

## **2007 EMPLOYMENT LAW YEAR IN REVIEW**

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## 2007 EMPLOYMENT LAW YEAR IN REVIEW

### I. HOT TOPICS IN EMPLOYMENT LAW

#### A. Problems Associated With Employee Use of Technology.

As technology becomes a more integral part of most workplaces, employers are facing a wide variety of new challenges to manage the proper use of technology and protect confidential information. Employers often use email or Internet messaging in place of face-to-face conversations leaving a forever trail of ill-advised comments or statements that can easily be taken out of context. Employers also face loss of productivity concerns due to employees surfing the Internet and sending and receiving external email during work. Employees' access to employer technology also raises intellectual property concerns for employers, such as the appropriate use of licensed software and employee access to trade secrets and other confidential and proprietary information.

Employers should proactively consider policies and training surrounding proper use.

#### B. Wage and Hour Lawsuits.

Wage and hour lawsuits continue to be a problem for employers in the Northwest. The number of such lawsuits filed continues to rise and the issues are becoming more complex. Recent attention on changes to the law and class action lawsuits have heightened the risks that improper pay practices can lead to a large claim.

#### C. Retaliation Claims.

With increasing awareness that employees should raise their concerns either internally or externally, including the focus on ethics issues following Sarbanes-Oxley, employees are asserting an increasing number of retaliation claims. Given that employees are encouraged to assert any complaints of improper or unethical conduct, this only increases the management challenges. Anyone who asserts a complaint is protected from retaliation and can file claims either with applicable agencies or in court. In 2006, retaliation claims accounted for 29.8% of all EEOC charges, up slightly from the prior year.

#### D. Class Actions.

A large number of lawsuits filed against Northwest employers continue to be filed as "class actions," in which a few employees seek to bring claims on behalf of a large group of similarly-situated employees. Class action lawsuits are particularly common for wage and hour violations. If an employer misclassifies one employee, there is often a classification problem with all employees holding that job title in the state or even in the whole country. Thus, it is not difficult for a potential class representative or plaintiff's attorney to find a large number of employees – perhaps hundreds or even thousands – to represent in a wage and hour class action. To a lesser extent, employees sometimes file

class actions for discrimination, generally alleging that an employer's practice or policy has a discriminatory impact on a protected class.

Class actions are particularly risky and harmful for employers. Although any damages attributable to a single employee may not be substantial, once multiplied by hundreds or even thousands of employees, the financial exposure for an employer can become very significant. As a means of preventing wage and hour class actions, employers should conduct internal or external audits of their job positions and review the current exempt or non-exempt classifications of the positions most likely to be targeted in a class action.

**E. Stock Option Back-Dating.**

In 2006, the Securities and Exchange Commission began investigating numerous publicly-traded companies with respect to their practice of back-dating stock option grants to key executives. In some cases, the grants were suspiciously dated on the day that the companies' stock prices were at their lowest. This investigation has prompted employers to take greater care in issuing stock options.

**F. Immigration/Undocumented Workers.**

Given the political attention that has been given to undocumented workers this year, employers must be particularly careful that their employees are legally permitted to work in the United States. Employers can expect heightened scrutiny of I-9 forms and compliance issues. Although the true nature of any immigration legislation is uncertain, employers should expect that if they hire illegal workers, the government will not be lenient in enforcement.

## WASHINGTON UPDATE

### II. WASHINGTON NEW LAWS AND REGULATIONS

#### A. New Washington Law Limits Circumstances Under Which an Employer Can Obtain Credit Reports.

Effective July 22, 2007, employers may only obtain a “consumer report” for employment purposes where any information contained in the report bears on the credit worthiness, credit standing, or credit capacity of a job applicant or employee in two circumstances. The first is if the credit-related information is *substantially related* to the current or potential position for which an applicant has applied. In this case, the reasons for using the credit information must be disclosed to the applicant in writing. Examples where this exception would most likely apply include situations where an employee will be handling money or sensitive personal data. The second exception is when the report is required by law. There is a further exception that applies to current employees, as opposed to applicants. An employer is allowed to request a credit-related report if the employer “has reasonable cause to believe that the employee has engaged in specific activity that constitutes a violation of law.”

#### Steps to Take

- Review the forms used for authorization of background checks to ensure that they comply with the new law. For example, when the background check will include credit-related information, the form should provide the reason why the credit information is important (e.g., “because of your potential access to sensitive financial information”).
- Identify those jobs where credit information is substantially related to the position and articulate the reasons why, in writing.
- To the extent you use a third-party to conduct background checks, make sure that it is in compliance and is not requesting/providing credit information when it is not necessary.

#### B. New Washington Law Expands Definition of Disability.

As of July 21, 2007, Washington again has an expansive definition of disability, much broader than under the ADA. Under the new definition, disability means “a sensory, mental, or physical ‘impairment’ that is medically cognizable or diagnosable, or exists as a record or history, or is perceived to exist.” Further, a “disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.” Impairment is defined very broadly, to include (but is not limited to) “(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including

speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or (ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” Again, very expansively, the statute states that a disability exists “whether or not it limits the ability to work a particular job or in general, or to engage in any other activity covered by the WLAD.” The most significant aspects of this are (1) the extension of “disability” to include temporary conditions; and (2) the fact that the impairment need not “substantially limit” a major life activity.

In order to receive a reasonable accommodation, the employee’s impairment must be “known by the employer or shown through an interactive process to exist.” Additionally, “the impairment must substantially limit the individual’s ability to perform the job,” OR “medical documentation must show there is a reasonable likelihood that engaging in job functions without accommodation would aggravate the impairment to the extent that it would substantially limit the employee’s ability to perform the job.” For purposes of accommodation, a limitation is substantial if it has more than a trivial effect.

Finally, this legislation was declared to be retroactive, applying to all discrimination causes of action brought under the WLAD prior to July 6, 2006. However, on July 27, 2007, Judge Marsha Pechman of the U.S. District Court ruled that the portion of the law that sought to make the statute retroactive was unconstitutional, violating separation of powers. *Varga v. Stanwood-Camano School District*, W.D. Wa C06-178MJP.

### **Steps To Take**

- Employers are urged to move very cautiously when applying discipline or attendance policies to employees with any sort of medical condition. Carefully document that any such decisions were made for objective reasons.
- Review your policies and procedures to ensure that they do not inadvertently affect the terms or conditions of employment for employees with “disabilities.”
- Be ready to engage in the interactive process regarding reasonable accommodations, even with respect to temporary conditions.

### **C. New Washington Law Prohibits Discrimination Against Veterans.**

Effective July 21, 2007, the WLAD has been amended to prohibit discrimination on the basis of veteran or military status. Veteran or military status includes any honorably discharged veteran and any active or reserve member in any branch of the U.S. armed forces, including the National Guard and Coast Guard. Veterans who were discharged in a status other than “honorable” are not protected under the new definition.

## **Steps to Take**

- Review your policies to ensure there is no inadvertent discrimination against employees returning from military leave.
- Bear in mind the interaction between this statute and the new definition of disability, as some studies estimate that up to 30% of veterans returning from Iraq have sustained physical or mental injuries or disorders.

### **D. Family Medical Leave Insurance.**

Although this law was passed in 2007, it will not become effective until October 1, 2009. At that time, parents taking leave from work to care for a newborn or newly adopted child will be eligible for up to 5 weeks of paid time off. The benefit will be \$250 per week for a full-time employee. In order to be eligible, the parent must have worked either 680 hours for the first four of the last five calendar quarters or the last four calendar quarters completed before beginning the leave. Benefits will be prorated for employees working less than 35 hours per week. Job protection is also provided under this law for workers in companies of more than 25 employees who have worked at least 1,250 hours in the 12-month period prior to the leave. Just how this benefit will be funded has yet to be decided, as a task force is looking at the issue and must report by January 1, 2008.

