HOPKINS & CARLEY

A LAW CORPORATION

2015 Employment Law Update

A REVIEW OF RECENT DEVELOPMENTS OF INTEREST TO EMPLOYERS

Introduction

Hopkins & Carley is once again pleased to provide its clients and friends with a summary of the new laws and legal developments from the past year that we believe will have the greatest impact on employers in 2015. As always, if you have questions or concerns relating to employment law or human resource management, we invite you to contact us.

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Hopkins & Carley's Employment Law Department is dedicated to providing comprehensive tools for success to its clients and community. Rather than merely reciting laws or telling clients what they can't do, our attorneys provide practical, real-world answers that clients can use and understand. You are invited to attend any or all of the seminars that we will host in 2015.

Month	**Topic**
January 7, 2015	2015 Annual Update
March 5, 2015	Developing Effective Employee Handbooks
April 9, 2015	The Dirty Dozen: Twelve Common HR Mistakes That Lead to Litigation…And How to Avoid Them
May 7, 2015	Alphabet Soup of Leave Laws
May 21, 2015	A Manager's Guide to Discrimination & Harassment
September 17, 2015	Performance Management, Discipline, & Termination
October 8, 2015	Pay Them Now, or Pay Them Later: A Review of Current Issues and Recent Developments in Wage and Hour Law
November 12, 2015	A Manager's Guide to Discrimination & Harassment

Visit www.hopkinscarley.com for time and location details. Dates are subject to change.

New Legislation Affecting Employers in 2015

California Employers Must Now Include Training Against "Abusive Conduct" in Anti-Harassment Training for Supervisors

California law not only prohibits discrimination and harassment, it also requires certain employers (those that receive services from 50 or more persons, including employees and independent contractors) to provide formal training to their supervisors in the prevention and correction of sexual harassment. Last fall, Governor Brown signed legislation that adds a new component to the required training. Starting January 1, 2015, anti-harassment training must also include training on the "prevention of abusive conduct."

The new law defines "abusive conduct" as:

> "[C]onduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious."

The definition is broad and leaves significant room for interpretation.

Unlike the anti-harassment training already required, the new training now mandated by law is not intended to prevent employment practices otherwise prohibited by the Fair Employment and Housing Act ("FEHA") or other workplace statutes. California has not adopted a workplace bullying or workplace civility law that generally prohibits bad behavior at work. Instead, under FEHA, harassment is illegal only when it is motivated by some protected characteristic of the victim, such as race or gender. Proponents of the new, expanded law argue that "workplace bullying" is a growing epidemic that undermines employee productivity and morale.

Although the new law only expands training obligations and does not define "abusive conduct" as an unlawful employment practice that may give an employee the right to sue, aggressive plaintiff lawyers will certainly work hard to derive such a cause of action from the new obligation to provide training. In addition, it is clear that proponents of this law will continue to push for further legislation making it an unlawful employment practice to subject an employee to an "abusive work environment."

The new law raises some interesting questions and challenges for covered employers. While the law creates a definition of "abusive conduct" and requires training to prevent such behavior, employers should consider carefully whether and how they revise their policies and practices in light of the expanded training obligation. No employer should encourage or tolerate bad behavior or bullying in the workplace, of course, but California law still does not subject employers to liability for all such conduct. Prudent employers should take care to avoid adopting policies or practices that could expose them to a liability that is not imposed upon them by law.

What should employers do now?

- **Training needs to be revised in 2015.** Employers subject to Assembly Bill 1825 (the law mandating training for certain employers) should assure that their training materials and trainers incorporate training on "abusive conduct" in all presentations conducted on or after January 1, 2015.
- **Carefully consider revision of policies to include prohibition of abusive conduct.** Employers with 50 or more employees should discuss with counsel whether their Employee Handbooks and/or anti-harassment policies should be revised in light of the expanded training required by the new law.
- **Comply with training obligations.** Employers subject to mandated training should ensure they provide the required training to new supervisors within six months of hiring or promotion and that they provide repeat training every two years.

New Law Requires Paid Sick Leave for Most Employees Starting on July 1, 2015

In the summer of 2014, California became the first state in the nation to pass a law requiring all employers to provide paid sick leave to most employees. Assembly Bill 1522 will become fully effective on July 1, 2015.

AB 1522 applies to all employers, including government entities. Employees eligible for paid sick leave under the new law include all employees who work 30 or more days in California within a year of the commencement of their employment, except (a) those covered by a collective bargaining agreement which provides for paid sick leave and (b) providers of home health care services.

Eligible employees will accrue sick leave at a rate of one hour for every 30 hours worked, to a maximum of six days per year. Alternatively, employers may provide eligible employees with three days of paid sick leave each year on a lump-sum basis, rather than an accrual basis.

Employees may use accrued sick leave beginning on their 90th day of employment, and may do so in minimum increments not to exceed two hours. Employees may use accrued sick leave for the diagnosis, care or treatment of an existing health condition of, or preventative care for, the employee or a family member. The law defines "family members" as including children (biological, adopted or foster), stepchildren, wards, parents (biological, adoptive or foster), step-parents, legal guardians, spouses, registered domestic partners, grandparents, grandchildren and siblings.

Employers are not required to pay employees for accrued but unused sick leave at the termination of employment. Employers must notify employees in writing (through pay stubs or on designated pay days) of the amount of sick leave available to them. Employees must provide their employer with reasonable advance notice of their need for sick leave when the need is foreseeable, and must provide notice as soon as practicable when the need for leave is unforeseeable.

Employers must display a poster reflecting information regarding paid sick leave. Employers must maintain records for at least three years documenting the hours worked and paid sick leave accrued and taken by employees.

If employers unlawfully withhold paid sick leave from employees, the Labor Commissioner may impose penalties of $250 or three times the value of the paid sick leave days withheld, whichever is greater. Additional penalties are also possible.

Significantly, the law creates a rebuttable presumption of retaliation if an employer takes adverse action against an employee within 30 days of the employee's opposition to any violation of AB 1522 by the employer or the employee's cooperation with an investigation concerning alleged violations.

Employers must permit employees to begin to accrue paid sick leave by July 1, 2015. The Division of Labor Standards Enforcement ("DLSE") has published a poster and a wage notice for employers to use in compliance with the new law. Under the Wage Theft Prevention Act, which became effective on January 1, 2012, employers are required to provide a mandatory notice to non-exempt employees at the time of hire. The DLSE has amended the required wage notice to include information about accrual and use of paid sick leave.

What should employers do now?

- **For employers that have a sick leave policy:** Employers that have adopted policies regarding sick leave (or paid time off that can be used for the same purposes as leave pursuant to AB 1522) should review their policies to ensure that, as of July 1, 2015, they provide benefits at least as generous as those required by the new law.
- **For employers that do not have a sick leave policy:** Employers that have not adopted policies regarding sick leave (or paid time off that can be used for the same purposes as leave pursuant to AB 1522) should create and implement policies that comply with the requirements of the law by July 1, 2015.
- M**ake sure to use the updated wage notice as part of the hiring process.** Employers should make sure that the wage notice being used to comply with the Wage Theft Prevention Act is updated to incorporate the information about accrual and use of paid sick leave.
- **All employers need to be alert to the risk of retaliation claims.** AB 1522's presumption of retaliation creates a substantial risk of liability for employers who take adverse action against an employee within 30 days of the employee's opposition to any acts in violation of the law. Employers should confer with counsel before discharging any employee who has recently taken or requested paid sick leave pursuant to AB 1522.

San Francisco Restricts Use of Criminal Records by Employers

Early last year, San Francisco passed a new law, the Fair Chance Ordinance, that follows an emerging trend and restricts an employer's ability to seek and utilize information regarding the criminal records of applicants and employees. Although the Fair Chance Ordinance is a local law, it highlights a growing trend of regulation with respect to the use of criminal records in employment decisions. Employers with employees in San Francisco should familiarize themselves with their obligations under the Fair Chance Ordinance, but all employers should be aware of the trend toward increased regulation and guidance issued by the Equal Employment Opportunity Commission on the use of criminal background checks.

The Fair Chance Ordinance applies to employers with 20 or more employees, but its protections benefit only those who work, or could work, within San Francisco. In calculating the 20-employee headcount, employers must count employees both inside and outside of San Francisco.

The law prohibits employers from including questions regarding criminal convictions on applications for employment. The ordinance also prohibits job advertisements stating that persons with an arrest or conviction are not eligible for employment. Employers may not conduct criminal background checks regarding an applicant until after completing their first interview with the applicant. Employers may not seek information regarding applicants or employees that relates to (a) arrests not leading to convictions, (b) participation in deferral or diversion programs, (c) dismissed, expunged, or voided convictions, (d) convictions in the juvenile justice system, or (e) convictions more than seven years old.

In the event that an employer obtains information regarding the criminal history of an applicant or employee and uses such information in making an employment decision regarding the applicant or employee, it must conduct an individualized assessment, considering the time elapsed since the conviction, the relationship between the offense and the job, and any evidence of rehabilitation, mitigating factors or inaccuracy in the criminal records.

Violations of the new law will result in warnings during the first year it is effective, but fines of $50 per employee or applicant may be imposed for a second violation of the law, and fines of $100 per employee or applicant may be imposed for subsequent violations.

The Fair Chance Ordinance became effective on August 17, 2014.

