HOPKINS & CARLEY
A LAW CORPORATION

2014 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 2014. As always, if you have questions or concerns relating to employment law or human resource management, we invite you to contact us.

San Jose
The Letitia Building
70 South First Street
San Jose, CA 95113

408.286.9800

Daniel F. Pyne III ..... DPyne@hopkinscarley.com

Ernest M. Malaspina ..... EMalaspina@hopkinscarley.com

Richard M. Noack ..... RNoack@hopkinscarley.com

Palo Alto
200 Page Mill Road
Suite 200
Palo Alto, CA 94306

650.804.7600

Karen Reinhold ..... KReinhold@hopkinscarley.com

Erik P. Khoobyarian ..... EKhoobyarian@hopkinscarley.com

Shirley E. Jackson ..... SJackson@hopkinscarley.com

Contents

Seminars

2014 Schedule of Seminars

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 2014.

Month	Topic
January 8, 2014	2014 Annual Update
March 5, 2014	Developing Effective Employee Handbooks
April 8, 2014	The Dirty Dozen: Twelve Common HR Mistakes That Lead to Litigation…And How to Avoid Them
May 7, 2014	Alphabet Soup of Leave Laws
May 22, 2014	A Manager's Guide to Discrimination & Harassment
September 10, 2014	Performance Management, Discipline, & Termination
October 15, 2014	Pay Them Now, or Pay Them Later: A Review of Current Issues and Recent Developments in Wage and Hour Law
November 6, 2014	A Manager's Guide to Discrimination & Harassment

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

Wage & Hour Developments

California courts issued several important decisions during 2013 in cases involving wage and hour issues, and the Legislature has also enacted or amended several statutes affecting the wage and hour obligations of employers.

Negri Decision Rejects Exempt Status When Employee Paid Solely By the Hour

The most common exemptions from overtime laws 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 white collar exemptions—the duties, salary basis and salary level tests.

The salary basis test examines the manner in which an employee is paid. Under California law, an employee satisfies the salary basis test if he or she "regularly receives each pay period a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." Employers must generally pay full salary to an exempt employee for any week in which he or she performs work, without regard to the number of days or hours worked.

In *Negri v. Koning Associates*, the plaintiff worked as an insurance claims adjuster and was paid $29 per hour for his services, with no minimum guaranteed compensation. Negri typically worked 60 or more hours per week, but Koning Associates did not pay him overtime compensation when he worked more than eight hours in a day or more than 40 hours in a week. After working for 19 months without overtime compensation, Negri sued, claiming that he did not qualify as an exempt employee and was entitled to overtime pay.

Although Koning Associates argued that Negri's compensation was functionally equivalent to a salary because the company always provided him with enough work to occupy him for 60 hours per week, the appellate court quickly rejected the argument and held that Negri did not qualify as an exempt employee because he was paid solely on an hourly basis, with no guarantee of any minimum amount. The *Negri* decision reinforces the simple but important proposition that an exempt employee's compensation must include a fixed sum that does not vary based on the employee's hours of work.

What should employers do now?

- **Review the compensation plan of any exempt employee whose pay varies based on the amount of time worked.** Exempt employees must receive a fixed salary in order to satisfy the requirement of "a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the

quality or quantity of the work performed," but the salary need not represent the employee's sole compensation. Employers should review the compensation plan of any exempt employee whose pay varies based on the amount of time worked in order to assure that the employee's compensation also includes a fixed salary that does not vary based on hours worked.

Mendiola Decision Highlights a Key Issue—The Calculation of "Hours Worked"

The continuing stream of lawsuits challenging employers' payroll practices is well-documented. A large portion of wage and hour lawsuits seek to recover overtime compensation that should have been paid to employees who were allegedly misclassified as exempt from overtime pay under applicable law. Wage and hour laws present employee attorneys with a myriad of opportunities to challenge payroll practices, however, and the recent decision in *Mendiola v. CPS Security Solutions, Inc.* highlights another area of vulnerability for many companies—the manner in which they calculate the hours worked by their employees.

In California, the state's Wage Orders define an employee's hours of work 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." Although this basic rule appears benign and non-controversial on its face, disputes regarding whether employees are entitled to be paid for time spent engaged in certain activities are increasingly common, and the *Mendiola* decision demonstrates that employers sometimes do not credit employees for all time that is considered "hours worked" under the law.

The nature of some jobs requires employees to be on call or on standby, ready to respond to business or customer needs whenever they may arise. Some employees carry pagers or cellular telephones, for example, so that their supervisors can contact them and direct them to respond quickly to emergencies. Time spent on call by non-exempt employees represents time worked, and is compensable, if the employee is (a) required to remain on the employer's premises, or (b) required to remain so close to the workplace that the employee cannot effectively use the time for personal purposes. Courts and the Labor Commissioner determine on a case-by-case basis whether the restrictions imposed upon an employee on call are so strong that the employee cannot use the time in question for personal purposes.

In *Mendiola*, the employer required its security guards to be on call overnight, and expected them to remain at the jobsite when on call. The company prohibited the guards from leaving the premises unless they notified management of their whereabouts, waited for another guard to relieve them, and remained within a 30-minute radius of the facility with a phone. The security guards sued, claiming that the time spent on call should be counted as "hours worked" and, therefore, compensable. The appellate court had little trouble agreeing with the guards, holding that the employer must pay them for the time spent on call during the week, but adding that it was not required to pay them for eight hours of sleep time when they were on call for 24 hours on weekend days. According to the court, the guards were "substantially restricted" when on call and could not enjoy the normal freedoms of an off-duty employee.

Calculation of hours worked is a seemingly basic step in the payroll process. Many mistakes result from misunderstanding the rules relating to on call time, however. Whether on call or standby time should be treated as compensable hours worked can be a complex question that must be answered on a case-by-case basis rather than by mechanically applying a set of rigid rules.

What should employers do now?

- **Review the extent to which the activities of employees on call are restricted.** Employers should carefully, and realistically, evaluate whether employees are unable to enjoy the normal freedoms of an off-duty employee while on call. In most cases, employers should confer with counsel in the analysis. To the extent that employees are subject to meaningful restrictions while on call, employers should consider whether to loosen those restrictions (thereby strengthening the argument that on-call time should not be compensable), pay employees for time spent on call, or accept some degree of risk.
- **Pay employees properly if they are called to perform any actual work when on call.** If a non-exempt employee is actually required to report to work when on call during a day he or she was not otherwise regularly scheduled to work, the employer's payment obligation varies depending on the number of hours worked. If the employee works more than half of his or her usually-scheduled day of work, the employer must pay the employee for all hours worked. If the employee works less than half of his or her usually-scheduled day of work, the employee is entitled to be paid half of the wages earned on a usual day, provided that the amount paid shall be equivalent to no less than two hours of pay and no more than four hours of pay. If an employee is required to report to work for the second time in a single day (regardless of whether the employee was regularly scheduled to work on that day or not) and works less than two hours after reporting for the second time in the day, the company must pay the employee for a minimum of two hours of work.

Piece Rate Compensation Plan Creates Traps for Uninformed Employers

Most non-exempt employees are paid by the hour for their work. California's Wage Orders permit non-exempt employees also to be paid on a piece rate basis, however, and a recent decision from the California Court of Appeal highlights some of the potential liability employers may assume if they do not understand or comply with the rules regarding piece rate compensation.

In *Gonzales v. Downtown LA Motors, LP*, the employer paid its mechanics on a piece rate basis for their work in repairing automobiles. As is common in the auto repair industry, Downtown LA Motors credited its mechanics for a flat number of hours of work for performing a particular repair task, regardless of the actual time the mechanic spent performing the repair. When not performing repairs, mechanics engaged in other work, such as attending meetings and cleaning their work stations. Downtown LA Motors guaranteed that the mechanics' average compensation for all hours worked would not fall below the minimum wage, but it did not pay the mechanics separately for the time spent

performing the non-repair tasks not paid on a piece rate basis if their piece rate wages, divided by their total hours of work, matched or exceeded the minimum wage.

