LABOR AND EMPLOYMENT LAW 2013: A YEAR-END REVIEW

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I. New Laws and Regulations

A. Federal

Following U.S. Supreme Court Decision, Federal Agencies Extend Definition of "Spouse" to Persons in Same-Sex Marriages. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the U.S. Supreme Court held unconstitutional a provision of the federal Defense of Marriage Act ("DOMA") that for purposes of all federal laws defined "marriage" to include only marriages between a man and a woman. In striking down the law, the Court recognized the right of each state to define marriage and the long-standing deference under federal law given to such state recognition. As a result of *Windsor*, it became clear that in those jurisdictions where same-sex marriages are recognized (including, among others, California, New York, and the District of Columbia), all federal rights, benefits, and privileges granted to spouses are extended to employees in same-sex marriages. Thereafter, the U.S. Department of Labor (Technical Release 2013-04), the Internal Revenue Service (Revenue Ruling 2013-17), and the Department of Homeland Security (www.uscis.gov/family/same-sex-marriages) announced that, for purposes of interpreting federal employee benefit, tax, and immigration laws, same-sex couples who are lawfully married in any state (the so-called "place of celebration") shall be treated as married, regardless of their place of residence. Thus, even if a same-sex married couple resides in a state where they may not legally marry, they will be recognized as married under these federal laws. This impacts a number of important employment rights that are now extended to same-sex spouses, including:

- Enrollment in Health Plans – Under the Health Insurance Portability and Accountability Act, marriage is a "qualifying event" that allows an employee to enroll a new spouse immediately in a company-sponsored health insurance plan.
- Tax Treatment of Spousal Health Insurance and Expenses – The Internal Revenue Service must now extend tax-free treatment to company-paid premiums for health insurance for an employee's same-sex spouse and pre-tax status to an employee's payments for spousal health costs via vehicles such as flexible spending accounts.
- Continuation of Spousal Insurance Under COBRA – Under the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), upon employment termination, most employees have a right to continued medical coverage for themselves, their dependents, and their spouses under an employer's plan.
- Pensions and Social Security – Same-sex spouses will have the same survivor rights as opposite-sex partners under private pension plans regulated by ERISA and under Social Security.
- Immigration – A U.S. citizen or lawful permanent resident may sponsor a same-sex spouse who is a foreign national for a family-based immigrant visa, and a U.S. citizen or permanent resident can file an immigrant visa petition for a same-sex spouse.

However, for the time being, it appears that, for purposes of the federal Family and Medical Leave Act ("FMLA"), an employer is obligated only to extend leave rights to an employee to care for a same-sex spouse if the marriage is recognized in the state in which the couple resides. *See* DOL Fact Sheet #28, www.dol.gov/whd/regs/compliance/whdfs28f.htm. This is because the current FMLA regulations expressly define "spouse" to mean a "husband or wife as defined or recognized under State law for purposes of marriage ***in the State where the employee resides . . .***" Nonetheless, there is speculation that the U.S. Department of Labor ("DOL") may revise its regulations to bring the treatment of same-sex spouses under the FMLA in line with other federal laws.

New OFCCP Rules. In August 2013, the Office of Federal Contract Compliance Programs ("OFCCP") issued a Final Rule requiring federal contractors and subcontractors to employ more individuals with disabilities and more veterans. OFCCP's Final Rule will impact both section 503 of the Rehabilitation Act and the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"). Under OFCCP's Final Rule, contractors must now establish a 7 percent goal for qualified individuals with disabilities. If the contractor has more than 100 employees, this goal will apply to each job group, and if the contractor has 100 or fewer employees, this goal will apply to its entire workforce. The Final Rule requires contractors to conduct an annual assessment of problem areas and establish specific action-oriented programs to address them. The Final Rule also revises the OFCCP's definition of "disability" to comply with the ADA Amendments Act of 2008.

With respect to VEVRAA, OFCCP's Final Rule requires that contractors establish annual hiring benchmarks for protected veterans using one of two methods. Contractors may choose to either: (1) establish a benchmark equal to the national percentage of veterans in the civilian labor force (currently at 8 percent) or (2) establish their own benchmarks tailored to their unique hiring circumstances and using certain data that will be posted in the Benchmark Database on the OFCCP website. The Final Rule also introduces new accountability and record-keeping requirements and clarifies job listing and subcontract requirements.

The Final Rules become effective on March 24, 2014. However, those contractors with a written affirmative action plan ("AAP") already in place on that date will have until the later start date of their successor AAP in 2014 to comply with the new requirements.

These new OFCCP rules are already being challenged by federal government contractors. On November 19, 2013, the Associated Builders and Contractors ("ABC") filed a complaint in the U.S. District Court for the District of Columbia stating that, while it supports the OFCCP's goals, it believes that the new rules set arbitrary and illegal hiring benchmarks, especially regarding the 7 percent goal for persons with disabilities.

FLSA Expands Certain Domestic Workers' Rights to Minimum Wage and Overtime. Under the U.S. Fair Labor Standards Act ("FLSA"), certain domestic workers are entitled to federal law minimum wage and overtime pay. However, Congress carved out an exception to this rule, known as the "companionship exception," which excludes workers who provide home-care "companionship services" to elderly or disabled persons.

In 2013, the DOL announced that it is revising the definition of "companionship services" to narrow the term to include only workers who provide the kind of limited, non-professional services Congress supposedly intended when creating this exception. Specifically, "companionship services" under the revised regulations refers to the fellowship and protection of persons who are elderly, disabled, injured, or ill and require assistance in caring for themselves. "Fellowship" means to engage the person in social, physical, and mental activities, while "protection" means being present with the person in or outside the home and monitoring his or her safety. "Companionship services" also refers to providing certain care, such as assisting the person with activities of daily living, in conjunction with providing fellowship and protection, so long as the care does not represent more than 20 percent of the total hours worked for a particular person per week. The DOL expressly excluded from the meaning of "companionship services" domestic services that are performed mainly to benefit other members of the household, such as preparing meals or doing laundry for the household, and medical-related services that typically require training, such as services performed by nurses. The DOL revision will mean that more domestic workers will be entitled to FLSA minimum wage and overtime pay after January 1, 2015, when the new regulation takes effect.

B. California

Increased Minimum Wage. Existing law requires that the minimum wage for all industries be not less than $8.00 per hour. AB 10 amends Labor Code section 1182.12 and raises California's minimum wage to $9.00 per hour beginning on July 1, 2014, and to $10.00 per hour on January 1, 2016. As the minimum salary that must be paid to overtime-exempt ("exempt") "administrative,"

"executive," and "professional" employees is pegged to twice the state minimum wage, in order to maintain exempt status in California, an employee's annual salary must be at least $37,440.00 per year starting on July 1, 2014, and at least $41,600.00 per year starting on January 1, 2016.

Expanded Employee Whistleblower Protections. Section 1102.5 of the California Labor Code currently prohibits an employer from enforcing a policy or taking other action to prevent an employee from reporting a violation of state or federal law to a government or law enforcement agency. The law also prohibits retaliation against employees who make such reports.

SB 496, effective January 1, 2014, expands these protections to similarly protect employees who *internally disclose* reasonably believed violations of law "to a person with authority over the employee, or to another employee who has the authority to investigate, discover or correct the violation or noncompliance." SB 496 also prohibits retaliation against an employee because the employer believes that the employee disclosed or may disclose such information.

Sexually Harassing Conduct Need Not Be Motivated by Sexual Desire. The California Fair Employment and Housing Act ("FEHA") currently prohibits harassment because of sex and gender. In *Kelley v. Conco Companies*, 196 Cal. App. 4th 191 (2011), the California Court of Appeal held that a male plaintiff in a same-sex harassment case must prove that the male harasser was motivated by a sexual desire. SB 292, effective January 1, 2014, overturns the *Kelley* decision by amending the FEHA to clarify that "sexually harassing conduct need not be motivated by sexual desire." This FEHA amendment might lead to more same-sex and opposite-sex bullying lawsuits.