The Fair Chance Ordinance is consistent with an emerging trend of "Ban the Box" laws being adopted by state and local governments across the country. Ten states, including California, have adopted "Ban the Box" laws for employers in the public sector, and four (Hawaii, Massachusetts, Minnesota and Rhode Island) have adopted laws that also apply to employers in the private sector. Lobbyists have proposed similar laws in other jurisdictions and we expect the trend toward increased regulation to continue.

The Equal Employment Opportunity Commission ("EEOC") has also issued guidance regarding the use of criminal records by employers. The EEOC's guidance does not carry the force of law, but it offers a clear indication of the agency's attitude and enforcement position. The guidance does not flatly prohibit criminal records checks, but encourages employers to conduct an individualized assessment of the criminal history of each applicant or employee in light of the relevant circumstances. Factors that the EEOC believes should be considered in the course of the individualized assessment include: the facts of the offense(s); the number of convictions; the applicant/employee's age at the time of the conviction(s); and the time elapsed since the offense.

What should employers do now?

- **Employers with employees in San Francisco** should familiarize themselves with the requirements of the Fair Chance Ordinance and comply with the law.
- **All employers** should re-evaluate their practices with respect to criminal records in light of the trend toward increased regulation and the EEOC's guidance on the use of criminal records in employment decisions.

New Law Makes Employers Liable for Labor Code and Other Violations of Staffing Companies

At some time during the business cycle, many companies utilize staffing or labor contracting agencies to obtain workers to perform certain tasks. In such situations, the staffing or contracting agency typically serves as the official "employer" of the workers and assumes the responsibilities and risks that arise from the employment relationship, such as the duty to pay wages and provide workers' compensation insurance. Assembly Bill 1897 changes the existing legal framework and creates potential liability for certain companies that utilize the services of staffing firms.

Assembly Bill 1897 adds a new section to the Labor Code, which defines companies that utilize workers from a staffing or contracting agency in the usual course of their business as a "client employer" and makes the client employer jointly liable with the staffing or contracting agency for: payment of all wages earned by the workers; failure to secure valid workers' compensation insurance; and compliance with occupational health and safety requirements.

The new law does not apply to companies with fewer than 25 workers (including employees, independent contractors, and staffing agency personnel), and does not apply to companies utilizing five or fewer workers from a staffing firm at any one time. In addition, the law does not apply to workers who qualify as exempt from the payment of overtime under the executive, administrative, or professional exemptions.

While the law makes employers and staffing companies jointly responsible for these obligations, it does not prohibit employers from enforcing any indemnity rights that they may hold against staffing companies pursuant to their contracts. An employer's contractual indemnity rights do not prevent an aggrieved worker from suing the employer directly; however any indemnity rights may be of little comfort if a staffing company rejects a request for indemnity or lacks the financial resources to indemnify the employer.

The new law specifically states that it does not impose liability for the use of a *bona fide* "independent contractor" and does not change the existing legal definition of an independent contractor.

What should employers do now?

The new law became effective on January 1, 2015. Covered employers should take steps to minimize their risk of liability under the new law, including:

- **Select staffing firms carefully.** In light of the increased risk associated with the use of staffing agency personnel, client companies should exercise due diligence when selecting staffing firms. Because the failures of a staffing firm now create potential liability for the client company, client companies should seek staffing firms that demonstrate competence in human resources and that have enough financial depth to indemnify for client companies if necessary.
- **Confirm the existence of workers' compensation insurance.** Client companies should insist on obtaining proof of valid workers' compensation insurance coverage from staffing companies before permitting staffing company personnel to begin work.
- **Be alert to wage and hour violations by staffing companies.** Client companies that learn of potential payroll violations should call those issues to the attention of their staffing companies so the problems can be addressed and rectified before a worker asserts a claim against the client company.
- **Include indemnity provisions in contracts with staffing agencies.** Client companies should insist that their contracts with staffing firms include provisions that require the staffing firm to defend and indemnify the client company in the event that an employee of the staffing firm asserts a claim against the client company.

California's Fair Employment and Housing Act Expanded to Include Unpaid Interns

California has long prohibited discrimination and harassment against employees and applicants for employment. Effective January 1, 2015, the state expanded its prohibitions to cover unpaid interns, volunteers, and other unpaid individuals.

As amended, California law now prohibits discrimination and harassment against an unpaid intern or volunteer on the basis of any legally protected classification unless an exception applies, such as a *bona fide* occupational qualification. California currently prohibits discrimination and harassment on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, pregnancy, age, sexual orientation, and military and veteran status.

What should employers do now?

- **Review harassment and discrimination policies.** This change in the law should be reflected in relevant policies in order to specifically include unpaid interns and other volunteer workers.

- **Inform individuals with supervision and hiring responsibility.** Many supervisors and individuals with responsibility for interns and other unpaid individuals will not be aware of this change in the law until their next AB 1825 training in the prevention of harassment and discrimination. Employers should specifically inform these individuals of the change to the law.

New Enforcement Guidance from the EEOC on Pregnancy Discrimination

In July of 2014, the Equal Employment Opportunity Commission ("EEOC") issued new guidance on pregnancy discrimination. The Enforcement Guidance on Pregnancy Discrimination and Related Issues not only provides some clarification regarding the EEOC positions on pregnancy discrimination, but it also appears to expand the law to provide significantly more protections to pregnant employees based on the interpretation by the EEOC. The Guidance is specifically related to the Pregnancy Disability Act ("PDA") and the application of the Americans with Disabilities Act ("ADA").

While the Guidance does not create new law, it does have the effect of changing how the law is applied to employers by the EEOC (the primary enforcement agency for federal employment laws). As a result, it is important for employers to be aware of what guidance the EEOC is giving on how it will enforce the law.

Among other things, the Guidance states that the PDA requires employers to offer light duty to pregnant employees if they make light duty available to nonpregnant employees similar in their ability or inability to work. According to the Guidance, "[a] violation under this provision will be established where all of the evidence, viewed as a whole, establishes that an employer has treated a pregnant worker differently than a non-pregnant worker similar in his/her ability or inability to work. For instance, an employer may not deny light duty to pregnant employees on the grounds such an accommodation is only offered to workers injured on the job because such a distinction based on source of impairment would violate the PDA."

According to the Guidance, under the PDA, an employer may not force an employee to take leave because she is pregnant, as long as she is able to perform the job. The PDA also requires employers to allow employees with physical limitations resulting from pregnancy to take leave on the same terms and conditions as nonpregnant employees similar in their ability or inability to work.

The Guidance also explains how the ADA's definition of "disability" might apply to pregnancy. The EEOC said under some circumstances, employees with pregnancy-related impairments may be covered by the ADA. "Although pregnancy itself is not an impairment within the meaning of the ADA and thus is not a disability, pregnant workers and job applicants are not excluded from the ADA's protection," the EEOC said. "Changes to the definition of the term 'disability' resulting from the enactment of the ADA Amendments Act of 2008 make it much easier for individuals with pregnancy-related impairments to demonstrate that they have disabilities and are thus entitled to the ADA's protection."

Pregnancy-related impairments are ADA-covered disabilities if they substantially limit one or more major life activities, including walking, standing and lifting, as well as "major bodily functions" that include the cardiovascular, circulatory and reproductive systems.

The EEOC also stated that the ADA could apply to a pregnant employee if the employer treats the employee as having a disability. In addition, an employer may violate the ADA by discriminating against a job applicant or employee based on a past history of pregnancy-related impairments, such as gestational diabetes in prior pregnancies.

The EEOC identified possible reasonable accommodations for pregnant employees including redistributing a pregnant employee's marginal or nonessential job functions among other employees, granting a pregnant employee more frequent breaks, altering schedules so a woman with morning sickness could start work later and leave later to make up the time, or allowing a pregnant employee placed on bed rest to work from home to the extent feasible.

The Guidance provides many examples by the EEOC of the types of complaints the agency has received and intends to investigate. Importantly, the EEOC has also indicated that it will more aggressively investigate and prosecute claims for pregnancy disability discrimination in the immediate future.

What should employers do now?

- **Review accommodation and leave policies.** Many California employers will not need to change their policies that affect pregnant employees if they already conform with California law. While the Guidance does appear to expand the rights afforded to employees under federal law, many of these rights are already provided to employees under California law. This is a good time, however, to ensure that policies are compliant with California and federal law.
- **Remind managers and others making hiring decisions that they must refrain from making any pregnancy-related inquiries.** Again, this is not new law, but the EEOC Guidance makes it even more important for employers to take steps to prevent exposure to liability, including educating those who hire and supervise employees.
- **Proceed with caution when making any employment decisions related to a pregnant employee or an employee recently returning from pregnancy leave.** Ensure that there is evidence supporting any decision to terminate the employment of the individual or any other adverse action being contemplated.

Changes in California and Federal Law Impact Payment of Overtime to Domestic Workers

Recent changes under both California and federal law have affected the manner in which employers must pay overtime to domestic workers. The changes to California law became effective January 1, 2014, and the changes under the Fair Labor Standards Act ("FLSA") are effective January 1, 2015.

