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# Annual Labor and Employment Law Update

## I. New Laws

### A. California

***California Broadens Its Fair Pay Act (SB 358).*** Since 1949, California Labor Code § 1197.5 has prohibited employers from paying employees of one gender "less than employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." However, as is also the case under the federal Equal Pay Act, lawsuits were rarely pursued under § 1197.5. Senate Bill ("SB") 358, the California Fair Pay Act ("CFPA"), amends § 1197.5, with the express purpose of making it easier for claimants to pursue a claim. Indeed, the legislature specifically stated that § 1197.5 was "rarely utilized" because the statutory language made it "difficult to establish a successful claim." The legislature further declared that "pay secrecy" contributes to gender-based wage disparities "because women cannot challenge wage discrimination that they do not know exists."

In order to meet the legislative goal of making it easier to pursue a claim, the CFPA makes the following significant changes to § 1197.5:

- Unlike the former statute, where a claim could only be pursued with respect to jobs requiring "equal skill, effort and responsibility" with similar working conditions, under the CFPA, equal pay is required for "substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions."

- The CFPA removes the "same establishment" requirement, thereby permitting equal pay claims based on evidence that employees working at another facility are being paid more.

- Under the former law, an employer could defeat a claim if it proved that any gender-based disparity resulted from one or more of the following: (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) any bona fide factor other than sex. While the CFPA does not eliminate these defenses, it makes it more difficult for employers to prevail on them. Specifically, each factor relied upon must be applied "reasonably," and the factors relied upon "must account for the entire wage differential."

- Moreover, with respect to the fourth factor, the employer must demonstrate that the "bona fide factor other than sex" is not based on or derived from a sex-based differential in compensation, is job-related with respect to the position in question, and is consistent with a "business necessity," which is defined as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." Even if the employer meets this burden, the employee still can prevail if she or he "demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential."

In addition to making it easier to state a claim and more difficult to establish a defense, the CFPA also includes a strong no retaliation provision which makes it unlawful for an employer to discharge, or in any manner discriminate or retaliate against, an employee for exercising any right under the CFPA. It also makes it unlawful for an employer to prohibit any employee from disclosing her or his own wages, "discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under the law." Significantly, nothing in the CFPA creates an obligation on the part of an employer to disclose wages in response to an employee inquiry, or otherwise.

The CFPA makes no changes with respect to remedies. Employees who prevail on equal pay claims may recover the amount of the wage differential that was withheld, plus an equal amount as liquidated damages, plus prejudgment interest. The recovery period is two years from the filing of an action, except that an action arising out a willful violation extends the recovery period to three years. Attorney's fees are also recoverable by plaintiffs who prevail on

claims under the CFPA. Lastly, under the prior law, employers were already required to maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of their employees for two years. The CFPA expands this time frame to three years.

***California Legislature Modified Paid Sick Time Law (AB 304).*** In July of 2015, the California Legislature passed Assembly Bill ("AB") 304, which made several changes to California's Healthy Workplaces, Healthy Families Act (the "HWHF Act") that went into effect upon passage.

Prior to its amendment, the HWHF Act required employers to either grant a minimum of 24 hours/3 days of sick time per year or to allow employees to accrue sick time at a rate of 1 hour for every 30 hours worked ("1:30 accrual"). As a result of AB 304, other than 1:30 accrual is permitted, so long as the accrual is on a regular basis and an employee will accrue no less than 24 hours of accrued paid sick time *or paid time off* by the 120th calendar day of employment each year (the employer may define the year as any 12-month period). Also, for employers that provide an upfront grant of sick time, for *new hires,* the employer must provide not less than 24 hours or 3 days of paid sick time that is available for use by the completion of the 120th calendar day of employment.

The HWHF Act also "grandfathered" a broader range of pre-existing paid time off policies that were in effect prior to January 1, 2015, provided such policies provided for accrual on a regular basis and provided no less than 8 hours/1 day of paid sick time within 3 months, and no less than 24 hours/ 3 days within 9 months from the beginning of each employment year. However, if an employer modifies the accrual method in a grandfathered policy, the employer must comply with the new statutory accrual rules.

AB 304 also made other amendments to the HWHF Act, for example, clarifying that an employee must work for the same employer for 30 days within a year to be eligible for paid sick time, and authorizing employers with unlimited sick leave or unlimited paid time off policies to satisfy the written notice requirement by indicating "unlimited' on the employee's paystub. Lastly for entertainment industry employers operating under Wage Orders 11 and 12, it delayed enforcement of the paystub requirements until January 21, 2016.

***California Modifies (or Eliminates) "Kin Care" Law (SB 579).*** Prior to the passage of the HWHF Act, Labor Code § 233, the so-called "kin care" law, required employers who provided sick time to permit employees to use up to one-half of their sick time each year to care for an ill or injured child, parent, spouse or registered domestic partner. However, with the passage of the HWHF Act, employers are now required to provide at least 3 sick days per year that may be used (1) in connection with the diagnosis, care or treatment of an existing health condition of, or preventative care for, the employee or the employee's family member; or (2) for the purpose of obtaining legal, medical and related assistance by an employee who is the victim of domestic violence, sexual assault or stalking ("Protected Purposes"). Moreover, under the HWHF Act, the definition of "family member" is broad and includes an employee's child (including foster child, stepchild and legal ward), parent (including foster parent, stepparent and legal guardian when the employee was a child), parent-in-law (that is the "parent" of the employee's spouse or registered domestic partner), spouse, registered domestic partner, grandparent, grandchild and sibling. Accordingly, the HWHF Act mandates time off for a broader spectrum of "kin."

Accordingly, SB 579 amends Labor Code § 233 to permit employees to use up to one half of their annual accrual or grant of sick leave for any of the Protected Purposes defined in the HWHF Act. As a result, employers that provide more than 3 paid sick days per year must allow employees to use at least half of that time (and in no case fewer than 3 days) for Protected Purposes. For example, an employer that provides 10 sick days per year would be required to allow employees to use at least 5 for Protected Purposes.

Further, Labor Code § 233 includes an anti-retaliation provision that makes it unlawful to "discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using, or attempting to exercise the right to use, sick leave to attend to an illness or the preventive care of a family member, or for any other reason specified in subdivision (a) of Section 246.5." Because the Division of Labor Standards Enforcement ("DLSE") has stated that under § 246.5, it may constitute "retaliation" to require an employee to submit a doctor's note or other

documentation supporting an absence, the question arises whether the same risk may arise if documentation is required to support an absence covered by § 233.

