

A REVIEW OF RECENT DEVELOPMENTS
OF INTEREST TO EMPLOYERS



2016 Employment Law Update



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 2016. As always, if you have questions or concerns relating to employment law or human resource management, we invite you to contact us.

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Seminars

2016 Schedule of Seminars

Hopkins & Carley's Employment Law Department offers periodic seminars on topics of interest to employers. Our attorneys discuss issues and present information in a practical, interactive manner, providing attendees with knowledge they can apply in their daily work. You are invited to attend any or all of the seminars that we will host in 2016.

Date	Topic
January 7, 2016	2016 Annual Update
February 4, 2016	Developing Effective Employee Handbooks
March 10, 2016	Managing Legal Risk in the Hiring and Onboarding Process
April 14, 2016	Alphabet Soup of Leave Laws
May 19, 2016	Reasonable Accommodation and the Interactive Process — Getting it Right
September 8, 2016	Performance Management, Discipline, & Termination
October 20, 2016	Pay Them Now, or Pay Them Later: A Review of Current Issues and Recent Developments in Wage and Hour Law
November 10, 2016	A Manager's Guide to Discrimination, Harassment, and Abusive Conduct

Visit www.hopkinscarley.com for date, cost and location details. Dates are subject to change.

Leave of Absence Developments

Of all the developments in employment law in 2015, none generated more attention or angst among employers than California's new law regarding paid sick leave. Employers should assure that they are complying with the law as amended and that they are aware of developments relating to the California Family Rights Act as the New Year begins.

New Paid Sick Leave Law Now Fully Effective, and Already Amended

Last year, California became the first state in the nation to pass a law requiring employers to provide paid sick leave to most employees. The new law applies to most employers and employees in the state and became fully effective on July 1, 2015. As a result of confusion among employers caused by hasty drafting of the law, the Legislature amended the law less than two weeks later, and further amendments remain possible.

The Basic Rules

The new paid sick leave law is set forth in Labor Code sections 245 through 249. Key provisions of the law include the following:

- Covered employers – AB 1522 applies to all employers, including government entities.
- Covered employees – Employees eligible for paid sick leave pursuant to AB 1522 include all employees who work 30 or more days in California within a year of the commencement of their employment, except (a) those covered by collective bargaining agreements which provide for paid sick leave, (b) providers of home health care services and (c) certain flight and cabin crew employees of air carriers.
- Effective date – The posting and record-keeping rules mentioned below became effective on January 1, 2015 and employers became obligated to grant sick leave to eligible employees, or permit them to begin to accrue it, on July 1, 2015.
- Methods of granting paid sick leave – Employers may elect to grant sick leave using either an accrual method or a lump-sum method. Under the accrual method, eligible employees accrue sick leave at a rate of one hour for every 30 hours worked, to a maximum of six days per year. The amendments permit employers to utilize alternative accrual methods as long as the method chosen provides for accrual on a regular basis and accrual of no less than 24 hours of sick leave by the employee's 120th day of employment. Under the lump-sum method, employees receive a lump sum grant of 24 hours or three days of sick leave, whichever is greater, each year. Employers utilizing the lump sum method may not pro-rate grants of sick leave if an employee joins the company mid-year.
- Use of paid sick leave – Eligible employees may use sick leave beginning on their 90th day of employment for (a) the diagnosis, care or treatment of an existing health condition of the employee or a member of the employee's

family, (b) preventive care for an employee or a member of the employee's family, or (c) to aid or care for a member of the employee's family. The law defines "family members" as including children (biological, adopted or foster), stepchildren, wards, parents (biological, adoptive or foster), step-parents, legal guardians, spouses, registered domestic partners, grandparents, grandchildren and siblings. Victims of domestic violence, sexual assault or stalking may also take sick leave for any purpose permitted by law.

- Permissible limitations on use – The amendment clarifies that employers may limit employees to using no more than 24 hours or three days of sick leave per year, and they may measure the one-year period by calendar years, the employee's date of hire, or any 12-month period.
- Not payable at termination – Employers are not required to pay employees for accrued but unused sick leave at the termination of employment, but they are required to reinstate balances of accrued but unused sick leave for employees who are rehired within a year after the conclusion of their employment unless the employee paid the unused balance to the employee at termination.
- Employer notice required – Employers must notify employees in writing (through pay stubs or separate documents on each pay day) of the amount of sick leave available to them. The amendments clarify that employers who allow unlimited sick leave or Paid Time Off may report sick leave as "unlimited" on wage statements. Notice must also be provided on the Wage Theft Protection Act "Notice to Employee," available at www.dir.ca.gov/DLSE/dlse.html.
- Calculation of payment – The amendment to the new law confirms that employers must pay non-exempt employees at either (a) the regular rate applicable during the workweek in which the employee uses sick leave or (b) an hourly rate equivalent to the employee's total wages (excluding overtime pay) during full pay periods in the previous 90 days divided by the number of hours worked. For exempt employees, sick leave pay is calculated in the same manner as pay during other forms of paid leave (such as vacation or Paid Time Off).
- Employee notice required – Employees must provide their employer with reasonable advance notice of their need for sick leave when the need is foreseeable, and must provide notice as soon as practicable when the need for leave is unforeseeable.
- Posting required – Employers must display a poster reflecting information regarding paid sick leave.
- Recordkeeping required – For at least three years, employers must maintain records documenting the hours worked and paid sick leave accrued and taken by employees.
- Penalties for violation – If employers withhold paid sick leave from employees unlawfully, the Labor Commissioner may impose penalties equivalent to the value of sick leave withheld plus an administrative penalty of \$250 or three times the value of the paid sick leave days withheld, whichever is greater, to a maximum of \$4,000. Additional penalties are also possible.
- Presumption of retaliation – Significantly, the law creates a rebuttable presumption of retaliation if an employer takes adverse action against an employee within 30 days of the employee's opposition to any violation of AB 1522 by the employer or the employee's cooperation with an investigation concerning alleged violations.

The amendments also contain a “grandfather clause” that permits employers to maintain certain sick leave or Paid Time Off policies that existed prior to the enactment of the new law. Pursuant to the amendments, previously existing policies may satisfy the requirements of the new law if they (a) were effective prior to January 1, 2015, (b) permit accrual of sick leave or PTO on a regular basis, and (c) provide for accrual of at least eight hours of sick leave within the first three months of employment each calendar year and 24 hours of sick leave within the first nine months of employment.

Questions and Challenges

Passage of the new law has prompted questions from many employers. Some of the questions are answered in the text of the legislation, but others are not addressed directly. Further legislation or regulations may shed additional light on some of these issues in the future.

Can employers provide different sick leave benefits to different classes of employees? The new law requires all employers to provide sick leave benefits, but it does not require employers to provide identical benefits to all employees. As a result, employers are free to provide more generous sick leave benefits to certain classes of employees, provided, of course, that they do so in a non-discriminatory manner. Employers are also free to utilize the accrual method with some classes of employees and to grant sick leave on a lump-sum basis to other classes of employees.

How does the law apply to employers that already offer sick leave or Paid Time Off? Many employers have long provided sick leave to their employees as a benefit. Other employers provide Paid Time Off, which employees are free to use for any purpose. The law provides that employers who offer sick leave or Paid Time Off are not required to provide additional sick leave to employees if they already: (a) provide no less than 24 hours or three days of paid sick leave or Paid Time Off to employees each year, (b) satisfy the accrual and carry-over provisions of the new law, and (c) permit use of sick leave or Paid Time Off for the same purposes authorized by law.

Many existing policies limit eligibility for sick leave or Paid Time Off to full-time employees or exempt employees, and other policies do not permit accrual of sick leave or Paid Time Off until an employee has completed 90 days of employment. Such policies are not fully consistent with the new law because they exclude employees who are covered by the law and/or impose restrictions more onerous than those permitted by the new law. Employers confronting this scenario must either: (a) revise their policies or (b) maintain their existing policies and adopt separate policies, consistent with the requirements of the new law, for those employees who are not eligible for benefits under existing policies.

Can employers require employees to provide doctor’s notes as a condition of receiving paid sick leave? The law is silent with respect to an employers’ right to require employees to provide doctor’s notes to use paid sick leave. Some commentators have interpreted a provision stating that employers “shall provide” paid sick days to an employee upon the employee’s request as prohibiting requests for doctor’s notes, but the law does not contain any language that reflects a clear intent to prohibit the long-standing practice of requesting doctor’s notes when employees are absent from work due to illness or injury.