Under California law, the Labor Code now requires payment of overtime wages to personal attendants working more than 9 hours in a single day or 45 hours per week. California Wage Order 15 defines "personal attendants" as persons who "work in a private household, to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision," and includes both persons employed directly by the private household and persons employed by a third party agency. Full-time nannies are covered by the law, but persons who work only casually or intermittently as babysitters are not. An employee does not qualify as a personal attendant, and therefore is not entitled to overtime under the new law, if the person spends more than 20% of his or her time on tasks other than caring for or supervising the needs of another person.

The FLSA exemption from overtime covers a slightly different group of workers. Under the FLSA, domestic service workers providing "companionship services" to the elderly, ill, injured, or disabled, and to those who reside in the households where they provide services, have been exempt under the FLSA. Employees qualifying for this exemption have historically included home health aides, attendants, and caregivers.

The new rules: (1) clarify and narrow the type of services that constitute "companionship"; (2) limit the application of the current companionship and live-in domestic worker exemptions to only employers who are the individual, family, or household using the services (i.e., employers like home care agencies cannot use the exemptions); and (3) impose new recordkeeping obligations on employers of live-in domestic service employees.

Over the years, courts and employers had come to interpret the term "companionship" very broadly. Under the Department of Labor's new rules, "companionship services" are limited to "fellowship and protection." "Fellowship" means engaging the client in activities like conversation, reading, games, crafts, and walks, while "protection" means being present with the client in her home or accompanying her when outside the home to monitor her safety and well-being. This means that there is a much more narrow definition of "companionship" and far fewer positions will satisfy the exemption. The new rules also limit the companionship exemption to situations in which the individual receiving services (or a family member) hires the caregiver.

What should employers do now?

- **Carefully assess whether the revised overtime exemptions apply to domestic employees.** Most employers are subject to both state and federal law, so they cannot classify an employee as exempt unless the employee satisfies the exemption criteria under both laws.
- **Calculate and pay overtime correctly when required.** Starting January 1, 2015, under California law employers will need to pay domestic workers overtime for hours worked in excess of 9 hours per day, and under federal law, for any hours worked in excess of 40 hours per week.

Wage & Hour Developments

Employee Use of Personal Cell Phones While Carrying Out Job Duties: When Must Employers Reimburse Employees?

With most people now carrying their own cell phones, employers have increasingly permitted or even required employees to use their personal cell phones and service plans to perform their job duties. This practice can be mutually beneficial by liberating employees from the requirement of carrying multiple devices and by saving employers the cost and administration of providing devices and service plans. But this arrangement raises an essential question under the wage and hour laws—who is required to pay for the cell phones and service plans when an employee is required to use a personal cell phone for a business purpose?

In August 2014, a California appeals court answered this question in *Cochran v. Schwan's Home Service, Inc.* by ruling that an employer must always reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone. Most California employers know that Labor Code section 2802 requires them to reimburse employees for necessary expenses incurred by the employees in carrying out their job duties. The Court of Appeal concluded that "[i]f an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense for the purposes of section 2802."

The employer in *Cochran* challenged liability based on the fact that many cellular service plans provide unlimited minutes or are paid by a third party family member instead of the employee. The Court of Appeal rejected this argument and found that "[t]he details of the employee's cell phone plan do not factor into the liability analysis." Therefore, employers are not allowed to ask employees how their cell phone plan works and are prevented "from digging into the private lives of employees to unearth how they handle their finances." To show liability, the employee only needs to show that he or she was required to use a personal cell phone to make a work-related call and was not reimbursed.

Increasing the potential exposure for the employer, the plaintiff in *Cochran* sought class certification of claims related to the employer's requirement that more than 1,500 managerial employees use their personal cell phones on the job. The Court of Appeal held that even though the employees had different cell phone usage, different cell phone plans, and therefore different damages, the case should proceed as a class action because the fundamental question on which liability depended—whether use of personal cell phones was required for business purposes—was the same for all employees.

The employer in the *Cochran* case petitioned the California Supreme Court for review of the appellate court decision but the California Supreme Court declined to take the case and also denied the request to depublish the opinion.

As a result, the holding in *Cochran* remains good law and California employers must take stock of its application to their employee cell phone practices. The holding in *Cochran* could subject unsuspecting employers to liability to either an individual employee or a class of employees when they require an employee to use a personal cell phone in carrying out work-related duties, or when the employee uses a personal cell phone to perform work because no other option is provided by the employer. Employers who require employees to use a cell phone for work-related calls need to either provide the cell phone or reimburse employees for their use of a personal cell phone.

What should employers do now?

- **Consider which employees should and should not be allowed to use personal cell phones for work.** Employers generally do not need all of their employees to use their personal cell phones for work, and therefore should consider which job positions require the use of personal cell phones to perform necessary work-related duties. Employers who do not need employees to use their personal cell phones and want to avoid an obligation to reimburse employees for a portion of their cell phone charges should consider adopting a policy that prohibits the use of personal cell phones for work-related calls.
- **Adopt clear policies that either provide cell phones or reimburse employees for work-related use of their personal cell phones.** Employers who require employees to use a cell phone for work-related calls should consider adopting a clear policy that either provides the cell phone or reimburses employees for the work-related use of their personal cell phone.
- **Evaluate practices requiring or allowing employees to use personal cell phones for work.** Employers should consider whether the duties assigned to employees require, as a practical matter, that employees use a personal cell phone. Even if there is no formal policy or mandate telling employees that they must use their personal phone, the employer is subject to liability if employees cannot carry out their job duties without the use of their personal cell phone.

Peabody Decision Tightens Requirements for Commission Payments and Exempt Status

State and federal law create an exemption from overtime compensation for commissioned employees engaged in sales who satisfy specific criteria. Although the requirements under each set of laws are not identical, each generally provides that the exemption applies only if the employee earns more than 150% of the minimum wage and if more than 50% of his or her income is derived from commissions. The manner in which commissions must be paid to qualify for this commissioned-salesperson exemption from overtime compensation remained unclear under California law until a decision last year.

In July 2014, the California Supreme Court issued its decision in *Peabody v. Time Warner Cable, Inc.*, holding that the requirements for the commissioned-salesperson exemption must be met for *each pay period* and that commissions paid in different pay periods could not be allocated back to earlier pay periods in which the commissions were earned.

The plaintiff employee in *Peabody* earned both an hourly wage and commissions. The company paid the employee's hourly wages on a biweekly basis, but it paid commissions only in every other paycheck. Peabody filed suit, alleging that she did not qualify as exempt from overtime compensation during those pay periods in which her wages did not include any commissions, because the money paid to her during those pay periods did not exceed 150% of the minimum wage and did not consist primarily of commission payments. Time Warner argued that it satisfied the criteria for the exemption because commissions earned should be allocated not just to the pay period in which they were paid, but also to the earlier pay periods in which they were earned.

The California Supreme Court rejected Time Warner's arguments, holding that "all earned wages, including commissions, must be paid no less frequently than semimonthly." According to the Supreme Court, "whether the minimum earnings prong is satisfied depends on the amount of wages actually paid in a pay period," and employers satisfy the minimum earnings test only in those pay periods in which (a) they actually pay at least 150% of the minimum wage to the employee and (b) more than 50% of the wages actually paid to the employee consist of commissions.

Many employers include commissions as one element of the compensation paid to certain employees. Some of those employers, like Time Warner, do not always pay commissions during the pay periods in which they are earned. In the wake of the *Peabody* decision such a practice will likely subject an employer to liability for overtime compensation that could have been avoided if the employer had paid the commissions in each pay period when the commissions were earned.

Employers in California should also recall that Labor Code section 2751 requires commission agreements to be set forth in writing and requires employers to provide signed copies of the agreements to their employees. Disputes concerning commissions are common because both employers and employees sometimes focus myopically upon the amount of commission to be paid if certain goals are achieved, neglecting to give due consideration to other critical issues, such as when the commission accrues, how the commission is calculated, and what happens if the goods are returned or the order is cancelled. Commission plans should eliminate potential sources of confusion that could lead to controversy and litigation by defining the employee's right to a commission as clearly and precisely as possible, eliminating ambiguity and addressing foreseeable "bumps in the road" such as a customer's failure to pay.

What should employers do now?

- **Review commission plans of employees classified by the employer as exempt salespersons.** Employers should review their commission plans to assure that commissions are paid at least semimonthly, and ensure that the wages paid to employees who are classified as exempt under the sales exemptions satisfy the minimum earnings test during every pay period. Specifically, employees classified as exempt under the sales exemption must receive wages during every pay period that (a) equal or exceed 150% of the minimum wage, and (b) consist primarily of commissions. Employers that have not submitted their commission plans to review by counsel in the past two years would be wise to do so at this time.

- **Expressly confirm commission plans in writing.** Employers that have not confirmed the terms of their commission and bonus plans in writing should do so immediately in order to comply with Labor Code section 2751. Our attorneys can work with you to either evaluate your current written commission plan or draft a new written commission plan to ensure compliance with the law.

To Deduct or Not to Deduct: When May Employers Deduct From Vacation Pay for Exempt Employees' Partial Day Absences?

Both state and federal law provide for a variety of exemptions from overtime compensation rules, the most common of which are the so-called "white collar exemptions" applicable to certain executive, professional and administrative employees. An employee must satisfy three tests in order to qualify for one of the three "white collar" exemptions—the "duties," "salary basis" and "salary level" tests.

In general, the "salary basis" test requires, with limited exceptions, that an exempt employee be paid their full salary for any workweek in which the employee performs work. Limited exceptions allow the employer to deduct for *full day* absences for personal reasons or for sick leave pursuant to a *bona fide* sick leave plan.

