care of a dying sibling. Make sure to not discriminate as to whom the employer grants/denies leave.
- Benefit, not a leave
- No length of employment required
- Paid by state from employee contributions
- For employees disabled from a non-work-related injury or illness, including pregnancy and childbirth
- No reinstatement right
- Voluntary Plans Update – see http://www.edd.ca.gov/disability/Employer_Voluntary_Plans.htm

Best Practices and Considerations When Managing Leave in the Workplace

- Consider all legal obligations (FMLA, ADA, State, etc)
- Determine what is best policy approach, balancing multiple state/local obligations with national policy approach
- Consider employee relation issues
- Ensure all managers and those charged with implementation and enforcement of policies are properly trained, understanding tools that can and cannot be used if abuse is suspected

Tab 6

Crossover Issues in Immigration and Employment

Morgan Lewis
technology
may-rathon

presenters
Malcolm K. Goeschl
Barbara J. Miller
Eric Meckley

May 21, 2014

Applicability of Federal Employment Statutes

- Immigration Reform and Control Act of 1986 (IRCA)
  - Immigration and Nationality Act (INA)
- Fair Labor Standards Act (FLSA)
  - Department of Labor Wage and Hour Division
- Title VII of the Civil Rights Act of 1964
  - U.S. Equal Employment Opportunity Commission (EEOC)
  - The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC)
- Family and Medical Leave Act (FMLA) Eligibility

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Immigration Reform and Control Act of 1986 (IRCA)

- IRCA's passage in 1986 attempted to close the loophole on illegal employment:
  - Makes the employment of unauthorized workers central to the policy of immigration law;
  - Prohibits, at a federal level, the employment of aliens not lawfully present and authorized to work in the United States;
  - Requires the use of Form I-9;
  - Outlines specific procedures in determining worker eligibility; and
  - Imposes civil and criminal penalties to employers for violations of its provisions.

Prehire and Hiring Concerns

- Job ads
  - Recent IBM settlement with OSC
- Questions on applications
- Nondiscrimination statutes apply to hiring decisions

Fair Labor Standards Act (FLSA)

- Governed by the Wage and Hour Division of the Department of Labor, the FLSA establishes minimum wage and overtime standards affecting employees in the private sector and the federal, state, and local governments.
- All foreign workers who are lawfully employed by a U.S. employer will be protected by the FLSA. Special considerations for NIV categories.
- Prevailing wage: Specific wage and hour considerations involve the H-1B, H-1B1, H-2B, and E-3 through the Labor Condition Application.
  - The prevailing wage must be greater than minimum wage.
  - Full-time (FT) employment: Required to pay the hourly wage to the worker for a FT week—35-40 hours.
  - Part-time (PT) employment: Required to pay the hourly wage to the worker for PT hours, cannot be paid for fewer than minimum hours indicated on range.

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Hoffman Plastics

- For undocumented employee, the employer is always liable for L&E wrongful conduct
- But cannot do a reinstatement since the employee is not work authorized
- Lost future wages—the court will look at wage earnings in home country

Morgan Lewis

FLSA Considerations

- Misclassification of exempt v. nonexempt
- 1099 to circumvent I-9
- B-1 workers deemed to be doing business in the U.S.
- Tax considerations
- Exception: the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) regulates the employment activities of agricultural employers, farm labor contractors, and associations using migrant and seasonal agricultural workers. The FLSA exempts agricultural workers from overtime premium pay, but requires the payment of the minimum wage to workers employed on larger farms (greater than 7 FT employees)

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Discrimination Protection Statutes

- The INA protects U.S. citizens and aliens authorized to accept employment in the U.S. from discrimination in hiring or discharge on the basis of national origin and citizenship status.
- Primary Statute: Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating on the basis of race, color, religion, sex, or national origin in hiring, firing, compensation, or other terms and conditions of work.
  - Heavy Penalty: The act provides employees with several forms of relief, including authorizing courts to award back pay, front pay, compensatory damages, punitive damages, reinstatement, attorney's fees and injunctive relief.
- Other Applicable Statutes: Additional federal laws prohibiting job discrimination will cover foreign national workers, e.g., Age Discrimination in Employment Act (ADEA), Titles I and V of the Americans with Disabilities Act of 1990 (ADA), and Equal Pay Act of 1963 (EPA).

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Applicability

- Title VII protects not only intentional discrimination, but also practices that have the effect of discriminating against someone based on these protections:
  - Examples: discrimination against an individual because of birthplace, ancestry, culture, or linguistic characteristics; English-only requirements are discriminatory unless the employer can show a business necessity.
  - Violation of Title VII and IRCA: Requesting employment verification for individuals of a particular national origin or who appear to sound foreign.
  - Violation of IRCA: Employers who impose citizenship requirements or give preference to U.S. citizens in hiring and employment practices.
- Employer KEY Considerations: PERM process and sponsorship policies.

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Enforcement Agencies: EEOC and OSC

- The U.S. Equal Employment Opportunity Commission (EEOC) enforces all of these laws.
  - Employer size must be 15+ employees.
  - EEOC announced it would treat the immigration status of employees as irrelevant to the merits of the charge and not investigate into immigration status.
- The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC)
  - Civil Rights Division of the Department of Justice.
  - Responsible for enforcing the anti-discrimination provisions of the Immigration and Nationality Act (INA), which protects U.S. citizens and certain work authorized individuals from employment discrimination based upon citizenship or immigration status. 8 U.S.C. § 1324b.