### **E. Domestic Partnerships.**

Effective July 23, 2007, “domestic partners” may register with the Secretary of State for official “domestic partnership” status. This applies to people of the same gender or of different genders where one of the partners is over 62 years of age.

## **Steps to Take**

- This law does not require that employers provide benefits to domestic partners of employees. However, if you already provide such benefits, you may want to consider requiring that the domestic partnership be registered with the state in order to qualify for benefits.

### **F. Industrial Insurance Workers’ Compensation Benefits.**

Effective June 30, 2007, two relevant changes are implemented. First, there are new minimum benefits for various situations facing injured workers or the family of a deceased worker. The minimums will now be set with respect to the average monthly wage in Washington, plus additional amounts depending on family size. Second, for purposes of “time loss” benefits, “wage” will be defined to include the employer’s contribution toward health insurance, unless the employer continues to provide the insurance during the time off following the injury.

### **G. Workers' Compensation – Self-Insured Employers.**

Effective July 22, 2007, an Office of Ombudsman for workers of self-insured employers was created. The Ombudsman is to act as an “advocate” for injured workers of self-insured’s, to provide information to those workers, and to facilitate resolution of complaints from those workers. The complaints will be passed on to the Department of Labor & Industries for actual resolution. Employees who seek the services of the Ombudsman are protected from retaliation, and communications between the employee and Ombudsman are considered to be privileged.

### **H. Unemployment Benefits for Self-Employed.**

Effective January 1, 2008, unemployed persons who seek to become self-employed through participation in a “self-employment assistance program” can still receive benefits, without demonstrating any attempts to obtain other employment. Of chief importance to employers is the condition that persons in the program may not compete with his or her former employer for up to one year, within geographic limitations to be determined by the Economic Security Department.

### **I. City of Seattle Levies Tax for “Employee Hours” in the City.**

Effective July 1, 2007, employers in Seattle who make more than \$50,000 year and have more than 3 employees will have to pay an Employee Hours Tax. The tax is based on the number of employee work hours performed within the Seattle city limits, not including vacation and sick hours. This tax applies to businesses that are not located in the City but do business there. Deductions can be taken for all hours worked by employees who commute at least 80% of the time by means other than single occupancy vehicles. The rate of the tax is .01302 per employee hour, or an alternative amount of \$25 per employee (pro-rated to \$12.50 for 2007). There is a \$50 credit available to each employer that should eliminate any tax obligation for employers whose employees work in the City only periodically. Employers must report on a form provided by the City, which can be found at <http://www.seattle.gov/rca/taxes/EmployeeHoursTax.htm>.

## **III. WASHINGTON AGENCY UPDATES**

### **A. Heat-Stress Requirements.**

As part of the Department of Labor and Industries (“L&I”)’s efforts to respond to a highly publicized heat-related death of a farm worker in Eastern Washington, L&I initially issued an emergency rule, modifying an existing rule on indoor temperature exposure to apply to outdoor conditions. The modification went into effect on June 1, 2006, was withdrawn, and is now in effect again as of June 18, 2007. The rule requires that employers provide adequate protection to employees who work in extreme heat, including the provision of adequate supplies of drinking water. Employers should evaluate their workplaces and determine if their employees will be at risk from heat-related illness. In addition to the new rule, L&I will ensure that heat-stress precautions are in place and effective in affected industries through regularly scheduled inspections and consultations.

**B. Rate Holiday.**

The Department of Labor & Industries announced that effective July 1, 2007, a rate holiday will be in effect for a period of six months, through December 31, 2007. The rate holiday means that employers and employees who pay premiums to L&I will pay no Medical Aid Fund premium for work performed July 1 through December 31, 2007. This is predicted to save nearly \$315 million in premiums.

**C. Washington and Federal Minimum Wage Increases.**

Effective January 1, 2007 the Washington State minimum wage increased to \$7.93 per hour, up from \$7.63. The state's minimum wage is recalculated each year in September as a result of an initiative approved by voters in 1998. The minimum wage is tied to changes of the federal Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). The minimum wage will increase again effective January 1, 2008, depending on the increase in the CPI-W. Effective July 24, 2007, the federal minimum wage increased from \$5.15 to \$5.85 per hour. The minimum wage will increase on July 24<sup>th</sup> of 2008 and 2009 as well, to \$6.25 and \$7.25, respectively. This does not affect Washington employers given that the Washington rate is higher.

**IV. WASHINGTON SIGNIFICANT CASES**

**A. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700 (2007).**

On March 1, the Washington Supreme Court ruled that out-of-state hours worked by an employee based in Washington do count when determining overtime pay. Bostain was an interstate truck driver who lived in Clark County, Washington and worked out of a trucking terminal located in the same county. A log audit of Bostain's final year of work for Food Express, a California corporation headquartered in Arcadia, California, showed that he averaged 48 working hours per week but that he never worked more than 40 hours in a week within Washington state. He spent 37 percent of his driving time in Washington and 63 percent out of state. He was not paid overtime. The court ruled that Washington's Minimum Wage law "unambiguously requires that overtime be paid to a Washington employee based on all hours worked."

**B. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546 (2006).**

A Washington Court of Appeals held that an employer could not manipulate lifting requirements for pregnant women. The court also clarified that pregnancy cases are not analyzed under a disability discrimination framework, but rather as gender discrimination. In the case, a customer service clerk was hired and then sent home when her physical revealed she was pregnant. Her employer then altered its lifting requirements (increasing them) and asked the plaintiff to obtain a medical release before finally concluding that plaintiff could not be accommodated and firing her. The court reversed the trial court and remanded the case for damages.

The Washington Supreme Court has agreed to hear this case on appeal.

## OREGON DEVELOPMENTS

### V. OREGON CASE LAW

#### A. *Washburn v. Columbia Forest Products, Inc.*, 340 Or. 469 (2006).

##### 1. **Facts.**

The plaintiff was prescribed medicinal marijuana to stop leg spasms he was experiencing when trying to sleep. When he took the marijuana, his leg spasms ceased. However, using the marijuana caused the plaintiff to fail a drug test. He was subsequently fired by his employer because he failed the drug test. The plaintiff then sued, alleging he was discriminated against because of his disability.

##### 2. **Held.**

The Oregon Supreme Court ruled that the plaintiff was not disabled, because using marijuana successfully mitigated what otherwise would be his disability. The court concluded that “to be considered disabled under the statutory definition, a person must possess a substantial limitation that operates presently, as opposed to potentially or hypothetically.” Thus, with regard to the “substantive provisions set out in ORS 659A.112 to 659A.139,” if “mitigating measures . . . counteract or ameliorate an individual’s impairment,” he or she is not disabled.

##### 3. **Practical Impact.**

The Court’s main opinion did not address the question most employers care about and that is whether medical marijuana must be accommodated as part of its reasonable accommodation obligations to disabled individuals, as the Court of Appeals held. A concurring opinion noted that marijuana is illegal under federal law and therefore could not be imposed on employees. Because that portion of the Court of Appeals ruling was not specifically overruled by the Supreme Court decision, the question is still open in Oregon. Therefore, Oregon employers should carefully consider whether to discipline an employee for failing a drug test if there is evidence that the medical marijuana is used to treat a disability. Is the employee disabled? Are there other treatments which could ameliorate the condition?

#### B. *Public Utility Commission v. Tillotson*, 210 Or. App. 433 (2007).

##### 1. **Facts.**

The employee had been warned about her poor writing skills multiple times in the past. On the date in question, employee’s supervisor informed employee that employee was to meet with the supervisor and an administrator that afternoon. Employee told the administrator that she would not attend the meeting without her lawyer; she did not in fact attend the meeting. The supervisor gave employee a written reprimand, which stated she was to attend another meeting later that day.