***School Activities Leave Expanded (SB 579).*** SB 579 also amends Labor Code § 230.8 which requires employers that employ 25 or more employees at the same location to provide an employee with up to 40 hours of unpaid time off each year (no more than 8 eight hours per month), for the purpose of participating in school activities for children enrolled in school (grades K through 12), pre-school or other child care facility (e.g., school plays and pageants, open school night, volunteering in classroom etc.). SB 579 expands "school activities" to include finding a school or a licensed child care provider, enrolling or re-enrolling a child, and addressing child care provider or school emergencies. Moreover, while the law previously applied only to parents, guardians and custodial grandparents, the expanded law also covers employees who are stepparents, foster parents, those who stand *in loco parentis* to a child and grandparents (whether or not they have custody of the child.)

***Whistleblower and Anti-Retaliation Protections Expanded (AB 1509).*** AB 1509 expands protections prohibiting an employer from retaliating against an employee who complains about unlawful conduct, or opposes practices which the employee reasonably believes are unlawful, to prohibit retaliation against an employee because her or his *family member* has engaged in whistleblowing or other protected activity. AB 1509 also expands joint employer liability by changing the definition of employer under anti-retaliation laws to include "client employers," a specific definition related to companies that contract for labor. Under AB 1509, the "client employer" may be held legally responsible when a labor contractor, such as a staffing agency, retaliates against a worker for engaging in protected conduct such as whistleblowing.

***Requests For Accommodation Is A Protected Activity (AB 987).*** California's Fair Employment and Housing Act ("FEHA") requires employers to reasonably accommodate known disabilities, and prohibits retaliation against an employee who opposes prohibited employment practices. Because the California Court of Appeal in *Rope v. Auto-Chlor System of Washington Inc.*, 220 Cal. App. 4th 635 (2013) held that a request for an accommodation was not a protected activity sufficient to support a claim for retaliation under the FEHA, AB 987 was enacted to amend the FEHA to provide that a request for a reasonable accommodation on the basis of an employee's disability or religion is indeed a protected activity.

***New Law Enacts Stronger Mechanisms For The DLSE To Enforce Judgments And Expands Individual Liability (SB 588).*** SB 588 attempts to address the issue of when employees are unable to collect on judgments against their employers for unpaid wages, and implements new methods for the California Division of Labor Standards Enforcement ("DLSE") to enforce judgments for nonpayment of wages on behalf of employees. The DLSE is now able to utilize the remedies available to a judgment creditor and to act as a levying officer when enforcing a judgment pursuant to a writ of execution, including placing liens on an employer's property. SB 588 also allows the DLSE to conduct hearings to determine whether a "person acting on behalf of an employer" such as an owner, director, officer or managing agent, should be individually liable for wage and hour violations.

***Changes To California's Piece-Rate Compensation Requirements (AB 1513)***. AB 1513 adds § 226.2 to the Labor Code and will heavily burden employers that pay employees on a piece-rate basis. Piece-rate compensation pays employees on a task-completed basis rather than a fixed hourly rate in order to provide an economic incentive for focused and efficient work. AB 1513 now requires employers to pay piece-rate employees a separate hourly minimum wage for "nonproductive" time worked, as well as a separate payment for rest and recovery periods. Employers must also separately itemize the hours and pay rates relating to "nonproductive" time and rest and recovery periods on the employees' paystubs. The bill defines "other nonproductive time" as time under the employer's control, exclusive of rest and recovery periods (such as compensable travel time between jobs), that is not directly related to the activity being compensated on a piece-rate basis. Because the new law purportedly codifies existing law, AB 1513 also contains a "safe harbor" provision allowing employers to pay any amounts owed and to meet the other requirements of the new law by December 15, 2016, without incurring liability.

***Right To Cure Certain Errors In Itemized Wages (AB 1506)***. AB 1506 amends the Private Attorneys General Act ("PAGA"), Labor Code §§ 2698, et seq., and will potentially help curb frivolous PAGA lawsuits alleging noncompliance with itemized wage statement requirements under California Labor Code § 226(a). PAGA authorizes an employee to bring a civil action to recover civil penalties, that would otherwise be assessed and collected by the Labor and Workforce Development Agency, on behalf of the employee and other current or former employees for the violation of certain provisions of the Labor Code.

The new law provides employers an opportunity to cure a paystub violation by providing fully compliant wage statements to all employees who had received an incorrect wage statement during the three-year period prior to the date of the aggrieved employee's letter to the Labor Workforce Development Agency. The bill limits the employer's right to cure to once in a 12-month period.

**B. Federal**

***Fines For OSHA Violations To Increase***. Under Congress' recently signed budget deal, fines against employers for failing to comply with workplace safety and health regulations are set to increase. The budget agreement requires the Occupational Safety and Health Administration ("OSHA") and other Labor Department agencies to increase enforcement penalties by August 1, 2016. OSHA would be allowed to raise fines annually in line with the Consumer Price Index, and to implement a one-time "catch up" adjustment of 82 percent to compensate for the fact that OSHA's maximum fines have not increased since 1990. Maximum OSHA penalties could increase 82 percent in 2016, which would raise the maximum fine for each repeated or willful violation from $70,000 to $127,438, while the limit for serious fines would grow per violation from the current $7,000 to $12,744.

**C. New York**

***Differential In Rate Of Pay Must Be Based On A Bona Fide Factor Other Than Sex.*** Previously, New York Labor Law § 194 required employers to pay employees of the opposite sex equal rates for work performed in the same establishment which requires equal skill and is performed under similar working conditions, except where the differential is based on (a) a seniority system, (b) a merit system, (c) a system that measures earnings by quantity or quality of production, or (d) any other factor other than sex. Effective January 19, 2016, subsection (d) is amended to read "a bona fide factor other than sex, such as education, training, or experience." This factor must not be sex-based and must be job-related with respect to the position in question. Amended § 194 also prohibits employers from banning employee disclosure of wages and subjects employers to a liquidated damages penalty of 300% of the wages found to be due for a willful violation.

***Amendments To New York State Human Rights Law.*** On January 19, 2016, a number of significant changes to the Human Rights Law will go into effect:

- Discrimination on the basis of familial status is now prohibited;
- The prohibition on sex discrimination and sex harassment are extended to employers of all sizes, not just those with 4 or more employees;
- Employers must provide reasonable accommodations for pregnancy-related conditions; and
- Attorneys' fees may be awarded to a prevailing plaintiff in a sex discrimination action.