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Enforcement Agencies: EEOC and OSC (Cont'd)

- OSC investigates the following types of conduct:
  1. Citizenship or immigration status discrimination by employers with four or more employees.
  2. National origin discrimination by employers with 4-14 employees.
  3. Unfair documentary practices related to verifying the employment eligibility of employees.
  4. Retaliation/intimidation.
- OSC investigates claims based off of charges and initiates independent investigations.
- Available Relief: Back pay, front pay, reinstatement, civil penalties, and injunctive relief, NOT compensatory or punitive damages like EEOC.

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Prescreening of Applicants Subject to Export Controls

- Nationals from certain countries, who are exposed to certain technologies, may require an "export license" before they are given access to those technologies
  - Acquiring export licenses may take several months, and can be very expensive
  - Some employers have a policy of not sponsoring any employees for export controls
  - Can an employer prescreen prospective hires to determine if they are subject to export controls?

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Family and Medical Leave Act (FMLA) Eligibility

- FMLA (29 U.S.C. § 2601 et seq.) provides job-protected, unpaid leave to employees for specified family and medical reasons.
  - Covered employers must have 50 or more employees.
- EMPLOYEE RIGHTS: Applicable to foreign workers so long as they have worked at least 12 months; 1,250 hours within the preceding 12 months; and at or within 75 miles of the employer.
- Right to file complaint with Wage and Hour Division or file private lawsuit.

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Employment Contracts

- Effect on Foreign Workers: A visa is not an employment contract
- Impact on H-1B portability
- Offer letters
- At-will language for H-1B and PERM

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Termination Letters

- Recommended for all termination letters to include the following:
  - Termination date.
  - COBRA information.
  - Timing of payment (last paycheck and/or severance).
  - Recordkeeping tip: Employees do not need to sign letters.

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I-9 Completion

- Can be completed without SSN
- Can only require SSN if E-Verify user
- Only complete I-9 after employee accepts job offer
- Recommend completing I-9 Part 1 before employee's first day of employment to screen for issues
- Restricted SSN never valid
- Review I-9 for completeness
- Make sure I-9 on file for all employees
- If employer on notice of problem, send employee to SSA for SSN verification

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Issues with SSA Mismatch

- No letters anymore
- Child support garnishment
- Other governmental notification – for example, for denial of benefits because of SS earnings amount
- Permissible inquiry
  - Keep it an SSN inquiry not tied to I-9 or status
  - SSA should be able to quickly issue confirmation

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Employees Gaining Legal Status After Using False SSN

- Can forgive misrepresentation if employer policy to do so
- Complete new I-9
- Attach explanatory memo
- Staple to old I-9
- Issue of maintaining seniority and reclaiming SSN contributions

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H-1B Wages

- Required Wage Rate: Employer must pay the higher of the actual wage rate or the prevailing wage for the occupation in the areas of intended employment.
  - Wage for occupation in geographic area
  - Actual wage given to other "similarly situated" workers
- Benefits: Employer must offer benefits to H-1B workers on par with benefits offered by the employer to similarly situated U.S. workers.
  - Benefits include health, life, disability, or other insurance; retirement and savings plans; cash bonuses; and noncash compensation (stock options).
- Make sure public access file created and updated for each H-1B

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Termination of Temporary Foreign Workers Sponsored by Company

- Employee status is tied to employment with company
  - Applies to all nonimmigrant (temporary) classifications sponsored by company (e.g., H-1B, L-1, E-3, O-1, TN, etc.)
  - Does not apply to F-1 Student with Optional Practical Training
- Consider giving notice rather than severance
- Advise employee in writing of termination, and possible impact on status; advise employee to seek own immigration counsel

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Additional Requirements When Terminating Workers in H-1B Status

- Notify USCIS that employment relationship has been terminated
  - Recommend sending notification about 30 days following worker's termination date
  - Include copy of H-1B receipt or approval notice
- Return transportation to home country
  - "Reasonable" cost
  - Does not include personal possessions or family members
  - Also required for O-1, Aliens of Extraordinary Ability

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Tab 7

I. WORKPLACE BEHAVIOR AND PRIVACY – CURRENT DEVELOPMENTS

A. Employee Surveillance

1. Video and Photographic Surveillance

In general, federal statutory law with application to employee monitoring and surveillance is contained in the Electronic Communications Privacy Act (ECPA), which has two parts: (1) the Wiretap Act (addressing communications in transit); and (2) the Stored Communications Act (SCA) (addressing stored communications). In general, the Wiretap Act prohibits acquisition of the contents of an electronic communication using an electronic, mechanical, or other device. 18 U.S.C. § 2511. The SCA addresses electronic communications accessed via a facility through which an electronic communication service is provided. 18 U.S.C. § 2701. In addition, federal common law may create privacy protections.

Employee surveillance that does not involve capturing voice or written communications is very different from monitoring and/or recording voice or written communications. Video recording of employee actions without sound does not implicate either the Wiretap Act or the SCA, as pictures of employee conduct are not "communications" within the meaning of these statutes. Moreover, many states regulate the actual recording of voices or conversations, but do not explicitly regulate video recording or pictures that do not involve sound. California, for example, does not permit recording of private conversations without employee consent. Thus, video recording not involving sound raises fewer concerns than actual capture or recording of conversations.

General privacy restrictions exist on employee surveillance that does not capture actual communications. In *Hernandez v. Hillside, Inc.*, 47 Cal. 4th 272 (2009), the California Supreme Court described the scope of privacy rights afforded to employees under both common law and the California Constitution with respect to employee surveillance. In *Hernandez*, the employer learned that someone had been accessing pornographic websites late at night from a computer in a private office shared by two employees. The employer set up a camera to watch the computer without telling the two employees, but only used the camera on a few occasions, at night, when the employees who worked in the office were at home.

The court held that (1) an employer violates an employee's privacy rights when it intrudes on the employee's reasonable privacy expectations, and (2) the intrusion must be so serious and without justification so as to constitute an egregious breach of social norms. In evaluating the second element, a court will consider whether less intrusive alternative means of achieving the business objective were available.