Expansion of Protected Time-Off for Crime Victims. SB 288, effective January 1, 2014, adds section 230.5 to the Labor Code to protect employees who are victims of a listed offense from being discharged or retaliated against for taking time off to appear in court or participate in related legal proceedings. SB 288 expands the list of offenses to include the following: vehicular manslaughter while intoxicated; felony child abuse likely to produce great bodily harm or a death; assault resulting in the death of a child under eight years of age; felony domestic violence; felony physical abuse of an elder or dependent adult; felony stalking; solicitation for murder; other serious felony; hit-and-run causing death or injury; felony driving under the influence causing injury; and sexual assault.

The bill defines a "victim" as "any person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act." According to the bill, "victim" also includes "the person's spouse, parent, child, sibling, or guardian." Employees wanting to take time off must give the employer reasonable notice, unless advance notice is not feasible. Employees who are discriminated or retaliated against in violation of this bill will be entitled to reinstatement and reimbursement for lost wages and benefits.

Expanded Employment Protections for Domestic Violence, Sexual Assault, and Stalking Victims. Existing law prohibits employers from discharging or discriminating or retaliating against a victim of domestic violence or sexual assault who takes time off from work to attend to issues arising from the domestic abuse or sexual assault, such as seeking medical attention or attending court proceedings.

Effective January 1, 2014, SB 400 extends these protections to victims of stalking and also broadens the protections by prohibiting employers from taking any adverse action against an employee because of his or her status as a victim of domestic violence, sexual assault, or stalking. This protection applies only if the victim provides notice to the employer of his or her status or the employer has actual knowledge of it.

The new law additionally imposes affirmative obligations on employers to provide reasonable accommodations, such as implementing a workplace safety plan, for a victim of domestic violence, sexual assault, or stalking.

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New California Law Guarantees Overtime Pay to Domestic Workers in Private Homes. Effective January 1, 2014, AB 241 creates the Domestic Workers Bill of Rights that would, until January 1, 2017, regulate the hours worked by domestic workers and require employers to pay domestic workers overtime pay if they work more than nine hours in any workday or more than 45 hours in any workweek. The bill defines "domestic work" to mean services related to the care of persons in private households or maintenance of private households. Such work would include, for example, childcare providers, caregivers to disabled, sick, or elderly persons, house cleaners, maids, and other household occupations. The bill also requires the Governor to convene a committee to study the impact of the Act and report back to the Governor.

More Family Members Covered Under California's Paid Family Leave Program. Under existing law, California workers who pay State Disability Insurance ("SDI") contributions are eligible to receive "paid family leave" benefits from the State for up to six weeks to care for a seriously ill child, spouse, parent, or domestic partner, or to bond with a minor child within one year of birth or placement of the child in connection with adoption or foster care. SB 770, which takes effect on July 1, 2014, expands the scope of the program to permit workers to take time off to care for a seriously ill grandparent, grandchild, sibling, or parent-in-law.

Employers Prohibited From Inquiring Into Judicially Dismissed or Sealed Convictions. Under existing law, employers are prohibited from requesting that an applicant for employment disclose information concerning an arrest or detention that did not result in a conviction or information concerning a referral or participation in any pretrial or posttrial diversion program. Employers are similarly prohibited from using any such information as a factor in determining any condition of employment. SB 530, effective January 1, 2014, will also prohibit employers from asking applicants to disclose, or from using as a factor in determining any condition of employment, any convictions that have been dismissed or sealed. However, the new law exempts employers from this prohibition if they are required by law to obtain the information, the applicant would be required to possess or use a firearm in the course of employment, the applicant is prohibited by law from holding the position sought, or the employer is legally prohibited from hiring an applicant who has been convicted of a crime.

Labor Commissioner's Authority to Award Liquidated Damages for Minimum Wage Violations Expanded. AB 442 amends the Labor Code, effective January 1, 2014, to expand the Labor Commissioner's authority to award liquidated damages to employees in an amount equal to the underpaid wages when the employer violates California's minimum wage law. Existing law grants workers the right to recover restitution and liquidated damages in a minimum-wage-claim hearing or lawsuit. However, under existing law, the Labor Commission does not have the authority to collect liquidated damages on behalf of workers. Under the new law, the Labor Commissioner can assess liquidated damages as part of a citation issued against an employer for failure to pay minimum wage and recover the unpaid minimum wage plus the liquidated damages after issuing the citation.

Military and Veteran Status Added to FEHA's Protected Categories. AB 556, effective January 1, 2014, adds "military and veteran status" to the list of categories protected from employment discrimination under California's FEHA. The bill defines "military and veteran status" to include a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard. The amendment clarifies that nothing in the Act relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.

Unlawful for Employers to Use Unfair Immigration-Related Practices to Retaliate Against Employees. Effective January 1, 2014, AB 263 creates new Labor Code section 1019, which prohibits employers from engaging in, or directing another person to engage in, an "unfair immigration-related practice" against a worker in retaliation for engaging in conduct that is protected under the Labor Code. Such protected conduct includes, but is not limited to, an employee's filing a bona fide complaint against the employer and/or making a written or oral complaint that he or she is owed unpaid wages. "Unfair immigration-related practices" include any of the following when taken for retaliatory purposes: requesting more or different documents than required by federal Form I-9 rules,

using the federal E-Verify system to check status in a manner not required or authorized under the program, threatening to contact or contacting authorities, and threatening to file or filing a false police report. The bill also creates a rebuttable presumption that an adverse action taken against an employee within 90 days of his or her engaging in conduct protected under the Labor Code is committed for the purpose of, or with the intent of, retaliation. AB 263 also amends section 98.6 of the Labor Code to expand "protected conduct" to include a written or oral complaint by an employee that he or she is owed unpaid wages.

AB 263 allows a court to order the appropriate government agencies to suspend or revoke an offending employer's business license for a period of up to 90 days. Under AB 263, an employee who is retaliated against or who is otherwise subjected to an adverse action is entitled to reinstatement and reimbursement for lost wages. A person who violates these provisions is also subject to a civil penalty of up to $10,000.00 per violation, and an employer who willfully refuses to hire or promote an employee who is determined to be eligible for rehiring or promotion, is guilty of a misdemeanor. Under this bill, it is not necessary to exhaust administrative remedies or procedures before filing a lawsuit.

The provisions of AB 263 and SB 666 will be codified January 1, 2014, in California Business & Professions Code sections 494.6 and 6103.7 and in California Labor Code sections 98.6, 244, and 1102.5.

Added Protections for Immigrant Workers and Other Labor Code Changes. SB 666, effective January 1, 2014, makes it a cause for suspension, disbarment, or other discipline for any attorney licensed in California to report or threaten to report the suspected immigration status of a witness or party to a civil or administrative action, or the person's family member, because the person exercises or has exercised a right related to employment.

Similarly, the bill will subject an employer's business license to revocation or suspension if the licensee threatens to retaliate or retaliates against an employee based on the employee's citizenship or immigration status for that employee's exercise of a right protected by California law.

The bill will also prohibit an employer from retaliating or taking adverse action against any employee or applicant for employment because the employee or applicant has engaged in protected conduct. "Protected conduct" is expanded to include making a written or oral complaint that the employee is owed unpaid wages. In addition, an employer is liable for a penalty of up to $10,000.00 for each violation of this section.

Employers are also prohibited under SB 666 from preventing or retaliating against an employee who provides information to, or testifies before, any public body conducting an investigation, hearing, or inquiry.

Should the employee seek civil redress under the Labor Code, SB 666 eliminates the requirement that employees first exhaust administrative remedies or procedures to bring a civil action under any Labor Code provision that does not expressly require exhaustion of an administrative remedy.