Employee did not attend the make-up meeting either. The same occurrence repeated later that day. Employee also refused to sign any documentation acknowledging her presence at the meetings with her supervisor. Employee was then suspended for 30 days and denied unemployment.

**2. Held.**

Under OAR 471-030-0038(1)(d), there are several rules that determine whether an employee's misconduct was "isolated," leaving the employee eligible for unemployment, or not isolated, excluding the employee from eligibility. To fall in the former category, "exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior." The court ruled that employee had not engaged in an isolated incident of poor judgment. Even though the events leading to her discipline arose from the same dispute, they were still repeated, distinctly separate events. Thus, employee was ineligible for unemployment.

**3. Practical Impact.**

Employers should still think carefully about challenging unemployment benefits. Unemployment findings are inadmissible in subsequent litigation and a denial of unemployment benefits can sometimes lead an employee to pursue litigation when she or he may not otherwise.

**C. *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or. App. 610 (2007).**

**1. Facts.**

The plaintiff sought to have the arbitration clause in her contract voided on a number of grounds. First, she argued that the clause was procedurally unconscionable because she was only 19 when she signed it, the clause was one of 70 forms she had to read in only two hours, and she had to sign the form or she would not have been hired.

**2. Held.**

The court found plaintiff's arguments without merit, primarily because the record showed that she was repeatedly told not to sign anything she did not understand, and was assured she could take time to read all of the forms and ask questions. The court did find that there was unequal bargaining power, but held that could not void the contract under a procedural unconscionability argument.

The court then addressed an issue of first impression in Oregon: whether an arbitration clause is void if it requires the employee to arbitrate all claims, but preserves the employer's right to file an action in court. The court found that the clause was not unconscionable, even though arbitration was made mandatory solely for the party with the weak bargaining power. The court reasoned "the arbitration clause does not impose any limits on the type or amount of recovery

that can be awarded by the arbitrator; impose any limits on discovery or admissible evidence, apart from those limitations that apply in federal district court; and does not impose tight deadlines on the filing of claims.”

**3. Practical Impact.**

The question of contract formation that the Court decided is essentially mooted by the change in the law discussed below. But employers wishing to use arbitration clauses should make sure there are no limits on the type or amount of recovery that can be awarded by the arbitrator, no limits on discovery that are different from the federal or state rules and no unreasonably tight deadlines, including any substantial change in the statute of limitations

**D. *Sprague v. Quality Restaurants Northwest, Inc.*, 213 Or. App. 521 (2007).**

**1. Facts.**

Former employee brought class action alleging a variety of wage and hour violations under Oregon law.

**2. Held.**

Defendant employer moved to compel arbitration shortly after the lawsuit was filed. The trial court denied the motion, but allowed the defendant to seek immediate review by the Court of Appeals. The Court of Appeals reversed. The court recognized the unequal bargaining power, but held that fact alone does not render the agreement unenforceable. The Court also said that shortening the statute of limitations by as much as 4 years (from six to two for some wage claims) did not void the contract. Finally, the Court held that simply because the agreement was silent with respect to class actions did not make the agreement unenforceable. However, the Court of Appeals noted that the Court, not the arbitrator, was the proper entity to determine whether a class action was allowed under the agreement and the Court of Appeals held that the arbitration agreement did provide for class actions and thus the agreement was enforceable.

**3. Practical Impact.**

Oregon employers should not prohibit class actions if they use arbitration agreements.

**E. *Love v. Polk County Fire District*, 209 Or. App. 474 (2006).**

**1. Facts.**

The plaintiff claimed she was wrongfully discharged. Plaintiff was responsible for tracking firefighters’ training hours. She believed the new fire chief did not do a sufficient job in the area of training. She voiced these concerns to several, including the fire chief. Her concerns increased when some of the firefighters

were involved in a fatal accident during training. The Department conducted an internal investigation into the accident as did NIOSH, a federal institute with authority to investigate and research workplace safety. Plaintiff believed some of the documents the employer provided to NIOSH were back dated. On at least one occasion, plaintiff told a coworker that the district “was going to hide the lack of training [from NIOSH] and pretend that there wasn’t a problem.” The fire chief learned of plaintiff’s statements. He believed that plaintiff’s conduct was unprofessional and distracting to the district’s work. On the same day the NIOSH investigators were scheduled to arrive, plaintiff was terminated.

**2. Held.**

The Court of Appeal first set out the standards for claim of wrongful discharge. The court reiterated that employees are at will and the wrongful discharge claim can only survive if the employee is exercising a job related right that reflects an important public policy or when the discharge is for fulfilling an important public duty. The court said “that a public duty may be ‘found’ through cases, statutes, rules, or constitutional provisions that either (1) specifically encourage or require a particular action or (2) otherwise demonstrate that such action enjoys high social value.” Furthermore, the court said that “the class of conduct that is deemed to ‘enjoy high social value’ . . . consists at least of (1) conduct that, by statute or rule, is explicitly described as being of high social value; and (2) conduct that is similar to that giving rise to legally compelled obligations to act in other, analogous contexts.” Finally, the court articulated an additional test that courts should use in whistleblower cases – a successful plaintiff must show that (1) the plaintiff reasonably believed the defendant was engaging in the objectionable conduct; and (2) the plaintiff’s discharge was causally related to the complaints plaintiff made.

Based on the foregoing, the Court held that internal complaints or grumbling about internal matters is not protected. The court specifically differentiated that conduct from a complaint to an outside agency was authority to investigate. However, an allegation that her supervisors were in fact engaging in illegal conduct (a “cover up”) was protected.

**3. Practical Impact.**

Employers must exercise great care in disciplining an employee who makes complaints. To the extent the employer can bring in a different or additional decision maker in any employment decisions involving potential “whistle-blowers” it can add a layer of protection against claims of retaliation.

**F. *Dew v. City of Scappoose*, 208 Or. App. 121 (2006).**

**1. Facts.**

Plaintiff, former city policy chief, sued alleging retaliation for exercising free speech rights as well as common law wrongful discharge and various statutory claims.

**2. Held.**

The Oregon Court of Appeals held that an employee's acceptance of severance pay, pursuant to a "no cause" termination provision in her employment contract, did not bar the employee from filing a common law wrongful discharge claim against the employer.

**3. Practical Impact.**

If you are going to have a severance plan, make it conditional on the employee signing a release of all claim.

**G. *Gafur v. Legacy*, 213 Or. App. 343 (2007).**

**1. Facts.**

Plaintiffs, on behalf of themselves and a class of employees, sought recovery of wages stemming from missed rest and meal breaks.

**2. Held.**

The court ruled that plaintiffs' action for recovery of wages for missed meal breaks was properly dismissed, because under OAR 839-020-0050(1)(a) paid meal breaks are not required – just meal breaks. The court did find that plaintiffs could proceed with their claim for wages due to missed rest breaks, reasoning rest breaks must be paid breaks under Oregon law, and thus by not providing employees with rest breaks, the employees suffer monetary loss, for which they can seek monetary compensation in court. The employer is seeking review of this decision by the Oregon Supreme Court.

**3. Practical Impact.**

Employers must be vigilant in ensuring rest breaks. Violation of the rule exposes employers to substantial penalties. To the extent feasible within your industry, schedule rest breaks.

**VI. OREGON LEGISLATIVE DEVELOPMENTS**

The Oregon legislature adjourned June 28, 2007, after passing numerous employment-related bills that will have a significant impact on employers doing business in the state

of Oregon. Of particular interest are the following bills, all of which become effective January 1, 2008, unless noted below:

**A. Arbitration and Non-Competition Agreements:**

**1. Summary.**

This bill amends ORS 36.620 and voids an arbitration agreement between an employer and an employee unless the employer notifies the employee at least two weeks prior to the beginning of employment that the employee will be required to enter into an arbitration agreement. The arbitration agreement may also be entered into upon a subsequent bona fide advancement in employment provided the same advanced notice is given.