A lengthy dispute has ensued in California as to whether an employer may deduct from accrued vacation or sick leave for an exempt employee's *partial day* absences. In 2005, the California Court of Appeal decided in *Conley v. PG&E* that it was lawful for an employer to require an employee to use accrued vacation for partial day absences of at least four hours. The court did not address increments of less than four hours. In 2009, the Division of Labor Standards Enforcement (DLSE) issued an opinion letter approving the practice of covering an exempt employee's partial day absence, of any duration, with sick leave, PTO, or vacation. However, no court had approved the practice and some employers were understandably hesitant to follow the DLSE opinion letter for fear of a court later determining the employer had violated the salary basis test and destroyed an employee's exempt status through the practice.

In July 2014, the California Court of Appeal in *Rhea v. General Atomics* finally decided that an employer may deduct from vacation time for an exempt employee's absences of *any* duration without destroying the employee's salary basis and thus the employee's exempt status. On behalf of herself and a class of exempt employees, Rhea challenged the employer's practice of requiring exempt employees to use their annual leave (an entitlement that included sick, vacation, and personal time) for partial day absences of any duration. On its face, the employer policy under challenge could theoretically require the exempt employee to use annual leave in an increment of as little as one-tenth of one hour. In fact, the evidence showed that the vast majority of exempt employees used annual leave for an absence of an hour or more. However, the employer policy did not require an exempt employee to use any annual leave if the exempt employee had worked 40 or more hours during the week in question, notwithstanding the partial day absence.

The *Rhea* opinion should give California employers who wish to require deductions from vacation or PTO for partial day absences some comfort that they are not destroying an employee's exempt status by doing so. Employers should not interpret the *Rhea* opinion as giving employers *carte blanche* to deduct from vacation or PTO anytime an exempt employee leaves work a few minutes early. Notwithstanding the acceptance in *Rhea* of deductions for absences of less than four hours, consistent deductions from an exempt employee's PTO or vacation for only a few minutes on any given day could present a fact pattern that allows the employee to take a position that they are being paid on an hourly basis, not a salary basis.

It is also important to emphasize the distinction between deducting from the pay of an exempt employee for a partial day absence (which is not permitted by California law) and deducting from an accrued vacation balance or PTO balance (which is permitted). Employers should never deduct from the salary or wages of an employee who is absent for a partial day, regardless of whether deductions from vacation or PTO are possible.

What should employers do now?

- **Consider changing policies and practices regarding partial day deductions from exempt employees' vacation, PTO and sick leave.** The *Rhea* opinion gives employers a legitimate basis for changing their policies and/or practices applicable to exempt employees to require deductions from vacation, sick leave, or PTO for partial day absences. However, employers should be careful to avoid addressing the issue in a manner that suggests exempt employees are no longer paid on a salary basis.

Secretly Working Off-the-Clock Is Not Compensable Time

California Labor Code section 1194 authorizes an "employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee" to recover the unpaid amount due plus interest, attorney's fees, and costs. The statute is silent on the issue of whether an employee who secretly works "off-the-clock" is entitled to such recovery, however. Federal courts addressing the issue under the Fair Labor Standards Act have held that an employer is not liable for failing to pay overtime compensation when the employer has no knowledge that an employee is engaging in overtime work and the acts of the employee prevented the employer for acquiring knowledge of the overtime work.

In May 2014, the California Court of Appeal confirmed, in *Jong v. Kaiser Foundation Health Plan, Inc.*, that a similar legal standard applies under California law by holding that employers are not liable for "off-the-clock" overtime work as long as they lack actual or constructive knowledge that such work was performed. Jong and two other outpatient pharmacy managers ("OPMs") filed a class action against Kaiser for its alleged failure to pay overtime compensation pursuant to Labor Code section 1194. Plaintiffs claimed that they were forced to work off-the-clock overtime because their job duties could not be completed within regular work hours and Kaiser's policy forbade overtime work. They argued that Kaiser had actual or constructive knowledge of their working off-the-clock, citing deposition testimony from a prior class action against Kaiser in which OPMs testified that they needed to work more than 40 hours per week in order to complete their job duties.

The appellate court affirmed summary judgment in favor of Kaiser. In doing so, the court determined that the deposition testimony taken in another case was insufficient to put Kaiser on notice because Kaiser had since changed the OPMs' classification from exempt to non-exempt status and instituted a policy directing the OPMs not to work overtime without prior approval and to report any overtime actually worked. Further, Jong made several damaging admissions, including that he knew about Kaiser's policy prohibiting off-the-clock work, that no supervisor had ever told him to work off-the-clock, that no one at Kaiser had ever denied him a request for approval to work overtime, and that he signed a form agreeing not to work off-the-clock.

What should employers do now?

- **Implement and enforce a written policy clearly prohibiting off-the-clock work.** Employers should consider implementing and enforcing a written policy that clearly prohibits off-the-clock work, which could later be used as evidence that the organization did not have constructive knowledge of an employee secretly working overtime.
- **Consider requiring employees to sign written acknowledgement forms of any policy prohibiting off-the-clock work.** Employers should also consider requiring employees to sign written forms acknowledging their receipt of any policy prohibiting off-the-clock work. This would assist employers in defending against an employee's claim that he or she was unaware of the policy.

Discrimination, Harassment, and Retaliation Developments

Franchisor Not Liable for Sexual Harassment of Franchisee's Employee Under FEHA

In *Patterson v. Domino's Pizza, LLC*, the California Supreme Court took on the issue of whether a franchisor is an "employer" of its franchisee's employees under the Fair Employment and Housing Act ("FEHA") and therefore legally responsible for alleged sexual harassment inflicted by a franchisee supervisor against a franchisee employee. After analyzing the franchisor-franchisee agreement and the day-to-day operations of the relationship between the franchisor and the franchisee's employees, the Court held that liability will be imposed against a franchisor only if it retains by contract or, in fact assumes, general day-to-day control over the franchisee employees, such as through hiring decisions, supervision, discipline, and discharge.

Sui Juris, LLC ("Sui Juris"), owned a Domino's Pizza franchise. One of its food servers, Taylor Patterson, alleged that her supervisor, Renee Miranda, sexually harassed and assaulted her at work. Patterson filed a lawsuit against the franchisor, Domino's Pizza, LLC ("Domino's Pizza"), as well as the franchisee, Sui Juris, and the alleged harasser, Miranda. Her claims included sexual harassment under FEHA, failure to take reasonable steps to prevent harassment, and other related claims.

Under FEHA, an "employer" is strictly liable for all acts of sexual harassment by a supervisor. Patterson argued that the control Domino's Pizza exhibited over Sui Juris, its franchisee, rendered each employee of the franchisee an employee of Domino's Pizza. Using this theory, Patterson argued that Domino's Pizza was strictly liable under FEHA for Miranda's sexual harassment of her. Similarly, using common law agency principles, Patterson argued that Domino's Pizza retained detailed control over Sui Juris' general operations sufficient to make Sui Juris an agent of Domino's Pizza for all business purposes, thereby rendering Domino's Pizza vicariously liable as the "principal" of Sui Juris under common law.

The Supreme Court rejected the employee's arguments and upheld summary judgment in favor of Domino's Pizza. The Court concluded that Domino's Pizza was not the employer under FEHA and also found that no agency relationship existed between Domino's Pizza and Sui Juris, which would be a prerequisite for vicarious liability against Domino's. Of critical importance to the Court was the fact that while Domino's Pizza prescribed and enforced strict standards and procedures involving pizza-making, delivery, general store operations, and brand image, Domino's Pizza *had no right or duty to control employment or personnel matters under the franchise agreement*. In fact, the franchisee, Sui Juris, exercised sole control over selecting employees to work in the restaurant, implementing its own sexual harassment policy and training program, and imposing discipline for any violations. Domino's Pizza lacked the general control of an "employer" or "principal" over the relevant day-to-day aspects of the employment and workplace behavior of Sui Juris' employees.

The Court's decision does not mean that franchisors are *always* immune from liability for sexual harassment occurring at a franchised location. Whether potential liability exists will depend upon whether the franchisor has retained or assumed the right of general control over the relevant day-to-day operations at its franchised locations, such as hiring, performance standards, supervision, discipline, and discharge. Thus, the degree of control and participation in employment decisions, both as delineated by the franchise agreement and as practiced during day-to-day business operations, will determine whether a franchisor has liability as an employer. In this case, Domino's Pizza had a written agreement that did not provide it with control over hiring, supervision or termination of franchisee employees. In addition to the written agreement, Domino's Pizza did not attempt to actually assert such control over the franchisee employees.

As reflected in the arguments raised by the employee in this case, the direct employer-employee relationship is not the only way in which a company can be held liable as an employer under FEHA or common law. As companies increasingly turn to alternative staffing arrangements, such as staffing agencies, professional employer organizations and other similar arrangements, the clear lines of the traditional "employer-employee" relationship are stretched. As the *Patterson* opinion demonstrates, it is critically important for the written agreement that governs the relationship to clearly delineate whether the company intends to exercise control over typical employer prerogatives such as hiring, termination, discipline, and performance standards. In addition, regardless of whether the written agreement actually provides the company with the right to control typical employer prerogatives, if the day-to-day reality is that the company is exercising control over the individual as it would over an employee, the company may be creating a circumstance in which it could be held responsible as an employer, under FEHA or common law, regardless of what the written agreement provides.