The mechanics filed a class action lawsuit, arguing that the compensation system violated the employer's obligation to pay "not less than the applicable minimum wage for all hours worked in the payroll period." Downtown LA Motors argued that it had complied with the law by guaranteeing that the mechanics' average compensation for all hours worked would not fall below the minimum wage. The appellate court held that the compensation plan represented illegal "pay averaging" and that the mechanics were entitled to be paid at least the minimum wage for time spent performing tasks not compensated on a piece rate basis, in addition to the piece rate compensation for repair work.

What should employers do now?

In the wake of the *Gonzales* decision, employers who pay non-exempt employees on a piece rate basis should assure that they comply with the following rules in order to avoid potential liability:

- **Compensate employees separately for time spent performing tasks not paid on piece rate.** If employees perform some work that is paid on a piece rate basis and other tasks that are not paid on a piece rate basis, employers must pay the employees separately for the time spent performing work not paid at piece rates. In order to comply with this obligation, of course, employers must track the hours of work of all non-exempt employees paid on a piece rate basis.
- **Remember the obligation to pay overtime, and calculate it correctly.** Non-exempt employees paid on a piece rate basis are generally entitled to overtime compensation if they work more than eight hours in a day or 40 hours in a week. The overtime premium owed to an employee paid on a piece rate is typically calculated by dividing the employee's total compensation for the week at the regular piece rate by the number of hours worked, then multiplying that result by 0.5 and the number of hours of overtime worked. As an example, if an employee is paid $25 to perform a task, performs the task 60 times during a week and works a total of 50 hours during the week, her regular rate of pay would be $30 per hour, calculated as $25 multiplied by 60 divided by 50. For her ten hours of overtime she would be entitled to a premium of $150, calculated as $30 per hour (her regular rate of pay) multiplied by 10 hours (the amount of overtime worked) multiplied by 0.5 (the overtime premium).
- **Don't forget about meal periods and rest breaks.** Employers should also recall that non-exempt employees paid on a piece rate basis are entitled to meal periods (which are unpaid) and rest breaks (which represent paid time under the law). The *Gonzales* court specifically declined to address the question of whether employers are obligated to pay hourly wages during rest breaks to non-exempt employees generally paid on a piece rate basis, so employers who pay non-exempt employees on a piece rate basis should confer with counsel to help determine how they will treat employees during their rest breaks.

Suits for Violation of Meal Period and Rest Break Rules Continue in the Wake of the *Brinker* Decision

Last year, we reported on the California Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court*. The *Brinker* decision both clarified rules regarding meal periods and rest breaks and offered guidance on when claims for violation of the rules are suitable for resolution in class action suits. The *Brinker* decision represented a significant victory for California employers in many respects, but some employers have drawn false comfort from it, believing that *Brinker* would mark the end of the decade-long barrage of claims that have plagued them.

Judicial decisions issued in 2013, following *Brinker*, demonstrate that the threat of claims, while perhaps diminished to some extent, remains real. In *Bradley v. Networkers International*, for example, the appellate court reversed a trial court decision denying class certification in a suit for alleged violation of numerous wage and hour laws. Numerous other decisions have also permitted class action suits for violation of meal period and rest break rules to proceed. The law remains unsettled when it comes to class actions. For example, in *In re Lamps Plus Overtime Cases*, the court of appeals affirmed denial of class certification on meal period and rest break issues. Relying on *Brinker*, the court found significant that the employer had a compliant meal and rest break policy and found particularly persuasive that employees were required to sign agreeing to comply with the policy and report any missed breaks. The *Lamps Plus* Court rejected the notion that class certification was appropriate on the meal period and rest break issues.

Similarly, in *Hernandez v. Chipotle Mexican Grill, Inc.*, the court rejected class certification of a meal period and rest break case concluding that individual issues predominated. Again, the court relied heavily on the employer's written policies and established reporting and disciplinary practices to reject the notion that common issues predominated and made the case appropriate for class certification.

What should employers do now?

The *Brinker* decision represents a victory for employers in many ways and should reduce—but not eliminate—claims alleging violation of meal period and rest break rules. In order to take advantage of the holding in *Brinker* and minimize their exposure to potential liability, employers should take the following steps, if they did not already do so in 2013:

- **Adopt or update written policies.** Employers that have not adopted written policies concerning meal periods and rest breaks should adopt policies consistent with the *Brinker* holding. Organizations which have policies in place already should review and revise them as necessary. *Many existing policies do not provide employees with rest periods as frequently as the Brinker decision now mandates and should be revised at this time.*
- **Written acknowledgment.** In order to confirm that employees are aware of the availability of meal periods and rest breaks, employers should require non-exempt employees to acknowledge in writing (either through an Employee Handbook acknowledgement form or separately) that meal periods and rest breaks are available to them

on terms consistent with the *Brinker* decision. Acknowledgments should contain language addressing the key elements of the meal period and rest break rules (*i.e.*, the duration and frequency of the meal periods and rest breaks, being relieved of all duty, etc.).

- **Record meal times.** Notwithstanding the *Brinker* decision, employers should require non-exempt employees to record the times at which they begin and end their meal periods each day. These records will provide useful evidence of the organization's compliance with the law and are also arguably necessary to comply with the obligation to maintain accurate records of employees' hours of work.
- **Inquire when you become aware of employees who don't take meal periods or rest breaks.** Since employees who routinely forego meal periods or rest breaks may argue that they were not permitted to take such breaks, employers should try to preempt such disputes by inquiring when they become aware of employees skipping meal periods or rest breaks on a recurring basis. Employers should confirm that employees are aware of the company's policy, ask the employee to explain the reason(s) for which he or she did not take a meal period or break and, after conferring with counsel, consider whether documentation of the conversation or some other further action is appropriate.

State and Local Minimum Wages Will Increase in 2014

California's minimum wage will increase in 2014, together with the minimum wages in certain cities that mandate payment of a minimum wage that is higher than the state minimum wage:

- California's minimum wage will increase to $9.00 per hour on July 1, 2014, and to $10.00 per hour on January 1, 2016.
- The City of San Jose's minimum wage will increase to $10.15 on January 1, 2014. The San Jose law applies to employers who are subject to the San Jose Business License tax or maintain a facility in San Jose, and requires payment of the minimum wage to employees working in San Jose.
- The City of San Francisco's minimum wage will increase to $10.74 per hour on January 1, 2014. The San Francisco ordinance applies to all employers in San Francisco with employees who perform at least two hours of work per week.

Although most employers are aware of the increase in the minimum wage, many are not aware of the manner in which the minimum wage affects other employer obligations under wage and hour laws. Among other things, the minimum wage is used to determine whether employees may qualify as exempt under the white collar exemptions and under the inside sales exemption. Employees classified as exempt under the white collar exemptions (executive, professional and administrative) must receive a salary equivalent to at least twice the minimum wage for full-time employment. In 2013, with the minimum wage of $8.00 per hour, employees classified as exempt under the white collar exemptions must receive a salary of at least $33,280 to qualify as exempt. When the minimum wage increases to $9.00 per hour on July 1, 2014, however, the minimum salary payable to exempt employees will similarly

increase to $37,440. Employees classified as exempt under the inside sales exemption must earn at least 150% of the minimum wage for all hours worked, so the minimum income threshold for employees under that exemption will increase to $13.50 per hour as of July 1, 2014.

The increase in the state minimum wage also affects employer obligations under a variety of other laws. When employers require non-exempt employees to furnish their own tools or equipment to perform their job, for example, they must pay the employees at least twice the statewide minimum wage, so such employees will be owed at least $18.00 per hour as of July 1, 2014, and $20.00 per hour as of January 1, 2016. If an employer requires an employee to work a split-shift, which the Wage Orders define as "a work schedule, which is interrupted by non-paid, non-working periods established by the employer, other than bona fide rest or meal periods," the employer must pay the employee a premium equivalent to one hour of pay at the minimum wage, in addition to the employee's regular wages for that shift.