The bill also amends ORS 653.295 and makes non-competition agreements *voidable* unless the employer informs the employee, at least two weeks before employment begins (or a bona fide advancement) that a non-competition agreement is required. Additionally, only “white collar exempt” employees may be required to enter into non-compete agreements and the employee must have access to trade secrets or other confidential business information. Finally, the employee must be paid more than the median income for a family of four, currently approximately \$60,000. The bill is effective for agreements entered into after January 1, 2008.

**2. Steps to Take**

- Make sure your hiring managers know to include any arbitration or non-compete requirements in the offer letter.
- Make sure you consider who you should have sign a non-compete agreement.
- Review non-compete templates to make sure they are consistent with the new statute.
- Inside sales people would not normally be “white collar” exempt and thus could not be subject to a non-compete. Therefore, use a non-solicitation agreement, prohibiting the employee from soliciting your customers or employees for a period of time after employment.
- Consider whether to take advantage of the “safe harbor” which allows you to buy a non-compete that might otherwise be unenforceable by paying the employee half her annual gross compensation (wages, commissions and bonuses) or half the annual median family income for a four-person family (whichever is greater) for up to two years.

**B. Expansion of Anti-Discrimination Provisions.**

**1. Sexual Orientation.**

Under Senate Bill 2 employers are now prohibited from discriminating in employment on the basis of an individual's sexual orientation. Employers may still enforce dress codes, but must make reasonable accommodations on a case-by-case basis.

**2. Damages.**

Employees may now recover punitive and compensatory (emotional distress) damages when they bring successful discrimination claims under ORS 659A.030.

**3. Steps to Take.**

- Review anti-discrimination/anti-harassment policies to ensure sexual orientation is included.

**C. Nursing Mothers.**

**1. Summary.**

Employers with 25 or more employees will be required to provide no more than 30 minutes' unpaid rest time for every four hours worked to a female employee who needs to express milk for her child, upon reasonable notice from the employee of the need for such rest time. This rest period is preferably to be taken at the same time as rest or meal periods otherwise provided to the employee. This requirement does not apply if the employer can show that compliance would create an undue hardship. The law also requires employers to make reasonable efforts to provide a private place (restrooms excluded) for employees to express milk.

**2. Steps to Take**

- Consider designating a common space for nursing mothers to use to express milk (e.g. an unused office).
- Be clear whether the time is part of the mandatory rest break and if so, 10 minutes of the time must be paid.

**D. Family Leave.**

**1. Summary.**

Several bills expanded Oregon's family leave law:

- OFLA leave now *excludes* leave taken by an employee who is unable to work because of a “disabling compensable injury” under Oregon’s worker’s compensation law. Similarly, an employer may not reduce the amount of family leave available to an employee by any period the employee is unable to work because of a disabling compensable injury.
- The definition of “family member” now includes grandparent or grandchild for purposes of a leave of absence under the Oregon Family Leave Act.
- Employees now must be allowed to use accrued paid sick leave for any leave under the Oregon Family Leave Act.

**2. Steps to Take.**

- Ensure that accepted workers compensation leaves are not counted towards the employee’s OFLA entitlement.
- Change your policy to reflect the new definition of “family member” and to ensure that an employee may use sick leave for any OFLA covered leave

**E. Personnel Records.**

**1. Summary.**

An employer will now be required to furnish or make available for inspection a certified copy of an employee’s personnel records within 45 days after receipt of an employee’s request to inspect such records. Before there was no time limit on the requirement.

**F. Meal Periods for Tipped Employees.**

**1. Summary.**

ORS 653.261 was amended to allow the Commissioner of the Bureau of Labor and Industries to adopt rules permitting employees who serve food or beverages and who receive tips and report the tips to their employers to waive a meal period.

**G. Wage-Related Discrimination.**

**1. Summary.**

It is an unlawful employment practice for an employer to discriminate against an employee for taking a wage-related action against the employer, and grants the allegedly aggrieved employee the option to file a claim with the Bureau of Labor and Industries.

## **H. Fixing Wage Mistakes.**

### **1. Summary.**

When an employer makes an error in an employee's regular pay to the employee's detriment, if neither party disputes the amount owed, the unpaid amount is due within three business days if it is 5 percent or more of the gross wages due to the employee on the regular payday. The unpaid wages may be included in the employee's next regular paycheck if the unpaid amount is less than 5 percent of the employee's gross wages.

### **2. Steps to Take.**

- Make sure managers understand that when pay discrepancies are brought to their attention, to notify payroll
- Consider adopting policies to require employees to bring pay questions to one person (e.g. payroll manager)
- To the extent your payroll office is out of state, make sure it is aware of this new law.

## **I. Leave for Domestic Violence Victims.**

### **1. Summary.**

This bill requires employers that have six or more employees to provide reasonable unpaid leave to an employee to address domestic violence, sexual assault, or stalking of the employee or the employee's minor dependents. To be eligible for leave, the employee must have averaged 25 hours of work per week for the previous 180 days. The employee may use any paid time off while on leave. The employer may require the employee to produce certification of the need for leave. If allowing the employee to take leave would be an undue hardship on the employee, the amount of leave the employee can take may be limited. An employee may file a complaint alleging violations of this law with BOLI or in court.

### **2. Steps to Take**

- Update personal leave policies to reflect the available leave under these circumstances.
- This bill went into effect immediately.

## THE SUPREME COURT AND OTHER SIGNIFICANT COURT DECISIONS

### VII. SUPREME COURT REVIEW

#### A. Decided Cases.

#### 1. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007).

##### a. Facts.

Ledbetter worked for Goodyear Tire from 1979 to 1998 as one of a few female managers. She brought suit under Title VII alleging pay discrimination. Salaried employees at Goodyear received wage increases based on performance reviews. The plaintiff alleged that her supervisor had given her several negative reviews because of her sex, which meant that her wages did not increase during the time of the reviews. After many such reviews, she found that she was making far less than her male colleagues. Ledbetter submitted a questionnaire to the EEOC in March of 1998, filed a formal charge with the EEOC that July, and filed suit under Title VII after she retired that November. The primary issue in the case was whether a plaintiff can challenge acts of discrimination that occur outside of the 180 or 300 day time limits provided for filing a charge with the EEOC.

##### b. Held.

In a 5-4 decision, the Court held that later effects of past discrimination are time barred if the past discrimination occurred more than 180 days before filing a questionnaire with the EEOC. An employee must file a questionnaire in response to a discriminatory act within 180 days of the act for courts to consider the act in discrimination cases. Here, the two wage decisions within the appropriate time period did not suggest that there was discrimination. The fact that her current disparate pay may have resulted from past discriminatory decisions did not bring those past acts within the statute of limitations. Under previous Supreme Court cases, plaintiffs were able to rely on a “continuing violations” theory to claim that each new paycheck was the result of discrimination, and therefore started the time limitation afresh, bringing past acts/decisions within the time limitation for filing a claim. The Court distinguished its previous holdings as pertaining to intentionally discriminatory pay systems and stated that Ledbetter failed to show that her pay was based on such a discriminatory pay system.

##### c. Practical Impact.

Employees will have to file complaints regarding alleged discriminatory pay within a short time frame. However, the Supreme Court left open the question of whether a “discovery rule” might provide tolling until a

plaintiff learns, or should have learned, of discriminatory pay disparity. Employers should review current pay practices to ensure that pay and raises are based on objective criteria that are well documented.