Employers Subject to Criminal Penalties for Failing to Remit Employee Wage Withholdings. Section 227 of the Labor Code currently imposes criminal penalties on an employer who willfully defrauds or fails to make agreed-upon payments to health and welfare funds, pension funds, or certain benefit plans. SB 390 amends this law, effective January 1, 2014, also to penalize employers who willfully or with an intent to defraud fail to remit to the appropriate agency withholdings from an employee's wages made pursuant to state, local, or federal law. As with the prior law, such acts are punishable as a felony or a misdemeanor if the amount unpaid exceeds $500.00 and as a misdemeanor if the amount is $500.00 or less.

Employer's Right to Attorney's Fees in Wage and Benefit Lawsuits Restricted to Actions Brought in Bad Faith. Under current law, California Labor Code section 218.5 requires a court to award reasonable attorney's fees to the prevailing party in any action brought

for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions if any party requests them upon initiation of the action. SB 462 amends the Labor Code, effective January 1, 2014, to make the award of attorney's fees and costs to a prevailing employer contingent on a finding by the court that the employee brought the action in bad faith.

Labor Commissioner May Create a Lien on Employer's Real Property. Under existing law, the Labor Commissioner is authorized to hear employee complaints regarding nonpayment of wages and other employment-related issues and promulgate orders, decisions, or awards within 15 days of hearing an employee complaint. AB 1386 amends this law, effective January 1, 2014, to allow the Labor Commissioner, once its order in a case has become final, to lien the employer's real property by recording a certificate of lien with the county recorder. The lien will continue until satisfied or released or for 10 years from its recording date.

Rest and Meal Period Penalties Extended to Heat Recovery Periods. Currently, under Labor Code section 226.7, if an employer fails to provide an employee a meal or rest period in accordance with an order of the Industrial Welfare Commission ("IWC"), the employer is required to pay the employee one additional hour of pay at the employee's regular rate of compensation for each day the meal or rest period is not provided (up to two one-hour's pay penalties per day).

Effective January 1, 2014, SB 435 extends the employer's pay penalty to missed "recovery periods," defined by SB 435 to mean a "cooldown period afforded an employee to prevent heat illness." While the bill does not include guidance on the timing or frequency at which employers are required to provide recovery periods, employers should consult applicable Cal/OSHA regulations for guidance on heat illness.

In addition, the new law also extends to any meal, rest, or recovery period required by applicable statute, regulation, standard, or order of the California IWC, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. The bill specifically excludes employees who are exempt from meal or rest or recovery period requirements pursuant to other state laws, including, but not limited to, a statute or regulation, standard, or order of the IWC.

Private School Employees Must Submit Fingerprints to Department of Justice. Existing law requires public school employees who have contact with students to submit their fingerprints to the Department of Justice("DOJ") for a background check. This enables school districts to be notified promptly of an arrest of their employees and allows them to take immediate action. AB 389 expands this protection to private schools, effective January 1, 2014, by requiring private school employees who have contact with students also to submit their fingerprints to the DOJ.

San Francisco Implements Family-Friendly Workplace Ordinance. The San Francisco Board of Supervisors recently adopted the Family Friendly Workplace Ordinance ("FFWO") to address the changing demographics of the local workforce and family structures. Under the FFWO, effective January 1, 2014, certain employees will have the right to request from their employers flexible work arrangements to assist with family caregiving responsibilities. To request a flexible work arrangement, the employee must be employed in San Francisco, have been employed by the employer for at least six months, and work at least eight hours per week, and the employer must have 20 or more employees. If eligible, the employee can request the flexible work arrangement to care for a minor child or children, a family member with a serious health condition, or the employee's parent if at least age 65.

The ordinance additionally outlines the procedure by which employees can request a flexible work arrangement. Once the employee makes a formal request, the employer is required to meet with the employee regarding the request and respond to it within 21 days of the meeting. If the employer denies the employee's request, the employer must provide the employee a written response that sets forth a "bona fide business reason" justifying the denial. The employer is also obligated to notify the employee of the right to request a reconsideration.

C. New York

New York Minimum Wage Increase. New York State is increasing its minimum wage from $7.25 to $8.00 per hour for nonexempt employees on December 31, 2013. The minimum wage is also scheduled to increase to $8.75 per hour on December 31, 2014, and to $9.00 (or the federal minimum wage, if higher) on December 31, 2015. The cash wages for tipped employees in the hospitality industry is also going up, in most cases from $5.50 per hour to $6.05 per hour. Overtime must be calculated on the $8.00-per-hour minimum wage, i.e., at $12.00 per hour, and the tip credit applied to that amount is, in most cases, limited to $1.95, for a cash wage overtime rate (in most cases) of $10.05 per hour for tipped employees. Credits given for meals and housing are also affected, as are uniform allowances.

Withholding Overpayments From Wages. Until this past October, when the New York Department of Labor issued new regulations, there was no way for an employer to lawfully deduct from wages any prior overpayments made by mistake, or to collect past advances. Employers may now do so, with some limitations on how they go about it. When an overpayment is made, and the amount of overpayment is less than the net wages (after deductions) in the immediately following pay period, the full amount of the overpayment may be taken out of the immediately following pay period. Otherwise, the deduction for an overpayment must be made in an amount that is not more than 12.5% of gross earnings, and, even then, the deduction may not drop the wages of the employee to less than the minimum wage. Advance notice of the deductions must be made. Cash advances may also be deducted, provided that the employee has agreed to the deductions in writing at the time the advance is made. That deduction also cannot be more than 12.5% of gross wages, nor may it have the effect of reducing the employee's wages below the minimum wage. The employer must also have a complaint mechanism in place so employees can contest the amount being withheld.

Application of Child Performer Regulations to Models. The New York Department of Labor is conducting itself as though the Child Performer Regulations, which took effect in April 2013, now apply to child models in the fashion industry – both print and runway. This is the result of a law passed by the New York Legislature in June and signed by the Governor in October. The new law going into effect, however, was on its face contingent on the New York Department of Labor's passing new regulations to implement it, which the state agency has not done, announcing on its website that new regulations are not necessary. Conservative employers should conduct themselves as if the Child Performer Regulations do indeed apply to child models, but if any employer has a dispute with New York State for noncompliance, there is a possible defense available based on the notion that, because no regulations were issued, the law never took effect.

NYC Sick Pay Law. Businesses located in New York City having 20 or more employees will be required to provide five paid sick days per year to their employees, and those New York City businesses with fewer than 20 employees will be required to provide 40 hours of unpaid, job-protected leave to their employees, beginning April 1, 2014. The obligation to provide paid sick leave will extend to businesses with 15 or more employees on October 1, 2015.

II. Discrimination and Retaliation Law

A. Federal Cases

Supreme Court Narrows Title VII Definition of "Supervisor." In *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), Vance sued her employer, Ball State University ("BSU"), alleging that a fellow employee, Davis, created a racially hostile work environment in violation of Title VII. BSU moved for summary judgment, arguing that, because Davis was not Vance's supervisor, BSU could not be held vicariously liable for Davis's alleged actions.

Under Title VII, the U.S. Supreme Court previously held that if, the harassing employee is a coworker, the employer is liable only if it was negligent in controlling workplace conditions. However, in cases where a supervisor's harassment culminates in a "tangible

employment action," defined as "a significant change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change to benefits," the employer is strictly liable. If no tangible employment action results, however, an employer may escape liability by establishing (1) that the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer.

Vance argued that a person is a "supervisor" if she has authority to control someone else's daily activities and evaluate performance." The Supreme Court disagreed, holding that, for purposes of Title VII, to be a "supervisor" a person must have the power to take a "tangible employment action" against the victim. The Court held that Vance failed to show that Davis was a supervisor under this definition and further held that BSU could not be liable in negligence because it responded reasonably to the incidents of which it was aware.