***New York City "Bans the Box".*** In 2015, New York City enacted the Fair Chance Act, an ordinance that prohibits New York City employers with 4 or more employees from inquiring about, or otherwise considering, a job applicant's

criminal history, *including convictions*, at any time prior to making a conditional offer of employment. In enacting so-called "ban the box" legislation, New York City joins a growing number of jurisdictions that have passed similar laws (e.g., the District of Columbia, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey and Rhode Island.) Prohibited inquiries include posing questions (in writing or otherwise), searching publicly available records, or obtaining consumer reports for the purpose of obtaining criminal background information. After the employer has made a conditional offer of employment, the employer may inquire about an applicant's arrest or conviction record. However, before taking any adverse action based on the inquiry, the employer must:

- Provide "a written copy of the inquiry to the applicant," which shall be in a manner that is to be specified in regulations;
- Perform an analysis of the applicant's criminal record consistent with Article 23-A of the New York Correction Law and New York's anti-discrimination laws;
- Provide a written copy of the analysis to the applicant in a manner to be established by regulations, which shall include, at a minimum, the supporting documents that formed the basis for an adverse action and the employer's reasons for taking any adverse action against the applicant; and
- Allow the applicant a "reasonable time" (no less than three business days) to respond after giving the applicant the inquiry and analysis and, during that period, hold the position open for the applicant.

In addition to restricting criminal history inquiries, the Fair Chance Act prohibits employers from expressing, either directly or indirectly, in any printed or circulated solicitation, advertisement or publication that employment opportunities will be based on a person's arrest or conviction record.

***New York City Adopts Broad Prohibition On Credit Checks.*** The "Stop Credit Discrimination in Employment Act" amends the New York City Human Rights Law to make it unlawful to consider an applicant's credit report or bankruptcies in connection with a hiring or other employment decisions, except for certain positions in law enforcement, in financial services, with signing authority of $10,000 or more, and with access to trade secrets or national security information. The law applies to all New York City employers with 4 or more employees

## II. Discrimination, Harassment and Retaliation Law

### A. Federal

***Supreme Court Expands Duty To Accommodate Pregnant Employees' Work Restrictions.*** In *Young v. UPS*, 135 S. Ct. 1338 (2015), the employer refused to accommodate a pregnant employee's lifting restriction. The lower federal courts dismissed the lawsuit, holding that the employer had not violated the federal Pregnancy Discrimination Act, although it accommodated non-pregnant employees with similar restrictions under its ADA and on-the-job injury policies. Reversing the lower courts, the U.S. Supreme Court held that a pregnant employee denied an accommodation states a *prima facie* case of discrimination if she establishes that (i) she is a member of a protected class (*i.e.*, pregnant women), (ii) she sought an accommodation from her employer, (iii) the employer did not accommodate her, and (iv) the employer did accommodate non-pregnant employees "similar in their ability or inability to do work." Once a prima facie case is made, the burden shifts to the employer to show that legitimate, nondiscriminatory reasons exist for denying the accommodation. If the employer does so, the plaintiff will still prevail if she can show that the employer's proffered reasons are a pretext for discrimination. To do so, the plaintiff must present sufficient evidence that the employer's policies impose a "significant burden" on pregnant workers and the employer's legitimate, non-discriminatory reasons are not sufficiently strong to justify the burden. A "significant burden" may be established by evidence that the employer accommodates a large percentage of non-pregnant employees while failing to accommodate a similar percentage of pregnant employees.

***An Employer May Not Consider a Job Applicant's Religious Practices When Making A Hiring Decision.*** In *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) the plaintiff was a practicing Muslim who wore a headscarf in accordance with her religious beliefs. She applied for a position at an Abercrombie store, was

interviewed, and rated highly enough to be hired. The store's assistant manager informed the district manager that she believed the applicant wore a headscarf because of her faith. The district manager directed the store manager not to hire plaintiff because her headscarf, like all other headwear, religious or otherwise, violated Abercrombie's "Look Policy." The Supreme Court rejected Abercrombie's argument that Title VII requires actual knowledge of a conflict between a job applicant's religious practice and a work rule, and held that an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in its hiring decisions. The Court explained that Title VII demands more than mere neutrality with regard to religious practices: "Title VII requires otherwise-neutral policies to give way to the need for an accommodation."

B. California

***Arbitrator Relied On Substantial Evidence In Upholding Termination.*** In *Richey v. AutoNation, Inc.*, 60 Cal. 4th 909 (2015), the claimant who took a leave under the California Family Rights Act ("CFRA") was warned that employees were not allowed to pursue other employment while on leave. The claimant was terminated after his employer discovered he was working in a restaurant that he owned while on leave. Claimant pursued a claim under the CFRA, which claim was sent to arbitration pursuant to an arbitration agreement between the employer and employee. The arbitrator ruled in favor of the employer, finding that the termination was non-discriminatory as the employer had an honest belief that the employee was abusing his medical leave or was dishonest.

The trial court denied plaintiff's motion to vacate the arbitration award. The Court of Appeal reversed, concluding that the arbitrator violated plaintiff's right to reinstatement under the CFRA by applying the honest belief defense to plaintiff's claim. The California Supreme Court reversed, upholding the arbitrator's award. Without deciding whether the honest belief defense applies under the CFRA, the Supreme Court held that the arbitrator's application of the honest belief defense did not deprive plaintiff of an unwaivable statutory right, thereby underscoring the deference given to arbitrator's decisions by the Courts.

***Prevailing Employers Face Uphill Battle When Seeking Costs Under the FEHA.*** Although a prevailing party may recover her, his or its cost under the Fair Employment and Housing Act ("FEHA"), in *Williams v. Chino Valley Independent Fire District*, 61 Cal. 4th 97 (2015), the California Supreme Court held that in order for a prevailing employer to recover its *costs* (e.g., deposition costs, filing fees, exhibit costs etc.), it must show that the claim was "objectively without foundation" when brought, or that plaintiff continued to litigate after it clearly became so. This higher standard was previously applied only to applications to recover *attorneys' fees*. Significantly, under Title VII, costs can be recovered even where attorneys' fees are not awarded.

***Elimination Of An Essential Job Function Is Not A Reasonable Accommodation***. In *Nealy v. City of Santa Monica*, 234 Cal. App. 4th 359 (2015), the plaintiff, a solid waste operator for the City of Santa Monica who suffered an on-the-job injury, was denied reinstatement due to a heavy lifting restriction imposed by his doctors. In affirming summary judgment for the City, the Court of Appeal found that heavy lifting was an essential function of a job, and that eliminating that essential function was not a reasonable accommodation.

C. New York

***Employee Can State A Religious Discrimination Claim Based On Comments Made About Spouse.*** In *Chiara v. Town of New Castle*, 126 A.D. 3d 111 (2015), plaintiff sued his former employer for religious discrimination based on anti-Semitic comments made by his former co-workers. The plaintiff was not Jewish, but he was married to a Jewish woman, a fact he shared with his co-workers after he heard the anti-Semitic comments. Relying on cases arising under Title VII, the Court held that while plaintiff was not Jewish, he had sufficiently stated a claim based upon his marriage to and association with a Jewish person.