What should employers do now?

- **By the applicable deadline, increase the wage of any employee paid below the new minimum wage rates.** Employers who are paying less than the statewide minimum wage that will become effective on July 1, 2014, or less than the local minimum wages that will become effective on January 1, 2014, should increase the wages of employees as necessary by the applicable deadlines.
- **Assure compliance with all laws affected by the minimum wage.** The minimum wage affects various employer obligations under wage and hour laws, such as the minimum salary payable to exempt employees under the white collar exemptions and the inside sales exemption. Employers should be aware of the legal obligations affected by the minimum wage and assure that they comply with them by the applicable deadlines.
- **Updating workplace postings.** Posting laws require employers to post notices informing employees of applicable minimum wages, so employers should update their postings as necessary by the relevant deadlines.

Employers Prevail in Independent Contractor Classification Disputes, But Risk of Claims Remains High

Companies utilize independent contractors, instead of employees, to perform certain functions for a variety of reasons. Often, companies find it easier to retain an "independent contractor" than to hire an employee for a discrete project. Other times, managers who may be unable to hire an employee due to headcount or budgetary constraints are able to fulfill their staffing needs by classifying the person hired as an independent contractor. Employers must recall that the law does not permit them to classify workers as independent contractors solely because it may be convenient to do so. Instead, the law requires courts and administrative agencies to examine various factors to determine whether the worker in question may be classified as a contractor. Two recent California appellate court decisions, while ultimately favorable for the employer, highlight the continued risk of challenges to contractor status.

In both *Happy Nails & Spa of Fashion Valley v. Julie Su* and *Beaumont-Jacques v. Farmers Group Inc.*, the appellate court concluded that workers at issue qualified as independent contractors because the employer lacked sufficient control over the "manner and means" by which the contractor performed the work in question. In *Happy Nails*, the Employment Development Department assessed the employer for unpaid unemployment insurance contributions, contending that the company should have classified cosmetologists as employees and paid unemployment taxes on their behalf. The appellate court rejected the EDD's contention, emphasizing that the cosmetologists provided many of the materials and all of the equipment they used at their own expense. Similarly, the court cited a contractor's control of her schedule and her payment of marketing, lease and telephone expenses as evidence of bona fide independent contractor status in the *Farmers Group* decision.

While the employer ultimately prevailed in both the *Happy Nails* and *Farmers Group* cases, the decisions demonstrate how disputes about contractor status may arise and how they remain common. In the *Happy Nails* case, the Employment Development Department initiated the controversy by assessing the company for unpaid unemployment insurance contributions. Given the budgetary strain felt by many government entities, suits seeking to enforce employment tax obligations are increasingly common. In the *Farmers Group* case, the individual classified as an independent contractor challenged her classification after having collected all the benefits of the agreement, contending it was a scheme to avoid taxes and obligations under the Labor Code. Although the employer prevailed in each of these cases, determining the proper classification of a worker is as much an art as a science, and we anticipate that claims challenging contractor classifications will remain common.

What should employers do now?

- **Base decisions upon the applicable legal criteria, rather than convenience or industry norms.** When deciding whether to classify an individual as an employee or a contractor, employers are often either ignorant of, or consciously disregarding, the legal criteria that control such classifications.
- **Avoid classifying workers as contractors in high-risk situations.** As mentioned above, the risk of a successful challenge to a contractor classification is particularly high when the worker in question is a former employee of the company now working as a contractor, or if an individual classified as a contractor is performing the same work as others who are classified by the company as employees. Employers should avoid these scenarios, which invite scrutiny from the Internal Revenue Service and Franchise Tax Board.
- **Review existing classifications.** Employers that have not reviewed the validity of their independent contractor classifications in more than a year should do so, and should work with counsel in order to assure that the product of the review (and particularly any finding suggesting that an individual has been misclassified) is protected by the attorney-client privilege.

AB 241 Makes Certain Domestic Employees Eligible for Overtime

As of January 1, 2014, the California Labor Code requires employers of personal attendants to pay overtime compensation whenever the personal attendant works more than nine hours per day or 45 hours per week.

Wage Order 15 defines "personal attendants" as persons "to 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.

Although the new law requires employers to pay overtime compensation to personal attendants, it does not require them to provide meal periods or rest breaks. Under Wage Order 15, personal attendants remain exempt from the rules generally requiring employers to provide non-exempt employees with meal periods and rest breaks.

What should employers do now?

- **Determine whether domestic employees are eligible for overtime under the new law.** Employers of domestic employees should review the actual work performed by those employees to determine if the employees qualify as "personal attendants" and are eligible for overtime under AB 241.

Discrimination, Harassment, and Retaliation Developments

Continued Stream of Cases Finds Potential Liability for Retaliation in the Absence of a Viable Harassment Claim

Lawsuits involving a claim of harassment or discrimination often include a claim that the employer unlawfully retaliated against an employee after complaining of the alleged harassment or discrimination. The continued stream of these types of lawsuits in 2013 reminds employers that even when an employee's harassment or discrimination claim is unfounded, a retaliation claim may survive.

In *Westendorf v. West Coast Contractors of Nevada*, a project manager assistant, Jennifer Westendorf, sued her former employer, West Coast Contractors, under Title VII of the Civil Rights Act of 1964 for sexual harassment and retaliatory discharge. Westendorf alleged that her supervisor and a co-worker made offensive sexual comments to her, including calling her work "girly work," commenting on another woman's breasts, telling Westendorf to clean the workplace while wearing a French maid's costume, and other sexually explicit comments. When Westendorf complained to the company's president, her supervisor began to criticize her work and the president terminated her employment approximately four months later.

The Ninth Circuit held that the offensive conduct was not severe or pervasive enough to create a hostile work environment and therefore found in favor of the employer on the harassment claim. Nonetheless, the court determined that there remained sufficient factual questions as to whether the employee's termination from employment was in retaliation for her complaints and therefore her retaliation claim survived.

A California Court of Appeal issued a similar opinion in *McCoy v. Pacific Maritime Association* (July 31, 2013). A marine clerk, Catherine McCoy, and other maritime workers filed a lawsuit against their employers, Pacific Maritime Association (PMA) and Yusen Terminals, Inc. (Yusen), based on allegations of unlawful discrimination that resulted in a confidential settlement agreement. McCoy later filed a second lawsuit for sexual harassment and retaliation under the Fair Employment and Housing Act (FEHA) against PMA and Yusen. In particular, she alleged that she was deprived of training materials and opportunities provided to her under the settlement agreement; she was harassed and shunned for having brought the initial lawsuit; and her coworkers made sexually explicit comments about other women's bodies on five to nine occasions over a four month period.

The Court of Appeal found that the trial court did not err in summarily adjudicating McCoy's sexual harassment claim in favor of her employers because the harassment was not so severe and pervasive to alter the conditions of her employment. Nonetheless, the Court of Appeal held that the trial court erred in setting aside the jury verdict in the

employers' favor on the retaliation claim because there was substantial evidence from which the jury could conclude she suffered retaliation. McCoy presented evidence that management exposed details of the prior litigation's confidential settlement to McCoy's supervisor and coworkers; those workers upon whom McCoy relied for training subjected her to harassment and ignored her requests for assistance, and McCoy's supervisor failed to intervene despite witnessing the abuse.

What should employers do now?