What should employers do now?

- **Review current franchise agreement language and actual practices.** Franchisors should review their franchise agreement to ensure that it has not retained or assumed the right of general control over the relevant day-to-day operations at its franchised locations, such as hiring, performance standards, supervision, discipline, and discharge. If the agreement contains terms similar to those relied upon by the *Patterson* court, confirm that actual day-to-day operational practices are consistent with the agreement language.
- **Review and evaluate alternative staffing arrangement agreements.** The *Patterson* decision was issued by a sharply divided court based on a very specific set of facts. Accordingly, how the court might analyze the relevant legal standards under a slightly different set of facts, or in connection with other staffing relationships, remains an open question. Therefore, staffing agencies and professional employer organizations should review their written agreements with employers to make sure the lines of control are clearly articulated and enforced.

The California Supreme Court Confirms that FEHA Protects Undocumented Workers

In mid-2014, the California Supreme Court decided *Salas v. Sierra Chemical* affirming that undocumented workers have broad access to all rights and remedies provided by California law including the protections of the Fair Employment and Housing Act ("FEHA").

In April 2003, Vicente Salas applied for a job with Sierra Chemical, a swimming pool chemical manufacturer, providing a false Social Security number and resident alien card. Salas completed and signed Immigration and Naturalization form I-9, under penalty of perjury, on which he listed the same false Social Security number he supplied to Sierra Chemical, and provided a copy of his Social Security card. In May 2003, Salas began working on the company's production line. Over the next four years, Sierra Chemical laid Salas off and re-hired him on multiple occasions. Each time he was re-hired, Salas used the same false Social Security number.

During his periods of employment with the company, Salas sustained two industrial injuries to his back, and filed claims for Workers' Compensation benefits. In May 2007, Sierra Chemical contacted Salas and offered him another seasonal position, pending the receipt of a release from his treating physician to return to work.

Instead of providing the requested release, Salas sued Sierra Chemical for disability discrimination under FEHA, and for retaliation. As the case progressed, Salas revealed that he was not authorized to work in the United States, and had repeatedly provided false information and documentation to Sierra Chemical to gain employment. Upon learning this, Sierra Chemical filed a motion for summary judgment, arguing that Salas' conduct in providing false information should prevent him from asserting claims, because the company would have never hired him had it known that he had provided false information. The trial court agreed with Sierra Chemical and the appellate court upheld the trial court's ruling.

The California Supreme Court disagreed. In a lengthy written decision, the court first considered the potential impact of federal immigration law with respect to California Labor Code, section 1171.5, which provides, in pertinent part that "for purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability…." The Court concluded that federal immigration law did not preempt state law in this instance, and that state law therefore authorized Salas to seek remedies for his alleged wrongful termination as alleged under FEHA. The Court further addressed the impact of Salas' misconduct by concluding that, although Salas' use of false information to obtain employment did not prevent him from asserting claims against the company, it would limit Salas' damages, including his ability to receive back pay after the discovery of his wrongdoing, and would also preclude Salas from seeking reinstatement.

What should employers do now?

- **Maintenance of a discrimination and harassment free work environment remains paramount.** At its core, the *Salas* decision confirms that all employees, documented or otherwise, enjoy the protections of California's body of employment law, and that undocumented workers may only be precluded from reinstatement or recovering some lost wages (but still able to recover punitive damages, attorneys' fees, and emotional distress damages) in limited situations. Accordingly, employers remain well advised to devote resources to the prevention of underlying claims.

Fitness for Duty Exams Approved in Two Court Decisions, but Employers Should Proceed with Caution

Employers ask applicants or employees to submit to so-called "fitness-for-duty" examinations in a variety of circumstances. Companies may request an examination during the hiring process as a condition of employment, they may request an examination upon an employee's return from a leave of absence, or they may request an examination of an active employee if they obtain information calling the employee's fitness for duty into question. Employers can expose themselves to obvious risks when seeking medical information or fitness-for-duty examinations, however, including claims of disability discrimination and/or invasion of privacy. Two recent decisions from California appellate courts offer guidance to employers seeking fitness-for-duty examinations and confirm that requests for such examinations are proper in certain circumstances.

The *White* Case—Exam Permitted Upon Employee's Return from FMLA Leave

In *White v. County of Los Angeles*, the employee requested a leave of absence pursuant to the Family and Medical Leave Act ("FMLA") following several incidents that raised concern regarding her behavior and ability to perform her duties. The County granted the employee's request for leave and extended her leave at her request. When the employee eventually asked to return to work and provided the County with a note from her doctor releasing her to work, the County reinstated her to her job but asked her to submit to a fitness-for-duty examination. The employee refused, arguing that the FMLA required the County to reinstate her based on her doctor's certification. The employee filed suit, seeking an injunction barring the County from requiring the fitness-for-duty examination.

The appellate court ruled in favor of the County and rejected the employee's argument that the County violated her FMLA rights by requiring a fitness-for-duty examination. Employers should note that the County requested the fitness-for-duty examination only after reinstating the employee to her position and then placing her on paid leave until the examination was complete.

The *Kao* Case—Exam Permitted

In *Kao v. University of San Francisco*, the employee was a professor who engaged in a series of confrontations with co-workers over the course of about a year. During the incidents, Kao often became enraged and his co-workers expressed concern for their safety. The University consulted experts in the fields of threat assessment and workplace violence and, based on recommendations from the experts, informed Kao that he must undergo a fitness-for-duty examination or take a leave of absence. Kao refused to undergo a fitness-for-duty examination, so the University placed him on leave and, after several attempts to resolve the impasse failed, eventually terminated his employment. Kao filed suit, asserting numerous claims, including disability discrimination.

After the University prevailed at trial, Kao appealed, arguing that the fitness-for-duty examination was not justified because the University had not engaged in the interactive process with him before demanding that he undergo an examination. The appellate court rejected Kao's argument, however, noting that Kao never claimed that he was disabled and never requested any form of reasonable accommodation. In the absence of a claimed disability or request for accommodation, an employer has no duty to engage in the interactive process with an employee. The appellate court also rejected Kao's argument that the fitness-for-duty examination was not job-related or justified by business necessity, finding that the examination was necessary to determine whether Kao posed a danger to others in the workplace.

What should employers do now?

- **Do not request fitness-for-duty examinations of applicants before extending a contingent offer of employment.** Employers should not request fitness-for-duty examinations of applicants before extending a contingent offer of employment because doing so can result in claims for disability discrimination. Employers should not consider information regarding an applicant's health or medical condition when making hiring decisions and therefore should not obtain such information before making a contingent offer of employment.

- **If you request a fitness-for-duty examination, ensure that the examination is job-related and justified by business necessity.** In both the *White* and *Kao* cases, the court's decision in favor of the employer was influenced significantly by the fact that the employers in each case were able to articulate reasonable business justifications for their requests and the examinations were properly tailored to the underlying justification. Employers expose themselves to risk if they request overly broad examinations or cannot support their request for an examination with a solid business justification. In scenarios where violence and workplace safety are not issues, employers should carefully consider whether ordering a fitness-for-duty examination is based on facts sufficient to support the need for an examination.

- **Do not reject a note from the employee's doctor without a sound, objective reason for doing so.** If an employee returns from a leave of absence and presents a note from his or her doctor certifying the employee's ability to perform his or her duties, the employer should generally accept the doctor's note as valid unless it can articulate a logical reason, supported by objective facts, for not doing so. In the *White* case, the employee was a peace officer who carried a weapon in the course of her work and had requested leave for mental illness, so the County was justified in seeking strong assurance that her presence at work would not subject others to danger.

- **Review workplace violence prevention policies and practices.** The importance of providing a violence-free workplace played a significant role in the court's evaluation about whether a fitness-for-duty examination was "job related and consistent with business necessity." A well-drafted workplace prevention policy will bolster the employer's position that such an examination is a "business necessity."

Arbitration and Class Action Developments

The California Supreme Court Finds Class Action Waivers Now Possible in Otherwise Enforceable Arbitration Agreements

Over the last year, California law continued to develop in support of enforcement of arbitration agreements between an employer and an employee. On the heels of the California Supreme Court's second decision in *Sonic Calabasas A., Inc. v. Moreno (Sonic 2)* last year, in which the Court held that an arbitration agreement that forces an employee to arbitrate a claim for unpaid wages rather than filing a claim with the Labor Commissioner, may be enforceable, the California Supreme Court issued its opinion in *Iskanian v. CLS Transportation Los Angeles, LLC*.

Under pressure from multiple United States Supreme Court opinions, the California Supreme Court overruled *Gentry v. Superior Court*. In *Gentry*, the Court had held that a clause forcing employees to waive their right to pursue claims in arbitration as a class member should not be enforced if class arbitration, rather than individual claim arbitration, was a significantly more effective way to vindicate the rights of the affected employees. In *Iskanian*, the California Supreme Court concluded that *Gentry* was no longer good law and held that the waiver of the right to bring a wage and hour class action, contained in an otherwise valid arbitration agreement between an employer and an employee, may be enforceable. The Court's decision reverses its prior holding in *Gentry* that such class action waivers are generally invalid.