## III. Wage and Hour Law

### A. Federal

***DOL Declares That Most Workers Are Employees Under The FLSA***. Generally, to determine whether a worker is an employee or independent contractor under Fair Labor Standards Act ("FLSA"), the employer must weigh a series of factors under a multi-factor "economic-realties" test which focuses on whether a worker is *economically dependent* on an employer. Under the test, the more economically dependent a worker is on the employer, the more the worker should be classified as an employee. According to the Department of Labor ("DOL"), however, employers have been increasingly misclassifying employees as independent contractors instead of employees, resulting in workers being denied certain workplace protections the FLSA intended to provide, such as like minimum wage, overtime, and workers' compensation.

To ensure that employers correctly classify workers, the DOL in July 2015 published interpretative guidance on the FLSA that placed significant emphasis on the fact that most workers in the United States are employees under the FLSA. In making this determination, the DOL relied on FLSA's broad definition of employment as including "to suffer or permit to work," which it found covers more workers as employees than independent contractors. Based on this finding, the DOL recommended that employers, when applying the economic realities test, consider the FLSA's broad definition of employment and the FLSA's intended expansive coverage for workers.

***U.S. Department of Labor Proposes Expanded Overtime Protections For "White Collar" Employees***. The U.S. DOL announced its proposal to revise its FLSA regulations to narrow the exemptions from overtime pay for most so-called "white collar" employees. The FLSA requires that most employees in the United States be paid at least the federal minimum wage and overtime pay at time and one-half their regular rate of pay after 40 hours in a workweek. Among others, the FLSA provides exemptions from overtime pay for executive, administrative, professional and some computer employees who meet both a job duties test and a salary basis test. The existing exemption applies to those persons with qualifying exempt duties who are paid on a salary basis of at least $455 per week ($23,660 annualized).

The DOL's proposed revisions more than double this salary threshold requirement. Specifically, the revisions set a new salary threshold at the 40th percentile of full-time salaried workers, which is projected for 2016 to be about $970 per week (or $50,440 annualized). The proposed revisions additionally establish a mechanism for automatically updating the salary threshold requirement to keep pace with inflation. These changes will primarily affect lower-wage industries, such as restaurants and retail stores, by broadening the number and type of employees eligible for overtime pay. For example, an exempt department store manager or fast food manager currently earning a salary of $42,000 per year would become entitled to overtime pay.

The DOL is expected to issue a final rule revising the FLSA's overtime exemptions in 2016.

***Ninth Circuit Holds That Employees Under Employer's Control Must Be Compensated For Commute Time.*** In *Alcantar v. Hobart Serv*., 800 F.3d 1047, 1049 (9th Cir. Cal. 2015), a service technician filed a class action against his employer alleging that he and other service technicians paid on an hourly basis and who drove company-owned vehicles should be compensated for the time they spent commuting from their homes to job sites and from those job sites back home. Plaintiff argued that the service technicians were under the Company's control when commuting to and from work because the company's agreement governing employees' usage of the vehicles prohibited them from transporting alcohol and carrying passengers without prior approval. Further, the company allegedly expected service technicians to respond to calls on company-issued cell phones while driving to and from their first and last assignments of the day.

The district court denied plaintiff's motion for class certification, reasoning that he offered no evidence demonstrating that the company had a uniform policy requiring technicians to commute in the service vehicle and there were therefore no questions of law or fact common to the class. The district court granted the company's motion for summary judgment, reasoning that there was no triable issue as to whether plaintiff was required to subject himself to the company's control.

The Ninth Circuit reversed its denial of class certification and grant of the company's motion for summary judgment, reasoning that there were questions of fact as to whether the company required technicians to use its vehicles for their commute. Significantly, it noted that technicians could be financially responsible for the tools and service parts on their vehicles. Further, there may not have been enough secure parking spaces for the vehicles at the company, forcing the technicians to either take the vehicles home or risk theft of tools and service parts from the vehicles.

***Second Circuit Ruling Provides Guidance and Hope For Employer That Use Unpaid Interns.*** In *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 379 (2d Cir. N.Y. 2015), unpaid interns who had worked on the film "Black Swan" and in the producer's corporate offices alleged that they were employees entitled to minimum wages under applicable law. The district court, relying on the U.S. DOL's 6-factor test, ruled that considering the totality of the circumstances, the interns should have been classified as "employees" under New York law and the FLSA. The district court also certified a class of New York interns and a collective nationwide action of interns working at Fox Searchlight ("Searchlight"). On appeal, the Second Circuit vacated the district court's ruling. Significantly, the Second Circuit rejected the plaintiffs' proposed test that interns should be considered employees whenever the employer receives an immediate advantage from their work. The Court of Appeals also declined to defer to the DOL's 6-part test for assessing whether an employment relationship exists, stating that the DOL's test was "too rigid" and unpersuasive. Instead, it accepted Fox's more nuanced "primary beneficiary" test that considers the totality of the circumstances, under which an employment relationship will not be found if the tangible and intangible benefits provided to the intern are greater than the intern's contribution to the employer's operation.

The Second Circuit outlined a non-exhaustive set of factors to be considered in determining whether the intern, or the employer, is the primary beneficiary of the relationship. Those factors include:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee;
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment;
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit;
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees, while providing significant educational benefits to the intern; and
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The Second Circuit indicated that this approach reflects a central feature of the modern internship – the relationship between the internship and the intern's formal education, noting that the purpose of a bona fide internship is to integrate classroom learning with practical skill development in a real-world setting. The Second Circuit also reversed the district court's granting of the plaintiffs' motion to certify a class of unpaid interns, finding that the question of an intern's employment status is a highly individualized inquiry. For similar reasons, it also vacated the lower court's conditional certification of the plaintiffs' FLSA collective action.

***Second Circuit Holds That Oral Complaints To Employer Are Protected Under The Fair Labor Standards Act.*** § 215(a)(3) of FLSA makes it unlawful to retaliate against an employee who has "filed a complaint" alleging violations of the FLSA. In *Kasten v. Saint-Gobain Performance Plastics*, 563 US 1 (2011), the Supreme Court ruled that a complaint does not need to be in writing in order to be protected. Left open in Kasten was the question of whether a complaint needed to be brought to a government agency in order to be protected. In *Greathouse v. JHS Security, Inc.*, 784 F.3d 105 (2nd Cir. 2015), the Second Circuit (which covers New York, Connecticut and Vermont), overruling its decision in an earlier case and joining the majority of circuit courts, held that an oral complaint made only to an employer is protected, provided that it is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."