How does the new state law relate to local laws that also require paid sick leave? While California is the first state to adopt a paid sick leave law that applies to most employees, some cities have already adopted laws that require the provision of paid sick leave. Within California, San Francisco, Oakland, San Diego and Emeryville have already adopted such laws, and other cities are likely to do so in the future. Employees working within those cities may be eligible for benefits under both state and local law. State and local laws are similar in some respects, but the provisions of each law are unique, and the new state law does not preempt local laws on the subject. As such, employers are obligated to comply with both sets of laws and employees will benefit by enjoying the “best of both worlds” if they work in a city with a local sick leave ordinance.

What Should Employers Do Now?

- If you have a policy regarding sick leave – Employers that already maintain policies regarding sick leave (or Paid Time Off) should review their policies to determine whether they satisfy the requirements of the new law, including its amendments. Many existing policies limit eligibility for sick leave more narrowly than the new law, for example, or authorize the use of sick leave for purposes more narrow than those permitted under the new law. Employers who maintain such policies should either revise them or adopt separate policies to cover employees not eligible for sick leave under existing plans.
- If you don't have a policy regarding sick leave – Employers that have not adopted policies regarding sick leave (or Paid Time Off) should create and implement policies that comply with the requirements of the law.
- Comply with notice and posting requirements – Apart from requiring employers to provide paid sick leave to employees, the new law also imposes notice and posting requirements, and those requirements became effective as of January 1, 2015. Employers that have not taken action to comply with these requirements should do so immediately.
- Assure that you comply not only with state law, but also with local laws – Employers should confirm whether they are subject to any local sick leave ordinances in addition to the state law and, if so, assure that they comply with the requirements of both laws.
- Be alert to the risk of retaliation claims – AB 1522's presumption of retaliation creates a substantial risk of liability for employers who take adverse action against an employee within 30 days of the employee's opposition to any acts allegedly in violation of the law. Employers should confer with counsel before discharging any employee who has recently taken or requested paid sick leave pursuant to AB 1522.

Amendments to CFRA Regulations Harmonize State and Federal Law, But Differences Remain

In addition to the new sick leave law, amendments to the California Family Rights Act (“CFRA”) regulations also became effective on July 1, 2015. In general, the amendments harmonize provisions of the CFRA with the federal Family and Medical Leave Act. Both laws, of course, apply only to employers with 50 or more employees.

The key provisions of the new amendments include the following:

- Application to joint employers – When two or more businesses each exercise control over an employee’s work or working conditions, they may be considered joint employers and each will be subject to the requirements of the CFRA.
- Treatment of employees who work from home – The new regulations clarify that employees who work from home are considered to work at the site from which their work is assigned or the site to which they report, not their home.
- Employees who become covered employees while not actively working – Employees who have not completed 12 months of employment when they begin a leave of absence but reach the 12-month milestone during leave become eligible for CFRA leave and protections when they do so.

Notwithstanding the recent amendments, several key differences still exist between the CFRA and the FMLA.

Employers should be particularly aware of the following key differences:

- Application to pregnancy – Employees disabled by pregnancy are not entitled to leave under the CFRA, but pregnancy disability is covered under the FMLA. The CFRA regulations confirm that employers must maintain an employee’s group health insurance coverage for the full duration of pregnancy disability leave (a maximum of four months) and any additional CFRA leave (a maximum of 12 weeks).
- Communication with employee’s health care provider – The CFRA permits employers to contact an employee’s medical provider only to authenticate a medical certification. The new regulations confirm that employers may not contact the health care provider to seek “clarification” of the medical certification, as is permitted under the FMLA.
- Second opinions – Under the CFRA, employers may not seek a second medical opinion regarding an employee’s condition unless they have a “good faith, objective reason” to doubt the employee’s original medical certification. The FMLA permits employers to seek a second medical opinion when they have “reason to doubt” the initial certification.
- Use of sick leave – The CFRA permits employers to require employees to use paid sick leave when absent due to their own serious health condition. When employees take CFRA leave for other purposes, the employer may not force them to use paid sick leave.

What Should Employers Do Now?

- Review and update policies as necessary – Employers, particularly those with operations both inside and outside of California, should review their family and medical leave policies to assure that they are consistent with current law.
- Comply with posting requirements – Employers should also confirm that they are using workplace posters and medical certification forms consistent with the new regulations.

Richey Decision Clarifies Rules Regarding Termination of Employees on CFRA Leave, But Only Slightly

Disputes concerning the termination of employees on statutory leaves of absence are common, and the rules applicable in such scenarios are sometimes complicated. The California Supreme Court's decision in Richey v. Auto Nation helps to clarify the rules to some extent, and in a manner that is favorable for employers, but employers must be careful not to interpret the decision too broadly.

In Richey, the employee injured his back at home and then went on a leave of absence under the California Family Rights Act. When hired, he had received an Employee Handbook stating that employees on medical leave were not permitted to engage in outside employment during leave.

Before injuring himself, Richey had been planning to open a restaurant. While on CFRA leave, he worked to get his restaurant ready for opening, doing a variety of tasks that were consistent with the restrictions his doctor had imposed on him during leave. When his employer confirmed that he was engaged in outside work, however, it terminated his employment.

Richey filed suit, alleging that the company had violated his CFRA rights. An arbitrator rejected his claims, holding that the employer based its decision on its "honest belief" that Richey had violated its policies, rather than the mere fact that he had taken CFRA leave.

Richey appealed the decision in court, and the California Supreme Court concluded that Richey's clear violation of his employer's policy constituted valid grounds for termination. The Supreme Court noted that it was not expressing any opinion on the legality of the employer's policy against outside employment during medical leave, however. To the extent that employees on medical leave engage in outside employment that is consistent with any restrictions placed on them by their health care provider, their activity is not illegal and, as such, is arguably protected by the California Labor Code, which generally restricts the ability of employers to regulate the off-duty conduct of employees.

Employers should not interpret the Richey decision as endorsing policies that prohibit outside employment during a leave of absence when such employment is otherwise consistent with the restrictions applicable to an employee during leave. The Richey decision does, however, affirm that employees on CFRA leave have no greater right to reinstatement than if he had been working continuously, and that violations of lawful policies constitute proper grounds for termination.

What Should Employers Do Now?

- Confer with counsel before terminating the employment of any employee on a leave of absence – Despite the guidance provided by the Richey decision, terminating employees on statutory leaves of absence remains a complicated and risky proposition for employers. Prudent employers will confer with counsel to assess all

potentially applicable laws and risks before finalizing and implementing any termination decision affecting an employee on a statutory leave.

- Communicate policies regarding leaves clearly to all affected employees – Auto Nation’s clear communication of its policy to Richey was important to the Supreme Court in its decision. Had the employer not communicated its policy clearly, and been able to prove that it did so, the Court could easily have reached a different conclusion. Employers should convey relevant rules and information to employees at the inception of a leave of absence, preferably in writing.

Wage & Hour Developments

Worker classification issues continued to vex employers in 2015. Government agencies are increasing their already heightened scrutiny of independent contractor classifications, and the battle brewing between Uber, its drivers and the government provides a compelling example of the practical and legal issues. Meanwhile, claims involving issues other than classification continue to increase as employee attorneys search for new points of vulnerability for employers.

The Department of Labor Issues Guidance on Independent Contractor Status

Last year, the federal Department of Labor's ("DOL") Wage and Hour Division issued new guidance on how it will determine whether workers can be classified as independent contractors or must be classified as employees subject to the Fair Labor Standards Act. The new guidance reflects the DOL's increasingly narrow concept of independent contractors, examines the longstanding "economic realities test" and encourages employers to consider all factors. In general, the DOL factors seek to determine whether a worker is truly an independent business person or is economically dependent upon the party that hired him or her.