- **Investigate employee complaints of unlawful conduct properly.** California law requires employers to take reasonable steps to prevent discrimination and harassment. When confronted with a complaint of discrimination, harassment, or other unlawful conduct, employers should generally respond by conducting a prompt, thorough and impartial investigation, preferably under the direction of counsel. Employers who elect not to investigate complaints of unlawful conduct significantly increase their potential liability because the lack of an investigation itself can be cited by the employee as evidence of insensitivity to discrimination and harassment.
- **Prevent managers who have been accused of unlawful conduct from making unilateral decisions affecting the complaining employee.** Employers should proceed with extreme caution when making personnel decisions that adversely affect an employee after a complaint of unlawful conduct. To minimize the risk of retaliation claims, employers should either direct other managers (and/or human resources representatives) to confer with the manager in making any necessary decisions jointly or remove the manager from the decision-making process entirely until the risk of a retaliation claim has subsided to an acceptable level.

New Developments in Leave of Absence Laws Expand the Rights of Employees

Leave of absence requests are one of the most vexing employment issues that employers are required to manage. An employee's leave of absence not only affects the ongoing functioning of the business, it also affects the workload and morale of other employees.

Three recent court cases expanded the rights of employees under federal and state leave of absence laws this past year.

Windsor Decision Impacts Administration of the Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) provides eligible employees up to 12 weeks of unpaid, job-protected leave each year for the employee to care for a spouse (and other recognized family members) with a serious health condition. If the spouse is an eligible military service member with a serious injury or illness, the employee is eligible for 26 weeks of leave.

The FMLA defines "spouse" to mean "a husband or wife." The FMLA regulations issued by the Department of Labor (DOL) more specifically 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, including common law marriage in States where it is recognized." With the enactment of the Defense of Marriage Act (DOMA) in 1996, however, the Federal Legislature narrowed the definition of "spouse" to "a person of the opposite sex who is a husband or wife" for the purposes of any Federal statute. Same-sex married couples therefore were not entitled to FMLA leave to care for their spouses as well as other federal benefits.

In the landmark case of *Windsor v. United States*, the United States Supreme Court held that DOMA's restricted definition of "spouse" is unconstitutional. Now that the court overturned DOMA, same-sex married couples who live in a state that either recognizes same-sex marriages or gives validity to same-sex marriages legal in other states will be recognized as "spouses" for FMLA purposes and entitled to FMLA leave to care for their spouse.

In response to *Windsor*, the DOL issued guidance as to the impact of the decision on benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA). The DOL explained that generally the terms "spouse" and "marriage" "should be read to include same-sex couples legally married in any state or foreign jurisdiction that recognizes such marriages, regardless of where they currently live." The terms apply to marriages only and do not include other formal relationships recognized by state law, such as domestic partnerships or civil unions.

The Internal Revenue Service also issued formal guidance on the treatment of same-sex spouses under the Internal Revenue Code. In Revenue Ruling 2013-17, the IRS confirmed that a same-sex couple will be considered married for federal tax purposes if the couple was married in any foreign or domestic jurisdiction that recognizes same-sex marriage.

What should employers do now?

- **Update leave of absence policies and practices.** Employers should evaluate all the bases on which an employee may be entitled to a leave of absence under the Family and Medical Leave Act.

United Airlines Decision Confirms That the Americans With Disabilities Act May Require Preferential Treatment of Disabled Employees

The Americans with Disabilities Act (ADA) requires employers to make reasonable accommodations for qualified employees with disabilities and lists several examples of possible accommodations, including reassignment to a vacant position.

In *EEOC v. United Airlines*, the United States Supreme Court declined to review a lower court decision holding that reasonable accommodation under the ADA may require employers to provide disabled employees with reassignment to a vacant position when the employee cannot be accommodated in his or her current position. The lower court's decision will therefore stand.

The Equal Employment Opportunity Commission (EEOC) had challenged United Airlines' policy under which employees with disabilities requiring a reassignment receive priority consideration for the vacant position, a guaranteed interview, and selection for the position only if the disabled employee is *equally qualified* as other candidates for the position. The EEOC alleged that the policy violated the ADA by requiring workers with disabilities to compete for vacant positions for which they were qualified and which they needed in order to continue working.

The Seventh Circuit found in favor of the EEOC and held that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to the employer." In so holding, the Seventh Circuit expanded upon the concept that providing *preferential treatment* to an employee with a disability may be a warranted accommodation under the ADA.

What should employers do now?

- **Consider reassigning employees with disabilities to a vacant position when the employee cannot be accommodated in his or her current position.** When engaging in the interactive process, employers should, as a reasonable accommodation, consider reassignment to a vacant position when an employee with a disability cannot be accommodated in his or her current position.
- **Remember that the duty to provide reasonable accommodation exists even after statutory leaves are exhausted.** Even if an employee has exhausted all the statutorily defined leaves, the employer must determine whether the employee qualifies as disabled and is therefore entitled to an additional leave of absence as a reasonable accommodation.

Duties to Employee Disabled by Pregnancy Do Not End With Expiration of Pregnancy Disability Leave

The California Pregnancy Disability Leave Law (PDLL) requires an employer to allow an employee disabled by pregnancy, childbirth, or a related medical condition to take a leave of absence for a reasonable period of time, not to exceed four months. The employer is also required under the PDLL to reinstate the employee to the same or comparable position at the close of the pregnancy leave.

In S*anchez v. Swissport, Inc.*, the California Court of Appeal concluded that an employer's obligation to an employee disabled by pregnancy may extend well beyond providing a four month leave pursuant to the PDLL. There, Ana Sanchez experienced a high-risk pregnancy requiring bed rest until birth. When she was unable to return to work after exhausting her accrued vacation time and four months of leave guaranteed under the PDL, Swissport terminated her employment. Sanchez filed a lawsuit, alleging that Swissport was liable for failing to grant her additional leave under the Fair Employment and Housing Act (FEHA).

The Court of Appeal ruled in favor of Sanchez. While the PDLL provides an entitlement of up to four months of leave for an employee disabled by pregnancy, the court determined that an employee disabled by pregnancy is also

entitled under FEHA to a reasonable accommodation—which may include leave of no statutorily fixed duration—provided that such accommodation does not impose an undue hardship on the employer. In the court's view, Swissport erred by not engaging in an interactive process to determine whether a reasonable accommodation that did not cause undue hardship was available and by not considering whether a leave through birth was such a reasonable accommodation. The court noted that the Fair Employment and Housing Commission's (FEHC) regulations interpreting FEHA specifically provide that an employee's right to take pregnancy disability leave under the PDLL is separate and distinct from that employee's right to take a leave of absence as a form of reasonable accommodation under other provisions of FEHA.

The FEHC regulations cited by the *Sanchez* court were among several new and amended pregnancy regulations enacted by the Department of Fair Employment and Housing (DFEH) that had become effective on December 30, 2012. These regulations address employers' obligations and employees' rights and responsibilities regarding pregnancy under FEHA, including, without limitation: (1) the expanded definition of "disabled by pregnancy" from being unable to perform one or more of the essential functions of her job, to being "unable to perform one or more of the essential functions without undue risk to the employee, the pregnancy's successful completion, or other similar factors"; (2) the addition of a non-exclusive list of medical conditions related to pregnancy that qualify for leave; (3) the protection of employees who are perceived as pregnant, even when they are not; and (4) the requirement that employers must give employees advance written notice of their rights and responsibilities in a variety of ways. These regulations can be found in full at Title 2, California Code of Regulations, Sections 7291.2, *et seq*.

What should employers do now?

- **Evaluate all bases on which a pregnant employee may be entitled to a leave of absence.** When managing leaves of absences, the employer should evaluate all the bases on which an employee may be entitled to a leave of absence, including, statutorily defined leaves such as the PDLL, the California Family Rights Act, and the Family and Medical Leave Act. An employee's right to take pregnancy disability leave under the PDLL is separate and distinct from that employee's right to take a leave of absence as a form of reasonable accommodation under other provisions of FEHA. Employers must engage in an interactive process to determine whether a reasonable accommodation that will not cause undue hardship is available, including considering whether a leave through birth is a reasonable accommodation.