Iskanian worked as a driver for CLS Transportation and signed a proprietary information agreement that contained an arbitration provision. The arbitration provision provided that any and all claims related to Iskanian's employment would be decided by binding arbitration. The arbitration provision allowed for reasonable discovery, a written award, judicial review of the award, and required that costs unique to arbitration (such as the arbitrator's fees) would be paid by the company. The arbitration provision also prohibited both Iskanian and CLS Transportation from pursuing class action or representative actions against the other.

Iskanian challenged the enforceability of the class action waiver. The California Supreme Court concluded that the waiver was enforceable in light of the United States Supreme Court decision in *AT&T Mobility, LLC v. Concepcion* holding that the Federal Arbitration Act ("FAA") preempts state laws that interfere with the fundamental attributes of arbitration. The Court also rejected Iskanian's argument that the waiver of class action rights was illegal under the National Labor Relations Act according to the NLRB's decision in *D.R. Horton*. However, the Court did conclude that such a waiver could <u>not</u> encompass claims that an employee might bring in a representative capacity, such as under the Private Attorney General Act ("PAGA"). Such claims are routinely brought by plaintiff employees in wage and hour class action proceedings and allow the plaintiff to sue, essentially as a proxy for the State enforcement agency, to recover Labor Code penalties. A PAGA claim is desirable for the plaintiff employee because PAGA allows for an award of attorneys' fees to the prevailing plaintiff.

The *Iskanian* decision does not mean all arbitration agreements between an employer and an employee are now valid. The Court did not roll back the already developed law that allows an employee to challenge an arbitration provision as "unconscionable." The Court has previously held that an employee arbitration agreement may be unenforceable if it is procedurally and substantively unconscionable. Procedural unconscionability exists when an agreement is presented in a "take it or leave it" fashion and one party has no ability to negotiate terms. Substantive unconscionability may exist if the agreement is unfairly weighted toward one party over another; such as when the employee gives up the right to recover attorneys' fees, punitive damages, or other substantive rights.

The *Iskanian* decision is the clearest direction from the California Supreme Court in some time regarding employee arbitration agreements. A defensible arbitration provision that eliminates the risk of wage and hour class actions is highly valuable to many employers. Although arbitration can be expensive because the employer must pay the private arbitrator's fees, the ability to avoid a protracted and expensive wage and hour class action in either state or federal court will have tremendous appeal for certain employers. Following the *Iskanian* decision, such arbitration provisions are achievable.

Whether an arbitration provision in which employees waive the right to bring wage and hour class actions makes sense for a particular employer involves weighing a variety of factors, including the size of the employer and the costs of any likely arbitrations, including individual arbitrations over small wage claims that otherwise would have been resolved in some other fashion. In addition, an employer that decides to adopt an arbitration provision must carefully consider the language used in the agreement as well as the process used to implement it across the existing workforce. Only by careful planning with counsel will an employer position itself to defeat claims that the arbitration agreement is procedurally or substantively unconscionable. While the *Iskanian* decision is one of the few positive developments regarding arbitration agreements to come out of the California Supreme Court, it does not mean all employers should immediately adopt such provisions, or that all arbitration agreements and class action waivers are enforceable.

What should employers do now?

- **Carefully consider the pros and cons of arbitration in light of the type of employee disputes the company is most likely to encounter.** Arbitration is an attractive option for many employers, but it offers both advantages and disadvantages when compared with jury trials. In order to make an intelligent decision regarding arbitration as a means of dispute resolution, organizations must understand the advantages and disadvantages of the process. Prudent employers should evaluate the pros and cons of arbitration within the context of the claims most likely to be asserted against them.
- **If arbitration is favored as a means of dispute resolution, confer with counsel to draft or update arbitration agreements.** If a company elects to require its employees to resolve disputes through arbitration, the parties must

sign an arbitration agreement which defines the terms pursuant to which claims will be resolved. As mentioned above, the enforceability of arbitration agreements imposed by employers upon their employees has been the subject of much litigation in recent years, so careful drafting is critical. At a minimum, an enforceable arbitration agreement must (a) require both the employer and the employee to submit claims to arbitration for resolution, (b) provide for resolution of the dispute by neutral arbitrators, (c) not limit the remedies available to the parties, (d) afford the parties with the opportunity to conduct adequate discovery, (e) require that the arbitrator provide a written statement of the findings and conclusions upon which the decision is based, and (f) not impose upon the employee costs beyond those imposed on the employee if the dispute were litigated in court. In addition, as discussed more fully at page 32, the National Labor Relations Board continues to take the position that class action waivers in arbitration agreements are an unfair labor practice, so this risk must also be carefully considered.

California Court Holds that Arbitrator Can Determine Enforceability of Arbitration Agreement

In recent years, courts have addressed many issues concerning the enforceability of arbitration agreements. In the recent case of *Malone v. Superior Court*, a California Court of Appeal confronted the question of whether a provision in an arbitration agreement that permits the arbitrator, rather than a court, to determine the validity of the agreement is enforceable.

Malone involved an arbitration agreement with a delegation clause that called for the arbitrator, not the court, to decide whether the arbitration agreement was enforceable. The impact of the "delegation clause" was tested by a wage and hour class action filed against the employer. The employer defendant moved to compel arbitration and the plaintiff employee representatives opposed the motion arguing the arbitration agreement was unconscionable.

The employer argued that the arbitration provision delegated the issue of enforceability of the arbitration provisions to the arbitrator. The trial court found the delegation clause was not unconscionable and compelled arbitration leaving it to the arbitrator to resolve Malone's claim that the arbitration agreement (as a whole) was unconscionable. On appeal, the appellate court held that a delegation clause is not on its face unconscionable. In this case, the court noted that the delegation clause was bilateral and that the Federal Arbitration Act preempts a conclusion that the delegation clause is unconscionable based on a presumption of bias in favor of arbitration on the part of arbitrators. The court noted that any such finding would be "nothing more than an expression of a judicial hostility to arbitration, based on the assumption that a paid decision-maker cannot be unbiased…." The court concluded that if a party challenges the enforcement of the arbitration provision as a whole and the arbitration clause delegates enforceability issues to the arbitrator, then the arbitrator may properly decide enforcement. If the party challenging the arbitration provision is challenging only the delegation clause, then a court should properly decide the enforceability of the delegation clause.

What should employers do now?

- **Consider whether an arbitration agreement should delegate to the arbitrator the initial challenge to enforcement of the arbitration provision.** The *Malone* opinion is worth noting because it represents a shift in favor of delegation clauses. Prior cases had generally held that delegation clauses are unconscionable. The possibility of drafting an arbitration agreement that delegates to the arbitrator the initial challenge to the enforcement of the arbitration provision is a welcome development for employers and one that should be carefully considered when drafting an arbitration agreement.

California Supreme Court Raises the Bar for Class Action Certification in a Wage and Hour Case—Statistical Sampling Does Not Fare Well and a Trial Plan is Required

Perhaps the most critical issue in a class action lawsuit is whether the court will permit the case to proceed as a class action (with the court resolving the claims of all class members at once), or whether potential class members will be forced to pursue their claims individually. When a case is certified as a class action, the employer's potential liability and cost of defense increase substantially, while denial of class certification may result in a favorable settlement or even dismissal of the case.

In *Duran v. U.S. Bank National Association*, the California Supreme Court made two important points regarding the class certification battle. First, the Court opined that no class should be certified by a trial court without the plaintiff presenting a trial plan demonstrating that the case can be tried manageably on a class basis. Second, the Court rejected the trial court's allowance of trial by a statistical sampling technique that did not provide a valid basis for determining liability and that did not allow the defendant employer the ability to raise all of its affirmative defenses.

The *Duran* case involved a challenge under California law to U.S. Bank's classification of loan officers as exempt under the outside sales exemption. U.S. Bank contended that loan officers qualified for the outside sales exemption because they spend more than half their time outside of the office on sales activities such as calling on clients and prospective clients and generating new sales leads. The plaintiffs argued that loan officers spent the bulk of their time in the office and therefore could not properly be classified as exempt under the outside sales exemption.

Although U.S. Bank submitted nearly 100 declarations from loan officers stating that the officers spent more than 50% of their time outside the office on sales activities, the trial court certified a class including all loan officers. Rejecting the plaintiffs' trial plan and U.S. Bank's trial plan, the trial court adopted a two-phase trial approach, with the first phase involving testimony from a random sampling of twenty loan officers in addition to the named plaintiffs, and the second phase extrapolating from that testimony the damages through the use of expert testimony. The trial court refused to allow U.S. Bank to introduce testimony from loan officer witnesses who were not part of the random sampling.

The California Supreme Court rejected the trial court's approach, finding that the statistical sampling method employed at trial was not statistically valid and also denied U.S. Bank its due process right to present affirmative defenses. The Court did not rule out the possibility of a proper use of statistical sampling at trial. Nor did it opine that a defendant must be permitted the right to present affirmative defenses as to every class member. However, the Court did conclude that the trial plan implemented by the trial court had prevented the defendant in this instance from presenting affirmative defenses to the class claims. In reaching its conclusions, the Court emphasized the requirement that the plaintiff present a manageable trial plan before a class is certified and that certification be continually reevaluated and the class decertified if individual issues ultimately predominate. The Court's opinion also recognized the issue of exempt/non-exempt status often involves numerous individual issues that make it difficult to litigate on a class basis.