**2. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007).**

**a. Facts.**

An employee who provides companionship services to the elderly and infirm sued her employer, a third-party agency, for minimum and overtime wages she claimed she was owed under the Fair Labor Standards Act (FLSA). People who work in domestic service, such as casual babysitters and companionship workers, are exempt from the FLSA minimum wage and overtime requirements. The Department of Labor (DOL) issued an interpretation that exempt companionship workers include those who are employed by an outside agency. The employer had relied on this interpretation and claimed that the employee was exempt from the FLSA requirements and therefore, she was not owed overtime or minimum wages.

**b. Held.**

Companionship workers employed by a third party are exempt from the minimum wage and overtime requirements of the FLSA. The Supreme Court held that the DOL's regulation does not overstep the agency's authority and therefore, it is valid and binding.

**c. Practical Impact.**

The Supreme Court's holding reaffirmed a DOL interpretation of the FLSA's minimum wage and overtime requirements. The decision indicates the Supreme Court's willingness to defer to the regulations established by the DOL when examining cases that arise under the FLSA. As wage and hour class actions continue to be tempting subjects for plaintiffs' lawyers, employers should carefully review their classification of positions and follow DOL regulations regarding the FLSA.

**3. *Parents Involved in Community Schools v. Seattle School District No. 1*, 2007 U.S. Lexis 8670 (2007).**

**a. Facts.**

This case consists of two consolidated cases. Defendant school districts, a Seattle district and Jefferson County, Kentucky, district, used race classifications as a tiebreaker in assigning students to high schools. The school districts did not use race to remedy the past effects of discrimination. The districts did not use race as one of many factors, but as the deciding factor. Parents of children in those districts who were

subject to this racial tiebreaker system sued the school districts, claiming the school districts violated the Equal Protection Clause.

**b. Held.**

The Supreme Court reversed the decisions below and held that the school districts' use of race as a tiebreaker violated the Equal Protection Clause. The school districts' means for achieving diversity in schools were too extreme to meet the test of strict scrutiny. The Supreme Court explained that the school districts used only two race categories and they made assignments based on race alone. Government sponsored programs cannot make decisions based on race alone when the goal is not to remedy past effects of intentional discrimination.

**c. Practical Impact.**

The Court's holding suggests that government employers may not use race to promote racial balance in the workplace, without showing that they are remedying the past effects of intentional discrimination. The case does provide guidance to employers, however, regarding the elements that are necessary to ensure that diversity programs are designed to address the goal of increased diversity in workplace without running afoul of the nondiscrimination laws.

**4. *Davenport v. Washington Education Association*, 127 S. Ct. 168 (2007).**

**a. Facts.**

A public sector union challenged a Washington State law that regulates how public sector unions use fees paid by non-union members. Public sector unions are allowed to collect fees from employees who are not union members to pay for the union's collective bargaining efforts from which they benefit. The state law requires that unions receive affirmative authorization from nonmembers before using their fees for political purposes. Two separate cases arose out of these circumstances. The highest court in Washington held that Washington's law requiring affirmative authorization violated the First Amendment.

**b. Held.**

The Supreme Court reversed the State Supreme Court's decision and held that the state law does not violate the First Amendment. The Constitution provides some regulation of unions' collection and use of fees, but those regulations create a floor, not a ceiling for state limitations. States may impose greater restrictions on how unions may spend nonmembers' fees. The Court found the Washington law is constitutional as applied to public-sector unions, but did not address whether the law would be constitutional as applied to private-sector unions.

**c. Practical Impact.**

Unions will be required to obtain affirmative authorization from nonmember employees in order for the unions to use their fees for political purposes. The larger implication of the Court's decision is that the Court showed a willingness to let states regulate union activity beyond the national regulations.

**5. *Beck v. PACE International Union*, 127 S. Ct. 2310 (2007).**

**a. Facts.**

PACE International Union represented employees who were participants in a single employer ERISA benefit plan regulated by the Employee Retirement Income Security Act (ERISA). The plan was administered and sponsored by Crown. Crown filed for bankruptcy and decided to terminate the plans by purchasing annuities rather than terminating the plan by merging it with the union's multiemployer plan. The union filed an action in the Bankruptcy Court claiming that Crown had violated its fiduciary duty by not seriously considering terminating the plan by merging.

**b. Held.**

Crown did not breach its fiduciary obligations because merger is not a permissible form of plan termination under ERISA. The Court noted that the two most common methods of distribution are the purchase of annuities and lump-sum distributions. The Court chose to follow the guidance of the Pension Benefit Guaranty Corporation (PBGC), the federal agency responsible for administering the federal insurance program. PBGC maintains that merger is not a permissible termination form under ERISA because it is an alternative to termination. Overall, the Court deferred to the PBGC's construction of the statute.

**c. Practical Impact.**

The Court's decision suggests that there are only two ways to terminate an ERISA plan. The plan administrator may either purchase annuities or make lump-sum distributions. The greater practical implication is that employers and ERISA plan administrators should follow agency regulations and interpretations when deciding how to administer a plan.

**6. *Norfolk Southern Railway Co. v. Sorrell*, 127 S. Ct. 799 (2007).**

**a. Facts.**

This case arose under the Federal Employer Liability Act (FELA), which provides the exclusive remedial scheme for all railroad workplace injuries.

An employee of the railroad company was injured in an automobile accident while on duty. The employee claimed the accident was caused by a co-worker, which would make the company liable, but the company claimed that the employee was partly at fault for the accident. The trial court, relying on state law, instructed the jury to use two different standards for negligence. First, the employer was negligent if it caused the accident “in whole or in part.” Further, the court instructed the jury to find contributory negligence on the part of the employee if the employee’s negligence “directly contributed to cause his injury.” The jury found for the employee and the employer argued that the application of state jury instructions defeated the federal substantive rights granted by FELA.

**b. Held.**

The same standard must be applied to determine railroad negligence and employee contributory negligence under FELA. The Court declined to answer the broader question of what the standard for causation under FELA should be. Using the same standard of causation for both forms of negligence should simplify a court’s effort to reduce damages owed by the railroad in proportion to the employee’s contributory negligence.

**c. Practical Impact.**

This decision clarifies the standards for negligence and contributory negligence to be applied in FELA cases. Overall, this result reaffirms the preemptive effect of FELA over state law standards and/or remedies

**B. Pending Cases**

1. *Federal Express Corporation v. Holowecki*, \_\_\_\_S. Ct.\_\_\_\_ (2007). *Decision below: 440 F.3d 558 (2d Cir. 2006).*

**a. Facts.**

A class of current and former couriers of Federal Express Corporation (FedEx) sued FedEx, alleging that FedEx had participated in a pattern and practice of age discrimination in violation of the Age Discrimination in Employment Act (ADEA).

**b. Holding Below.**

The Second Circuit reversed and remanded part of the district court’s decision that the complaints were time barred. The Second Circuit held that a named plaintiff’s intake questionnaire filed with the EEOC was enough to satisfy the ADEA’s exhaustion requirement even though the EEOC never investigated the employer. Moreover, the court found that the questionnaire was enough for eleven named plaintiffs who never filed

EEOC charges to take advantage of the piggybacking rule and file one suit.

**c. Practical Impact.**

The Supreme Court's decision in this case will clarify what constitutes an EEOC charge. The ADEA mandates that this document must be filed with the EEOC within 60 or 300 days, depending on which state the claims is filed in, before filing a complaint in federal court. The result will affect the process for filing discrimination suits under the ADEA in federal court.