***Uber Drivers Are Likely Employees, Not Independent Contractors.*** In *O'Connor v. Uber Techs.*, 82 F. Supp. 3d 1133 (N.D. Cal. March 11, 2015), Uber drivers alleged that they were improperly classified as independent contractors. Denying Uber's motion for summary judgment, the court rejected Uber's argument that it is a technology company and that the drivers are "simply its customers who buy dispatches that may or may not result in an actual ride." The court reasoned that drivers were presumptive employees because, among other reasons:

1. The drivers provide service to Uber;
2. "Uber simply would not be a viable business entity without its drivers;"
3. "Uber's revenues do not depend on the distribution of its software, but on the generation of rides by its drivers;"
4. Uber unilaterally sets the fares that drivers charge riders;
5. Uber claims a proprietary interest in its riders, demonstrating that it is more than a passive intermediary between riders and drivers;
6. Uber exercises substantial control over the qualification and selection of its drivers including requiring an application process, background check, city knowledge exam, vehicle inspection and personal interview; and
7. Uber regularly terminates the accounts of drivers who do not perform up to Uber's standards.

Further, the court found that an inference of an employment relationship could be drawn because, Uber's driver handbook states that it expects on-duty drivers to accept all ride requests and states that rejecting too many trips could create a performance issue leading to a driver's possible termination. Further, Uber makes quality control suggestions to drivers regarding their dress, the radio station selection played for riders, and to include an umbrella in the car for riders. Additionally, the court held that the issue of whether a driver is an employee or independent contractor is a mixed question of law and fact generally to be decided by the jury.

B. California.

***California Supreme Court Holds That Sleep Time Is Compensable***. In *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015), the Supreme Court held that under the California wage order covering security guards, security guards are entitled to compensation for all on-call hours spent at their assigned worksites under their employer's control. The employees in *Mendiola* were security guards assigned 24-hour shifts guarding construction sites. As a condition of their employment, the guards were required to reside in a trailer provided by the employer, be on call at the worksite, and respond to disturbances as needed. If a guard wanted to leave the worksite, she had to notify a dispatcher where she was going and for how long, and also had to remain within a 30-minute radius of the worksite and respond to calls from the employer. While the guards were compensated for the time spent actually patrolling the worksite, they were not generally compensated for any time during which they were on-call and not on active patrol, including sleep time. The Court found that the employer exercised significant control over the guards' activities and, as a result, held that all on-call time – including sleep time – was compensable hours worked.

***Employers' Duty To Relieve Employees Of All Duties During Rest Breaks***. In *Augustus v. ABM Security Services*, *Inc.*, 233 Cal. App. 4th 1065 (2014), the Court of Appeal held that California law, while prohibiting employees from working during rest breaks, did not mandate that employees be relieved of *all duties* during rest breaks. In *Augustus,* current and former security guards brought a wage and hour class action against an employer that, pursuant to a companywide policy, required guards to remain on duty during the entirety of their 10-minute rest break. Specifically, the employer's policy required the guards to carry radios, to remain vigilant, and to respond to emergencies as they arose. The lower court found in favor of the employees and awarded a $90 million judgment against the employer for rest break violations. The Court of Appeal reversed the judgment, however, finding that while employees must be relieved of all work during rest breaks, merely remaining available to work during a rest break does not constitute actual work.

On April 29, 2015, the California Supreme Court granted review of *Augustus*. The Court is likely to reverse the Court of Appeal decision and hold that employees must be entirely free from all duties during rest and meal breaks.

***Minimum Wage Increases In The City And County Of Los Angeles.*** Both the city and county Los Angeles have enacted laws that will raise the minimum wage to $15 per hour for all employees by 2021, as follows:

| Year | Employers with 26 or more employees | Employers with 25 or fewer employees |
|---|---|---|
| 2016 | $10.50 | |
| 2017 | $12.00 | $10.50 |
| 2018 | $13.25 | $12.00 |
| 2019 | $14.25 | $13.25 |
| 2020 | $15.00 | $14.25 |
| 2021 | | $15.00 |

## IV. Arbitration and Class Actions

### A. Arbitration Update

#### 1. Federal

***The Ninth Circuit Upholds Iskanian's Ban On PAGA Waivers***. In last year's *Iskanian v. CLS Transportation*, 59 Cal.4th 348 (2014), the California Supreme Court held that class action waivers in employment arbitration agreements governed by the Federal Arbitration Act (FAA) are enforceable, but an employee's right to bring a representative action under PAGA cannot be waived. The U.S. Supreme Court declined to review *Iskanian*. Thereafter, in *Sakkab v. Luxottica Retail North America Inc.*, 803 F.3d 425 (9th Cir. 2015), the Ninth Circuit followed the *Iskanian* rule and declined to enforce a PAGA waiver in an arbitration agreement. Specifically, three Ninth Circuit judges, in a 2-1 decision, found that, although a prohibition of class action waivers is preempted by the FAA, a prohibition of PAGA waivers is not. As a result, PAGA representative action waivers in arbitration agreements currently will not be enforced in state or federal California courts. The employer in *Sakkab* has petitioned the full panel of the Ninth Circuit for further review and the matter might be headed to the U.S. Supreme Court.

***The Ninth Circuit Refuses To Apply Severability Clause In Arbitration Agreement***. Relying on state law principles, California courts generally refuse to sever unenforceable terms in arbitration agreements when multiple provisions of the contract "permeate" the entire agreement with unconscionability. In *Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461 (9th Cir. 2014), the lower court applied the California approach and refused to sever the problematic terms to allow arbitration of the underlying claims. The employer appealed, arguing that this approach was contrary to the U.S. Supreme Court's trend in favor of arbitration under the FAA. The Ninth Circuit rejected the employer's argument, finding that the lower court did not abuse its discretion in applying the California approach. The U.S. Supreme Court has agreed to hear this case.

***U.S. Supreme Court Again Favors Individual Arbitration***. Although California courts traditionally have looked at class action waivers with disfavor (and that attitude persists among the plaintiffs' bar and certain California courts), the U.S. Supreme Court again held in *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) that the California Court of Appeal's restrictive interpretation of an arbitration agreement was inconsistent with the FAA, and that the FAA required the arbitration agreement, including the class action waiver, to be enforced. Although the case was in the consumer class action context, the U.S. Supreme Court's consistent support for individual arbitration is heartening.

#### 2. California

***Arbitration Not Allowed If the Unenforceable PAGA Waiver Cannot Be Severed***. In *Securitas Security Services USA, Inc. v. Superior Court*, 234 Cal. App. 4th 1109 (2015), a security guard brought suit over failure to provide meal and rest periods alleging, among other things, representative claims under PAGA. The employer moved to compel arbitration on an individual basis, relying on an arbitration agreement that contained a waiver barring all class and representative actions, including PAGA actions. The agreement expressly stated that the waiver of class and PAGA

claims could not be severed from the rest of the agreement. Applying *Iskanian*, the Court of Appeal found not only that the purported waiver of PAGA claims was unenforceable, but also that it rendered the entire agreement unenforceable because it could not be severed.