In general, employees have higher expectations of privacy in private areas such as private offices or in areas where they undertake private activities such as changing clothes, using a restroom, etc. In the *Hernandez* case, the court held that the employees possessed an expectation of privacy in their office because the employer provided an enclosed office with a door that could be shut and locked and window blinds that could be closed.

Employers may reduce the expectation of privacy by setting policies that clearly provide for monitoring in areas other than restrooms and where employees change clothes (employers should never monitor these areas). A policy alone, however, may not be sufficient to eliminate the risk of a privacy claim where the employer monitors in private areas.

Courts will accept surveillance where a moderate level of privacy exists, but the employer has a strong and particularized justification for the surveillance. In *Hernandez*, the court held that despite the expectation of privacy, the intrusion did not rise to the level of actionable conduct because (1) the employer possessed a good and particularized reason for the surveillance (to determine who was using the computer in violation of reasonable employer policies), (2) the employer significantly limited the time of surveillance to capture only the person who may have been violating the policy, (3) access to the surveillance equipment was very limited, and (4) the activities of the employees at issue were never recorded.

Best practices regarding employee surveillance include the following:

- Make sure that equipment used for surveillance does not capture audio at all.
- Make sure that equipment operators are properly trained and understand employee privacy issues, including the prohibition on capturing audio.
- Set clear standards and policies before undertaking any surveillance.
- Communicate policies to employees so that they understand the scope of surveillance and where in the workplace they may be monitored.
- Do not monitor areas used for private activities such as restrooms or anywhere used for changing or lactation. Be very wary of monitoring other areas used for private activities such as praying.
- Consider whether employees have heightened expectations of privacy in the surveillance area. Private offices, areas where employees are encouraged to discuss private information, confidential conference rooms, or other areas where employees expect privacy may raise heightened privacy concerns.
- Define business justification for surveillance before conducting surveillance.
- Narrowly tailor the scope of surveillance to achieve the justifiable business needs and nothing more.
- Use the least intrusive means to achieve the legitimate business objective.
- Limit the disclosure of surveillance results to only those with a significant and definable need to know the information.
- Be wary of generalized, ongoing, or indiscriminate monitoring in areas where a heightened privacy expectation may exist.

Further, the National Labor Relations Act (NLRA) prohibits employers from any of the following: (1) visually monitoring employees' union activities; (2) giving the impression of surveillance if it improperly interferes with union activities; or (3) photographing or recording employees engaged in concerted activities without proper justification (such as legitimate security concerns).

2. GPS Monitoring

Rapidly expanding technology allowing GPS monitoring of employee location offers employers both a tremendous potential tool to address legitimate business concerns and potential legal exposure for invading employee privacy.

Potential legitimate uses of GPS technology include monitoring employees for efficient logistics and safety reasons, helping employees find customer and travel locations, increasing employee safety, and increasing productivity through improved information about employee activities.

Use of GPS monitoring implicates privacy concerns particularly when conducted without employee knowledge or when employees are not on duty. General best practices include the following:

- Clearly inform employees about and obtain consent to GPS monitoring in writing.
- Use company-supplied devices to conduct monitoring and obtain consent to such monitoring.
- If a third-party service provider will store the electronic information, the contract with the provider should prohibit the use or disclosure of such information without the employer's consent.
- Monitor only while the employee is working – do not monitor during off-duty periods, meal breaks, or rest breaks.
- Be aware of technology that enables 24/7 monitoring even if that function is not used – ensure that monitoring cannot take place during nonworking time.

Remain aware of legislative developments that may further regulate GPS monitoring as technology improves and becomes more widespread.

B. Searches of Desks, Smartphones, Lockers, Vehicles, Equipment, Etc.

As with surveillance, employees may possess privacy interests in keeping personal information/items in private areas in the workplace. Private areas in the workplace may be owned by the employer, such as desks, file cabinets, desk drawers, lockers, etc. Private areas also include those items owned by the employee, such as handbags, briefcases, gym bags, and shopping bags/boxes (e.g., items delivered by Amazon). Searches of such private areas raise significant privacy concerns and issues. As with surveillance, courts addressing claims relating to searches of personal items consider whether (1) a search intrudes on an employee's reasonable privacy expectations, and (2) intrusion is so serious and without justification so as to constitute an egregious breach of social norms.

1. Searches of Employer-Owned Physical Spaces

Employers wanting to retain the right to search employer-owned, but potentially private, physical spaces such as lockers, desk drawers, file cabinets, and other closed areas that employees may consider private should take affirmative steps to reduce and/or eliminate the expectation of privacy that an employee may have in such spaces. Such steps may include the following:

- Written policies clearly informing employees that desks, lockers, drawers, file cabinets, and other employer-owned or -controlled spaces are not private and may be subject to search by the employer.
- Written acknowledgments of the nonprivate character of such employer-controlled spaces.
- Making employees aware in writing that the employer retains keys and the ability to access locked spaces such as drawers, offices, file cabinets, and lockers.
- Written policies discouraging employees from keeping any items that they want to remain private in any employer-owned or -controlled space.

When implementing a search, the employer should consider the following steps to ensure that the search is reasonable and narrowly tailored to achieve legitimate business objectives:

- Define the business objectives of the search before searching.
- Narrowly tailor the search to achieve business objectives.
- Consider less intrusive alternatives to a search of highly private areas.