**2. *Sprint/United Management Co. v. Mendelsohn*, \_\_\_\_S. Ct. \_\_\_\_ (2007). *Decision below: 466 F.3d 1223 (10th Cir. 2006).***

**a. Facts.**

Former employee sued former employer, Sprint/United Management Company, claiming Sprint unlawfully discriminated against her on the basis of age. She claimed Sprint violated the Age Discrimination in Employment Act (ADEA) when the company fired her as part of a company-wide reduction in force.

**b. Holding Below.**

The district court found in favor of the defendant employer, but the Tenth Circuit reversed and remanded the case on the basis of an evidentiary ruling. The Tenth Circuit found that the district court abused its discretion in deciding to exclude testimony from former Sprint employees who were discriminated against during this same reduction in workforce. The Tenth Circuit held that the plaintiff was not required to show that she and the other employees had worked under the same supervisor before the evidence could be admitted.

**c. Practical Impact.**

The Supreme Court's decision in this case is one of evidentiary value. However, this case is another reminder that discrimination claims occur in different forms. Employers should be aware that pattern and practice claims of discrimination can arise out of company policies that have a discriminatory effect. Employers should also perform periodic performance evaluations and maintain records of these evaluations and employment decisions.

3. ***LaRue v. Dewolff, Boberg & Associates, Inc.*, \_\_\_ S. Ct. \_\_\_ (2007). Decision below: 450 F.3d 570 (4th Cir. 2006).**

**a. Facts.**

This case involves an employee benefit plan regulated by the Employment Income Security Act (ERISA). DeWolff, Boberg & Associates is a national consulting firm that administers the ERISA plan in which its current and former employees participate. Plaintiff, a Dewolff, Boberg & Associates employee, brought suit against his employer under ERISA, alleging that they failed to carry out the investment strategy that he selected for his 401(k) retirement account. He sought to recover his losses.

**b. Holdings Below.**

The Fourth Circuit affirmed the district court's decision that individualized remedies were not available in this particular case. Plaintiff did not allege that the defendant was withholding the funds, but rather, he alleged that the funds did not come into existence. The Fourth Circuit found that the remedy he sought was outside the scope of equitable relief available under ERISA for his particular claims.

**c. Practical Impact**

The Supreme Court's decision in this case may shape the types of claims participants in ERISA plans may make against plan administrators and fiduciaries. If the Court affirms the Fourth Circuit's decision, the available remedies under an ERISA claim will depend on the specific facts alleged in the complaint. If the Supreme Court reverses the Fourth Circuit's decision, employees may be able to seek broader remedies under ERISA regardless of the particular facts alleged in the complaint.

## **VIII. OTHER COURT DECISIONS**

### **A. Wage and Hour**

1. ***In re Farmers Ins. Exch.*, 466 F.3d 853 (9th Cir. 2006).**

This case has been bouncing around for years, and because of the very large potential for back pay, motivated many employers to re-evaluate their classifications of employees as exempt or nonexempt. In this latest ruling, the Ninth Circuit relied on the Department of Labor (DOL) interpretation of claims adjusters as exempt. The court held that insurance claims adjusters are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), regardless of the size or type of claims they handle. The court relied on the DOL regulation that specifies the activities claims adjusters must perform to be exempt from the FLSA. The court defers to the DOL's interpretations of

the FLSA and until the DOL distinguishes claims adjustors beyond their activities, the court will not create a distinction.

## **B. Uniformed Services Employment and Reemployment Rights Act (USERRA)**

### **1. *Wallace v. City of San Diego*, 460 F.3d 1181 (9th Cir. 2006), amended by 479 F.3d 616 (9th Cir. 2007).**

In *Wallace v. City of San Diego*, 460 F.3d 1181 (9th Cir. 2006), amended by 479 F.3d 616 (9th Cir. 2007), the Ninth Circuit reversed the lower court's decision to grant the City's motion for judgment as a matter of law and the decision to grant a new trial. The court found the plaintiff, a former employee of the San Diego Police Department, had presented evidence such that the jury could find that the Police Department constructively discharged him and retaliated against him on the basis of his military status in violation of USERRA. Employers have an obligation to rehire employees who are members of the armed services after they return from active duty if the employees comply with the procedural requirements of USERRA.

## **C. Discrimination Law**

### **1. Misconduct Caused by Disability Is Protected.**

In *Gambini v. Total Renal Care, Inc.* (9<sup>th</sup> Cir. 2007), the court held that an employer cannot fire an employee for misconduct if the misconduct is caused by a disability. The employee experienced depression and anxiety and her employer, DaVita, a provider of dialysis services, knew that she had been diagnosed with bipolar disorder. The employer became increasingly concerned about Gambini's performance and behavior in the workplace, as she grew more and more irritable and unable to concentrate on her work. When she was presented with a performance plan, she became angry and yelled and swore at her supervisors, saying that her supervisors would "regret this." After kicking and throwing things around her cubicle, she left for the day. About a week later, DaVita terminated Gambini's employment. She asked them to rescind their decision, stating that her behavior had been caused by her bipolar disorder. When DaVita refused, she sued claiming discrimination.

At a jury trial, the jury found for DaVita. However, on appeal, the 9<sup>th</sup> Circuit found that there was reversible error when the lower court failed to give the jury an instruction Gambini had requested – that "conduct resulting from a disability is part of the disability and not a separate basis for termination." The Court held that where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that it may find that the employee was terminated on the impermissible basis of her disability.

This is quite a departure from prior cases under the ADA, where conduct that violated an employer's policies was permissible grounds for termination, unless the employee could show that a reasonable accommodation would have prevented the conduct but had been denied. This case may pose particular dangers in Washington, under the newly-revised and broad definition of "disability." Employers must carefully consider whether

employee misconduct may be attributable to a known mental or physical condition before taking disciplinary action.

## **2. Religious Discrimination.**

In *Noyes v. Kelly Services*, 2007 WL 1531824, 2007 U.S. App. LEXIS 12356 (9th Cir. 2007), the Ninth Circuit reversed the lower court's decision to grant summary judgment on a religious discrimination claim. An employee sued her former employer, alleging that her supervisor favored and promoted fellow members of a small religious group. The Ninth Circuit reversed the lower court's decision because the lower court required the plaintiff to meet a higher standard on summary judgment than the Supreme Court has required in summary judgment proceedings.

## **3. Race Discrimination.**

In *EEOC v. Target Corp.*, 460 F.3d 946 (7th Cir. 2006), African American applicants received emails asking them to call and schedule interviews. After calling, they did not receive interviews. Target argued that it did not know the race of the plaintiffs, but an EEOC expert testified that some people can determine a speaker's race based on voice or name. This testimony created a factual issue, barring summary judgment. (The court also held that a trial was required on the issue of whether Target destroyed employment applications in bad faith.)

## **4. Gender Discrimination.**

In *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), the court affirmed a district court's decision to grant class certification. This class action lawsuit is the largest discrimination lawsuit ever with almost two million current and former employees. The case stems from a claim that Wal-Mart systematically pays women less than their male counterparts and passes over women for promotions.

## **5. Age Discrimination.**

In *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487 (7th Cir. 2007), the court affirmed summary judgment in an individual reduction-in-force (RIF) case, even though statistics showed that 84% of the employees who were laid off were over 40. The plaintiff, a Senior Vice President, had been fired at the end of a two-year contract. Therefore, he was not "similarly-situated" to the employees affected by the RIF. Further, the stray remarks regarding age alleged by the plaintiff were not enough to establish discrimination, as they did not meet the following criteria. "A particular remark can provide an inference of discrimination when the remark was (1) made by the decision maker, (2) around the time of the decision, and (3) in reference to the adverse employment action."

## 6. Retaliation.

As the following cases show, courts are grappling with the standards for finding “retaliation” set forth in last year’s Supreme Court decision in *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006), which is set forth below.