The DOL guidance reveals that the Department will focus heavily upon the following factors in determining whether a worker is a bona fide independent contractor:

- Is the work integral to the company's business? The DOL guidance emphasizes that work integral to a business should be performed by employees, so if the work performed by the individual in question is integral to the business of the company, that fact would tend to support classification as an employee, rather than a contractor.
- Does the worker's role and skill affect his or her opportunity for profit or loss? True independent contractors usually bring a specific skill to the job and face the possibility of profit or loss from their work, while employees are simply paid for their time and effort.
- How does the worker's investment compare to the company's investment? Bona fide independent contractors often invest in training, equipment or materials in providing their services, while employees generally do not make any investments in the business they serve. The DOL guidance cautions, however, that the worker's investment should not be viewed in isolation and should be compared to the company's investment, suggesting that token or nominal investments will not carry significant weight in the DOL's analysis.
- Does the work performed by the worker require special initiative or skill? When assessing a contractor classification, the DOL will focus on a worker's business skills, judgment and initiative, as opposed to technical skills. True independent contractors utilize business skills, judgment and initiative to a greater degree than employees.

- Is the relationship between the company and the worker continuing and indefinite, or of fixed duration?
Ongoing, indefinite relationships are characteristic of employment, while bona fide contractors typically work for the duration of a specific project, or for a fixed time period.
- How much, and what kind of, control can the company exercise over the worker? In its guidance, the DOL states that a worker's ability to control his work schedule, by itself, is not strong evidence of contractor status. Rather than mere control over work hours, the DOL guidance focuses on whether the company has the ability to exercise control over meaningful aspects of the work performed, even if it does not exercise that control routinely.

Uber Driver Deemed an Employee, Not a Contractor, in Labor Commissioner Case

One well-publicized example of the continuing tension over contractor classifications involves Uber, the ride-sharing service. Last year, the California Labor Commissioner's local office in San Francisco concluded that an Uber driver should be classified as an employee and not an independent contractor. As a result, the hearing officer awarded the driver \$3,878.08 in reimbursement for mileage and bridge tolls incurred while providing rides. Uber has filed an appeal and a trial on the matter will proceed in state court. The hearing officer's decision, which only became widely known after Uber filed its appeal, has received a great deal of publicity and added fuel to the debate about contractor classifications, particularly in the changing services economy.

Challenges to the validity of a contractor classification can arise in numerous ways. In the Uber case, the driver filed a claim with the local office of the Labor Commissioner. The hearing officer reasoned that Uber could not exist without drivers, so the drivers are integral to the business. Ultimately, the hearing officer rejected Uber's argument that its core business is providing a technological platform which allows riders and drivers to transact business and ruled in favor of the driver.

In addition to filing a claim with the Labor Commissioner's office, persons classified as independent contractors sometimes apply for unemployment benefits after their engagement ends. When this happens, the Employment Development Department (EDD) will determine whether the individual is an employee or independent contractor applying the standards used by the EDD (which are similar, but not identical, to the DOL's standards). If the EDD determines the individual should have been classified as an employee, its determination may trigger an audit in which the EDD will determine whether other individuals working for the organization have been classified improperly as independent contractors. The EDD audit will look back several years and can result in a significant assessment of payroll taxes against the business. Significantly, the EDD also shares information with the Internal Revenue Service (IRS). As a result, companies subject to an EDD audit should expect the IRS also to take an interest in any challenged independent contractor classifications.

What Should Employers Do Now?

- Resist the temptation to base contractor classifications on criteria other than those recognized by law – Businesses often classify workers as independent contractors because they perceive a financial advantage in doing so.

After all, they are not required to pay payroll taxes for contractors, and contractors are not eligible for overtime. Prudent businesses base classification decisions upon the applicable legal criteria, however, and recognize that the long-term risks of misclassification outweigh the potential short-term savings. The recent DOL guidance reveals that the extent to which the company retains control over the “manner and means” by which the worker performs services may be the most significant factor in its analysis.

- When reviewing the validity of contractor classifications, confer with counsel to obtain the protection of the attorney-client privilege – When employers analyze the proper classification of their workers, the information that they gather, and the conclusions that they reach, can be used against them in claims asserted by workers or governmental agencies unless the analysis is conducted with the guidance of an attorney under the attorney-client privilege. Employers that review classifications and conclude that they are incorrect can essentially admit liability if they cannot use the attorney-client privilege to preserve the confidentiality of their conclusions.

Augustus: To Relieve or Not to Relieve – That Remains the Question

Meal and rest period disputes remain commonplace, and the flow of judicial decisions in 2015 indicates that despite the welcome guidance provided by the Brinker decision, additional issues remain. One important example is the California Supreme Court’s decision to grant review of Augustus v. ABM Security, Inc., a class action lawsuit involving thousands of former and current security guards employed throughout California.

In the original action, the employees claimed, and the employer acknowledged, that the company required security guards to keep their radios and pagers on during rest periods, to “remain vigilant,” and to respond when the need arises, such as when a building occupant wished to be escorted to the parking lot, or when any emergency situation arose. Both the company and the class members further admitted that the security guards, though on call during rest periods, engaged in various non-work activities including smoking, reading, making personal telephone calls, and surfing the internet. The trial court determined that California law requires employers to relieve their employees of all duties during rest periods, and issued a \$90 million judgment in favor of the class.

On January 29, 2015, the California Court of Appeal vacated the judgment. In reaching its decision, the Court of Appeal rejected the lower court’s finding that California law requires employers to relieve employees of all duties during rest periods. The appellate court first noted that Labor Code section 226.7 states that “[A]n employer shall not require an employee to work during a meal or rest...period;” and on that note, believed it was charged simply with determining whether being on call constitutes “work.” The court concluded, largely based on the fact that the security guards at issue engaged in various non-work activities during rest periods, that being on call in such circumstance did not constitute “work.”

The court supported its conclusion by examining the language of the applicable Industrial Welfare Commission Wage Order. The court found instructive that while the section pertaining to meal periods requires that an employee be “relieved of all duties,” the section on rest period contains no similar requirement. Further, the court concluded that

because rest periods constitute paid time, and the employee therefore remains under the employer's control, there is no support for the conclusion that a rest period is only valid if the employee is relieved of all duties.

The appellate court decision was initially helpful to employers as it clarified that being on call during a rest period, if the employee is otherwise permitted to engage in personal activities, did not render a rest period invalid and therefore subject to a missed rest period premium. However, on April 29, 2015, the California Supreme Court granted the employee's petition for review. Accordingly, the appellate court's decision can no longer be relied upon, and the issue is once again in flux.

What Should Employers Do Now?

- Review current practices with respect to rest periods – Without any indication concerning the Supreme Court's view of such "on duty" rest period practices, employers should carefully evaluate their current practices and policies to ensure that employees are relieved of all duties while enjoying meal *and rest periods*. To the extent that employees are subject to meaningful rest period restrictions, employers should consider lifting such restrictions until the Supreme Court weighs in, proactively pay a rest period premium, or accept some degree of risk.
- Watch for legal updates – The Supreme Court is expected to issue a decision in 2016, and it will be the subject of an Employment Law Advisory. If you are not already receiving Hopkins & Carley's periodic Employment Law Advisory, please contact us directly or through our website at www.hopkinscarley.com.

Mendiola – 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 attorneys representing employees with a myriad of opportunities to challenge payroll practices, however, and the California Supreme Court's 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 generally 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, and consider factors such as (a) whether the employee is required to live on premises, (b) restrictions imposed on the employee's mobility or movement, (c) the frequency of calls made to the employee while on standby, (d) the restrictiveness of any response-time obligations imposed upon the employee, and (e) whether the employee actually engaged in personal activities while on call.

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" (including time spent sleeping) should be counted as "hours worked" and, therefore, compensable.

The Supreme Court had little trouble agreeing with the guards, holding that their employer must pay them for the time spent on call during the week, including the time they spent sleeping. 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 employees on call are restricted – Employers should carefully, and realistically, evaluate whether employees are able 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.

The Salary Level Test – The Department of Labor’s Proposed Regulations

On July 1, 2015, the Department of Labor issued proposed regulations concerning the so-called “white collar” exemptions under the Fair Labor Standards Act (FLSA). The proposed regulations have received a great deal of publicity and, if adopted as proposed, would substantially increase the minimum salary needed to qualify as exempt from overtime under the FLSA, potentially affecting over ten million employees nationwide and requiring employers either to increase the salaries of those employees or re-classify them as non-exempt.

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 proposed regulations pertain primarily to the “salary level” test.

Under current federal law, exempt employees must receive a salary of at least \$455 per week, or \$23,660 per year, in order to qualify for one of the “white collar” exemptions. Under California law, exempt employees must receive a salary of at least twice the minimum wage for full-time employment, which amounts to \$41,600 for 2016, to qualify for the “white collar” exemptions.