U.S. Supreme Court "But-For" Causation in Title VII Retaliation Claims. In *University of Texas S.W. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), the U.S. Supreme Court held that a plaintiff alleging an unlawful retaliation claim is required to prove that the retaliation was the "but-for" cause of the adverse employment action. In this case, a university affiliated with a hospital employed a professor who also worked as physician at the hospital. The professor-physician complained to the university's department chairperson that a colleague was harassing him on the basis of his national origin. This employee later resigned and wrote a letter to that chairperson citing the harassment as the reason for his quit. When the hospital offered this employee a different position with the hospital, the chairperson opposed that offer, resulting in the hospital's withdrawing it. In response, the employee sued the university alleging that the chairperson's actions constituted retaliation based on his previous complaint.

The issue before the Supreme Court was what standard of causation should apply in Title VII retaliation claims. In discrimination claims, Title VII requires that the employee show that the discrimination was a "motivating factor" for the adverse employment action. However, the Court noted that retaliation is treated differently under Title VII and requires the employee to show that the retaliation occurred "because" the employee opposed an unlawful employment practice. As a result, the Court held that retaliation claims must be proved according to traditional principles of but-for causation and not the more lenient "motivating factor" test. The narrow standard adopted by the Supreme Court should make it more difficult for employees to prevail on Title VII retaliation claims.

B. California Cases

Court Holds That Police Reserve Officer Is a Volunteer, Not an Employee, Despite Receiving Workers Compensation Benefits. In *Estrada v. City of Los Angeles*, B242202 (2013), the Court of Appeal addressed the issue of whether a volunteer worker qualifies as an employee for purposes of the FEHA. Under the FEHA, an "employee is an individual under the direction and control of an employer who has been appointed, hired under express or implied contract, or serves as an apprentice." In *Estrada*, the plaintiff was a volunteer reserve police officer for the LAPD who filed suit against the City of Los Angeles for alleged disability discrimination. Although police reserve officers are volunteers, the City deems them "employees" for the limited purpose of providing workers' compensation coverage. The Court of Appeal affirmed the trial court's conclusion that the City's policy decision to extend workers' compensation benefits to its reserve police officers did not transform their volunteer status to "employee" for FEHA purposes.

III. Wage and Hour

A. Federal

Ninth Circuit Holds That Individual Damage Calculations Do Not Alone Defeat Class Certification. In *Leyva v. Medline Indus.*, 716 F.3d 510 (9th Cir. 2013), the plaintiff was an hourly employee working in a distribution warehouse who sought to represent approximately 538 employees in a class action alleging that his employer had an illegal time-rounding policy and excluded

nondiscretionary bonuses from overtime rates. Additionally, the plaintiff sought unpaid wages, as well as statutory waiting time and wage statement penalties. The District Court denied class certification, holding that common questions of fact did not predominate over individual questions because the damages inquiry would be highly individualized and because alternative methods for resolving the dispute were superior. The Ninth Circuit reversed, finding that the district court abused its discretion. The appellate court stated that, because damages determinations are individual in nearly all wage-and-hour class actions, damage calculations alone cannot defeat class certification.

B. California

Class Certification May Be Established by Demonstrating That an Unlawful Uniform Policy is Consistently Applied to a Group of Individuals. In *Faulkinbury v. Boyd & Assoc., Inc.*, 185 Cal. App. 4th 1363 (2010), the plaintiffs were security guards who sought to certify a wage-and-hour class action on behalf of approximately 4,000 current and former employees of Boyd & Associates, Inc. ("Boyd"). Plaintiffs asserted that, when they were hired, Boyd required each of them to sign an agreement to take on-duty meal periods. They also asserted that they were instructed by Boyd not to leave their posts for meal breaks and that they were not authorized or permitted to take off-duty rest breaks. Plaintiffs further claimed that Boyd failed to include certain reimbursements and an annual bonus payment in calculating the hourly rate for overtime pay. The trial court denied certification as to all three subclasses sought, and the Court of Appeal affirmed in part and reversed in part. The California Supreme Court granted review, but held the case pending its decision in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012).

In light of its decision in *Brinker*, the California Supreme Court transferred the case back to the Court of Appeal, which changed its earlier position and held that the trial court erred by denying class certification of all three sought subclasses (regarding meal periods, rest periods, and overtime claims). In *Faulkinbury v. Boyd & Assoc., Inc.*, 216 Cal. App. 4th 220 (2013), the Court of Appeal stated that "*Brinker* teaches us that we must focus on the policy itself and address the issue whether the legality of the *policy* can be resolved on a class wide basis." With regards to the on-duty meal breaks, the Court of Appeal held that, because Boyd had a uniform policy of requiring all security guards to take on-duty meal breaks and sign an agreement to that effect, the lawfulness of Boyd's policy could be determined on a class wide basis. Similarly, with regard to the lack of off-duty rest breaks, the Court held that this claim was amenable to class treatment because the uniform rest break policy, or lack of policy, was unlawful. Finally, the Court held that the plaintiffs' claim that Boyd had a uniform practice of excluding certain amounts from its overtime calculations was also amenable to class treatment, even if eligibility for recovery would have to be shown on an individual basis.

Court Reverses Order Denying Meal, Rest, and Overtime Certification Following Brinker, Bradley, and Faulkinbury Decisions. In *Benton v. Telecom Network*, BC 349267 (2013), plaintiffs filed a wage-and-hour class action lawsuit against Telecom Network Services ("TNS") alleging, among other things, violation of meal and rest break requirements and failure to pay overtime. The proposed class consisted of approximately 750 cell-phone tower technicians, most of whom were hired and paid by staffing companies that contracted with TNS, and the remainder of whom were hired and paid by TNS directly. The plaintiffs argued that the pace of work, as well as other work pressures, prevented them from taking lawful meal-and-rest breaks and that TNS lacked a uniform California-compliant meal-and-rest break policy. The trial court denied certification, concluding that, even if TNS was the employer of every class member, plaintiffs could not establish liability through common proof because the technicians worked under a variety of working conditions, and the staffing companies that hired and paid the TNS technicians all adopted different meal, rest break, and overtime policies.

The Court of Appeal reversed the trial court's order and remanded for the court to reconsider the class certification motion. The court agreed with *Bradley* and *Fauklinbury's* conclusion that, under *Brinker*, "the fact that individual inquiry might be necessary to determine whether individual employees were able to take breaks despite the defendant's allegedly unlawful policy, is not a proper basis for denying certification." The court held that, for the purposes of class certification, the proper inquiry is whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment. After reviewing the holdings in *Brinker, Bradley,* and

Faulkinbury, the court held that plaintiffs' theory that TNS violated the law by failing to adopt uniform California-compliant meal-and-rest period policies was susceptible to class treatment.

Court Addresses On-Call and Sleep Time Issues. In *Mendiola v. CPS Security Solutions, Inc.*, 217 Cal. App. 4th 851 (2013), security guards for building construction sites brought a class action against their employer, CPS Security Solutions, seeking unpaid overtime wages for on-call time. CPS contracts with construction companies in California to provide security services from 3:00 p.m. to 7:00 a.m., Monday through Friday, and for 24 hours on Saturday and Sunday. Prior to being hired by CPS, each guard was required to sign an "On-Call Agreement," which designated eight hours per day, usually from 9:00 p.m. to 5:00 a.m., as "On-Call" hours. Pursuant to the Agreement, the security guards were expected to be present in their trailer or elsewhere on the jobsite during all on-call hours. If a guard wished to leave the jobsite during on-call hours, he or she was required to notify a dispatcher and provide information as to where he or she would be and for how long and then wait for a relief guard to arrive. Once relieved, the guard was required to stay within a 30-minute radius of the jobsite, carry a pager, and respond immediately if called during that time. While in their trailers, the security guards were forbidden from having children, pets, or alcohol present, and prior approval from CPS was required before any adult visitors were allowed.