2. Searches of the Employee and Employee-Owned Spaces

Legitimate security concerns often mandate routine searches of an employee's person and personal spaces such as bags, boxes, briefcases, etc. Retail employers, for example, may conduct routine security checks of employee pockets or handbags to ensure against theft of small items. Employees possess a heightened privacy interest in their persons and physical spaces. Thus, employers need to carefully implement such searches with the goal of (1) reducing the expectation of privacy, (2) obtaining consent, and (3) conducting searches in a manner that is narrowly tailored to achieve the desired business objective.

Employers should refrain from conducting searches in a manner causing physical contact with an employee. For example, if an employer wants to check an employee's pockets, the employee should be asked to empty his/her pockets. Any type of search involving physical contact may give rise to tort claims such as assault, battery, and/or false imprisonment.

When conducting a search of personal space, the following best practices may be helpful:

- Determine the legitimate business reason for the search.
- Narrowly tailor the search to achieve legitimate business objectives. For example, if searching for missing items, do not search personal spaces too small to hold such items.
- Issue and have employees acknowledge written policies prohibiting the behavior that the search is intended to address. For example, a policy should clearly prohibit possession of illegal substances in the workplace and/or taking employer-owned property away from the workplace, if the employer desires to conduct a search for either illegal substances or employer-owned property.
- Issue and have employees acknowledge the reduced expectation of privacy in personal items that are brought to the workplace. Make clear that personal items may be subject to search in connection with determining violations of company policies.
- Set guidelines for when and how searches will be conducted.
- Obtain advanced written employee consent to searches of the person or of private property.

- Limit the search to the confines of the written policies and/or written consent. For example, if no policy suggests that an employee's car may be subject to search, consider refraining from such a search unless written employee consent is obtained.
- Conduct searches in a nondiscriminatory manner.
- Make sure that policies provide for a business justification for the search and some reasonable basis to believe that the search is necessary before conducting the search.

3. Searches of Smartphones

Historically, employers have often provided employees with personal devices such as cell phones and devices that send and receive email when such functionality was necessary for business purposes. Where an employer implements effective written policies and consents in connection with issuing such a device, the employer can mitigate any expectation of privacy that an employee may possess in connection with the use of that device. Moreover, in a recent case, *Garcia v. City of Laredo*, 2012 U.S. App. LEXIS 25370 (5th Cir. 2012), the court held that a cell phone was not a "facility through which an electronic communication service is provided" for purposes of the SCA.

Employers should consider the following best practices in connection with searches of employer-owned smartphones:

- Set policies regarding appropriate use of smartphones. Policies should make clear that an employer-owned device should not be used for personal purposes; that the purposes, content, and information for which the device is used is not private; that the employer owns the device; that the employee should not use the device to engage in conduct the employee wants to keep private; and that the device may be subject to search and/or monitoring.
- Before providing the employee with the device, obtain the employee's written consent to searches of the device and acknowledgment of the employee's understanding that his/her use of the device is not private.
- Set a nondiscriminatory policy regarding when and how smartphones will be searched. The policy should address when a search will be conducted, how a search will be conducted, and the scope of the search.
- When an employer conducts a search, the employer's policies should limit review of personal information. For example, if searching or reviewing calls during work hours, the employer should not review or view calls during nonworking hours.
- Items maintained in a "cloud" as opposed to on the device itself may implicate SCA concerns, and greater care should be taken before implementing any such search.

Increasingly, employees are using their own devices for work with the knowledge and consent of the employer. In fact, some have estimated that in the future, half of all employers may require that employees provide their own devices that receive and send email and telephone calls. The potential for employer sanctioned mixing of personal and work through use of a single personal device may create significant privacy as well as other issues for employers.

For privacy purposes, employees will possess a heightened expectation of privacy in their nonwork-related use of their own personal devices. Thus, the employer should consider how to adopt and implement search policies that limit searches of personal devices to only work-related content. As a first step, employers should consider the following types of policies with respect to use of devices to limit the expectation, as much as possible, of privacy in content created during work hours:

- Employees should not comingle personal and work-related items. For example, employees should maintain separate work and personal email accounts and keep those accounts separated on their personal devices.
- Employees should not comingle work content with personal content. For example, work-related photographs, contacts, and data should be maintained separately from personal data.
- Employees should understand that content created, calls made, calls received, messages sent, and messages received during work hours are not private and may be subject to search.

Next, policies must address what happens to device information/data if employment ends and/or a device is lost or misplaced. Employers should refrain from any solution that could result in an unauthorized deletion of personal data or information such as personal contacts, photographs, music, etc.

When implementing a search of a personal device, the best practice involves identifying the business necessity for the search, defining the scope of the search, *obtaining the employee's consent to the search and its scope* before conducting the search, and narrowly tailoring the search to only work-related items. Employers should consider adopting formal policies for implementing a search that consider the following elements:

- Defining the business necessity for the search.
- Defining the scope of the search narrowly to only that necessary to achieve the business objective.
- Obtaining specific employee consent before conducting the search.
- Implementing procedures for ending a search that encounters clear personal data.
- Implementing procedures for limiting the search to content created during work hours.
- Implementing procedures for ensuring that search results are not disseminated to individuals without a legitimate business reason to receive the information.

The Computer Fraud and Abuse Act (CFAA) presents a risk to employers who implement any kind of "Remote Wipe" of an employee's device without prior authorization from the employee. This risk is particularly heightened where the employer "wipes" any kind of personal (nonwork-related) information or content.

The SCA prohibits unauthorized access to email stored at an email service provider. While the phone itself may not be a service provider, data maintained in a cloud or not in the phone itself may be. Thus, written employee consent to searches of personal email on a smartphone should be considered to mitigate such risk before a search of such personal email is undertaken.