If adopted, the proposed regulations would result in the following significant changes:

- Increase in minimum salary needed for “white collar” exemptions – Most notably, the proposed regulations would require that employees receive a salary equal to or greater than the 40th percentile of weekly earnings for full-time salaried workers in order to qualify as exempt under the “white collar” exemptions. Economists currently project that this formula would result in a minimum salary of \$970 per week, or \$50,440 per year, for 2016.
- Automatic annual adjustments – The proposed regulations also call for automatic annual adjustments to the minimum salary level, based either on the rate of inflation or percentiles of earnings.
- Increase in minimum compensation for “highly compensated employee” exemption – The proposed regulations also address the minimum compensation required to qualify for the little-known “highly compensated employee” exemption. Under current rules, employees must earn at least \$100,000 per year to qualify as exempt under the highly-compensated employee rules. The proposed regulations would set the minimum salary equivalent to the 90th percentile of earnings for full-time salaried workers (currently \$122,148).

The proposed regulations must go through the complex federal rule-making process before they can become effective, but the Department of Labor is expected to finalize its rule before President Obama leaves office.

What Should Employers Do Now?

- Remain alert for updates on the adoption of the proposed regulations – Adoption of the proposed regulations could mean increased payroll costs for many employers. Employers should remain alert to the proposed

regulations and prepare themselves to comply with them if they are adopted, either in their current form or in a revised form. We will report on significant developments concerning the proposed regulations as they occur.

- Don't forget that state law also applies – Employers should remember that many companies are subject to two separate sets of wage and hour laws. In California, for example, most employers are subject to both the federal Fair Labor Standards Act and the Industrial Welfare Commission's Wage Orders. The FLSA and relevant state laws address many of the same subjects and are similar in many ways, but they are not identical. Employers cannot classify an employee as exempt unless the employee qualifies as exempt under both state and federal law.

Pay Stub Controversies – Some Very Narrow Relief

Employers are all too familiar with the ongoing wave of wage-and-hour litigation that has plagued companies of all sizes for many years. Some claims arise from alleged failure to comply with new or complex laws, such as those relating to overtime exemptions. Other claims arise from a failure to comply with laws that are well-established and relatively straightforward. One of the latter types of claims, involving alleged violations of pay stub rules, is increasingly popular among plaintiffs' attorneys and problematic for employers.

The California Labor Code requires employers to provide employees with certain information together with their paychecks. The necessary information can be provided in a document separate from the paycheck, but is most often reflected on a detachable check stub. Regardless of the format chosen, employers must provide employees with an itemized listing of the following information:

- gross wages earned;
- total hours worked by the employee, except for exempt employees paid on a salary basis;
- the number of piece-rate units earned and any applicable piece rate, if the employee is paid on a piece-rate basis,
- all deductions;
- net wages earned;
- the inclusive dates of the pay period;
- the name of the employee and only the last four digits of his or her Social Security number or an employee identification number other than a Social Security number;
- the legal name and address of the employer;
- all applicable hourly rates in effect during the pay period and the number of hours worked at each hourly rate.

Although the rule is relatively simple and straightforward, violations are all too common. Violations are particularly common for employers who process payroll checks internally, rather than through a vendor. Even some payroll vendors utilize pay stubs that do not comply with all of the requirements of California law, however, so employers should not assume that they are immune to risk merely because they utilize a vendor to process their payroll.

Violations of the pay stub rules entitle employees to recover \$50 for the first violation, and \$100 per employee for each violation in subsequent pay periods, not to exceed an aggregate penalty of \$4,000. Employees are also entitled to recover the legal fees and costs they incur in pursuing such claims, so liability can mount quickly.

Unfortunately, the law provides few meaningful defenses to claims for violation of pay stub rules, so employees often have little incentive to compromise in settling claims. However, on October 2, 2015, Governor Jerry Brown signed Assembly Bill 1506 amending the Private Attorneys General Act (“PAGA”) to provide employers an opportunity to cure certain wage statement defects. The new law, which took effect upon the governor’s signature, impacts only PAGA claims where the alleged defects are that the employer failed to include (a) the inclusive dates of the pay period, and (b) the legal name and address of the employer. In that limited circumstance, the law permits the employer to correct and reissue compliant wage statements for the previous three years to all employees that received defective ones. The employer must take the opportunity to correct the deficiencies within 33 days of receiving notice of a PAGA claim.

What Should Employers Do Now?

- Review documentation provided to employees with paychecks to assure that all necessary information is included – Regardless of whether they process paychecks internally or through an outside vendor, employers should review the documentation provided to employees with each paycheck to assure that all of the information listed above is included in either the paystub or in a separate document that accompanies each check. In the event documentation is not compliant, employers should confer with counsel to formulate a plan to achieve compliance and manage any existing risk of liability.
- Take advantage of the opportunity to cure defects if presented – Employers typically receive notice of a threatened PAGA claim through a letter from an attorney that is planning to bring such an action on behalf of one or more former or current employees. Upon notice, a prudent employer will confer with counsel in order to assure that they take advantage of any opportunity to correct deficiencies as permitted under the new law.

More Power to the Labor Commissioner! – New Enforcement Tool in 2016

On October 11, 2015, Governor Jerry Brown signed Assembly Bill 970 into law. AB 970 authorizes the Labor Commissioner to investigate and enforce local overtime and minimum wage laws, such as those currently in place in San Jose, San Francisco and Oakland, and to issue penalties for violations, except in cases where the local entity has already cited the employer for the same violation. Perhaps more significantly, AB 970 empowers the Labor Commissioner to issue citations and assess penalties against employers that violate the expense reimbursement provisions of the Labor Code.

Employers commonly reimburse expenses incurred by employees in the course of their employment, but many employers do not fully understand their obligations with respect to the reimbursement of business expenses. The obligation to reimburse business expenses incurred by employees originates in California Labor Code section 2802,

which requires an employer to “indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties” Simply stated, the statute requires employers to reimburse employees for all necessary expenses incurred in the course of performing their job duties.

In an understandable effort to control expenses and process them efficiently, many employers maintain expense reimbursement policies that require employees to submit reimbursement requests and within a defined period of time, or limit reimbursement to expenses that were approved by management. The Labor Code requires reimbursement of legitimate business expenses without regard to the timing of the employee’s request or the existence of management approval, however. To the extent that employees incur legitimate business expenses but do not comply with expense reimbursement policies, employers should generally address the non-compliance as a disciplinary issue, rather than expose themselves to potential liability by refusing to reimburse the employee.

As the 2014 decision in Cochran v. Schwan’s Home Service, Inc. indicates, the obligation to reimburse employees for expenses incurred in the course of performing their jobs is quite broad. In Cochran, the Court of Appeal concluded that “[i]f an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense for the purposes of section 2802.” The logic underlying the Cochran decision is not limited to reimbursement of cell phone charges, however. Prudent employers should consider whether their employees are required to use other personal devices or resources to perform their jobs. Some employees, for instance, are required to use their own tablets, laptop computers, home computers (and Internet service), and other tools or equipment in carrying out their duties. The Cochran decision suggests strongly that employers are obligated to reimburse such employees for at least a portion of the cost associated with their use of these personal resources. Employers should consider whether employees need to use particular equipment or services in carrying out their duties and, if so, employers should decide whether to provide the equipment to the employee at the employer’s expense or reimburse the employee for the use of the item (or service). Employers should also consider whether to prohibit the use of personal equipment and services in order to avoid potential claims for reimbursement.

What Should Employers Do Now?

- Do not deny reimbursement of otherwise valid business expenses due to non-compliance with internal policies – When confronted with requests for the reimbursement of valid business expenses that are not submitted in accordance with company policy, employers should generally reimburse the expense as required by law and treat the policy violation as a disciplinary matter, rather than a justification for denying reimbursement.
- Consider the implications of the *Cochran* decision and act accordingly – Employers should identify the resources necessary to perform existing jobs (potentially including cell phones, home computers, and home Internet access) and determine whether they will provide those resources to employees or reimburse employees for providing the resources themselves. Employers who elect to provide the resources should consider adopting policies that prohibit the use of personal property and resources when company resources are provided.