In calculating hours worked, CPS did not include on-call time unless it was spent actively conducting an investigation. The security guards sought damages for failure to pay minimum wage and overtime compensation. The trial court granted the class's motion for summary adjudication, finding that CPS's on-call policy violated Wage Order No. 4 and Labor Code section 1194, because CPS's level of control over the guards during the on-call period was sufficient to bring the time within the applicable state law definition of "hours worked." Pursuant to Wage Order No. 4, the term "hours worked" is defined as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." The court found that the facts that the guards were required to live in the trailer during on-call periods, their geographical movements were severely restricted, and they could engage in only limited personal activities all lent support to its conclusion.

While the Court of Appeal upheld the trial court's finding that the trailer guards' eight hours of on-call time during the week must be compensated, they reversed the trial court's decision regarding the guards' 24-hour weekend shifts. The appellate court held that an employer who engages an employee to work a 24-hour shift and compensates him or her for 16 of those hours may exclude the remaining eight hours for sleep time, as long as the time is "uninterrupted, a comfortable place is provided, and the parties enter into an agreement covering the period."

Waiver of an Employee's Right to Vacation Pay Must Be Clearly and Unmistakably Stated. In *Choate v. Celite Corp.*, 215 Cal. App. 4th 1460 (2013), the Court of Appeal held that a collective bargaining agreement ("CBA") abrogates an employee's statutory right under Labor Code section 227.3 to immediate payment for vested vacation time only if the CBA clearly and unmistakably waives that right. In *Choate*, union employees alleged that Celite failed to pay them all earned vacation time promptly on termination. Under the CBA, employees terminated from Celite were entitled to receive "whatever vacation allotment is due them upon separation." Pursuant to that provision, Celite paid terminated employees for the vacation time already allotted to them for the year of their termination, but did not pay them the vacation time they had accrued toward the next year's allotment. Plaintiffs filed a class action seeking the pro-rata portion of the next year's vacation allotment and waiting-time penalties after they were laid off.

Labor Code section 227.3 allows a union to waive its members' rights to "vested vacation time" by entering into a CBA that "otherwise provide[s]" for such waiver. Celite argued that the CBA contained an "implied waiver" of the employees' right to a pro-rata share of vacation time, because the employees were entitled to receive only "whatever vacation allotment is due them upon separation." Celite also argued that the union had never objected to this practice for over 25 years and therefore a waiver could be reasonably inferred.

The trial court held, and the Court of Appeal agreed, that a waiver under section 227.3 must be clear and unmistakable, meaning that it must be "specific, and mention either the statutory protection being waived, or at a minimum, the statute itself." However, with

regards to the waiting-time penalties, the Court of Appeal held that summary adjudication should be entered in favor of Celite because it had a good-faith position since this was the first case to define the section 227.3 standard for the CBA exclusion.

Pay Based on Number of Hours Billed Is Not Salary for Overtime Exemption Purposes. Among other things, California law provides that, absent an exemption, an employee must be paid time and a half for work in excess of 40 hours per week. To be exempt from that requirement, an employee must perform specified duties in a particular manner and generally must be paid "a monthly salary equivalent to no less than two times the state minimum wage for full-time employment." In *Negri v. Koning & Assocs*., 216 Cal. App. 4th 392 (2013), the defendant employer paid the plaintiff $29.00 per hour for each hour he billed his clients and never paid him for less than 40 hours in a week. However, when he worked more than 40 hours in a week, the plaintiff still received only $29.00 for each such hour. Plaintiff, who on average worked 20 hours of overtime per week, sued for overtime pay. Defendant denied that plaintiff was owed any overtime on the theory that plaintiff was exempt since he received well more than two times the minimum wage for each hour worked.

The appellate court rejected the defendant's argument, finding that, even though in practice the employee received more than two times the minimum wage for each hour worked, he was not paid a "salary" as defined under law. The court, relying on federal law, stated that, in order to meet the "salary basis test" for exemption, the employee would have to be paid "a predetermined amount that is not subject to reduction based upon the number of hours worked." The defendant stipulated to the fact that, it never paid plaintiff a guaranteed salary. The court found that, because the plaintiff was not paid a predetermined amount, he was not paid a "salary," and therefore the employer could not prove that the exemption applied.

Primary Purpose of the Task Is Key in Determining Whether Managers Who Simultaneously Perform Exempt and Nonexempt Work Are Entitled to Overtime Pay. In *Heyen v. Safeway Inc.*, 216 Cal. App. 4th 795 (2013), an assistant manager brought an action to recover unpaid overtime pay, contending that Safeway should have classified her as a "nonexempt" employee because she regularly spent more than 50% of her work hours doing "nonexempt" tasks such as bagging groceries and stocking shelves. The trial court agreed and awarded plaintiff overtime pay.

On appeal, Safeway argued that the trial court should have classified as "exempt" all hours during which the plaintiff simultaneously managed the store's operations. The Court of Appeal disagreed and affirmed the trial court's judgment, holding that the trier of fact must determine the objective "primary purpose" of the employee's actions in assessing whether such work is exempt or nonexempt. The court stated that, if the employee's actions were taken to "supervis[e] the employees or contribute to the smooth functioning of the department, they were 'exempt work'; if they were taken for some other reason, they were 'nonexempt work.'"

Employers Begin to Phase Out Unpaid Internships. In October 2013, publisher Condé Nast announced that it would be ending its internship program. This decision by the magazine company that publishes *The New Yorker*, *Vanity Fair*, *W Magazine*, and *Vogue* came five months after two former interns sued the company over its practice of not paying interns. In addition to Condé Nast, media companies such as Hearst Corp. and Fox Searchlight Pictures have recently faced lawsuits brought by interns alleging violations of state and federal wage-and-hour laws.

The U.S. DOL earlier attempted to clarify the standard for determining whether an unpaid internship is lawful, or whether the intern should be classified as an employee who should receive at least minimum wage, by establishing a 6-factor test. In 2010, the California Division of Labor Standards Enforcement ("DLSE") also adopted the DOL 6-factor test. The 6 factors attempt to ensure that an internship is essentially for the benefit of the intern and state that the training received must be: (1) "similar to that which would be given in a vocational school"; (2) primarily "for the benefit of the trainees or students"; (3) "trainees or students do not displace regular employees, but work under close observation"; (4) the employer "derives no immediate advantage" from the activities of trainees or students; (5) "trainees or students are not necessarily entitled to a job at the conclusion of the training period"; and (6) all participants "understand that the trainees or students are not entitled to wages for the time spent in training."

In the case against Fox Searchlight, the U.S. District Judge ruled that Fox violated federal and New York minimum wage laws by not paying its interns who worked on the film "Black Swan." The interns alleged that they performed menial tasks, such as retrieving lunch, that should have been performed by paid employees. The judge relied on the DOL's 6-factor test and ruled that, considering the totality of the circumstances, the interns should have been classified as "employees" under New York labor law and the FLSA.

On appeal, Fox has urged the Second Circuit to define the proper standards for determining who is an intern and who is an employee under the FLSA, but the Second Circuit has not yet issued its decision. In light of these recent lawsuits, and the lack of clarity about application of the 6-part test by courts, other employers might soon follow Condé Nast's decision to end unpaid internship programs.

Private Law Firms Can Hire Students as Unpaid Interns on Nonprofit Matters. In September 2013 the DOL issued an opinion letter stating that law students can work as unpaid interns on nonprofit matters at private law firms if the internships provide an educational benefit. Generally, the FLSA does not permit individuals to volunteer their services to for-profit businesses. However, the FLSA does permit individuals to participate in unpaid internships conducted by for-profit entities if certain criteria are met (as discussed above).

The DOL essentially restated its 6-factor test discussed above. However, the DOL stated that "a law student would be considered an employee subject to the FLSA where he or she works on fee generating matters, performs routine non-substantive work that could be performed by a paralegal, receives minimum supervision and guidance from the firm's licensed attorneys, or displaces regular employees." The opinion letter also stated that, unlike current law students, law school graduates cannot volunteer for private law firms without pay.