"Supervisor" Defined Narrowly Under Title VII for Purposes of Analyzing Employer Harassment Liability

The extent and type of liability the employer faces for the harassing behavior of an employee is contingent on whether the harasser is a "supervisor" of the employee being harassed. Generally, an employer is vicariously liable for a supervisor's harassment if it involves a tangible employment action, such as a promotion or pay raise, even if the

employer had no knowledge of the harassment. When the harasser is a co-worker, however, the employer may be held liable for the harassment only if the employer failed to take appropriate steps to prevent the harassment. As a result, who qualifies as a supervisor in the harassment context significantly impacts the employer's risk of liability.

Courts have been split on the issue of how much authority one employee must exercise over another to be considered a "supervisor" for purposes of liability under Title VII of the Civil Rights Act of 1964.

The United States Supreme Court resolved this issue with its June 2013 decision in *Vance v. Ball State University*. The Court concluded that an employee qualifies as a supervisor under Title VII only if the individual is empowered by the employer to take tangible employment actions against the victim, *i.e.*, "to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The Supreme Court specifically rejected the EEOC's attempt to define supervisor status based on the individual's "ability to exercise significant direction over another's daily work," labeling the EEOC definition a "study in ambiguity."

This narrow definition of who qualifies as a supervisor will enable the issue to be more readily resolved as a matter of law before trial and, thus, is a victory for employers.

It is important to remember that the opinion in *Vance* is limited to federal law. California's Fair Employment and Housing Act (FEHA) continues to define "supervisor" more broadly as an individual authorized by the employer "to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Cal. Gov't Code § 12926(s). The narrower definition of "supervisor" announced in *Vance* therefore has little practical impact on how employers should approach their obligation to provide a workplace free of harassment.

What should employers do now?

- **Use a broad definition of "supervisor" for training purposes.** In California, employers with fifty or more employees must also provide biennial harassment training to all supervisors. Given FEHA's broader definition of "supervisor," employers would be wise for training purposes to use a definition that is more inclusive than the definition articulated in *Vance*.
- **Adopt and disseminate a clear written policy prohibiting harassment.** Best practice and the law dictate that employers adopt and disseminate a clear written policy prohibiting harassment. The harassment policy must include a robust reporting mechanism and must provide for diligent investigation and a prompt and effective response to any reported complaints.

New Laws Prohibit Retaliation Based on an Employee's Citizenship or Immigration Status

This year the California Legislature enacted several bills intended to expand protections for undocumented workers threatened with exposure for exercising rights relating to their employment. The bills, which add and amend various Labor Code, Business and Professions Code, and Vehicle Code sections, largely target "unfair immigration-related practices," and subject employers to heavy fines, enforcement actions, and exposure to risk of business license suspension and revocation.

The first, and perhaps most expansive, of three important new pieces of legislation is AB 263. AB 263 is broadly intended to prevent discrimination and retaliation against employees that engage in protected conduct relating to the enforcement of certain rights. For example, the new law expands the current protections found in Labor Code section 98.6 to include an employee who complains to his or her employer, orally or in writing, that he or she is owed unpaid wages, and provides enhanced civil penalties (up to $10,000 per employee per violation) against certain corporate employers that engage in retaliation in response to such conduct. AB 263 also amends Labor Code section 1102.5 (prohibiting the adoption and enforcement of any rule precluding an employee from disclosing certain violations to state and federal agencies) to prohibit retaliation and discrimination against an employee who provides information or testifies before any public body conducting an investigation, regardless of whether disclosing information is part of the subject employee's job duties.

Specific to immigration status, AB 263 adds Labor Code sections 1019 and 1019.1 which prohibit employers from engaging in "unfair immigration-related practices" against any employee who exercises a "right protected under this code or by any other local ordinance applicable to employees." The new law defines "unfair immigration-related practices" as any of the following undertaken for retaliatory purposes:

- Requesting more or different work eligibility documents than those required under federal law, or refusing to honor work eligibility documents that appear to be genuine on their face;
- Using the E-verify system to check on an applicant's or employee's authorization to work status at any time other than when required under federal law;
- Threatening to file or the filing of a false police report; or
- Threatening to contact or contacting immigration authorities.

Importantly, the new law indicates that taking any of the above-referenced action within 90 days of the employee exercising his or her protected rights creates a rebuttable presumption that the employer's actions were retaliatory. Additionally, "exercising a right protected by this code" is defined broadly to include at least the following:

- Filing a good faith complaint alleging an employer's violation of the Labor Code or local ordinance;

- Seeking information concerning whether an employer is in compliance with the Labor Code or local ordinance;
- Informing another employee of his or her rights under the Labor Code of local ordinance; and/or
- Assisting another employee assert his or her rights under the Labor Code of local ordinance.

In addition to enhanced monetary fines, the new law authorizes employees subjected to prohibited practices to pursue a civil action to recover damages, including reasonable attorneys' fees and costs, and empowers courts to order appropriate governmental agencies to suspend the business license of employers found in violation.

Much like AB 263, SB 666 was largely intended to prevent retaliation and discrimination based on an applicant's or employee's immigration status. However, in addition to proposing some identical changes to the Labor Code found in AB 263, SB 666 resulted in the addition of Labor Code section 244 prohibiting the reporting or threat of reporting the suspected immigration status of an applicant or employee, *as well as that of their family member*, for having exercised a right under the Labor Code, Government Code, or Civil Code. For purposes of the new law, "family member" is defined as a spouse, parent, sibling, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership. Should an employer engage in such prohibited conduct, its business license is subject to suspension or revocation.

Finally, AB 60 amends the California Vehicle Code to allow the issuance of a driver's license notwithstanding the fact that a person is unable to submit satisfactory proof that the applicant's presence in the United States is authorized under federal law, if the applicant meets all other qualifications for licensure. Though not in effect until January 1, 2015, the new law will result in the issuance of a readily identifiable license including the letters "DP" ("driver's privilege"), as opposed to a license issued with the letters "DL" ("driver's license") on the front. The new licenses will indicate on the back that it is to be used strictly for driving purposes, not employment, and the code makes clear that a "DP" license shall not be used as evidence of the holder's citizenship or immigration status. At the same time, the code also makes clear that the holder of a "DP" license may not be discriminated against for having such a license.

What should employers do now?

- **Review hiring procedures.** Given the heightened exposure resulting from a violation of these new laws, employers should review their hiring protocol to ensure that they are requiring the production of identification documents and using the E-verify system only in strict compliance with federal law.
- **Establish or review protocols for receiving and handling employee complaints regarding mistakes in pay.** Employers are well advised to create and publish procedures to handle complaints from employees concerning pay issues, and to educate its managerial staff concerning the anticipated receipt of those complaints.
- **Educate managers and supervisors concerning prohibited activity.** Employers should notify their managerial staff that they are not permitted to threaten or leverage an employee's immigration status, or suspected immigration status, against an applicant, employee, or employee's family, at any time.

- **Review Form I-9 completion practices.** In anticipation of receiving the new "DP" marked licenses, employers should educate all staff responsible for completing the I-9 process as to the permitted and prohibited uses of a "DP" license, focusing on the associated prohibition against retaliation.

Additional New California Laws Concerning Discrimination, Harassment, and Retaliation Effective in 2014

New employment laws concerning discrimination, harassment, and retaliation will take effect in 2014. Some of the more notable State and local laws in addition to the new laws prohibiting retaliation based on employee's citizenship or immigration status are summarized below.

"Military and Veteran Status" Added to the List of Classes Protected Under FEHA

AB 556 amends the California Fair Employment and Housing Act (FEHA) to add "military and veteran status" to the list of classes protected from employment discrimination. "Military and veteran status" is defined to include "a member or veteran of the U.S. Armed Forces, U.S. Armed Forces Reserve, the U.S. National Guard, and the California National Guard." The new law also allows employers to inquire about the military or veteran status of a job applicant or an employee for the purpose of awarding a veteran's preference as permitted under the law. AB556 takes effect on January 1, 2014.