Piece Rate Compensation – The Legislature Provides Interesting Clarification

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 piece-rate compensation is common in industries such as agriculture and automobile repair. Assembly Bill 1513, which became effective on January 1, 2016, now requires employers to pay employees who are compensated on a piece-rate basis for rest and recovery periods and "other nonproductive time" separately from any piece-rate compensation.

Under the new law, employers must pay piece-rate employees during rest and recovery periods at least the greater of the minimum wage or their average hourly rate for the workweek. (Average hourly rate for the week is determined by dividing total compensation for the week, excluding compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked in the week, excluding rest and recovery periods). During "other nonproductive time," which is defined as the time during which the employee is under the employer's control that is not directly related to the work being paid on a piece-rate basis, employers must pay piece-rate employees at least the minimum wage. Employers that pay an hourly rate of at least the minimum wage for all hours worked, in addition to any piece-rate compensation, may take advantage of a "safe harbor" rule and are considered to be in compliance with the law.

AB 1513 also requires employers to provide itemized wage statements to piece-rate employees that include, in addition to the information required in all other wage statements, (a) the total hours of compensable rest and recovery periods, (b) the rate of compensation and gross wages paid for such periods, (c) the total hours of other non-productive time, and (d) the rate of compensation and gross wages paid for such time.

What Should Employers Do Now?

- Consider whether the benefits of piece-rate compensation outweigh the complications and risks – In light of the complexities and administrative challenges created by AB 1513, employers should consider whether the potential advantages and benefits of piece-rate compensation justify the increased complexity and administrative burden they must bear. In many cases, employers may be better served by avoiding piece-rate compensation.
- Implement any piece-rate compensation plans in compliance with the new law – Employers that elect to maintain piece-rate compensation systems should confer with counsel to assure that they are implementing such systems in compliance with the new law. Prudent employers will also consider utilizing the "safe harbor" rule described to minimize their risk of liability.

Discrimination Developments

Discrimination and harassment is always a fertile field within employment law, and 2015 offered significant developments relating to gender discrimination, disability discrimination, and discrimination in hiring.

Lessons for Employers from the Pao Trial

Last March, a San Francisco jury returned a verdict in favor of venture capital firm Kleiner Perkins Caulfield & Byers in the highly publicized trial of sex discrimination and retaliation claims asserted by Ellen Pao. The trial caused significant public discussion of gender discrimination and inequality in the workplace. The publicity generated by the Pao trial, together with the passage of the Fair Pay Act, may lead to an uptick in gender discrimination claims.

The Pao verdict does not make new law, but it does offer several valuable messages for employers:

- Sex discrimination claims are likely to increase – Although Ms. Pao ultimately did not prevail at trial, she did convince at least four jurors to vote in her favor before the verdict was finalized, and her case served to highlight both the overt and the subtle discrimination that many female employees perceive in the workplace. In the wake of the trial, and the increased publicity and public discussion of sex discrimination in the workplace, many observers expect the volume of sex discrimination claims to increase, particularly in professional environments and in Silicon Valley. Prudent employers will anticipate this trend and take appropriate precautions to minimize their risk of litigation, including meaningful training for their personnel and proper investigation of complaints, regardless of how established or powerful the target of the complaint may be.
- Documentation is very important – During trial, the defense team placed considerable emphasis upon the performance evaluations issued to Ms. Pao, and the jury appears to have done so as well. The evaluations reflected certain criticisms of Ms. Pao's performance and conduct and lent valuable credibility to the employer's arguments at trial. Many commentators believe that the jury may have found in favor of Ms. Pao had Kleiner Perkins not been able to produce credible documentation supporting its criticisms. All too often, employers either fail to document deficiencies in performance or conduct at all, or create documentation which is incomplete or unconvincing. The Pao trial provides a compelling example of the importance and value of proper documentation.
- EEO policies do matter – While Kleiner Perkins ultimately prevailed, there were difficult moments during the trial during which the company was forced to admit that it could not find its written equal employment opportunity or non-discrimination policies. Just because most employers have long had written EEO policies, the policies should not be taken for granted. Employers should make sure they have current equal employment and non-discrimination policies and that those policies have been properly distributed and are redistributed on a regular basis.

- Beware of acts that may reflect subtle or unconscious bias – Attorneys in the Pao case devoted much attention to actions that arguably reflected subtle or unconscious bias against females, including dinners and firm functions to which only males were invited, as well as criticism for demonstrating certain traits (such as assertiveness and confidence) that were praised in male co-workers. Notably, many of the male witnesses at trial did not even recall events that Pao regarded as discriminatory, and that many professional women view as all too common in the workplace, demonstrating a “disconnect” that could make the recurrence of such events more likely than not. As overt and intentional discrimination hopefully becomes less prevalent in the workplace, the outcome of some lawsuits will increasingly be determined by evidence reflecting subtle and unconscious bias. In addition to addressing problems of overt discrimination in the workplace, employers should attempt to increase consciousness of subtle and unintended acts that may reflect (or be perceived as reflecting) bias.

Because the jury returned a verdict in favor of the employer and the case did not involve novel questions of law, the Pao case may not represent a true landmark in discrimination law. However, the trial reignited a public discussion about women in the workplace and received intense publicity. The evidence in the trial and how it was used by Pao’s counsel offers several valuable messages for employers who seek to eliminate bias in the workplace and avoid potential liability. Prudent employers will heed those messages and take steps to reduce their risk of claims.

California Fair Pay Act Increases Risk of Liability for Gender-Based Differentials in Pay

Last year, Governor Brown signed Senate Bill 358, the California Fair Pay Act, a bill intended to help eliminate inequality between the wages of male and female employees. The new law became effective on January 1, 2016.

Existing law already prohibits discrimination in compensation, but Senate Bill 358 enhances existing protections by reducing the burden of proof placed upon employees alleging discriminatory pay practices and increasing the amounts recoverable by employees who assert a claim.

Under the new law, an employee claiming discrimination in pay must show only that she is not being paid the same as a male counterpart for substantially similar work. The law expressly permits an employee to compare her pay to that of a male who holds a different job, but one that is substantially similar in terms of skill, responsibility and working conditions. If the employee succeeds in demonstrating that she is paid less than a male employee for substantially similar work, the employer must then justify the difference by showing that it is attributable entirely to (a) a seniority system, (b) a merit system, (c) a system that measures earnings by quantity or quality of production, or (d) a bona fide factor other than sex (such as education, training or experience) consistent with a business necessity. Employers must also show that any factor cited as a reason for the discrepancy is applied reasonably. As a result, employers that do not conduct systematic, comprehensive and well-documented performance evaluations are likely to be unable to justify differentials in pay by citing merit or performance as the cause.

Employees who prove the existence of discriminatory pay practices pursuant to the new law are entitled to recover the differential in pay, interest, and liquidated damages equivalent to the differential in pay, essentially creating a “double damages” remedy in every case.

Aside from making it easier for employees to prove discriminatory pay practices and enhancing the remedies available, the new law also prohibits employers from preventing employees from discussing their wages, a common practice at many companies. This provision is intended to create greater transparency and access to the information that would be needed to support a claim of discrimination in pay.

What Should Employers Do Now?

- Increase awareness of wage discrepancies – In light of the lower standard of proof and greater potential liability, employers should be more alert to discrepancies in pay that could create a basis for a claim.
- Consider whether a thorough review of compensation practices is warranted – Employers who become aware of sex-based discrepancies in pay between employees performing substantially similar work should consider whether to conduct a thorough and systematic review of their compensation practices to determine the cause of the discrepancy and the extent of their potential liability.
- Conduct any review of compensation practices under attorney-client privilege – Employers who elect to review their compensation practices should do so in conjunction with an attorney in order to gain the protection of the attorney-client privilege. Employers who review their payroll practices without conferring with an attorney may be forced to disclose any harmful findings to employees who complain of discrimination.
- Eliminate any policies that prohibit or discourage employees from discussing or disclosing their wages – Policies that prohibit or discourage employees from discussing or disclosing their wages are common, so any employer that still maintains such a policy should discontinue the policy.