IV. Class Action/Arbitration

A. Federal

U.S. Supreme Court Defers to Arbitrator's Ruling on Intent to Arbitrate Class Claims. In *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), a pediatrician filed a proposed class action against a health plan for alleged breach of contract. The plaintiff earlier had signed an agreement requiring arbitration of any contractual disputes. The health plan moved to compel arbitration, and the parties agreed to allow an arbitrator to determine whether the contract authorized class-wide arbitration. The arbitrator decided that the arbitration agreement expressed the parties' intent to arbitrate class disputes because the "intent of the clause was to vest in the arbitration process everything that is prohibited from the court process." As a result, the health plan sought to vacate the arbitrator's decision on the grounds that the arbitrator exceeded his powers under the Federal Arbitration Act ("FAA").

The Supreme Court rejected the health plan's claim and deferred to the arbitrator's decision that the agreement authorized class-wide arbitration. The Court reasoned that the FAA permits courts to vacate an arbitrator's decision only where the arbitrator abandoned his duty of interpreting the parties' contract, and not merely when the arbitrator misinterprets the contract. The Court found that the arbitrator in this case did construe the contract by focusing on its language to reach the conclusion that the agreement authorized class arbitration.

U.S. Supreme Court Rules That "Arbitration Is Not Worth the Expense" Is Not a Valid Defense to a Class Action Waiver. In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the Supreme Court held that a class action waiver is not invalidated merely because the individual cost of arbitrating a claim would exceed the potential recovery. In this case, merchants brought a class action against American Express for alleged Sherman Act antitrust violations. The merchants' arbitration agreement with American Express prohibited class-wide arbitration. The merchants tried to invalidate the class action waiver on the ground that the costs they would incur to hire experts necessary to prove Sherman Act violations would be more than each merchant would potentially receive in an arbitration award. The Court held that the FAA does not permit courts to invalidate arbitration agreements on this basis, and in any case Congress evidenced no intention in the Sherman Act to preclude class arbitration.

Notably, however, the Court created an exception based on the distinction between an arbitration agreement that eliminates a plaintiff's right to *prove* their claim and an arbitration agreement that eliminated a plaintiff's right to *pursue* their claim. While the Court found the former applied in this case, it recognized that an arbitration agreement that makes access to arbitration impracticable, such as requiring substantial upfront filing and administrative fees, eliminates a person's ability to vindicate their statutory rights.

Unconscionability Remains a Viable Defense to Employee Arbitration Agreements. In *Chavarria v. Ralphs Grocery Co.*, No. 11-56673, 2013 WL 5779332 (9th Cir. October 28, 2013), the Ninth Circuit upheld denial of a grocery company's motion to compel arbitration under California's unconscionability rules. In this case, a prospective employee submitted an employment application to a Ralphs grocery store that bound her to the company's arbitration policy, even without requiring her signature. The grocery store provided the employee with the actual terms of the arbitration agreement three weeks later.

The Court reaffirmed the California rule that contracts can be invalidated only where procedural and substantive unconscionability are both present. In evaluating procedural unconscionability, the Court took issue with the fact that the policy was made a condition of applying for employment since it bound employees upon submission of the application and denied prospective employees the chance to negotiate its terms. The fact that the terms of the arbitration agreement were not provided to the employee until three weeks after agreeing to be bound by it by submitting the employment application enhanced the finding of procedural unconscionability.

The Court's assessment of substantive unconscionability involved the agreement's arbitrator selection and fee provisions. The arbitrator selection clause prohibited the parties from using neutral arbitrators from either the American Arbitration Association ("AAA") or the Judicial Arbitration and Mediation Services ("JAMS"). If the parties could not agree on an arbitrator, the policy outlined a procedure that, in practice, resulted in an arbitrator nominated by the grocery company.

In addition, the agreement's cost provision required each party to pay half of the arbitrator's fees at the outset of the arbitration before the merits of the case were addressed. The grocery company represented that the employee's portion of arbitration costs could range from $3,500.00 to $7,000.00 *per day*. The Court held that heavy cost provision fit the exception in *American Express Co. v. Italian Colors*, whereby an arbitration agreement may be invalidated if it denies a party's right to pursue a claim because requiring an employee to incur a substantial amount in upfront fees makes it impracticable to vindicate his or her rights. To the Court, the procedural and substantive unconscionability were sufficient to "shock the conscience," and the grocery company's motion to compel arbitration was denied.

Lastly, the court rejected the defendant's argument that the FAA preempts the application of California unconscionability rules to arbitration agreements. Rather, the Court found that unconscionability is a contract doctrine applicable to the formation of all contracts, not just those specific to arbitration.

Ninth Circuit Clarifies Removal Rules Under CAFA. Federal removal provisions in 28 U.S.C. sections 1446(b)(1) and (b)(3) specify that a defendant must remove a case within 30 days of receiving either an initial pleading or other document if the pleading or document shows that the case is removable. In *Roth v. CHA Hollywood Med.* Ctr., 2013 US App. LEXIS 13224, 2013 WL 3214941 (9th Cir. 2013), the Ninth Circuit held that a defendant may remove a case to federal court under the Class Action Fairness Act ("CAFA") outside of the 30-day windows set forth in the federal removal statutes if the defendant later discovers, based on its own investigation, that the case is removable.

The plaintiffs in this case filed a state-law class action lawsuit in a California state court. Later, the plaintiffs amended the complaint to include Cha Hollywood Medical Center ("Cha") as an added defendant. Cha sought to remove the case to federal court pursuant to CAFA diversity jurisdiction when it discovered, based on a later investigation, that one of the class members was domiciled in Nevada. CAFA has broad jurisdictional requirements that permit removal to federal court when at least one class member resides in a different state (is "diverse") than at least one defendant and more than $5 million in total is in controversy. The plaintiffs filed a motion to

remand the case back to state court on the grounds that Cha failed to file its notice of removal within the 30-day period required by the federal removal statutes.

In denying the plaintiffs' motion to remand, the Court held that the federal removal provisions merely operate as limitations on the right to remove, and not as authorizations to remove. Thus, the 30-day period is not the only period during which the defendant may remove a case to federal court. The Court concluded that the defendant may remove, outside of the 30-day period, when it discovers, based on its own investigation, that the case is removable. Since Cha's investigation revealed that the case was removable, the Court permitted Cha to remove the class action to federal court.

B. California

California Supreme Court Limits Concepcion's Protection of Arbitration Agreements. In *Sonic-Calabasas A., Inc. v. Moreno (Sonic II)*, 57 Cal. 4th 1109 (2013), the California Supreme Court ("CSC") for the first time analyzed the enforceability of an employment arbitration agreement after the U.S. Supreme Court's pivotal ruling in *AT&T Mobility v. Concepcion*. The CSC held that a blanket rule prohibiting an employer from requiring employees to waive their right to a "Berman hearing" before the State's Division of Labor Standards Enforcement ("DLSE") in an employment arbitration agreement violates the FAA.

In *Concepcion*, the U.S. Supreme Court held that state unconscionability rules aimed at destroying arbitration undermine the FAA's purpose of ensuring the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. In *Sonic II*, the CSC adopted a narrow reading of *Concepcion* in finding that "state-law rules that do not 'interfere[] with fundamental attributes of arbitration' . . . do not implicate *Concepcion's* limits on state unconscionability rules." The CSC determined that Berman hearings substantially delay arbitration, and, thus, the unwaivability of such a hearing, even if fair, interferes with the fundamental attributes of arbitration. Thus, the FAA preempts blanket state rules that prohibit Berman hearing (and presumably other state agency hearing) waivers in arbitration agreements.