Developments Concerning Severance Agreements

Severance agreements are among the most commonly utilized employment documents. Well-drafted severance agreements are generally quite effective in providing meaningful protection against liability to employers. In order to realize the intended benefit of a severance agreement, however, employers should understand certain rules applicable to them and the manner in which the enforceability of severance agreements can be challenged.

EEOC Continues Its Challenge to the Enforceability of Severance Agreements

Many employers utilize severance agreements to eliminate their risk of financial liability to departing employees. On occasion, however, some companies have included unreasonable and over-reaching terms in their severance agreements, prompting challenges to the enforceability of the terms in question or, in some cases, to the agreements in their entirety.

Over time, various court decisions and regulations have addressed the enforceability of severance agreements. The Older Workers Benefit Protection Act, for example, requires that severance agreements be "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate." In 2013, the Equal Employment Opportunity Commission ("EEOC") announced its Strategic Enforcement Plan for 2013 through 2016 and stated that it intends to "target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC's investigative or enforcement efforts." Included among the practices condemned by the EEOC are overly broad releases of claims, terms that prohibit the filing of complaints with the EEOC or similar agencies, and prohibitions on assisting in the investigation or prosecution of claims for illegal discrimination.

In keeping with its announced plans, the EEOC filed suit against CVS Pharmacy, Inc. in 2014, alleging that a severance agreement utilized with hundreds of employees, violated federal law because it interferes with employees' rights to file charges, communicate with the EEOC and participate in investigations. The EEOC identified the following specific provisions in the severance agreement as inconsistent with federal law:

- <u>cooperation clause</u> – a provision requiring the employee to notify the company promptly of information relating to legal proceedings, including an administrative investigation. The EEOC contends that such clauses violate federal law because they can impede investigation efforts;
- <u>non-disparagement clause</u> – a provision prohibiting the employee from making any disparaging statements about the company and its personnel. The EEOC contends that such provisions impede investigation efforts and unreasonably restrict employees;

- <u>confidentiality clause</u> – a provision prohibiting the employee from disclosing confidential information to any third party. The EEOC contends that such clauses impede investigation efforts and prevent employees from participating in investigations or asserting claims;
- <u>general release of claims</u> – a provision releasing all claims held by the employee. The EEOC claims that full and complete releases are overbroad;
- <u>covenant not to sue</u> – a provision prohibiting the filing of any lawsuit or complaint regarding the claims released through the agreement. The EEOC contends that such provisions illegally prohibit the filing of administrative complaints, and
- <u>remedies clause</u> – a provision granting the company the right to recover injunctive relief and attorney fees if the employee breaches the severance agreement.

Notably, the EEOC also criticized the length of the CVS severance agreement, emphasizing that it was "five pages single spaced" (a length not uncommon for carefully drafted, complete severance agreements).

The CVS case is still pending in federal court, but the EEOC's aggressive stance against broad severance agreements suggests that additional challenges to the enforceability of severance agreements are probably forthcoming, and such challenges may embolden individual employees and their attorneys as well.

What should employers do now?

- **Consider modifying provisions likely to draw close scrutiny from the EEOC.** The EEOC has focused its efforts on challenging several specific provisions commonly found in severance agreements. Prudent employers should review their severance agreements and consider modifying the provisions in question in a manner that would reduce the likelihood of a challenge without eliminating the value of the clause.
- **Simplify and shorten severance agreements as appropriate.** Some provisions in severance agreements are unnecessarily lengthy and unclear, and add little or no substance. Although employers should not sacrifice precise expression for brevity, they should carefully consider whether long sentences full of "legalese" can be shortened and simplified.
- **Remember that severance agreements should not be regarded as "one-size-fits-all" documents.** Too often, employers utilize a standardized form of severance agreement for all departing employees, ignoring the fact that some provisions may be relevant to certain employees but not to others. Although it is not necessary to craft every provision in a severance agreement from scratch, employers are wise to consider the content of each agreement they propose to departing employees individually, rather than relying on a "one-size-fits-all" form.

Quality Stores Decision Confirms That Severance Payments Are Taxable

Although the interests of employers and employees often conflict during the course of severance negotiations, both parties have an incentive to deem the employee's severance benefits as something other than wages, since wages are subject to payroll taxes borne by each party. The United States Supreme Court's decision in *United States v. Quality Stores, Inc.* confirms that employers must treat severance payments as wages and accordingly must withhold payroll taxes.

In the *Quality Stores* case, the employer made severance payments to employees whose employment terminated as a result of a reduction in force or store closure. After withholding Social Security (FICA) taxes on the severance payments, Quality Stores filed a claim seeking a refund of the FICA tax payments, arguing that the severance payments did not constitute wages subject to FICA withholdings. The Supreme Court rejected Quality Stores' arguments, however, holding not only that the severance payments were subject to FICA taxes, but also adding that "severance payments squarely fall within the broad textual definition of wages for purposes of income tax withholding." As the Court emphasized, Internal Revenue Code section 3402(o) provides that all severance payments shall be treated as if they were wages for the purpose of income tax withholding.

What should employers do now?

- **Resist the temptation (and requests) to treat severance payments as non-taxable income.** Employees negotiating severance benefits often seek to avoid tax liability by characterizing the payment as something other than wages. Regardless of the desires of the parties, the *Quality Stores* decision and the Internal Revenue Code clearly compel employers to treat severance benefits as wages subject to both Social Security taxes and income tax withholding. Employers that do not withhold taxes properly from severance payments subject both themselves and the affected employee(s) to a risk of audit and liability.
- **Recognize that a portion of settlement payments (as opposed to severance payments) can often be characterized as something other than wages, resulting in tax savings.** Applicable law requires employers to treat severance payments as taxable wages, but employers enjoy some ability to reduce potential tax liability when settling claims asserted by former employees. Settlement payments (as opposed to severance payments made to employees who have not asserted any claim against the employer) may include funds paid to resolve claims for lost income, as well as funds paid to resolve claims for emotional distress and attorney fees. While funds paid to settle claims for lost income are taxable as wages, funds paid to resolve claims for emotional distress or attorney fees are not subject to payroll withholding taxes. Employers should confer with counsel before making a final decision on the characterization of settlement proceeds, however.

Another Troubling Year for the NLRB ... and for Employers

2014 was another difficult year for the National Labor Relations Board. Hanging over the year was the specter of *NLRB v. Noel Canning*, the United States Supreme Court case questioning the legitimacy of Presidential recess appointments of three NLRB members. Frustrated by the long delays and partisan wrangling in the Senate in carrying out its constitutional "advice and consent" responsibility for Executive Branch appointments, President Obama appointed the three NLRB members during a three-day Senate recess in December 2011. Following lower court decisions declaring the recess appointments invalid, the President and the Senate reached a compromise in August 2013 in the standoff over appointments. As a result of the compromise, the President appointed, and the Senate approved, new members of the NLRB.

Shortly after the beginning of 2014, the United States Supreme Court heard oral arguments in the *Noel Canning* case. On June 26, 2014, the Supreme Court issued an opinion in which all nine justices agreed, although some for slightly different reasons, that these three NLRB appointments in 2011 were invalid under the Constitution's recess appointments clause. The three-day Senate recess was too short, the Court held, for the President to justify making the appointments. As a result of the *Noel Canning* decision, hundreds of NLRB decisions issued in 2012 and 2013 were invalidated. Some of the invalidated cases have been dismissed but others in which the NLRB is looking to develop the law have been re-briefed and re-considered.

Despite this tumult, the NLRB has been very successful in accomplishing one of its primary objectives, which is convincing employers that the National Labor Relations Act applies equally to both unionized and non-unionized workplaces. The NLRB advanced this objective by deciding cases prohibiting employers from disciplining employees for social media comments and from enforcing restrictive arbitration clauses in employment agreements. The NLRB continues to stake out aggressive positions that shape federal employment law in our more technological workplaces and in the realities of the new economy. A more labor friendly NLRB has affected employers in other ways as well. For instance, in 2014 unions won a higher percentage of representation elections than in recent years, reversing a decades-long slide.

NLRB Still Fighting Class Waivers in Employee Arbitration Agreements

The *D.R. Horton* case, decided in 2012, continues to be an area of concern for employers. In *D.R. Horton,* the NLRB held that class action waivers in employee arbitration agreements violate the right of employees to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" as protected by Section 7 of the National Labor Relations Act. In December of 2013, in *D.R. Horton v. NLRB*, the Fifth Circuit Court of Appeal overruled the NLRB's decision finding it to be contrary to the Federal Arbitration Act as interpreted by the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*. The NLRB's position in *D.R. Horton* has also been criticized by numerous state and federal courts. However, the NLRB continues to apply *D.R. Horton* in finding that class action waivers constitute a violation of Section 7 rights. In October 2014, the NLRB found that the employer in *Murphy Oil USA* violated the National Labor Relations Act by requiring employees as a condition of employment to sign an arbitration agreement that waived the right to file a class action, in court or in arbitration. In particular, the NLRB advanced that position that the Federal Arbitration Act does not preempt Section 7 rights to concerted action. This issue seems destined for the Supreme Court.

Employer Email Systems: The Next Frontier for Union Organizing?