### a. Reassignment to Worse Job Held Grounds for Retaliation Claim.

In *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006), the U.S. Supreme Court held that the definition of retaliation under Title VII is broad and includes employer actions that are “materially adverse to a reasonable employee.” The Court found that the Sixth Circuit was correct in upholding a verdict in favor of the plaintiff, who was transferred to a more physically demanding and dirtier job and then suspended after complaining of sex discrimination even though she was eventually reinstated with back pay. The Court noted that the retaliation provision of Title VII, unlike its substantive provision, is not limited solely to actions which affect employment or alter workplace conditions.

### b. Paid Leave Can Be Retaliatory.

In *Foraker v. Apollo Group, Inc.*, (2006 WL 390306 (D. Ariz. November 22, 2006) Foraker took FMLA leave for his own medical condition. He alleged that the employer retaliated when he returned by not giving him a promised promotion and raise. A year later, he sought another medical leave. The employer granted his request, putting him on paid administrative leave. Fifteen months later, the employee was still on paid leave, against his wishes. The employer stated that the leave was not retaliatory, simply a “cooling off period” following complaints about the employee from his co-workers. A jury found that the paid leave, when the employee wanted to return to work, and the earlier denial of the promotion, constituted retaliation. The court noted that the absence deprived Foraker of all contact with coworkers, regular employment reviews and any normal experience or training.

### c. Alleged Retaliatory Actions Must Be Materially Adverse.

In *Higgins v. Gonzales*, (8th Cir. 2007), Higgins, a Native American, was hired as an Assistant U.S. Attorney. She alleged that she was given the cold shoulder at work, including being deprived of any “mentoring.” Further, her supervisor made offhand comments about Native Americans. At the end of her two-year position, she was offered another position, in an office 200 miles from her current location. The pay, benefits, job responsibilities and job “prestige” were the same as her first job. She accepted and relocated, but filed a suit claiming she was retaliated against for complaining of racially discriminatory conduct. The Court upheld the

dismissal of her claims, stating that “personality conflicts, petty slights and snubs in the workplace” do not amount to materially adverse actions. The Court also found that “transfers” from one employment position to another do not constitute a materially adverse action when there is no diminution in benefits, job duties, job responsibilities or job prestige. Further, the fact that a transferred employee may have to develop new business contacts for her new position is one of the normal inconveniences of a transfer that is trivial and does not create a materially adverse employment action.

#### **D. Labor Law Update**

##### **1. Claims for Overtime Compensation Not Preempted by NLRA.**

The Ninth Circuit recently held that an employee’s claims for compensation for employer mandated travel time are not preempted by the National Labor Relations Act. In *Burnside v. Kiewitt Pacific Corp.*, 2007 WL 1760747, 2007 U.S. App. LEXIS 14650 (9th Cir. 2007), a class of former and current employees sought compensation for the travel time between designated meeting places and jobsites. Employers whose employees are unionized must remember that employees retain state law rights unless they explicitly bargain away those rights in a collective bargaining agreement.

##### **2. Selective Enforcement of Policy Prohibiting Personal Email Use Not Lawful.**

In *Gen. Operations Inc. d/b/a Richmond Times-Dispatch v. NLRB*, 4th Cir., No. 06-1023, unpublished opinion (3/15/07), the Court enforced an NLRB order finding that the employer violated the Act by telling union officers who also were employees of the Company to stop using the company’s e-mail system to discuss union matters. While the company did have a policy forbidding e-mail use for non-business purposes, the policy was not regularly enforced. The Board found that employees frequently used company e-mail for non-business purposes such as personal matters and social events. The Board therefore held that selective enforcement of the e-mail policy solely to prohibit communications regarding union issues violates the Act.

In a similar case, *DynCorp Inc. v. NLRB*, 6th Cir., No. 05-1138, unpublished opinion (3/16/07), the United States Court of Appeals for the Sixth Circuit held that the employer violated Section 8(a)(1) of the Act by restricting the use of a company bulletin board during an organizing campaign. The court noted that even where a company has a rule restricting the use of the bulletin boards by employees, if such rule has not been enforced in a uniform non-discriminatory manner, the company cannot use the rule to limit pro-union materials during an organizing campaign.

**3. Charge Nurses Are Supervisors Under NLRA When They Exercise Scheduling Authority.**

In *Oakwood Healthcare Inc.*, 348 N.L.R.B. No. 37, 2006, the Board determined that the permanent charge nurses in this acute care hospital should be excluded from the collective bargaining unit as “supervisors.” The charge nurses, as a regular part of their duties, assigned nursing personnel to the specific patients for whom they would care during their shift. The Board found that such assignments, which consisted of giving “significant overall duties” to an employee, met the statutory definition of “assign” under the Act. The Board further found that the employer met its burden to show that its charge nurses exercised independent judgment in making such assignments. The employer argued that its rotating charge nurses should also be considered supervisors. The Board rejected this argument, however, finding that the rotating charge nurses did not exercise supervisory authority a “substantial” amount of their work time.

**4. Back Pay in “Salting” Cases Limited to “Reasonable” Amount.**

In *Oil Capitol Sheet Metal Inc.*, 453 F.3d 532, (D.C. Cir 2006), the Board announced that it will no longer use a presumption of “indefinite” employment in union salting cases. A union “salt” is an employee who seeks employment with a company specifically to promote the union during an organizing campaign. It is an unfair labor practice to fire such “salts” based solely on the employee’s status as a salt. In the past, if an unfair labor practice charge was brought against an employer for terminating or failing to hire a “salt,” there was a presumption that the employee would have worked for the employer “indefinitely,” and was entitled to back pay from the time of the illegal conduct until the employer made an unconditional offer of employment. Now, the burden will be on the Board’s General Counsel to show that the claimed period of back pay is “reasonable.”

**5. Cases Under NLRA Cannot Be Appealed in Federal Court Until Board Issues Final Decision.**

In *AMERCO v. N.L.R.B.*, 458 F.3d 883 (9th Cir. 2007), the court relied on the procedure for appeals outlined in the National Labor Relations Act (NLRA). The NLRA provides that all appeals arising out of unfair labor practices claims must be heard by appellate courts. In this case, an employer sought an injunction in district court to stop a hearing of unfair labor practices in front of an Administrative Law Judge. The NLRA dictates that district courts do not have jurisdiction to enjoin pending hearings in front of administrative law judges. Only U.S. courts of appeals may hear these appeals and they may only hear them after the National Labor Relations Board (NLRB) has given its final order.

**E. Mandatory Arbitration**

In *Davis v. O’Melveny & Myers*, 485, F.3d 1066 (9th Cir. 2007), a former paralegal filed a class action lawsuit against the law firm, alleging that the firm failed to compensate her

for working during rest and meal breaks. Before the employee left the firm, the firm adopted a mandatory dispute resolution program that mandated that every dispute brought by an employee would be settled by arbitration. The firm, on the other hand, could pursue remedies in court in cases involving attorney-client or work product issues. Proceedings brought by an employee had to begin within one year of the act that caused the dispute, or the claim would be barred. Further, the agreement required strict confidentiality. The agreement also prohibited employees from filing complaints with administrative agencies. The Ninth Circuit found the firm's "take it or leave it" agreement contained provisions that were unconscionable and those provisions were too prevalent and onerous to be severed from the remainder of the agreement. The agreement was unconscionable because firm employees were not able to negotiate the terms of the agreement and the agreement removed rights guaranteed by state law. Take it or leave it agreements that remove employees' rights are probably not enforceable.

#### **F. Taxation of Emotional Distress**

The United States Court of Appeals for the D.C. Circuit recently reversed its previous conclusion that awards for emotional distress unrelated to lost wages or earnings are not taxable under federal law. *Murphy v. United States*, No. 05-5139 (July 3, 2007) (reversing decision dated August 22, 2006). The case involved the taxation of an award to a former federal employee who had been awarded \$70,000 in emotional distress damages. The Court of Appeals concluded that "gross income" includes compensation for nonphysical injuries and taxing those awards is constitutional.