The CSC additionally analyzed whether *Concepcion* affects a court's ability to invalidate employment arbitration agreements on the ground of unconscionability. The CSC clarified that unconscionability is still a valid defense to arbitration agreements in the employment context. In doing so, however, the CSC created confusion as to the proper standard to apply in determining whether an agreement is substantively unconscionable. The CSC described the standard as whether the agreement is "unreasonably one-sided," whereas other courts previously have employed a more limited "shock the conscience" standard. The CSC did not decide "whether these different formulations actually constitute different standards in practice and whether one is more objective than the other," creating more uncertainty for employers seeking to enforce arbitration agreements. The CSC at least stated that unconscionability requires a substantial degree of unfairness that is more than a bad bargain.

California Court of Appeal Carves Out an Exception to Concepcion for PAGA Claims. In *Brown v. Superior Court*, 216 Cal. App. 4th 1302 (2013), the Court of Appeal held that class action waivers do not apply to claims brought under the Labor Code's Private Attorneys General Act of 2004 ("PAGA"). Under PAGA, an employee has the right to pursue civil penalties for Labor Code violations for current and former employees. In addition, these claims are brought by employees to supplement the resources of the state's labor law enforcement agencies.

According to the Court, this arrangement renders employees who bring PAGA claims "proxies" of the state. The Court relied on PAGA's purpose to find that PAGA claims are "necessarily a representative action intended to advance a predominately public purpose." On this basis, the Court determined that class action waivers are not enforceable as to PAGA claims because "the representative aspect is intrinsic to the claim."

The Court noted that the employee maintains his right to pursue or recover other remedies available under state or federal law, either separately or concurrently. This same issue, whether PAGA claims can be an exception to the *Concepcion* requirements enforcing arbitration agreements according to their terms, is currently pending before the California Supreme Court in *Iskanian v. CLS Transportation of Los Angeles* (S204032).

California Court Holds That Wal-Mart v. Dukes Does Not Apply to California Wage-and-Hour Class Actions. In *Williams v. Superior Court of Los Angeles*, B244043 (December 6, 2013), a group of vehicle field adjusters brought a class action against their employer alleging wage-and-hour violations based on the employer's failure to pay overtime. The trial court had decertified the class based on the U.S. Supreme Court's ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In *Dukes*, the Supreme Court held in a gender discrimination action under Title VII that class members had to prove that each manager intended to discriminate. The employer in *Williams* argued that, in light of *Dukes*, the class must be decertified because there was no commonalty among the class and because statistical evidence, or "trial by formula," is an improper method of proof in class actions. The lower court agreed and decertified the class.

However, the California Court of Appeal held that *Dukes* has little application to California wage-and-hour claims. The lower court had relied on *Dukes* to decertify the class based on the unavailability of money damages under the federal class action statute. The Court of Appeal found this reliance misplaced since the plaintiffs were pursuing their class action under California law. Further, the Court of Appeal distinguished *Dukes* on the ground that Title VII claims require subjective evidence of discriminatory intent, while California wage-and-hour claims require objective evidence of unpaid wages regardless of intent. Lastly, the Court of Appeal held that the "trial by formula" method of calculating damages can be appropriate and is not a proper basis to decertify a class.

V. NATIONAL LABOR RELATIONS BOARD ("NLRB") DEVELOPMENTS

NLRB Clarifies Confidentiality Rules and Further Expands Into Nonunion Workplaces. In 2013, the NLRB continued to interject its policies into nonunion workplaces by issuing an advice memorandum and a decision regarding the limitations imposed on employers with respect to confidentiality agreements. For example, the NLRB previously held in *Banner Health Systems* that an employer's practice of asking employees not to discuss ongoing workplace investigations with their coworkers violated the employees' Section 7 rights under the National Labor Relations Act ("NLRA").

In early 2013, the NLRB issued an advice memorandum that clarified the *Banner Health* holding and issued advice on acceptable confidentiality rules and language. To the NLRB, a confidentiality agreement that includes a blanket rule barring employees from discussing any matter related to an investigation is impermissibly overbroad. In assessing an employer's confidentiality policy, the NLRB determined that the following emphasized provision constituted an impermissible blanket rule:

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

Instead, the NLRB advised that employers should determine the necessity for confidentiality on a case-by-case basis. As an example of a lawful policy, the NLRB provided sample language modifying the above provision so that it was consistent with *Banner Health*:

> Verso may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If Verso reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

Moreover, in *American Red Cross Blood Services*, No. 08-CA-090132 (2013), the NLRB held that the American Red Cross's confidentiality policy barring employees from disclosing confidential information was overbroad. Specifically, the Administrative Law Judge ("ALJ") found that the policy's stated prohibition of disclosure of any information in personnel records, any information about litigation, and financial information would interfere with employee rights under Section 7 of the NLRA to discuss NLRB and Equal Employment Opportunity Commission ("EEOC") litigation or arbitration.

These NLRB developments suggest that employers, including nonunion employers, should review their confidentiality policies to ensure that they comply with the NLRB's requirement that the policies not be overbroad. The NLRB's advice memorandum further suggests that an employer's confidentiality agreement may not violate employees' Section 7 rights if it implements that advice memorandum's suggested language for such a policy.

Employee Lawfully Discharged for Facebook Griping. The NLRB's Office of General Counsel released an advice memorandum in 2013 addressing whether an employer violated NLRA Section 8(a)(1) when it terminated an employee for comments she made in a private group message on Facebook.

The employee, together with nine other current and former employees of the employer, engaged in a Facebook group message to organize a social event. At some point during the group's e-conversation, the employee expressed her disdain toward a supervisor who had tried to speak to her. She said that she told this supervisor to "back the freak off." The employee went on to say that the employer was "full of shit" and that the employer should just "FIRE ME" and "make my day." No other current employees participated in that part of the on-line discussion. A current employee who was part of this group message informed the employer about the comments, and the employer discharged the griping employee.

Under these circumstances, the NLRB's Office of General Counsel advised that the employer did not violate Section 8(a)(1) of the Act by discharging the griping employee because her comments did not constitute "protected concerted activity." The NLRB's test for concerted activity is whether the activity is engaged in with or on the authority of other employees, and not solely by and on behalf of the employee herself. This advice memorandum noted examples of concerted activity, which include circumstances where "employees seek to initiate or to induce or to prepare for group action" and where individual employees bring "truly group complaints" to management's attention. In contrast, the subject employee's comments in her group message constituted "mere griping" rather than shared concern about working conditions and did not indicate that she anticipated any group action. On this basis, the NLRB advised that the employer was within its right to terminate her employment.

Fourth Circuit and D.C. Circuit Strike Down NLRB's Employee Rights Notice Rule. In 2011 the NLRB released its final rule imposing a new mandatory posting requirement on most private sector employers (union and nonunion alike). The NLRB required that this notice, informing employees of their rights under the NLRA, be posted by employers as of November 2011.

Immediately after this rule's promulgation, opponents challenged the NLRB's authority to issue it. A District Judge for the District of Columbia in *Nat'l Ass'n of Mfrs. v. NLRB* was the first to decide the issue and, after review, upheld the NLRB's authority. On appeal, however, the D.C. Circuit struck down the notice requirement under Section 8(c) of the NLRA, which protects an employer's right of expression on workplace issues. *National Association of Manufacturers, et al. v. NLRB*, Case No. 12-5068 (DC Cir. May 7, 2013).

The Fourth Circuit in *Chamber of Commerce of the U.S. v. NLRB*, No. 12-1757 (4th Cir. Jun. 14, 2013), was faced with the same challenge. That court also struck down the notice requirement in light of the NLRA's mandate limiting the NLRB's authority to "[carrying] out its statutorily defined reactive roles in addressing unfair labor practice charges and conducting representation elections upon request." That court found that imposing the notice requirement on employers who have not committed a violation of the NLRA is proactive and not reactive. Thus, the NLRB decision to mandate notice requirements was outside its authority.