***PAGA Claims In Court Are Stayed Pending Individual Arbitration***. In *Franco v. Arakelian Enterprises, Inc.*, 234 Cal. App. 4th 947 (2015), the plaintiff signed an arbitration agreement barring all class and representative actions, including PAGA actions. On the motion to compel individual arbitration, the Court of Appeal upheld the class action waiver, and ordered the plaintiff's wage and hour claims to arbitration on an individual basis. Following *Iskanian*, the Court held the PAGA waiver unenforceable, but found that the derivative PAGA claims must be stayed at the trial court pending the outcome of the individual arbitration.

***An Arbitration Agreement Might Be Enforceable Even If It Has Numerous Objectionable Elements.*** In 2011, the U.S. Supreme Court ruled in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), that the FAA preempts state laws that prohibit class action waivers. But, in California, the unconscionability doctrine continues to allow courts to invalidate "one-sided contracts" by examining whether the terms are both procedurally and substantively unconscionable. In *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899 (2015), the lower court used the unconscionability doctrine to invalidate the plaintiff's arbitration agreement. The California Supreme Court, however, reversed and found that the lower court applied that doctrine too harshly and that the arbitration agreement (with a class action waiver) in fact was enforceable, despite four supposedly one-sided arbitration provisions in the agreement.

***The "Death Knell" Doctrine Does Not Apply When PAGA Claims Remain After Denial of Class Certification***. Under California law, an order denying a motion to certify a class (leaving only the plaintiff's individual claims in the trial court) is an appealable order under the "death knell" doctrine. The rationale for this rule is that, if denial of class certification is not immediately appealable, the plaintiff will have no financial incentive to pursue the case. In *Munoz v. Chipotle Mexican Grill, Inc.*, 238 Cal. App. 4th 291 (2015), however, the Court of Appeal held that a trial court's order denying plaintiff's class certification motion was a nonappealable order because the plaintiff's PAGA claims remained. Because the plaintiff still had financial incentive to pursue the case, the "death knell" doctrine did not apply and the case would need to proceed to trial before the plaintiff could appeal the certification order.

B. Class Action Update

***"Facially Legal" Policies Are Not Sufficient To Defeat Class Certification Where Employer's Practices Differed From Policies.*** In *Alberts v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388 (2015), nurses at several psychiatric hospitals filed a class action lawsuit against Aurora, alleging that that they were denied meal and rest periods because of Aurora's intentional understaffing of its hospitals and policies that prohibited nurses from leaving their posts until they were relieved by another nurse. The trial court denied certification due to the lack of commonality among the nurses and because the meal and rest period policies were "facially legal." The Court of Appeal reversed, though, stating that the mere existence of a lawful break policy will not defeat class certification in the face of actual contravening policies and practices that, as a practical matter, undermine the written policy and do not permit breaks. According to the Court of Appeal, the plaintiffs had articulated a theory susceptible to common resolution sufficient to allow certification of the class.

***A Uniform Policy Of Refusing To Pay Meal And Rest Period Premiums May Be Sufficient To Certify A Class.*** In *Safeway, Inc. v. Superior Court*, 238 Cal. App. 4th 1138 (2015), the plaintiffs alleged wage and hour claims on a class-wide basis under the theory that the employers' policy of not paying meal break premiums "under any circumstances" was unlawful. The trial court granted class certification based on that policy and the "central and predominating common issue: Did Safeway's system-wide failure to pay appropriate meal break premiums make it liable to the class?" The employers tried to appeal, but the Court denied the petition stating that a claim may be predicated on a practice of not paying premium wages for missed, shortened, or delayed meal breaks.

***Written Policies Suggesting Uniform, Unlawful Practices Might Not Be Sufficient To Support Class Certification If They Are Not Uniformly Applied.*** In *Mies v. Sephora U.S.A, Inc.*, 234 Cal. App. 4th 967 (2015), managers filed a class action lawsuit against Sephora, alleging that they were improperly classified as exempt employees. The managers sought class certification citing, among other things, a job description that suggested they spent most of their time on the sales floor selling rather than managing the store. In opposition, Sephora submitted numerous declarations establishing that the managers' actual duties varied widely depending on the individual strengths of each manager, the location of the store, and the size of the store. The trial court denied certification, and the Court of Appeal affirmed, noting that written policies suggesting uniform employment practices are insufficient to support class certification in the face of evidence that those policies were not uniformly applied.

Similarly, in *Koval v. Pacific Bell Telephone Co.*, 232 Cal. App. 4th 1050 (2014), service technicians filed a class action lawsuit claiming that they were not totally relieved of their duties during meal and rest periods. While PacBell's written policies placed several limitations on service technicians during their meal and rest periods, the trial court found that the service technicians could not show that the policies were consistently and uniformly applied because they were issued verbally by numerous supervisors. The trial court therefore denied class certification, and the Court of Appeal affirmed, noting that the mere existence of a uniform policy does not limit a trial court's inquiry into whether class action treatment is appropriate.

## V. National Labor Relations Act Developments

***New NLRB Election Rules Take Effect***. The National Labor Relations Board's ("NLRB") new "ambush election rules" went into effect on April 14, 2015. The purpose of these rules is to aid union organization efforts by shortening the amount of time between when an employer learns of an organization campaign and an election. By shortening this time period, the employer's ability to respond to the union's campaign is hindered. The new rules accomplish the following changes, among others, to NLRB election procedures:

- Permit parties to file petitions for election electronically with the NLRB's regional office and require the petitioner to file any evidence (e.g., showing of interest – signed union cards) with the petition rather than 48 hours after its filing;
- Require that, in most cases, the pre-election hearing begin seven (7) days after filing the petition;
- Require employers to provide a "Statement of Position," within seven days of the service of the notice of hearing, which must set forth the employer's position on any objections that the employer intends to raise at hearing (e.g., appropriateness of the bargaining unit). Failure of the employer to raise an issue in its timely filed Statement of Position will constitute a waiver of the employer's right to contest that issue;
- Require employers to submit as part of the "Statement of Position" a list of employees described in the proposed unit in the election petition, and their job titles, work shifts and locations.
- Expand the information that must be included in the employee election eligibility list (also known as the "Excelsior" list) to include all employees' personal phone numbers and email addresses (including those employees voting subject to subsequent challenge). The time for submitting this list was shortened to two days following the stipulation or direction of an election.
- Eliminate employers' rights to request that the NLRB review decisions of the Regional Director regarding the representation petition before the election, and limit the Board's post-election review; and
- Limit the issues that may be litigated before the election (including who is eligible to vote) and the evidence that can be introduced during the representation hearing.