Inability to Work With a Particular Supervisor is Not a Disability Under FEHA

The disability discrimination laws impose at least three distinct obligations on employers- a duty to refrain from discriminating against qualified individuals with a disability, a duty to provide reasonable accommodation, and a duty to engage in an interactive communication process with disabled individuals to identify potential reasonable accommodations. If an applicant or employee files suit alleging that the employer did not engage in the interactive process, courts decide, with the benefit of 20/20 hindsight, whether the communication process was sufficiently interactive or whether the employer should have offered a particular accommodation. Often in recent years, courts have ruled against employers in disability and accommodation cases. In some significant decisions issued this past year, however, employers prevailed.

Addressing conflicts between a supervisor and a subordinate is nothing new for employers. But how should an employer respond to an employee who returns from a medical leave of absence with a doctor's note requesting reassignment as a form of reasonable accommodation for stress and anxiety caused by dealing with the employee's supervisor? The court answered this question in Higgins-Williams v. Sutter Medical Foundation.

Michaelin Higgins-Williams worked for Sutter Medical Foundation as a clinical assistant and conducted patient intake, reporting to her immediate supervisor Debbie Prince. After Higgins-Williams told her doctor that she was

stressed because of interactions at work with human resources personnel and her supervisor, Higgins-Williams was diagnosed as having adjustment disorder with anxiety. Based on this diagnosis, Sutter Medical Foundation granted Higgins-Williams a stress-related leave of absence from work under the California Family Rights Act (CFRA) and the federal Family and Medical Leave Act (FMLA). Her doctor reported her disabling condition as “stress when dealing with her Human Resources and her manager.”

When Higgins-Williams returned to work after exhausting her statutory leave, Prince gave her a negative performance evaluation. According to Higgins-Williams, a month later Prince also falsely accused her of being irresponsible in the care of her identification badge. And on the same day, her regional manager, Norma Perry, grabbed her arm and yelled at her, causing Higgins-Williams to suffer a panic attack, leave work, and not return. Soon thereafter, Higgins-Williams requested a leave of absence and a transfer to a department managed by someone other than Perry pursuant to her doctor’s recommendation. Sutter Medical Foundation granted the requested leave of absence and extended the leave of absence several more times. Her doctor stated that she could not work in the same department as her regional manager, but could return to work without limitations if she worked under different supervisors.

After several months of leave, Sutter Medical Foundation advised Higgins-Williams that it would terminate her employment unless she provided information as to (a) if and when she could return to work and (b) whether additional leave as an accommodation would effectuate her return to work as a clinical assistant. She did not supply this information by the deadline provided and Sutter Medical Foundation terminated her employment. Higgins-Williams sued and alleged a variety of claims under FEHA, including disability discrimination, failure to engage in the interactive process and make reasonable accommodation for her disability, retaliation for her assertion of disability rights, and disability-related wrongful termination in violation of public policy.

For each of the causes of action under FEHA, Higgins-Williams was required to establish that she suffered from a mental disability. A qualifying mental disability under FEHA includes “any mental or psychological disorder ..., such as ... emotional or mental illness” that “limits a major life activity.” The term “major life activity” is broadly construed and includes physical, mental and social activities, and working.

The appellate court concluded that Higgins-Williams did not suffer from a FEHA-recognized mental disability. Relying on earlier case law, the court held that “[a]n employee’s inability to work under a particular supervisor because of anxiety and stress related to the supervisor’s standard oversight of the employee’s job performance does not constitute a disability under FEHA.” Consequently, each of her FEHA claims failed. The court left as an open question, however, whether something other than “standard oversight of job performance” could result in a different outcome. Thus, employees are not entitled to pick their supervisors under the guise of a reasonable accommodation.

What Should Employers Do Now?

- Remember that a qualifying disability is a predicate for the duty to provide reasonable accommodation – When engaging in the interactive process, employers should consider asking themselves whether the employee’s condition arises to the level of a qualifying disability under FEHA. If there is any question, employers would be wise to seek

legal counsel to aid them in answering this question and determining how to proceed in navigating any obligation to engage in the interactive process and provide reasonable accommodation.

- Remember that problems not rising to the level of a legal dispute may still represent human resources issues worthy of attention – Although some concerns expressed by employees may not rise to the level of a legal issue, they still may represent bona fide human resources or employee relations issues that are worthy of serious attention. Human Resources personnel should always strive to prevent garden-variety issues from escalating into claims (whether meritorious or not), so employers should not confuse the absence of a legal issue with the absence of a human resources issue.

Employers Not Required to Eliminate Essential Job Functions or Transfer Disabled Employee if There is No Vacant Position for Which He is Qualified

A disabled employee returns from a medical leave of absence but cannot perform one of the job functions that the company considers to be essential. Must the company restructure the job to eliminate that particular function to fulfill its obligation to provide a reasonable accommodation? And what should the company do if the disabled employee applies for a vacant position but is not qualified for that position? The court answered these questions in Nealy v. City of Santa Monica.

Tony Nealy worked for the City of Santa Monica as a solid waste equipment operator. He sustained a knee injury when his foot slipped as he was moving a large bin full of waste. His doctor declared him temporarily totally disabled and several surgeries ensued. Following the initial knee injury, there were a series of incidents, including two more knee surgeries and a related back injury, which required Nealy to be placed on leave and then return to work with restrictions on multiple occasions. In each instance, the City convened an accommodations committee that reviewed the medical restrictions placed on Nealy against the job description for the position Nealy was currently performing or a proposed alternative. And in each instance, the accommodations committee met with Nealy and his representative to discuss Nealy's position on his ability to perform certain functions required by the position. The City provided a series of accommodations, including an assignment to a groundskeeper position and multiple paid and unpaid leaves of absence.

When Nealy eventually decided he wanted to return to his original position of solid waste equipment operator, the City concluded that Nealy could not perform numerous essential job functions, including operating four different types of refuse collection vehicles, heavy lifting of refuse and containers, and kneeling to inspect vehicles. The committee then discussed reassigning Nealy to an alternative vacant position. Although Nealy applied for a vacant city planning staff assistant position, the City determined he did not meet the minimum qualifications for the position.

Nealy filed suit, alleging the City had failed to provide a reasonable accommodation and had also failed to engage in the interactive process as required by the law. The court rejected both contentions. The court concluded that while job restructuring or alteration of how an essential function is performed may be a reasonable accommodation, the

elimination of an essential function from a position is not a reasonable accommodation. The court also reasoned that while reasonable accommodation may include reassignment to a vacant position for which the employee is qualified, reasonable accommodation does not require reassignment if there is no vacant position for which the employee is qualified.

While the City's use of an accommodations committee may sound burdensome and time-consuming, a committee process need not be used to duplicate what the City got right in this instance. The City's actions provide a useful blueprint for how to engage in the interactive process and to provide reasonable accommodation in a defensible manner.

What Should Employers Do Now?

- Document dialogue with employees during the interactive process – Best practices dictate that employers have a documented dialogue with employees about the restrictions on their ability to perform their job and about the accommodations the employees believe would work.
- Analyze and respond to all potential accommodations proposed by employees – If employees propose specific accommodations, analyze the proposals against the essential functions of the job to determine whether all essential job functions of the position will still be performed with the proposed accommodation. Even if a proposal is not implemented, do not leave employee requests for accommodation unanswered. Although employers are not required to agree to a particular requested accommodation, employers should respond and explain why a requested accommodation is not implemented.
- Independently consider potential reasonable accommodations – Consider what accommodations the company believes it could make without undue hardship while maintaining the essential job functions and offer those accommodations to the employee in writing. Remember that job reassignment is one form of accommodation. Therefore, if a vacant position exists that is comparable or of a lower-grade than the employee's current position, conduct a documented evaluation of whether the employee is qualified for the vacant position and whether reassignment is a reasonable accommodation.
- Do not rush the interactive process – While the interactive process is often frustrating and cumbersome, time spent on engaging in a thorough process with documented discussions and conclusions is time well spent.

OSHA Issues "A Guide to Restroom Access for Transgender Workers"

With the very public transition of Bruce Jenner to Caitlin Jenner, issues around transgender rights were also very much in the public domain during 2015. The Occupational Safety and Health Administration ("OSHA") issued guidance during 2015 setting forth its view of how employers should handle access to restrooms for transgender employees. The "core principle" of the guidance is that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity.