Email has become an indispensable method of communication. But does that mean that employer email systems may be used by employees for the purpose of union organizing? In an opinion issued on December 11, 2014, in *Purple Communications, Inc.*, the NLRB has answered that question "YES" with a 3 to 2 vote. Seven years ago, the NLRB answered that question "NO" in *Register Guard*. According to R*egister Guard*, the long-standing rule had been that as long as an employer email policy was uniformly applied and did not discriminate on the basis of protected union activity, the employer could prohibit employees from using the email system to send either pro-union or anti-union emails. In *Purple Communications*, however, the NLRB has now decided that *Register Guard* was "clearly incorrect" and overruled it. The NLRB has now decided "that employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." This anomalous result means that employers may prohibit employee use of employer-provided telephone systems for organizing purposes but not employer email systems (although the NLRB questioned the legitimacy of continuing the restriction on the use of telephone systems). Calling their decision "carefully limited," the NLRB indicates in the opinion that it is not requiring employers to provide employees with access to email, that only "special circumstances" would justify an employer total ban on nonwork use of email, and that the opinion does not address access to employer email systems by nonemployees (i.e. union agents) or any other form of electronic communication (e.g. telephone systems). The restriction on employer email use for organizing purposes has long been a top priority for unions and *Purple Communications* demonstrates how political NLRB opinions can be. Chances are this decision will be appealed by the employer.

Franchisees as Joint Employers with Franchisors

Although licensed to use the name and products of the franchisor, franchisees are considered separate independent entities and employers under state and federal law, responsible for their own legal compliance. Fast food chains are a common example of franchises. As reported in the news, there were numerous union organizing drives throughout the country during 2014 aimed at increasing the wages of fast food restaurant workers. In July of 2014, the NLRB announced that it was allowing 43 unfair practice charges to be filed against McDonald's for violations allegedly committed by franchisees. Typically, the NLRB will find a single or joint employer when one employer exerts sufficient control over the other. A number of factors are considered, including common terms and conditions of employment and personnel administration. The NLRB General Counsel advocated that indirect control should be sufficient for joint employer status. That would mean that if franchisor rules or operational recommendations impacted terms and conditions of employment for the employees of the franchisee, then the franchisor could be considered jointly liable for violations of the franchisee. Franchisors want their franchisees to be successful and typically provide a lot of support and advice because they also want to protect the integrity of their brand.

In the past, such actions on the part of the franchisor did not convert them to single or joint employers under state law. In fact, the position taken by the NLRB is contrary to the recent holding of the California Supreme Court in *Patterson v. Domino's Pizza LLC* (discussed above at page 19). In *Patterson*, the plaintiff alleged that she was sexually harassed and sued the franchisee, supervisor, and the franchisor, claiming that the franchisee was an agent of the franchisor and the actions of the supervisor was sufficiently controlled by the franchisor to create a single employer. The Supreme Court found that the franchisee was completely responsible for training and supervising its employees and the franchisor restricted its control to assuring consistency of the product and to enhancing its brand image:

> A franchisor enters this arena, and becomes potentially liable for actions of the franchisee's employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees. Any other guiding principle would disrupt the franchise relationship.

Employers will need to wait and see whether the NLRB will abide by this long-standing rule of law.

Unionization Efforts of NCAA Division I College Athletes

One of the more surprising developments of the year occurred in March 2014 when the Chicago Regional Director for the NLRB determined that football players for Northwestern University had the right to vote on whether to be represented by a union. The question the Regional Director dealt with was whether the student athletes were functionally employees of the University because of the amount of control exercised over them. Other cases involving graduate students teaching classes found that students were not employees subject to the National Labor Relations Act. In April 2014, the Regional Director allowed a representation election to take place subject to the University's objection. The votes were immediately impounded and the University filed an appeal. That appeal is pending now before the NLRB. Numerous groups—from unions to universities to the Republican Members of the House of Representatives—have filed briefs in the case. No word on when the NLRB will issue a decision.

Hurry Up and Vote: What Speedier Union Elections Mean

After an earlier attempt to streamline the representation election process was de-railed by the *Noel Canning* decision invalidating the votes of the recess appointees, on December 12, 2014, the NLRB adopted new rules to be effective April 14, 2014, that if ultimately implemented will result in faster union elections. Under the previous rules, the NLRB attempted to hold elections within 42 days of the date the representation petition is filed. During that time, questions about the composition of the bargaining unit and the eligibility of some voters would be sorted out in a Representation Hearing. That period of time also gave employers the opportunity to present an opposing viewpoint to unionization. Under the newly adopted rules, the time period between unions filing a representation petition and the date of the NLRB conducted election would be shortened to between 10 to 21 days. Unions typically want elections as quickly as possible after submitting the representation petition, believing that support may waiver as the employees hear the other side of the story. The new regulations require that once a representation petition is submitted employers will have to give the union not only the home addresses of employees in the proposed bargaining unit, which has been required for years, but also their home telephone numbers and personal email addresses. The new regulations will also defer issues about eligibility of voters and composition of the proposed bargaining unit until after the election. The new regulations may be challenged by employer organizations before the April 14, 2015 effective date, so stay tuned.

Micro-Unions Treading Upward at the NLRB

In the *Specialty Healthcare* case of 2011, the NLRB for the first time approved a small and narrowly defined bargaining unit for a union election. For elections, conventional wisdom has traditionally been that employers wanted the largest units possible while unions have wanted smaller units. Under the National Labor Relations Act, the rule has always been that a proposed bargaining unit need only be "appropriate," but not necessarily the "most" appropriate, in terms of the number and kinds of employees to be included in the proposed bargaining unit. It was uncommon for unions to propose very small units with a small percentage of an employer's total workforce. Representing such small units was either economically unviable or failed to accomplish the larger goal of having as many unionized employees as possible for the greatest tactical leverage. New thinking in attempting to boast declining union membership has developed the idea of "micro-unions."

While the original micro-union was in healthcare, two notable cases involving retailers clarified the issues in 2014. Within days of each other, the NLRB approved a bargaining unit comprised of cosmetics and fragrance sales employees at a Macy's in Massachusetts while rejecting a bargaining unit of women shoes associates in two different departments on separate floors in a New York Bergdorf store. While finding that the Macy's cosmetic and fragrance employees shared a "community of interest," the NLRB determined that differences in the Bergdorf department structure meant the sales associates in the two different departments did not share a community of interest. While smaller bargaining units may be trending upward with the NLRB, the different results in these two cases suggest that the NLRB will not approve bargaining units that attempt to randomly cobble together employees with disparate interests.

Finally, an Unprotected Social Media Case

The NLRB has long considered employee communications in social media sites, such as Facebook, to be just as protected by Section 7 of the National Labor Relations Act as conversations around the water cooler. Section 7 authorizes and protects employees who "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." An example of the protections given to employee social media communications can be found in the case of *Three D, LLC d/b/a Triple Play Sports Bar and Grille* in which current and former employees posted comments on Facebook critical of their employer when they learned they would have to pay more in state taxes they attributed to their employer improperly calculating their state tax withholding. The employer terminated the two employees who made the critical comments as well as an employee who simply "liked" the online conversation. Despite the critical comments and the obscene language used in the Facebook posting, the NLRB found that the comments were not so defamatory and disparaging to lose the protection of Section 7. The NLRB even excused the profanity directed at the employer as "voicing a negative personal opinion." In *Richmond District Neighborhood Center*, the NLRB finally found a case in which the online communication went so far as to be unprotected by Section 7. In another profanity-laced communication, two employees engaged Facebook posts that appeared to be a conspiracy to conduct wide-scale insubordination in specific detail to disrupt the operations of the employer. This exchange was unique in the specificity of the plans to harm the employer by engaging in insubordinate actions. While it may be uncommon for conspiring employees to engage in such online misconduct, it seems that even the pro-employee and pro-union NLRB will allow employers to rectify massive and unquestionable employee disloyalty.

What should employers do now?

- **Follow news on developments in labor relations and the decisions of the NLRB even if you do not have a labor contract.** The NLRB is actively applying portions of the National Labor Relations Act to non-union employers.
- **Be proactive in developing a positive workplace and employment policies to assure legal compliance.** The unwary and uncaring employer is always susceptible to a union organizing drive. Eliminating sources of insecurities and wage disparities can be a significant deterrent to union organizing efforts. Communicate frequently with employees about changes going on with your business and in your industry. Help employees understand why decisions have been made and how changes will affect the business and them.
- **Class action waivers in employee arbitration agreements appear to be enforceable in federal court but may draw an unfair practice charge from the NLRB.** If having an arbitration agreement is important to your company, continue to monitor developments as the issue is eventually appealed to the United States Supreme Court.
- **Consult legal counsel if you have rules about employee use of email.**
- **If you are a franchisor, limit your relationship with your franchisees to operational concerns and brand protection.** Do not involve yourself in specific employee problems.
- **Exercise caution in disciplining employees for comments in social media.** Disclosing confidential information or attempting to harm the reputation of the company are not protected by federal labor law but comments critical of supervisors should be evaluated carefully before taking disciplinary action.

Conclusion

We hope that this summary assists you in understanding some of the recent developments that will affect employers in 2015. Please recognize that this document does not contain a comprehensive listing of all new laws or decisions that regulate employment, and that the information provided is only a brief summary and should not be used as a substitute for legal advice tailored to a specific factual scenario.

If we can be of any assistance to you in understanding these new developments or in any other matter relating to employment, please do not hesitate to contact us.

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