This amendment is largely symbolic as active members of the military and veterans are already afforded protections under federal law including the Uniformed Services Employment and Reemployment Rights Act (USERRA).

SB 292 Confirms That Sexual Harassment Need Not be Motived by Sexual Desire

SB 292 amends FEHA to expressly provide that unlawful "[s]exually harassing conduct need not be motivated by sexual desire." This new law takes effect on January 1, 2014. This amendment clarifies existing case law providing that sexual intent or desire on the part of the alleged harasser towards an employee is only one of many evidentiary routes to prove a hostile work environment based on sex.

SB 400 Expands Protections to Stalking Victims From Discrimination and Retaliation

SB 400 amends California Labor Code sections 230 and 230.1 to extend protections from discrimination and retaliation to employees who are victims of stalking. Existing law protects victims of domestic violence and sexual assault by prohibiting adverse employment actions against them if they take time off from work to attend to issues arising from the domestic violence or sexual assault. The new law will extend those protections to stalking victims. Employers will also be prohibited from discharging or otherwise discriminating or retaliating against employees because of their known status as a victim of domestic violence, sexual assault, or stalking, and will be required to

provide reasonable accommodations to those victims who request an accommodation for their safety while at work. SB 400 takes effect on January 1, 2014.

Benefits Under the California Paid Family Leave Benefits Program Expanded

SB 770 expands the definition of "family member" under California's Paid Family Leave benefit program to include grandparents, grandchildren, siblings, or parents-in-law. Under existing law, employees are provided up to six weeks of wage replacement benefits from the State Disability Fund when they take time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child. The new law will extend those benefits to employees needing to care for a wider number of family members. SB770 takes effect on July 1, 2014.

San Francisco Family Friendly Workplace Ordinance Enacted

The San Francisco Family Friendly Workplace Ordinance provides eligible employees employed in the City of San Francisco with the right to request predictable and flexible workplace schedules to assist with providing care for a minor child, a person with a serious health condition, or a parent age 65 or over. The ordinance also prohibits employers from discriminating or retaliating against them. Employers who receive such a written request must follow certain procedures outlined in the ordinance, including, for example, meeting with the employee within 21 days of the request and responding to the request in writing within 21 days of the meeting. An employer who denies a request must explain the denial in a written response that, among other things, explains the bona fide business reason justifying the denial. This ordinance applies to employers with 20 or more employees in San Francisco, and takes effect January 1, 2014.

What should employers do now?

- **Update policies and procedures to ensure compliance.** Employers should review and revise their policies and procedures to ensure compliance with the new laws taking effect in 2014.

Arbitration and Class Action Developments

Understandably, most employers would love to avoid the uncertainty of appearing before a judge or jury to defend their employment decisions. Administrative entities like the Labor Commissioner's office or the Department of Fair Employment and Housing are often even more disfavored by employers because of their perceived pro-employee bias and the often bureaucratic nature of the offices. So, it is not surprising that employers have sought to avoid these forums by including pre-dispute arbitration clauses in employment agreements.

More recently, employers have also sought to use such arbitration agreements to require employees to arbitrate claims individually rather than as class actions. Federal law and California law regarding the enforceability of employer-employee arbitration agreements continued to develop over the last year, with the United States Supreme Court continuing to express enthusiastic support for arbitration under the Federal Arbitration Act ("FAA") while the California Supreme Court continued to be more hesitant to enforce pre-dispute agreements to arbitrate.

It remains to be seen whether the United States Supreme Court's view that the FAA preempts state law that impedes its enforcement will slowly force California courts to accept arbitration more broadly. The evolution of federal and California law on this topic remains an important topic for employers who would like to control litigation risk by forcing all employment disputes into binding arbitration.

California Supreme Court Says an Employer May be Able to Force an Employee to Arbitrate a Wage Claim Instead of a Proceeding Before the Labor Commissioner

The Labor Commissioner's office is considered one of the more pro-employee agencies in California and employers often dread appearing there to defend against wage claims because it often seems a foregone conclusion that the agency will find in favor of the employee. Under pressure from the United States Supreme Court, the California Supreme Court moved closer to permitting employers to avoid that forum for wage claims by using an arbitration agreement. This year, the California Supreme Court issued its second opinion in the case of *Sonic-Calabasas A., Inc. v. Moreno (Sonic 2)*, this time concluding that an arbitration provision that forces an employee to arbitrate a claim for unpaid wages is **not categorically** unenforceable under California law, and the agreement **may be** enforceable if it passes muster under the Court's articulated test for whether a contract is unconscionable. The trial court was instructed to review the facts and make a determination on that issue. The *Sonic 2* opinion suggests that notwithstanding pressure from the United States Supreme Court, the California Supreme Court intends to stand by its authority to strike arbitration agreements on the grounds of unconscionability.

Can an Employer Effectively Insulate Itself From Class Action Claims Through an Arbitration Agreement?

The California Supreme Court previously held in the case of *Gentry v. Superior Court* that a class waiver provision in an arbitration agreement should not be enforced if class arbitration, rather than individual arbitration, would be a significantly more effective way of vindicating the rights of affected employees. Whether this ruling is still good law after the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* is an open question and is pending for review with the California Supreme Court in the case of *Iskanian v. CLS Transportation Los Angeles, LLC*. [1]

In keeping with its decision in *AT&T Mobility LLC v. Concepcion*, the United States Supreme Court ruled this year in *American Express v. Italian Colors* that the FAA does not permit a court to invalidate a waiver of federal class action claims contained in an arbitration agreement, even if the class action waiver means that individual federal law claims will not go forward because the cost of pursuing such claims individually in arbitration is cost prohibitive. While the case did not deal with employment claims, the opinion reinforces the United States Supreme Court's view that arbitration is a matter of contract and the agreement by the parties should be enforced.

If the California Supreme Court concludes that *Gentry* is no longer good law and that employers may both require employees to resolve claims through arbitration and also preclude arbitration of class claims, requiring instead that all claims be arbitrated individually by an employee, it will be a significant victory for employers.

While it is impossible to predict the opinion the California Supreme Court will issue in the *Iskanian* case, it seems unlikely that it will be a complete victory for the employer in light of the current California Supreme Court's historical reluctance to enforce arbitration agreements between an employer and employee if it views the agreement as grossly unfair or one-sided. If the Court's opinion in *Sonic 2* is any predictor, employers should expect a carefully crafted opinion that shows appropriate deference to the Federal Arbitration Act preemption defense but continues to carefully define California law on the issue of unconscionability.

What should employers do now?

- **Review and update arbitration agreements as necessary.** Given the current state of the law regarding arbitration agreements, if you are determined to push all disputes with your employees into binding arbitration, review any current or proposed arbitration agreement language to determine whether: (1) it passes the California Supreme Court's articulated test for unconscionability; (2) whether the arbitration agreement clearly includes wage and hour claims that would normally first be filed with the Labor Commissioner's office; and (3) whether there is language that waives the right of employees to bring class claims and instead forces individual arbitration of those claims.

[1] The California Supreme Court's online summary of the case identifies the following issues: (1) Did *AT&T Mobility LLC v. Concepcion* impliedly overrule *Gentry v. Superior Court* with respect to contractual class action waivers in the context of non-waivable labor law rights? (2) Does the high court's decision to permit arbitration agreements to override the statutory right to bring representative claims under the Labor Code Private Attorney General Act of 2004?

Employer Responsibility in 2014 Under the Affordable Care Act

In 2012, the United States Supreme Court upheld the Affordable Care Act, the sweeping health care law enacted by Congress and signed into law by President Obama in 2010. Many of the most important provisions of the law were scheduled to become effective in 2014, but recent developments have delayed implementation of rules, including the much publicized "play or pay" provision. The implementation of the Affordable Care Act is a constantly moving target. In 2014, Hopkins & Carley will continue to provide updates, and employers should keep track of the ongoing developments.