C. Monitoring Employee Communications: Calls, Email, and Internet Use

As with employee surveillance and searches, managing employee privacy expectations is very important with respect to monitoring employee communications during work hours. In addition, several states regulate monitoring and/or recording of many forms of communication. Thus, before undertaking any kind of program to monitor and/or collect employee communications, employers should be aware of both federal and state laws that may regulate such monitoring and/or collection. In addition, laws in this area change and develop rapidly. Thus, employers should make sure they remain current on local laws that may apply.

1. Monitoring/Recording of Telephone Communications

Interceptions of telephone conversations are subject to the Wiretap Act along with numerous state laws. Thus, monitoring and/or recording of telephone communications should never take place without full awareness of and compliance with all applicable federal and state laws. In general, such laws require actual employee knowledge of and consent to the interception and/or recording of the communication. Thus, while disclosed and consented-to monitoring of employee interactions with customers, for example, may be an effective performance management tool, undisclosed monitoring and/or recording should be avoided as an investigatory tool.

2. Employee Email and Internet

When employers make employees aware that their use of the employers' computer systems, including email systems, is not private and may be monitored, a reduced expectation of privacy exists. For example, in *Holmes v. Petrovich Development Co.*, 191 Cal. App. 4th 1047 (2011), the California Court of Appeal held that communications between an employee and her attorney were not privileged and were properly accessed by the employer where (1) the electronic email system searched belonged to the employer; (2) the employer had advised the employee that her communications using the email system were not private and could be monitored; (3) the employer's policy provided that email should only be used for company purposes; and (4) the employee acknowledged that she was aware of the policies through a written acknowledgment. The court found that under these circumstances, the email from the employee to her attorney was "akin to consulting her attorney in one of [the employer's] conference rooms, in a loud voice, with the door open, yet unreasonably expecting that the conversation . . . would be privileged." *Id.* at 40; *see also Redeker v. Collateral Specialists Inc.*, 2013 Cal. App. Unpub. LEXIS 7990 (2013) (holding that the employee had no expectation of privacy in communication with counsel where the employee handbook provided notice that the employer could monitor personal emails sent from the employer's computers).

Thus, to mitigate the risk of privacy-related claims in connection with monitoring or searching employee email on employer IT systems, an employer should consider written policies containing the following elements:

- Employee use of the employer's email and computer systems should be limited to work-related activities.
- The email and computer systems are not private, and employees should not use them for anything that they want to keep private.
- Email, computers, and Internet provided by the employer may be monitored.
- Written acknowledgment of receipt.

3. Employee Text Messaging

In *City of Ontario, California v. Quon*, 560 U.S. 746 (2010), police officer Quon repeatedly went over his allotted text message amount. While he paid the city for the overage, the city wanted to understand whether it needed to increase the texting plan for its officers. Thus, it decided to review two months of Quon's text messages during work hours. The city obtained the text messages from the third-party provider of the texting service and reviewed only those emails that occurred while Quon was scheduled to work.

For purposes of its opinion, the Supreme Court assumed (but did not decide) that Quon possessed a privacy interest in his personal texts, even though they took place during work hours. The Court held, however, that the search did not violate Quon's privacy rights, as the city's review was reasonable in light of the articulated legitimate business interest.

Quon addresses Fourth Amendment privacy rights not afforded to employees of private employers. The case, however, helps understand the scope of California's privacy protections. In *Quon*, the city's policy stated that the city could "monitor and log all network activity including email and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." The city told employees that this policy extended to text messages.

Lessons from *Quon* include the following: (1) policies limiting expectations of privacy should explicitly apply to text messages; (2) reasonable procedures and limits should be placed on searches so that they are narrowly tailored to legitimate business objectives; and (3) when implemented, searches should be reasonable in practice (i.e., searches should be structured to capture as little irrelevant data as possible).

D. Dress Code/Personal Appearance

Employers may and do set guidelines for appropriate workplace attire and personal grooming, and nothing per se limits or restricts employers from setting such personal appearance and grooming guidelines. Courts generally respect reasonable dress codes that further legitimate business interests. Dress and grooming guidelines may create litigation risk when implemented in a manner that discriminates based on gender, gender identity, or sexual orientation. In addition, employers must always remain aware of the mandate that they reasonably accommodate religious practice and disabilities where such accommodation does not create an undue hardship.

Employers, particularly in California, should take steps to ensure that dress codes and grooming guidelines respect personal gender identity preferences. An employer may adopt a set of standards designated for male- or female-type attire, but should refrain from telling any employee which gender's guidelines to adopt (e.g., men may dress pursuant to the female guidelines). In addition, dress codes cannot impose a significant and unreasonable burden on one gender as opposed to the other. For example, in *Frank v. United Airlines*, 216 F.3d 845 (9th Cir. 2000), the court invalidated female flight attendant weight restrictions that were not imposed on men performing the same or similar functions. By contrast, in *Jespersen v. Harrah's Operating Co.,* 444 F.3d 1104 (9th Cir. 2006), a divided court held that a casino requirement mandating facial makeup for women but not men did not impose a sufficiently significant burden on women to constitute discrimination.

Employers should remain wary of dress codes or grooming restrictions that exclude employees or, more problematically, groups of employees from a position if the exclusion can be tied to some protected characteristic such as gender. Employers should consider whether a strong business interest supports the guideline and/or restriction and whether alternative means of achieving the goal exist. For example, in certain businesses, uniforms may not accommodate pregnancy. The employer should consider exceptions or other ways to accommodate pregnancy in such situations.

Finally, California requires that employers reasonably accommodate religious beliefs and disabilities. The California Fair Employment and Housing Act (FEHA) specifically requires that employers accommodate "religious dress and grooming practices." Cal. Gov. Code § 12940(l)(1). The FEHA broadly defines religious dress practices to include "the wearing or carrying of religious clothing, head

or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed." *Id.* § 12926(q). Religious grooming practices include "all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed." *Id*.