OSHA regulations require employers to provide their employees with restroom facilities. In adopting this new transgender guidance, OSHA concluded that because gender identity is an intrinsic part of every person's identity and everyday life, it is necessary that employees be allowed to work in a manner that is consistent with how they live the balance of their lives. Accordingly, OSHA concluded that it is not appropriate to require transgender employees to use restrooms that are inconsistent with their gender identity nor is it appropriate to require transgender employees to use gender-neutral or other specifically designated restrooms. OSHA concluded that such requirements single out transgender employees and may cause them to fear for their physical safety or may cause illness.

What Should Employers Do Now?

- Increase awareness of transgender issues, particularly with respect to restrooms – In light of OSHA's new guidance, employers should be sensitive to issues involving transgender employees and the restroom facilities provided to them. Requiring transgender employees to use a gender neutral bathroom violates the guidance issued by OSHA and should be avoided.
- Consider providing training – With respect to the restroom issue, the OSHA regulations place the interests of transgender employees above those of others who may be uncomfortable sharing a restroom with them. If employees do not accept the concept of sharing a restroom with transgender employees or find it controversial, employers may be wise to consider providing training to those employees affected by the issue.

Motive Matters in Suits Concerning Religious Accommodation in Hiring

In July of 2015, the United States Supreme Court held, in EEOC v. Abercrombie & Fitch Stores, Inc., that a job applicant can establish religious discrimination under Title VII of the Civil Rights Act of 1964 (Title VII) if she shows her need for a religious accommodation was “*a motivating factor*” in the employer's decision not to hire. Notably, proof that the employer actually knew of the applicant's need for a religious accommodation is not necessary.

Samantha Elauf is a practicing Muslim and appeared for her job interview for a sales position at an Abercrombie store in Tulsa, Oklahoma, wearing a black hijab – a traditional headscarf worn by Muslim women in public. She did not affirmatively say that she was a practicing Muslim and did not request any accommodation. After her job interview, the store's assistant manager, Heather Cooke, rated Elauf as qualified for the job. Cooke was concerned, however, that Elauf's headscarf would violate the company's “Look Policy,” which forbids “caps” as too informal for the store's desired image. When she sought guidance from district manager Randall Johnson and informed Johnson that she believed Elauf wore the headscarf because of her faith, Randall said that all headwear, religious or otherwise, violated the policy. He directed Cooke not to hire Elauf.

The Equal Opportunity Commission (EEOC) sued Abercrombie on Elauf's behalf, claiming that the store's refusal to hire Elauf violated Title VII, which prohibits employers from refusing to hire applicants in order to avoid accommodating a religious practice that could be accommodated without undue hardship. Abercrombie argued that a job applicant cannot prove discrimination without first showing that the employer had actual knowledge of the applicant's need for an accommodation.

The United States Supreme Court disagreed with *Abercrombie*, holding that an applicant need only show that her need for an accommodation was “a motivating factor” in the employer’s decision. The Court emphasized that Title VII, in contrast to some other statutes, does not require applicants or employees to prove any knowledge on the part of the employer in order to prevail on a claim. Instead, Title VII prohibits discriminatory *motives*, regardless of the employer’s knowledge. The Court acknowledged that employers ordinarily may maintain policies against headwear in the workplace, but emphasized that such policies must give way when a need for accommodation exists. Thus, the Court concluded that “[a]n employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.”

What Should Employers Do Now?

- Provide sufficient training on religious accommodation to human resource personnel and managerial employees – Employers should ensure that human resources personnel and managerial employees with hiring and firing authority are aware of the need to accommodate a job applicant’s religious practices whether or not the applicant requests a specific accommodation. Training should also be provided on how to handle applicants or employees whose religious beliefs may conflict with company policies.
- Consider that neutral dress codes and other policies may need to be modified to provide religious accommodation – Employers may continue to adopt and enforce otherwise neutral policies concerning dress codes and other work related matters. However, employers should be flexible in the enforcement of those policies when they affect an applicant or employee’s religious practices. The *Abercrombie* decision teaches that employers cannot treat all dress and grooming issues alike, and variations from policy must be accommodated in some circumstances.

New California Law Creates Penalties for Misuse of E-Verify

Verifying a new employee’s right to work in the United States is a crucial step in the hiring process. Employers must utilize the Employment Eligibility Verification form, commonly known as Form I-9, to verify the identity and right to work of all employees hired in the United States after November 6, 1986. Form I-9 must be completed within three days of hire

“E-Verify” is a free Internet-based application that compares information from an employee’s Form I-9 to data from the U.S. Department of Homeland Security and the Social Security Administration to confirm eligibility for employment. Use of e-Verify is voluntary for most employers, but some federal contractors and government agencies are required to use it. When an employer enters a worker’s information into the E-Verify system, E-Verify either confirms that the worker is authorized to work, or issues a “tentative non-confirmation” (TNC) notice, indicating that the worker’s status cannot be confirmed. A TNC notice does not mean the worker is not entitled to work in the United States.

Last fall, California Governor Jerry Brown signed Assembly Bill 622, which adds Section 2814 to the Labor Code. The new law prohibits employers from misusing E-Verify to check the status of an existing employee or an applicant

that has not yet been offered employment, except as required by federal law or as a condition of receiving federal funding. Nothing in the statute, however, prohibits an employer from using E-Verify, in accordance with federal law, to check the eligibility for employment of a person who has already been offered a job.

Labor Code section 2814 requires employers who receive a TNC notice to provide the TNC notice to the employee as soon as practicable, and imposes a \$10,000 civil penalty for each violation. The penalties are intended to help eliminate discriminatory abuse of the E-Verify system in ways that prevent immigrants legally authorized to work from getting a job. The new law will impact the more than 600,000 employers nationwide who are estimated by the U.S. Citizenship and Immigration Services to use the system.

What Should Employers Do Now?

- Train E-Verify users on when to use the system and what is to be done with the information received – If the company uses the E-Verify system, it should properly train its personnel to ensure that it is used at the proper time – after an applicant has been offered employment – and properly respond to a TNC notice – promptly give a copy to the employee.

Arbitration and Class Action Developments

After several years of complicated and often conflicting rulings regarding mandatory arbitration and class action suits, 2015 offered just a few developments of note in this area of law.

Use of Arbitration Agreements Increases, But PAGA Claims Still Not Subject to Arbitration

In 2014, the California Supreme Court ruled in Iskanian v. CLS Transportation Los Angeles, LLC a waiver of the right to bring a wage and hour class action, if set forth in an otherwise valid arbitration agreement between an employer and an employee, may be enforceable. Although the Iskanian decision is correctly seen as a victory for employers, it contains a significant loophole that leaves employers still subject to claims filed in a representative capacity.

The Iskanian court held that waivers of class action rights cannot encompass claims that an employee might file in a representative capacity under the Private Attorney General Act (PAGA). Such claims are routinely brought by plaintiff employees in wage and hour class action proceedings and allow the plaintiff to sue, essentially as a proxy for the State enforcement agency, to recover Labor Code penalties.

The employer in Iskanian petitioned the United States Supreme Court in the hope that the Supreme Court would conclude that the rule prohibiting waivers of PAGA claims is inconsistent with the Federal Arbitration Act (FAA) and case law interpreting it. Unfortunately, the United States Supreme Court declined to hear the case, so employers remain unable to protect themselves against PAGA claims through waivers set forth in arbitration agreements.

During 2015, the federal Ninth Circuit Court of Appeals also reaffirmed the PAGA carve-out from arbitration agreements in its decision in Sakkab v. Luxottica Retail North America, Inc. In Luxottica, the Ninth Circuit held that the FAA did not preempt the California rule announced in Iskanian holding that PAGA claims could not be waived in an arbitration agreement.

California Legislature Unsuccessfully Attempts to Limit Use of Arbitration Agreements

During 2015, the California Legislature passed a bill to limit an employer's ability to enforce mandatory pre-dispute arbitration agreements. The Legislature passed AB 465, which would have precluded employer use of mandatory arbitration agreements by employers. Fortunately, late in 2015, Governor Brown vetoed AB 465 and the proposed law did not become effective. However, employers should expect continued legislative effort to chip away at an employer's ability to use arbitration agreements with employees.

What Should Employers Do Now?