The "Play or Pay" Mandate Is Delayed to 2015

One of the central provisions of the Affordable Care Act requires large employers to provide health care coverage to full-time employees or pay a penalty if they do not do so. The so-called "play or pay" mandate was scheduled to become effective in 2014, but the Department of Treasury announced last fall that it is delaying implementation of the "play or pay" mandate to January 1, 2015.

Employers subject to the "play or pay" mandate include those with 50 or more full-time employees, or the equivalent of 50 full-time employees. The law defines a full-time employee as one working 30 or more hours per week. The number of "full-time equivalent" employees working for an employer is determined by dividing the number of hours worked per month by part-time employees by 120. As such, 60 part-time employees working 25 hours per week will count as 50 full-time equivalent employees and subject an employer to the "pay or play" mandate (60 employees multiplied by 25 hours per week multiplied by four weeks per month and divided by 120 equals 50).

In order to avoid the penalty imposed by law, large employers subject to the Affordable Care Act must offer qualifying group health insurance coverage to at least 95% of their full-time employees and their children. Insurance offered must (a) be affordable, and (b) provide certain minimum coverage to employees. Coverage is deemed affordable if the contribution required of an employee under the lowest-cost option does not exceed 9.5% of (a) the employee's W-2 wages from the employer for the year, (b) the employee's rate of pay, or (c) the federal poverty level. Qualifying coverage must pay for at least 60% of the cost of the medical treatment.

Large employers who do not offer qualifying coverage to their full-time employees will be required to pay a penalty of at least $2,000 for each full-time employee in excess of 30 if any of their full-time employees receive a tax credit because the employer (a) did not offer coverage at all, (b) did not offer coverage at affordable rates, or (c) did not offer coverage meeting the minimum standards established by law.

State Exchanges and the Individual Mandate Are Still Effective in 2014

Although the "play or pay" mandate applicable to certain employers will not become effective until January 1, 2015, the mandate applicable to individuals will become effective on January 1, 2014. As of that date, all individuals must have health insurance coverage or pay a penalty.

In order to facilitate the purchase of coverage by individuals, state insurance exchanges will offer coverage commencing on January 1, 2014, with open enrollment having started on October 1, 2013.

Employer Notice to Employees Is Required

The Affordable Care Act requires employers to have notified employees of their options for coverage under the law by October 1, 2013, including the availability of coverage from the state insurance exchange. The notice may be provided by email or in hard copy form, and the Department of Labor has created a model form that employers can use to satisfy their obligations under the law. The model form, OMB No. 1210-0149, is available on the Department of Labor's website at www.dol.gov. Employers must provide the notice to existing employees within 14 days of their date of hire. The Department of Labor has stated that there will be no fine or other penalty under the law for failing to provide the notice by October 1, 2013, so employers should promptly ensure that this has been done, even if it is late.

New Hire Waiting Period

As of January 1, 2014, employers and group health insurance plans in California must permit newly hired employees to become eligible for coverage within 60 days of commencing employment. Many employers currently impose longer waiting periods on newly hired employees (provisions making employees eligible for coverage on the first day of the month following completion of 60 days of employment are common), so employers are wise to check their benefits policies and make any necessary revisions before 2014.

What should employers do now?

- **Provide required notices to existing employees and all new hires within 14 days of hiring.** Employers should provide existing employees with the required notice concerning their options for coverage under the law. The model form, OMB No. 1210-0149, is available on the Department of Labor's website at www.dol.gov.
- **Review benefits policies to assure compliance with the new hire eligibility rule.** Employers and health insurance plans are required to permit newly hired employees to become eligible for coverage within 60 days of commencing employment as of January 1, 2014. Employers should check their benefits policies and make any necessary revisions.
- **Seek tax advice regarding potential tax benefits resulting from the payment of premiums.** Employers that offer health care coverage to employees should confer with their accountant or tax advisor to assure that they are taking advantage of any tax credits that may be available to them.

As We Watched and Waited With Trepidation: The NLRB's Horrible Year and What Lies Ahead for Employers

The National Labor Relations Board was in turmoil for much of 2013. Lingering questions concerning the legitimacy of the President Obama's recess appointments of three Board members, the Senate's persistent refusal to confirm the President's nominee for General Counsel of the NLRB, who is the chief enforcement strategist for the government agency, and the rejection by federal courts of the Board's decisions in several high profile cases that sought to advance the agenda of organized labor, made for a year of uncertainty and angst.

During 2013, some courageous and tenacious employers actively shouldered the cost and litigation burden of challenging anti-employer positions of the NLRB, while most of the employer community anxiously watched and waited from the periphery to see where the lines would eventually be drawn. But to what end?

As a result of an August 2013 compromise between the President and the Senate, the NLRB has a full complement of members for the first time in years, three Democrats—Chairman Mark G. Pearce, Member Nancy J. Schiffer, and Member Kent Y. Hirozawa—and two Republicans—Member Philip A. Miscimarra and Member Harry I. Johnson, III. The President also appointed (and the Senate confirmed) Richard F. Griffin, Jr. as General Counsel. Prior to being named General Counsel, Mr. Griffin served from January 2012 until August 2013 as one of the NLRB Members who were recess appointees. Mr. Griffin is a former in-house union attorney.

The waiting is now over. The lines will be drawn and not likely in a way that will benefit employers. All private sector employers, including those without unions representing their employees, must be aware of how the NLRB can affect the way they do business.

Noel Canning Corporation v. NLRB—The Recess Appointments Case

By the end of 2011, the NLRB had too few Board Members to lawfully review any cases or conduct any business because the Senate had failed to confirm President Obama's nominees. On January 9, 2012, the President made three "recess" appointments during a period of time Congress was traditionally in recess, although the House of Representatives had maintained a pro forma session in an effort to prevent the President from making such appointments.

In 2012, the NLRB Members who were "recess" appointees determined that Noel Canning had committed an unfair labor practice. In appealing the NLRB's decision to the United States Court of Appeals for the D.C. Circuit, *Noel Canning* argued that the recess appointments were invalid and that the NLRB lacked jurisdiction to rule in its case. On January 25, 2013, the D.C. Circuit agreed with Noel Canning and held that the President had exceeded his

constitutional power when he made the three recess appointments. Since then, dozens of cases have challenged the validity of the recess appointments and for the most part, the cases have agreed with the D.C. Circuit. In an interesting twist, the Eleventh Circuit of the U.S. Court of Appeals determined in an unpublished decision on November 15, 2013, that the President's NLRB recess appointments complied with the constitutional requirements. The final decision rests with the United States Supreme Court because on June 24, 2013, the Court agreed to hear the *Noel Canning* case. Oral arguments are scheduled for January 13, 2014. The decision of the Supreme Court will be released by June 30, 2014.

If the Supreme Court holds in *Noel Canning* that the President exceeded his authority in making the recess appointments, that determination could erase three years of actions by NLRB Members, invalidating more than 1,300 NLRB decisions dating back to 2011, the NLRB's recent attempts to issue regulations, such as the poster of labor law rights, and the appointments of Directors for 10 of the NLRB's 26 Regions throughout the country.

The Death Knell for the NLRB's Poster Rule?

An estimated six million employers would have been required by a 2011 regulation of the NLRB to post a notice informing employees of their rights under federal labor law. In April 2012, the NLRB's poster rule was held by a federal judge in South Carolina to be in excess of the agency's statutory authority. Since then, two federal courts of appeal, the D.C. Circuit and the Fourth Circuit, have determined that the NLRB lacked the authority to require employers who had not violated the law from posting the notice. The Fourth Circuit wrote that "[h]ad Congress intended to grant the NLRB the power to require the posting of employee rights notices, it could have amended the NLRA to do so." With no indication that the NLRB intends to appeal either loss to the United States Supreme Court, the Board may have given up on the paper notice posting as being too "20th century." Instead, just before Labor Day of 2013, the NLRB launched a smart phone "app" that provides the same information contained in the proposed poster but designed for a younger and more tech-savvy audience.