Accommodations for both religion and disability must be reasonable and not impose an undue hardship. The FEHA provides that "an accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public." *Id. § 12940*(l)(2). When confronted with a request for an exception to a grooming or dress standard to accommodate a religious belief or a disability, the employer bears the burden of proving that it endeavored to reasonably accommodate the request. Thus, the employer should consider alternatives that would accommodate the belief or disability, but still meet the business objective or goal of the grooming or dress standard. If the employer ultimately decides that the religious practice or disability cannot be accommodated, the employer bears the burden of establishing both that it endeavored to accommodate and that no accommodation existed that would not impose an undue burden. Accordingly, employers should document accommodation efforts and why an accommodation would unreasonably burden legitimate business interests.

E. Drug and Alcohol Testing – Private Employers

No specific California law categorically prohibits drug and/or alcohol testing by private employers. California courts have, however, raised privacy concerns relating to such testing, particularly after employment begins (i.e., postemployment testing). In addition, employers must always remain aware that any drug or alcohol testing program must be administered in a way that is not discriminatory. Thus, employers must be vigilant about how any testing program is implemented to ensure that it does not adversely impact protected employees.

1. Preemployment Testing

In *Loder v. City of Glendale*, 14 Cal. 4th 846 (1997), the court held that suspicionless drug testing of all job applicants as part of a general preemployment medical evaluation does not violate the privacy provision of the California Constitution. The court stated that the incremental intrusion upon an applicant's privacy is justified by the employer's interest to avoid hiring drug abusers. *Id.* at 729; *see also Hind v. Superior Ct.*, 66 Cal. App. 4th 28 (1998)

Thus, preemployment drug testing policies fall within the constitutional parameters if all applicants for a particular job are required to test, the applicants have notice of the policy prior to the test, the test is a condition of an offer of employment (i.e., it should be conducted after an offer is made), and the test is taken in a minimally intrusive fashion. In addition, employers should make sure that the facility engaged to perform testing has well-established procedures to protect employee privacy and the integrity of testing results.

2. Postemployment Random Drug Testing

Postemployment drug testing raises heightened privacy concerns, and balancing the employer's interest against the employee's privacy interest will generally weigh in the employee's favor. Thus, in California random postemployment drug testing raises significant risk. *See Kraslawsky v. Upper Deck Co.*, 56 Cal. App. 4th 179, 187 n.8 (1997).

Two broad exceptions to the general privacy constraints on random postemployment drug testing exist: (1) where the employee is in a safety sensitive position or (2) where federal law requires testing.

Federal law and/or regulations may require or permit drug testing of certain types of employees such as truck drivers (DOT regulations) and airline pilots. Compliance with such laws trumps privacy concerns. In addition, the employer's interest in preserving the safety of employees and others may trump privacy concerns in highly safety-sensitive positions. *See Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147 (1999) (allowed testing for employees holding a safety-sensitive position involving operation of heavy equipment).

3. Postemployment Reasonable Suspicion Testing

California privacy law may permit reasonable-suspicion drug or alcohol testing. Whether an employer actually possesses an objective reasonable suspicion, however, can form the basis for privacy-based litigation. As explained by the court in *Kraslawsky*, "reasonable cause connotes an objective standard. While the standard is not difficult to meet, it necessarily requires a showing of specific objective facts and rational inferences from those facts supporting the conclusion that an employee was under the influence of intoxicants." 56 Cal. App. 4th at 189. The court went on to find that whether the supervisors had reasonable cause to believe that the employee was intoxicated constituted an issue for the jury.

Thus, employers wanting to implement a reasonable-suspicion drug testing program should think about clear guidelines informing decisions about whether reasonable suspicion exists and a process for an objective review of the on-the-ground observations giving rise to the reasonable suspicion.

General guidelines for implementation of any postemployment drug testing program include the following:

- Narrowly tailor the program to address the identified problem/issues.
- Adopt, distribute, and have employees acknowledge a drug/alcohol policy that explains prohibitions on drug/alcohol use and the drug testing program.
- Publicize the testing program and the behaviors that may trigger testing in advance (for example, a work-related accident).
- Obtain a written waiver that conforms to the requirements of the California Confidentiality of Medical Information Act.
- Engage a reliable, certified outside provider to administer testing and ensure that the provider respects employee privacy concerns.
- Engage providers that have established processes for ensuring the integrity of testing results (safeguards for specimen collection and chain of custody).
- Keep results confidential.
- Do not publicize results.
- Consider discipline based on bad behaviors rather than endeavoring to determine the cause of performance problems.
- Be aware of accommodation requirements, including the need to grant leave for rehabilitation.

Local ordinances may also limit drug testing. For example, the City of San Francisco has an ordinance prohibiting drug testing except for (i) preemployment; (ii) reasonable suspicion where there is clear and present danger to the physical safety of the employee or others; or (iii) in conjunction with rehabilitation. Under the ordinance, an employer need not use a laboratory, but an employee can get independent retesting of an employer's positive result. Postaccident testing is prohibited. This applies to both public- and private-sector employers. *See* San Francisco Police Code Art. 33A.

F. Psychological and Personality Tests

Employers sometimes seek to utilize psychological testing to make hiring or promotional decisions—particularly for employees who work under stressful conditions—or to improve the communication and function of employee teams. Psychological tests can be administered in-house by an employer or by a third party.

Under California law, a compelling interest test determines whether psychological testing violates the privacy rights of an employee or applicant. For example, in *Soroka v. Dayton Hudson Corp.*, 18 Cal. App. 4th 1200 (1991), a California Court of Appeal reviewed the practice of Dayton Hudson (Target) department stores of using prehire psychological tests for their security officer positions. The tests included questions regarding the applicants' sexual orientation and religious preferences. Target was unable to show that the tests, particularly the questions scrutinized by the court, directly measured the characteristics of a security officer. Accordingly, the court determined that these intrusions invaded the applicants' privacy and Target was unable to show a compelling interest to justify the testing.