### **IX. OTHER FEDERAL AGENCY DEVELOPMENTS**

#### **A. OSHA**

##### **1. OSHA/EPA Occupational Chemical Database.**

OSHA recently launched a searchable database containing more than 800 chemicals commonly found in the workplace. Users can search for information such as chemicals' physical properties and exposure limits. The database can be found at <http://www.osha.gov/web/dep/chemicaldata/#target>.

##### **2. Guidance on Flu Pandemic.**

On February 6, 2007, OSHA issued a publication titled Guidance On Preparing Workplaces for an Influenza Pandemic. This document can be found at [http://www.osha.gov/Publications/influenza\\_pandemic.html](http://www.osha.gov/Publications/influenza_pandemic.html). OSHA has also issued such guidance for healthcare employers and workers. That document can be found at [http://www.osha.gov/Publications/OSHA\\_pandemic\\_health.pdf](http://www.osha.gov/Publications/OSHA_pandemic_health.pdf).

## **B. Equal Employment Opportunity Commission (“EEOC”).**

### **1. The Statistics.**

The EEOC received 75,768 discrimination charges in fiscal year 2006 (FY 2006 covers October 2005 through September 2006), up only slightly over FY 2005, which was the lowest since FY 1992. Over the past few years there have been no dramatic trends with respect to the number of charges relating to any specific type of discrimination claim. Race discrimination continued to be the most commonly asserted charge in FY 2006 (35.9% of all charges filed), followed by sex discrimination (30.7% of charges).

The EEOC obtained \$44.3 million in benefits through direct suits and “interventions” (interventions are where the EEOC joins a lawsuit that has been filed by a private plaintiff), down more than 50% from last year’s \$104.8 million. It also recovered \$229.9 million in settlement monies and/or benefits paid, for a combined total of \$334.7 million. The EEOC voluntary mediation program continues to be successful, achieving 63% settlement rate in FY 2005. Ninety-six percent of employers who participate in the EEOC mediations report they would try it again.

### **2. Enforcement and Guidance.**

On May 23, 2007, the EEOC issued Guidance on the Treatment of Workers with Caregiving Responsibilities. While it makes it clear that workers with caregiving responsibilities are not a protected class in and of themselves, disparate treatment may run afoul of anti-discrimination laws such as Title VII or the ADA. Further, such workers may have protections under the FMLA. The Guidance provides several examples of treatment that may constitute unlawful harassment or discrimination: (1) treating male caregivers more favorably than female caregivers (or vice-versa); (2) altering an employee’s responsibilities after returning from a leave for childbirth; (3) unequal childcare leave for men and women; (4) limiting the duties of pregnant employees based on stereotypes; (5) refusal to hire because of an applicant’s responsibility for a disabled family member; and (6) harassment based on maternal status or caregiver responsibilities.

### **3. New Initiative.**

On February 28, 2007, the EEOC unveiled a new nation-wide initiative called E-RACE, which stands for Eradicating Racism and Colorism from Employment. The purpose of the initiative is to “identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims, and enhance public awareness of race and color discrimination in employment.”

**4. Revised EEO-1 Form Will Be Effective with the September 2007 Report.**

Beginning in 2007, employers will be collecting and reporting data about the racial, ethnic, and gender composition of their workforces on a revised EEO-1 form. Notably, the revised EEO-1 form contains changes to the job and racial/ethnic identity categories. A new category titled “two or more races” has been added, and the category “Asian or Pacific Islander” has been divided into two separate categories - “Asian” and “Native Hawaiian or other Pacific Islanders.” The new form also divides the Officials and Managers category into two subgroups - Executives/Senior Level and First/Mid-Level Officials, adding one more job category to the old form.

**5. Age Discrimination in Employment Act Regulations Revised.**

On July 6, 2007, the EEOC announced that it has revised the ADEA regulations in accordance with the Supreme Court’s decision in *General Dynamics Land Systems, Inc. v. Cline*. Accordingly, the regulations now provide that the ADEA does not prohibit employers from favoring older employees over younger ones when both are protected by the Act.

**C. Employment Standards Administration’s Wage and Hour Division (WHD).**

The Employment Standards Administration’s Wage and Hour Division (“WHD”) is responsible for administering and enforcing some of our nation’s most comprehensive labor laws, including: the minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act (“FLSA”); the Family and Medical Leave Act (“FMLA”). It recovered more than \$172 million in back wages for over 246,000 employees in FY 2006. This is slightly higher than its recovery amount in FY 2005. The agency concluded 31,987 compliance actions and assessed nearly \$7.9 million in civil money penalties – a 24.8% decrease from \$10.5 million in 2005.

WHD continues to pursue compliance in low-wage industries that employ young and immigrant workers. In fiscal year 2006, the agency collected nearly \$50.6 million in back wages for approximately 86,700 workers in low-wage industries - an increase of over 10 percent of back wages collected in the same low-wage industries during the previous fiscal year. Over one-third of WHD enforcement resources are attributed to investigations in nine low-wage industries, which include day care, restaurants, janitorial services, and temporary help. A component of the agency’s low-wage focus will include regional and district initiatives in agriculture to increase compliance with the Migrant and Seasonal Agricultural Worker Protection Act.

**D. National Labor Relations Board (“NLRB”).**

The National Labor Relations Board (“NLRB”) is the federal agency responsible for conducting elections to determine whether employees want union representation, and for investigating and remedying charges of unfair labor practices brought by unions, employees, and employers. The Board itself has five Members and primarily acts as a

quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings. Board Members are appointed by the President to 5-year terms, with Senate consent, the term of one Member expiring each year. The current Members of the Board are: Chairman Robert J. Battista, Wilma B. Liebman, Peter C. Schaumber, Peter N. Kirsanow, and Dennis P. Walsh.

The General Counsel, appointed by the President to a 4-year term with Senate consent, is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases. The current General Counsel is Ronald Meisburg.

During FY 2006, a total of \$110,727,428 was recovered on behalf of employees as back pay or reimbursement of fees, dues, and fines, with 2,927 employees offered reinstatement.

## **E. Department of Labor**

### **1. Recent Department of Labor Opinions: Leave Time.**

Under State Leave Laws (such as unpaid time to attend child's school activities) deductions from an exempt employee's pay or leave bank can be made without endangering exempt status. Pay can only be reduced in full-day increments, to the extent a full day has been used. Leave can be deducted in less than full-day increments, so long as the employee still received full pay for that week. If an employee is gone for less than a full-day increment and his or her leave bank is empty, no deduction from pay can be made. (FLSA 2007-6).

### **2. Department of Labor Issues Report.**

On December 1, 2006, the Employment Standards Administration's Wage and Hour Division issued a Request for Information (RFI) regarding the Family Medical Leave Act ("FMLA"). The RFI asked the public to comment on their experiences with, and observations of, the Department's administration of the law and the effectiveness of the regulations. More than 15,000 comments were received in the next few months from workers, family members, employers, academics, and other interested parties.

In June, the Department issued a 2007 update on the RFI, outlining many of the issues and comments that had been raised. The Department noted that unscheduled, intermittent leave was the "single most serious area of friction between employers and employees seeking to use FMLA leave." The Department did not set forth any proposals for change to the regulations with the report. Instead, it sought to provide information for a fuller discussion among all interested parties and policymakers about how some of the key FMLA regulatory provisions and their interpretations have played out in the workplace.

A full copy of the update can be found at <http://www.dol.gov/esa/whd/FMLA2007Report/2007FinalReport.pdf>.