NLRB ALJ Upholds Class Action Waiver in Light of American Express v. Italian Colors Decision. In *Chesapeake Energy Corporation*, Case No. 14-CA-100530, an NLRB ALJ for the first time held that the NLRB's position prohibiting class action waivers in employee arbitration agreements cannot be sustained after the Supreme Court's ruling in *American Express v. Italian Colors*, 133 S. Ct. 2304 (2013). In *Chesapeake*, an employer required employees to submit all disputes to arbitration and waive their right to bring a class action. The NLRB's General Counsel filed an unfair labor practice ("ULP") complaint against Chesapeake on the basis that the class action waiver violated the employees' right under the NLRA to pursue collective action.

The NLRB previously determined that class action waivers are prohibited because they chill employees' rights to engage in concerted protected activity. However, numerous federal court decisions have concluded otherwise. In the *American Express* decision, discussed above, the U.S. Supreme Court held that, in the context of antitrust violations under the Sherman Act, class action waivers in arbitration agreements could be enforced because the Sherman Act does not mention class actions and was enacted prior to the federal class action procedure rules. The ALJ noted that the NLRA also does not mention class actions, and the NLRA also existed before the federal rule on class action procedures. Accordingly, the ALJ held that class action waivers in arbitration agreements do not violate the NLRA.

NLRB Approves Union Practice of Paying Workers to Protest. The NLRB's Office of the General Counsel released an advice memorandum on November 15, 2013. It principally concerned whether a union violated the NLRA by offering a $50 gift card to employees who engaged in a protest against Walmart, a nonunion retailer. In 2012, the union planned a day of nationwide picketing of Walmart stores on Black Friday, the busy shopping day the day after Thanksgiving. To encourage Walmart employees to participate, the union offered the gift card to the first 700 Walmart employees who walked off the job that day.

The NLRB, in dismissing the charge against the union, found that its offer of a $50 gift card to employees was the equivalent of permissible "strike fund" and did not constitute restraint or coercion of employees in violation of the NLRA.

VI. Other Developments

California Supreme Court Rules That L.A. County Must Provide Nonunion Employees' Contact Information to a Union. In *County of Los Angeles v. Los Angeles County Employee Relations Commission*, 56 Cal.4th 905 (2013), the California Supreme Court held that the Service Employees International Union, Local 721 (SEIU), the exclusive bargaining representative of certain Los Angeles County employees, was entitled to obtain the home address and phone numbers of all employees that it represented. In this case, the SEIU sought the contact information of all such County employees, even those who had declined to join the union, to communicate with them about union activities and events. The Court recognized that employees have a cognizable privacy interest in their home address and telephone numbers under the California Constitution, but ultimately found that the balance of interests strongly favored disclosure of information to their representative union.

To protect the employees' privacy interest, the Court held that privacy safeguards may be developed for employees who object to the disclosure. For example, Los Angeles County could bargain for notice and an opt-out procedure in negotiating memoranda of understanding (the municipal equivalent of a CBA) with employee unions or could include a notice to employees in their employment documentation that their contact information is subject to disclosure.

VII. PENDING DECISIONS

A. California Supreme Court

The California Supreme Court granted review in ***Reyes v. Liberman Broadcasting***, S205907, and ***Franco v. Arakelian Enters., Inc.***, S207760, to decide whether *AT&T Mobility LLC v. Concepcion* impliedly overruled *Gentry v. Superior Court* with respect to class action waivers in the context of nonwaivable labor law rights. *Reyes* involved a class action for alleged wage-and-hour violations. The Court of Appeal reversed the lower court's finding that the employer waived its right to compel arbitration by failing to timely invoke the arbitration clause because the arbitration agreement did not authorize class arbitration. While the Court granted review, it deferred further action in the matter pending the Court's decision in *Iskanian v. CLS Transportation of Los Angeles*.

The California Supreme Court granted review in ***Richey v. AutoNation Inc.***, S207536, to determine whether an employer's honest belief that an employee is in violation of the employer's policies or abusing medical leave is a complete defense to the employee's claim that the employer violated the California Family Rights Act. The Court will also decide whether the Court of Appeal's decision to vacate the arbitration award in the employer's favor was consistent with the limited judicial review of arbitration awards.

The California Supreme Court granted review in ***Williams v. Chino Valley Independent Fire District (No. S213100)*** to decide whether a prevailing defendant in an action under the FEHA is required to show that the plaintiff's claim was frivolous, unreasonable, or groundless in order to recover ordinary litigation costs.

The California Supreme Court granted review in ***Gregory v. Cott***, 213 Cal. App. 4th 41 (2013), *review granted*, 154 Cal. Rptr. 3d 651 (2013), to decide whether the doctrine of primary assumption of risk bars tort claims brought by an in-home caregiver against an Alzheimer's patient and her husband for injuries the caregiver received when the patient lunged at her. The majority of the Court of Appeal held that the doctrine applies to bar such a claim where the patient is known to be violent. One Justice on the Court of Appeal dissented, arguing that California law does not extend the doctrine to this context.

The California Supreme Court granted review in ***Ayala v. Antelope Valley Newspapers***, 210 Cal. App. 4th 77 (2012), *review granted*, 151 Cal. Rptr. 3d 570 (2013), to decide whether common issues predominate in a proposed class action alleging that members of the putative class are employees instead of independent contractors. In *Ayala*, the plaintiffs worked as newspaper carriers for Antelope Valley Newspapers (AVN). Plaintiffs alleged that AVN incorrectly classified them as independent contractors in violation of California labor laws. Plaintiffs moved for class certification and argued that the central issue was whether the newspaper carriers were employees or independent contractors and that that issue was amenable to common proof. The trial court found there were numerous variations in how the carriers performed their jobs and denied class certification on all counts. The Court of Appeal reversed in part and held that, because all of the carriers perform the same job under virtually identical contracts, the trial court erred in finding that the independent contractor/employee issue is not amenable to class treatment.

***Patterson v. Domino's Pizza,* 207 Cal. App. 4th 385 (2012)**, *review granted*, 148 Cal. Rptr. 3d 497 (2012) (No. S204543/B235099), has been fully briefed. The California Supreme Court granted review to determine whether a defendant franchisor is entitled to summary judgment on plaintiff's claim that it is vicariously liable for tortious conduct by a supervising employee of a franchisee.

***Salas v. Sierra Chemical,* 198 Cal. App. 4th 29 (2011)**, *review granted*, 133 Cal. Rptr. 3d 392 (2011) (No. S196568/C064627), has been fully briefed. The California Supreme Court granted review to determine whether the after-acquired evidence doctrine will permit an employer to contend that it would have refused to hire the employee had it known that he used a counterfeit Social Security Number at the time of hire.

In ***Duran v. U.S. Bank National Ass'n,* 203 Cal. App. 4th 212 (2012)**, *review granted*, 140 Cal. Rptr 3d 795 (2012) (No. S200923), the Court of Appeal reversed a trial court judgment in favor of a class of bank officers and ordered the class decertified. The Supreme Court granted review and stated that the issues in the case are the "certification of class actions in wage and hour misclassification litigation and the use of representative testimony and statistical evidence at trial of such a class action."

B. Federal Courts

The U.S. Supreme Court granted review in ***Harris v. Quinn***, 656 F.3d 692 (7th Cir. 2011), to determine whether a state may, consistent with the First and Fourteenth Amendments to the U.S. Constitution, compel personal care providers to accept and financially support a private organization as their exclusive representative to petition the state for greater reimbursements from its Medicaid programs. The Court will also decide whether the claims of providers in the House Based Support Services Program were ripe for judicial review.

In ***Lawson v. FMR LLC***, 670 F. 3d 61 (1st Cir. 2012), the Supreme Court will decide whether the Sarbanes-Oxley Act's whistleblower protection under § 1514A is limited to employees of publicly traded companies and excludes employees of a publicly traded company's contractors or subcontractors.

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