If an employer is considering the use of psychological testing of applicants or employees notwithstanding the risks in doing so, some risks can be mitigated by the following best practices:

- Make sure that you can demonstrate a compelling interest in the testing and that the testing is related to the necessary competencies of the job.
- Confirm the reliability and validity of any testing used, as well as that the testing does not have a disparate impact on the members of any protected group.
- Obtain permission for use of the testing from the applicant or employee.
- Be consistent in using the testing (test all applicants or affected employees, for example).
- Maintain the confidentiality of testing information and results.
- Ensure that the test does not include questions that ask about sex, sexual orientation, religion, politics, medical conditions, or disability, or that are aimed at determining an employee's likelihood of filing a claim for workers' compensation.
- Consider whether to outsource the testing function to a third-party vendor and, if so, carefully review the vendor's qualifications.

G. Workplace Violence: Harassment and Bullying

Recent publicized events have motivated organized efforts throughout the country to prohibit workplace bullying. Various descriptions of workplace bullying exist, with Wikipedia containing the following description:

> Workplace bullying occurs when an employee experiences a persistent pattern of mistreatment from others in the workplace that causes harm. Workplace bullying can include such tactics as verbal, nonverbal, psychological, physical abuse and humiliation. This type of aggression is particularly difficult because, unlike the typical forms of school bullying, workplace bullies often operate within the established rules and policies of their organization and their society. Bullying in the workplace is in the majority of cases reported as having been perpetrated by someone in authority over the target. However, bullies can also be peers, and on occasion can be subordinates. Bullying can be covert or overt. It may be missed by superiors or known by many throughout the organization. Negative effects are not limited to the targeted individuals, and may lead to a decline in employee morale and a change in company culture.

Generally, laws regulating workplace behavior are limited to traditional torts such as assault, battery, false imprisonment, and intentional infliction of emotional distress. In addition, federal and state laws prohibit harassment based on protected characteristics such as gender, sex, race, religion, etc. The laws, however, tend not to protect employees from abusive behavior that is not based on some protected class. Some employers are interested in developing policies to prohibit abusive behavior even when not motivated by or related to a protected class.

When thinking about an antibullying policy that goes further than a policy prohibiting unlawful harassment, employers should remain aware that they may create legal protections for employees that would not otherwise exist. For example, handbooks or policies may create promises or contracts that are broader than the protections afforded by law. Thus, employers should be thoughtful about how they implement such policies.

II. UNEMPLOYMENT INSURANCE

Employees are eligible to receive unemployment insurance under the following conditions: (1) their employment ended through no fault of their own; (2) they are physically able to work; (3) they are actively seeking work; and (4) they are ready to accept work. Part-time and short-term employees are eligible to receive benefits. Employees are not eligible if they (1) voluntarily quit without good cause, (2) are terminated for misconduct, or (3) refuse to perform suitable work. Misconduct does not include good faith errors in judgment, mere inefficiency, or failure in good performance that results from inability or isolated negligence. *Robles v. EDD*, 207 Cal. App. 4th 1029 (2012).

When employment begins, the employer must distribute the EDD notice titled, “Unemployment Insurance, State Disability Insurance, Paid Family Leave” (DE 1857A). When an employee is discharged, laid off, put on a leave of absence, or experiences a significant hours reduction, the employer must provide a brochure titled “For Your Benefit” (DE 2320).

The Unemployment Claims process generally proceeds as follows: (1) the employer needs to provide each employee with a state booklet called “For Your Benefit: California’s Programs for the Unemployed,” which can be obtained from the EDD website; (2) the employee files a claim; (3) the EDD mails a form to the employer titled “Notice of Unemployment Insurance Claim Filed;” (4) the employer responds; (5) the EDD decides if the employee is eligible through reviewing the forms received and any follow-up information obtained (*e.g.,* phone interviews); (5) the EDD mails a “Notice of Determination/Ruling;” (6) employers or employees who object to the ruling may appeal the decision by sending a letter to EDD that includes the company’s name, address, telephone number, and reserve account number, the employee’s name and social security account number, the reason for the appeal, and the name, address, and telephone number of any agent acting on the employer’s behalf in filing the appeal; (7) the decision will be reviewed by EDD and then sent the Office of Appeals for hearing by an Administrative Law Judge (“ALJ”); (8) the ALJ schedules a hearing and advises the employer about the time and place of a hearing; (9) after a hearing, the ALJ makes and mails a final decision; (10) either party may appeal the ALJ’s decision to the California Unemployment Insurance Appeals Board (“CUIAB”); (11) if a party disagrees with the full CUIAB’s decision, the party may file a Writ of Mandate with the Superior Court.

A. Responding to UI Claim Notices – Respond in 10 Days or Lose Rights

EDD sends the employer a "Notice of Unemployment Insurance Claim Filed" (DE 1101CZ). This Notice provides the employer opportunity to dispute the employee's eligibility for benefits. For example, an employee who voluntarily resigns may then file a claim. The employer can communicate to the EDD that the employee voluntarily quit through the form. In addition, completing and returning the form in a timely manner (10 days of the mail date) enables the employer to obtain a Notice of Determination/Ruling and preserves the right to appeal the ruling. ***Employers who do not timely return the form will lose the right to appeal the initial determination***. Similarly, an employer who receives a "Notice of Wages Used for Unemployment Insurance Claims" (DE 1545) should submit a written statement to the EDD within 15 days.