In addition, the NLRB General Counsel released a guidance memorandum (GC Memorandum 15-08 (revised), Oct. 26, 2015), announcing that regional directors will begin to accept electronic signatures as part of a union's required showing of interest. While the General Counsel described this as a simple application of existing standards to modern technology, this change actually represents a significant victory for unions. In conjunction with the NLRB's 2014 decision in *Purple Communications*, the acceptance of electronic signatures opens the door to virtual organization campaigns conducted on an employer's own computer and email systems.

Early numbers suggest that elections are happening roughly two weeks quicker under the new rules—with the time between petition and election shortened from 38 days to 23 days. Moreover, the true effect of the rules goes far beyond this shortened timeframe -- with the drastically shortened time periods for employers to raise legitimate objections to election petitions, employers face a mine-field to assert their rights when served with an unexpected organization petition. Employers must take affirmative steps to prepare for potential organization campaigns, including education of supervisors and employees regarding the unionization process prior to receiving a union petition.

***NLRB's New Joint Employer Standard.*** In its decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), the NLRB greatly expanded the scope of its joint employer test. It held that it would no longer require a joint employer to actually exercise the authority to control employees' terms and conditions of employment and instead offered a new test. Under this new test, if an entity possesses or reserves the authority to control the terms and conditions of employment of individuals, even if it does not exercise the authority, that entity is considered a joint employer. In *Browning-Ferris*, the NLRB held that a recycling plant was a joint employer with the staffing agency that supplied it with employees to perform cleaning and sorting activities. The NLRB looked at several factors in making this determination, including whether the recycling plant had the right to exercise direct or indirect control over the contractors, such as by establishing the number of workers to be supplied, controlling scheduling, seniority and overtime, assigning work, and determining the method of the contractors' performance.

The *Browning-Ferris* decision could have wide-ranging effects, including subjecting employers to unexpected collective bargaining obligations. If an employer is considered a joint employer because it has certain rights with respect to contractors under its agreement with a third party service provider, even if it does not exercise those rights, it may be considered the joint employer of those contractors. They may then be considered part of a bargaining unit for collective bargaining purposes. In addition, this decision may have particular implications for the relationship between franchisors and their franchisees' employees. The NLRB currently has a case pending against McDonald's USA LLC, in which it claims that McDonald's and its franchisees are joint employers that violated the rights of the franchisees' employees. The impact of *Browning-Ferris* on franchisor-franchisee relationships remains to be seen.

***NLRB Continues Assault On Class Action Waivers Despite Wide-Spread Rejection From Courts***. Originally in *D.R. Horton, Inc.*, 357 NLRB 184 (2012), and again in *Murphy Oil USA, Inc.*, 361 NLRB 72 (2014), the NLRB held that an employer's mandatory employee arbitration agreement, which included a class action waiver, violated its employees' Section 7 right to engage in "concerted activity" under the National Labor Relations Act ("NLRA"). However, since the NLRB announced this position in 2012, the courts responsible for enforcing or rejecting Board decisions have uniformly rejected this position and criticized it as inconsistent with longstanding precedent and the Federal Arbitration Act. Since 2012, every Circuit Court presented with the opportunity to follow *D.R. Horton* has rejected it, including the 2nd, 5th, 8th, and 9th Circuit Courts of Appeals.

Not to be deterred, the NLRB continued to enforce and expand on *D.R. Horton* in 2015. The Board found employers to have committed unfair labor practices for maintaining mandatory employee arbitration agreements containing class action waivers in a number of cases, including *Citigroup Technology, Inc.*, 363 NLRB 55 (2015); *Amex Card Services Company*, 363 NLRB 40 (2015), and *Neiman Marcus Group, Inc.*, 362 NLRB 157 (2015). In a fourth case, , the Board expanded on *D.R. Horton,* finding an arbitration agreement containing a ten (10) day opt-out clause to be unlawful. The Board reasoned that, despite the fact that the arbitration agreement ***was not required as a condition of employment***, that placing the affirmative duty to submit an opt-out form on the employee interfered with the employee's Section 7 rights.

***NLRB's Recent Decisions Regarding Electronic Communications, Internet Usage and Social Media.*** In 2015, the NLRB issued several decisions implicating employees' internet and social media usage. These followed the NLRB's 2014 decision in *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), wherein it held that employees who are given access to employer email systems for work purposes are presumptively permitted to use those systems for certain union organizing and other concerted activities during non-working time.

In *Cellco Partnership d/b/a Verizon Wireless Inc. and Sara Parrish*, 28-CA-145221, 2015 NLRB LEXIS 718 (Sept. 18, 2015), an NLRB administrative law judge found that Verizon Wireless went too far in its restrictions on employee communications in its handbook, ordering the company to change several provisions. The judge found that provisions of the company's 2015 employee handbook, including those regarding solicitation using internal email, employees' disclosure of information, and discipline of employees for causing the company embarrassment on the internet, could affect employees' ability to communicate about wages, hours and working conditions. In particular, the judge held that the "embarrassment" provision contravened the NLRB's decision in *Purple Communications.*

In *Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309 (D.C. Cir. 2015), the Court of Appeals for the D.C. Circuit partially upheld the NLRB's decision in *Hyundai America Shipping Agency, Inc. and Sandra L. McCullough,* 357 NLRB No. 80 (2011), which held that certain provisions of an employer's employee handbook violated the NLRA. Among the provisions that the D.C. Circuit agreed were unlawful was a provision admonishing employees to only disclose information or messages from electronic systems to authorized persons, and a provision prohibiting employees from performing activities other than company work during working hours. The Court held that these two provisions could be interpreted as prohibiting employees from sharing information that pertained to the terms and conditions of their employment and engaging in union activity, respectively.

In *Three D, LLC v. NLRB*, 2015 U.S. App. LEXIS 18493 (2d Cir. Oct. 21, 2015), the Second Circuit Court of Appeals affirmed the NLRB's decision in *Three D, LLC (Triple Play)*, 361 NLRB No. 31 (2014), in which the NLRB held that an employer's termination of two employees, one for "liking" a critical post on Facebook regarding the employer's tax withholding policies and one for commenting on that post, violated the NLRA because the employees' actions constituted protected concerted activity. The NLRB declined to hold either employee responsible for any of the other profanity-laced statements posted in the Facebook discussion. The NLRB also held (and the Second Circuit affirmed) that the employee's comment was not made to disparage the employer or to undermine its reputation. The Second Circuit declined the NLRB's request that it publish its decision; however, the NLRB's decision and the fact that it was affirmed by the Second Circuit should give employers pause before disciplining employees for their comments on social media, including their use of the "like" button on Facebook.