The Viability Of A Controversial NLRB Decision Prohibiting Routine Confidentiality Admonitions During Investigations Is Now Questionable After *Noel Canning*

As reported in last year's Annual Update, the NLRB found that an employer had violated the Section 7 rights of its employees when it routinely issued a confidentiality admonition in all workplace investigations. *Banner Health System* (2012) 358 NLRB No. 93. Instead, the NLRB required that employers "determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, and there [was] a need to prevent a cover up." (Brackets in the original.)

In an Advice Memorandum dated January 29, 2013, the Office of the General Counsel determined that a complaint should be issued against an employer with a blanket rule requiring confidentiality from employees participating in

workplace investigations. The Division of Advice reasoned that a blanket rule failed to comply with *Banner Health System* which required the demonstration of the need for confidentiality on a case-by-case basis: "An employer may prohibit employees' discussions during an investigation only if it demonstrates that it has a legitimate and substantial business justification that outweighs the Section 7 right."

Interestingly, two of the NLRB Members deciding *Banner Health System* were recess appointees whom the *Noel Canning* case found had been improperly appointed to office. The *Banner Health System* case was appealed to the United States Court of Appeals for the D.C. Circuit, although the appeal is being held in abeyance pending the outcome of the *Noel Canning* case in the Supreme Court.

Social Media Is Still All The Craze At The NLRB

The NLRB continues to regard social media posts as the equivalent of protected office water cooler conversation, despite the permanence, virtual global reach, and potential for significant harm of such online communications. In a trio of cases involving employees who had written Facebook postings critical of co-workers, supervisors, and the employer, the NLRB found that the employees involved had engaged in protected concerted activity and the employers had violated the rights of the employees under federal labor law.

In *Hispanics United of Buffalo*, 359 NLRB No. 37 (December 14, 2012), an employee who had been critical about the work of her five co-workers was subjected to Facebook postings by her co-workers criticizing her. When the employee complained that the critical Facebook postings violated the employer's "zero tolerance" policy against "bullying and harassment," the employee's five co-workers were terminated. The NLRB used a traditional employee speech analysis, even though the communication occurred completely online and after work hours. The NLRB found that the Facebook postings amounted to mutual aid or protection and therefore were protected concerted activity.

In *Design Technology Group*, 359 NLRB No. 96 (April 19, 2013), three retail store employees criticized a store manager in Facebook postings and were terminated. The Company claimed that it had been defamed online as justifying the terminations. However, the NLRB found that the Facebook posts were "in and of themselves" protected concerted activity and ordered that the three employees be reinstated to their former jobs with full back pay. In addition, the NLRB ordered that the company revise its employee handbook, deleting an unlawful provision prohibiting employees from disclosing their wages.

In N*ew York Party Shuttle, LLC*, 359 NLRB No. 112 (May 2, 2013), a tour guide criticized the employer's employment practices in an invitation-only Facebook group, claiming that some of his paychecks had bounced, and encouraging his co-workers to unionize. The employer claimed that these postings amounted to online libel and were therefore not protected. The NLRB found that the claims of the employee were for the most part true and constituted protected concerted activity. The employer was ordered to reinstate the employee with back pay.

Are Class Actions Really Concerted Activities Protected By Section 7 Of The NLRA?

While the NLRB may think that class action waivers in arbitration agreements violate Section 7 of the National Labor Relations Act, the federal courts considering the argument have so far disagreed. In the case of *D.R. Horton*, 357 NLRB No. 184 (2012), the NLRB determined that a class action waiver in an employee arbitration agreement violated the right of concerted action under Section 7. This ruling directly contradicts the decision of the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*, which permitted waivers of class actions under the Federal Arbitration Act. On December 3, 2013, the Fifth Circuit Court of Appeals overturned the NLRB in the *D.R. Horton* case, joining the Second, Eighth and Ninth Circuit courts in rejecting the reasoning of the NLRB and enforcing arbitration agreements requiring waivers of class actions.

Micro Bargaining Units: The New Reality?

In a rare win for the union agenda, the NLRB's 2011 decision in *Specialty Healthcare* which approved so-called "micro" bargaining units has been upheld. The Sixth Circuit Court of Appeals in *Kindred Nursing Centers East, LP v. NLRB* (August 15, 2013), concluded that the NLRB has "wide discretion" in approving union proposed bargaining units. A bargaining unit need only be an "appropriate" unit, not the most appropriate unit possible. The onus of challenging the appropriateness of a proposed bargaining unit is on the employer, which must show that the proposed unit is "arbitrary, unreasonable, or an abuse of discretion." A "micro" bargaining unit could involve a single facility or job classification. This change in direction concerns employers because "micro" units are easier for unions to organize, thereby giving the union an inroad into the employer's remaining workforce.

What should employers do now?

- **Prepare for a re-invigorated NLRB now that a full complement of Board Members and a General Counsel are in place.** As political appointees, the Board Members and General Counsel can be expected to pursue ideological objectives. The possibility that many Board decisions and actions from the past three years may be invalidated just means that the Board will likely revisit those same cases and issue new decisions. Employers should expect a lot of activity from the NLRB and should be vigilant about how the direction of federal labor laws affects them.
- **Anticipate the NLRB to use sophisticated technology solutions to communicate with workers about their rights.** In an environment in which about 7% of the nation's private sector workforce is unionized, look for the NLRB to continue to find ways of enforcing federal labor laws in non-union workplaces.
- **Consider closely the need for confidentiality.** Although the continuing viability of the *Banner Health System* case, which requires individualized determinations of the need for confidentiality in employer investigations, is questionable in the wake of *Noel Canning*, employers are well advised to consider the appropriate process for each investigation. Blanket confidentiality admonitions are clearly on the radar of the NLRB and if there are no

concerns in a particular investigation about tampering with witnesses or evidence, then employers should not require confidentiality.

- **Social media policies should be reviewed and revised by legal counsel to comply with the current interpretation of federal labor law.** Terminations of employees for online postings that are critical of the employer should be considered high-risk.
- **The enforceability of arbitration agreements will continue to be an area of legal development.** As discussed in further detail in this Annual Update, employers with arbitration agreements having class action waivers should consult with legal counsel to assess whether the agreement will be enforceable following the resolution in *D.R. Horton.*
- **Anticipate increased union organizing activity as a result of many NLRB initiatives, including the "micro" bargaining unit development.** Employers need to be perceptive to and eliminate sources of tension and insecurity in the workplace that may prompt employees to seek the assistance of a union. Once union organizing is underway, it is often more difficult to deal with underlying problems. Cross train employees for operational efficiencies and to preclude union claims that the employees in a proposed "micro" bargaining unit share a unique community of interest that makes the unit appropriate.

Conclusion

We hope that this summary assists you in understanding some of the recent developments that will affect employers in 2014. 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.

San Jose
The Letitia Building
70 South First Street
San Jose, CA 95113

408.286.9800

Daniel F. Pyne III ..... DPyne@hopkinscarley.com

Ernest M. Malaspina ..... EMalaspina@hopkinscarley.com

Richard M. Noack ..... RNoack@hopkinscarley.com

Palo Alto
200 Page Mill Road
Suite 200
Palo Alto, CA 94306

650.804.7600

Karen Reinhold ..... KReinhold@hopkinscarley.com

Erik P. Khoobyarian ..... EKhoobyarian@hopkinscarley.com

Shirley E. Jackson ..... SJackson@hopkinscarley.com

HOPKINS & CARLEY

A LAW CORPORATION

San Jose • Palo Alto • Burbank 408.286.9800 hopkinscarley.com