The employer should promptly respond and submit any documents showing the facts that caused the employee to separate from. For example, if the employee provided a resignation letter, submit it along with the response. To show misconduct, the employer needs to show that the employee had a duty to the employer that was violated. For example, an employee may have a duty to refrain from unlawful harassment. In such a situation, the employer should submit the policy establishing the duty to refrain from unlawful harassment. The employer must also show a substantial breach of duty. Unless the breach is very serious, numerous breaches may be required. Employers should submit written warnings or documents to show such repeated breaches or violations. The breach of duty must be willful, wanton, or deliberate, which requires that the employee was aware of the unacceptable behavior. The employee must act contrary to the employer's material interests, which requires that the employer show a significant consequence to the employee's action. Finally, the employer must show the circumstances of the final incident that triggered the termination.

If the employer learns that an employee has turned down another job opportunity, it can report this information to the EDD by submitting a writing detailing the following: (1) the employee's name and social security account number; (2) the date the job was offered; (3) who offered the job; (4) the wages, hours, and working conditions of the job offered; (5) whether the job was permanent; (6) the date the employee refused the job; and (7) and the reason the employee provided for refusing the job. This information must be submitted within 10 days of learning about it.

The employer may also have information that the employee has made false statements or withheld information for the purpose of obtaining benefits. If the employer receives such information, it can provided it to the EDD in writing.

B. Properly Classify Independent Contractors

Many employers believe that if they have an independent contractor agreement with an individual, that individual is not an employee for unemployment insurance purposes. This belief may result in an EDD audit of all individuals having independent contractor relationships with an employer, if only one person files an unemployment insurance claim. Thus, it is critical that employers remain vigilant about properly classifying individuals as either employees or independent contractors.

C. The Appeals Process

The employer must appeal a benefits determination within 20 days of when the EDD mails it. If the appeal is mailed late, the ALJ who hears the appeal may still accept it, if the ALJ determines that good

cause existed for the delay. The ALJ will then set a hearing where both the employer and the employee can present their evidence, including witnesses. Testimony and evidence submitted at the ALJ hearing become part of a public record and can be used in other proceedings.

If the employer disagrees with the ALJ's decision, the employer can file a letter of appeal CUIAB within 20 days of the mailing date of the ALJ decision. In the letter, the employer must identify the parties, the case number, the employee's social security number, the employer's reserve account number, the name and mailing address of an agent presenting the appeal, the ALJ's decision, and the reasons for the appeal. If the employer wants written or oral argument, the employer must request such argument within 10 days of the letter of appeal's mailing.

Once the CUIAB makes a decision, the only remedy the employer has for decision with which it disagrees is a Writ of Mandate to the California Superior Court.

Upcoming Events

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Veteran Employment Roundtable

Join employers, policy experts, legal professionals, and training consultants for an interactive roundtable to discuss best practices, government resources, and tools for designing and implementing robust initiatives to hire and retain veterans.

Topics will include:

- Recruiting, screening, and retaining veterans, including guidance on translating military occupational specialties into industry-recognized credentials and creating a veteran-friendly workplace
- Complying with Title VII of the Civil Rights Act of 1964, Office of Federal Contract Compliance Programs regulations, and state employment laws
- Using federal and state statutory and administrative resources, including tax credits and programs to defray training costs
- Training human resources and hiring managers on best practices for implementing a veteran hiring program, including Equal Employment Opportunity Commission guidance on hiring wounded warriors and related disability accommodations issues
- Maximizing a new veteran hiring initiative, including strategic communications and partnerships

questions?

Please contact **Jen McNally** at jmcnally@morganlewis.com or 215.963.4957.

when

Monday, June 23, 2014
Reception | 5:30–7:30 pm

Tuesday, June 24, 2014
Conference | 8:30 am–4:00 pm

where

Morgan Lewis
1111 Pennsylvania Avenue, NW
Washington, DC 20004

featured presenter

Rosye Cloud
Senior advisor for veteran employment, U.S. Department of Veterans Affairs

REGISTER EARLY FOR EVENT

A block of rooms has been reserved for Monday, June 23, at the Willard InterContinental, 1401 Pennsylvania Avenue, NW, Washington, DC 20004. Please call 202.628.9100 by June 4 to reserve a room at our group rate of $349/night.

CLE credit in FL, IL, NJ, NY, PA, TX, and VA is currently pending approval.

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Whistleblower Claims:
Risk Management and Compliance Strategies

save the date

Save the date for an interactive roundtable that will focus on mitigating risk and maintaining compliance in the face of whistleblower claims.

Using case studies, we will consider the many areas in which a whistleblower claim may affect a company's business, including securities litigation and enforcement, white collar litigation, and employment law issues.

Topics will include:

- The legal landscape, including recent cases and awards
- Whistleblower compliance programs
- Retaliation protection for whistleblowers
- The False Claims Act and qui tam issues

Guest speaker Jeffrey Eglash, senior counsel of litigation and legal policy at General Electric Company, will join us for a "fireside chat" on best practices and hot-button compliance issues, particularly as they relate to global operations.

when
Wednesday, June 18, 2014
8:30 am–1:30 pm

where
Sofitel San Francisco Bay
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Thursday, May 8 | 12:00–1:30 pm ET

webinar 2 Navigating Global Diversity Trends and Requirements
Thursday, May 29 | 12:00–1:30 pm ET

webinar 3 Implementing Workplace Policies Across Multiple Jurisdictions
Thursday, June 12 | 12:00–1:30 pm ET

webinar 4 International Assignments: Structuring and Managing for Business Success
Thursday, June 26 | 12:00–1:30 pm ET

For more information, contact Greta Ito at gito@morganlewis.com or 213.612.7293.
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