In *Pier Sixty LLC*, 362 NLRB No. 59 (2015), the NLRB held that an employee who was fired after calling his manager a "nasty mother f***er" on Facebook did not lose the protection of the NLRA and had to be reinstated to his job. The employee posted the comment on Facebook two days before a union election. The NLRB found that the post was part of a sequence of events of employees protesting rude and demanding treatment by the employer's managers. In addition to the comment regarding the manager, the post at issue asserted "mistreatment of employees" and sought "redress through the upcoming union election." Therefore, the Board held that it constituted protected concerted activity and union activity. The Board also held that the employee's conduct was not so egregious as to cause him to lose the protection of the NLRA.

***NLRB Reverses Rule On Union Dues Check-Offs Post CBA Expiration***. In *Lincoln Lutheran of Racine*, 362 NLRB 188 (2015), the Board reversed longstanding precedent by holding that an employer's obligation to check-off union dues survives the expiration of the parties' collective bargaining agreement. A dues check-off is an agreement through which an employee authorizes an employer to automatically deduct union dues from the employee's wages and forward them automatically to the union. Since the Board's 1962 *Bethlehem Steel* decision, employers were not required to honor dues check-off agreements following the expiration of a collective bargaining agreement. Unions disliked *Bethlehem Steel* because the ruling allowed employers to interrupt a union's regular access to dues money when the union needed it most, during contract negotiations and while contemplating a potential strike.

*Bethlehem Steel* had been in doubt for some time. In 2010, the 9th Circuit refused enforcement of a Board decision following *Bethlehem Steel*, describing it as a longstanding rule without a coherent explanation. Next, the Board initially overruled *Bethlehem Steel* in 2012, but that decision was nullified by the United States Supreme Court's *Noel Canning* decision that invalidated a number of President Obama's NLRB appointments.

In *Lincoln Lutheran*, the Board relied on another longstanding precedent, the Supreme Court's *NLRB v. Katz*, which prohibits an employer from unilaterally changing an employee's "wages, hours, and other terms and conditions of employment" following the expiration of a collective bargaining agreement. The Board reasoned that union dues check-offs were a term and condition of employment and allowing an employer to unilaterally stop the check-off created an unnecessary obstacle to the collective bargaining relationship during a critical period. By contrast, *Lincoln Lutheran* did not disturb a second holding from *Bethlehem Steel* that employer-union agreements requiring all employees to be members of the union (a so-called union-security clause) must expire at the end of a collective bargaining agreement.

***NLRB Weighs In On Workplace Investigations.*** In 2015, the NLRB issued two decisions that will impact workplace investigations. These decisions built upon the NLRB's ruling in *Banner Health System d/b/a Banner Estrella Medical Center and James A. Navarro*, 358 NLRB No. 93 (2012), which the Board reaffirmed when it revisited that case in 2015, *see* 362 NLRB No. 137 (2015). In *Banner Health,* the NLRB held that an employer's practice of requesting employees who were involved in a workplace investigation not to discuss the matter with their coworkers while the investigation was ongoing was unlawful.

In the first decision, *American Baptist Homes of the West d/b/a Piedmont Gardens*, 362 NLRB No. 139 (2015), the NLRB held that employers are now required to disclose confidential witness statements gathered during the course of a workplace investigation to union representatives processing employee grievances, unless the employer can establish that its legitimate and substantial interest in confidentiality outweighs the union representative's need for the information. To make this showing, an employer must establish there is some need for witness protection, or some danger of evidence being destroyed, testimony being fabricated or facts being covered up. In reaching its holding, the NLRB overturned its long-standing precedent *Anheuser-Busch, Inc.*, 237 NLRB No. 146 (1978), which held that such confidential statements were excluded from general disclosure.

In the second decision, *Boeing Co. and Joanna Gamble*, 362 NLRB No. 195 (2015), the NLRB ruled that the employer's policy of asking employees involved in workplace investigations to keep them confidential violated the NLRA. The NLRB held that the employer's original policy, as well as an updated policy (which "recommended" that employees keep the workplace investigations confidential) implemented after the employee filed an unfair labor practice charge, infringed employees' statutory right to discuss their terms and conditions of employment and to engage in concerted protected activity.

***NLRB Holds Unlawful Employer's Ban On Recording In The Workplace.*** The NLRB very recently held that an employer's work rule prohibiting employees from recording conversations with other employees without prior approval from management was unlawful. In *Whole Foods Market, Inc. and United Food and Commercial Workers*, 363 NLRB No. 87 (2015), the NLRB held that the employer's rule making it a violation of company policy to record conversations with other employees using a tape recorder or other recording device (including a cell phone) without prior approval violated the NLRA. The stated purpose of the rule was to "eliminate a chilling effect to the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded" and the rule applied only when employees were on work time. The employer claimed that the rule was intended to protect employees who spoke out during town hall meetings, store meetings and team meetings. Although there is no indication from the case that any specific employee was disciplined for violating the rule, the NLRB held that, because the rule prohibited all workplace recording, it would serve to chill employees in the exercise of their Section 7 rights.

***Successorship Rules Create Issues With Worker Retention Laws.*** In *GVS Properties, LLC*, 362 NLRB 194 (2015), the NLRB held that an employer that assumes control of an existing business, and is required to retain certain employees based on a "local worker retention statute" may be required to negotiate with an existing union rather than determining its own conditions of employment for its new employees. GVS purchased a number of real estate properties in New York City. Pursuant to a New York City ordinance, GVS was required to retain a number of employees from the prior owner for 90 days. Under federal law, a new employer is required to bargain with a preexisting union when it retains a certain number of employees from a preexisting business. The critical question was when should the number of retained employees be counted to determine "successor" status -- when the new employer assumes control of the business, or after the expiration of the mandatory period of continued employment under local law?

The Board held that successor liability should be determined when the new employer assumes control of the business because the employer assumed control with knowledge of, and subject to, the local worker retention statute. The Board reasoned that labor laws are intended to maintain industrial peace and that goal is best achieved by "maintaining existing bargaining rights." However, the Board's decision creates a potential problem for local worker retention statutes. If local worker retention laws force an employer to bargain with a union through the successorship doctrine, those laws may conflict with, and be preempted by, the NLRA, which determines the circumstances under which an employer has an obligation to bargain with employees. This preemption issue was dismissed by the Board majority, but a related 2012 New York district court decision suggested that the Board's *GVS Properties* decision could result in the end of local worker retention laws. *Paulsen ex rel. N.L.R.B. v. GVS Properties LLC*, 904 F. Supp. 2d 282, 291-92 (E.D.N.Y. 2012).