- Carefully consider the pros and cons of arbitration in light of the type of employee disputes the company is most likely to encounter – Arbitration is an attractive option for many employers, but it offers both advantages and disadvantages when compared with jury trials. In order to make an intelligent decision regarding arbitration as a means of dispute resolution, organizations must understand the advantages and disadvantages of the process. Prudent employers should evaluate the pros and cons of arbitration within the context of the claims most likely to be asserted against them.
- If arbitration is favored as a means of dispute resolution, confer with counsel to draft or update arbitration agreements – If a company elects to require its employees to resolve disputes through arbitration, the parties must sign an arbitration agreement which defines the terms pursuant to which claims will be resolved. The enforceability of arbitration agreements imposed by employers upon their employees has been the subject of much litigation in recent years, so careful drafting is critical. At a minimum, an enforceable arbitration agreement must (a) require both the employer and the employee to submit claims to arbitration for resolution, (b) provide for resolution of the dispute by neutral arbitrators, (c) not limit the remedies available to the parties, (d) afford the parties with the opportunity to conduct adequate discovery, (e) require that the arbitrator provide a written statement of the findings and conclusions upon which the decision is based, and (f) not impose upon the employee costs that the employee would not bear if the dispute were litigated in court.

NLRB Developments

Some employers overlook their obligations under the National Labor Relations Act (NLRA) because they view the law as one that regulates only unionized employers. Many of the provisions of the NLRA apply equally to both unionized and non-union employers, however, and the National Labor Relations Board (NLRB) has been increasingly active in recent years with respect to issues that are relevant to both unionized and non-union employers.

The Dues Checkoff Rule Upended

For 53 years, the authority to deduct employee union dues from paychecks and send them to the union- the so-called “dues checkoff” - has expired when a collective bargaining agreement expires without a new one to take its place. In Lincoln Lutheran of Racine, however, the NLRB rejected that longstanding rule and held that the dues checkoff survives the expiration of a collective bargaining agreement, just like most other contract terms.

In some contract negotiations, the prospect of the dues checkoff expiring can motivate a union to finalize a new collective bargaining agreement. As a result of this Board decision, the only contract terms that cease effect upon the expiration of a collective bargaining agreement are the grievance procedure (for grievances occurring after the expiration of the agreement) and the no strike/no lockout clause. All other contract terms remain in effect after the expiration of the collective bargaining agreement until changed by mutual agreement between the union and the employer or until the union is no longer the exclusive bargaining representative through disclaiming interest, decertification, or a lawful withdrawal of recognition.

What Should Employers Do Now?

- Do not automatically curtail dues deductions upon the expiration of a collective bargaining agreement – Employers should continue deducting dues from employee paychecks and remitting them to the union even after the expiration of the collective bargaining agreement.

NLRB Out of Sync With Federal Courts On Class Action Arbitration Waivers

Although courts are willing to enforce agreements waiving employee rights to assert class action claims in some circumstances, as mentioned above, the NLRB remains hostile to the concept, insisting that such waivers violate the right of employees to engage in concerted action for “mutual aid and protection.” Several decisions from federal appellate courts have rejected the NLRB’s analysis, but the NLRB and its administrative law judges have stubbornly persisted in ruling against arbitration agreements with class action waivers, including AT&T Mobility Services in June, Amex Card Services in November, and Citigroup in December.

In Murphy Oil USA, Inc. v. NLRB, the Fifth Circuit Court of Appeals overturned an NLRB ruling that relied on its repudiated holding in *D.R. Horton*, which in 2013 declared that maintaining an arbitration agreement with a class action waiver was a per se unfair labor practice. The 5th Circuit Court of Appeals held:

Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here.

However, the Fifth Circuit reminded employers that arbitration agreements cannot prohibit employees from filing charges against their employer with the NLRB:

Accordingly, as we held in *D.R. Horton*, an arbitration agreement violates the NLRA if employees would reasonably construe it as prohibiting filing unfair labor practice charges with the Board.

What Should Employers Do Now?

- Recognize the continued vulnerability of class action waivers with the NLRB – The enforceability of arbitration agreements has been the subject of numerous lawsuits. The NLRB will likely continue to hold that arbitration agreements that include class action waivers violate the section 7 rights of employees, at least until the United States Supreme Court rules on the issue. Employers with class action waivers in their arbitration agreements are well-advised to consult legal counsel to assess their risk of litigation challenging the enforceability of such agreements.

Living With Expedited Union Elections

In December of 2014, the NLRB adopted a rule designed to expedite the processing of representation petitions, thereby shortening the time between filing of the petition and holding the election from an average of 38 days to as few as 13 days. On April 14, 2015, the NLRB General Counsel issued a Guidance Memorandum detailing how the expedited process will be handled.

In addition to generally reducing timelines, the NLRB now requires electronic filing and submission of text searchable documents. Many of the voter and bargaining unit composition challenges typically handled before the election will now be handled by challenged ballots after the voting occurs. Although employers have feared that expedited elections would provide unions with an unfair advantage in the election process and result in more union victories in representation votes, initial results reveal only a modest change from historical patterns. For the months of May 2015 through September 2015, the first five months of elections under the new rules, unions won 499 of the 748 elections conducted, or 66.7%, compared to the 63% of all elections won by unions in 2014.

The NLRB has also revised its regulations concerning the information that must be provided by employers in the so-called “Excelsior list” of eligible voters in a proposed bargaining unit. In addition to the name and home addresses of eligible voters,

employers must now provide the union with “available” personal email addresses, home telephone numbers, and cell phone numbers. In October, an election won by an employer was overturned because a NLRB Regional Director found that the employer had not exercised “reasonable diligence” in compiling the contact information for voters because it consulted only its main HR database and not other data sources such as supervisor contact lists. Arguments that it would be unduly burdensome to check through other sources of information in the two days the employer was given to produce the Excelsior list were unavailing.

In September, the General Counsel issued new guidance allowing for electronic signatures of employees to be accepted on representation petitions, instead of the traditional signatures on union authorization cards and petitions. Employers are typically wary about the authenticity of signatures on authorization cards and are increasingly concerned about this new means of collecting employee signatures. The General Counsel’s Guidance Memorandum requires six discrete pieces of information to accompany electronic signatures. Employers may still submit plausible evidence of inauthenticity and the NLRB Regional Director will conduct an investigation, as in the past.

What Should Employers Do Now?

- Minimize employees’ motivation to unionize – As a result of the new expedited election rules, seasoned observers expect that unions will prevail more frequently in representation votes in the future. In order to minimize the risk of unionization, employers should be proactive in treating employees with respect and dignity, and in addressing workplace concerns quickly and positively. Supervisors who bully employees or maintain arbitrary work rules should be corrected or reassigned.

Application of Joint Employer Rules Expands

In last year’s Update, we reported that the NLRB was claiming that franchisors were joint employers with franchisees in some cases. In 2015, the NLRB has increasingly treated companies that contract with staffing agencies for temporary or contingent workers as joint employers.

In Browning-Ferris Industries of California, the employer contracted with a staffing company, Leadpoint Business Services, to provide temporary employees inside its recycling sorting facility. The Teamsters petitioned the NLRB to include the temporary employees in an existing Browning-Ferris bargaining unit. Predictably, Browning-Ferris opposed the petition by arguing that the Leadpoint employees were not its employees. The NLRB overturned longstanding case law and ruled that Browning-Ferris and Leadpoint were joint employers of the petitioned employees.

The NLRB will evaluate joint employer status by seeking to determine whether the staffing company and the company that contracts with it “share or codetermine those matters governing the essential terms and conditions of employment,” focusing on “whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.” The fact that a joint employer only possesses theoretical control over the employees but does not actually exercise such control is now considered irrelevant.

The Browning-Ferris case has significant implications for businesses that utilize the services of staffing companies. As a result, federal legislation intended to reverse the decision is currently pending in Congress, but the fate of the pending bills remains unsettled.

What Should Employers Do Now?

- Recognize the multiple risks posed by the joint employer doctrine – The joint employer doctrine exposes a business not only to risks with respect to unionization, but also with respect to wage and hour violations, discrimination, harassment and other risks faced by employers.
- Assure that contracts with staffing companies contain appropriate terms to minimize risk – Businesses that contract with staffing companies for personnel should assure that their contracts confirm not only that the staffing agency is the employer of the leased/temporary employees, but that the staffing agency has sole and exclusive control over the terms and conditions of employment. Businesses may also seek strong indemnify clauses in contracts with staffing companies.

Employee Handbooks Still On The NLRB Radar

NLRB scrutiny of Employee Handbook provisions, even for nonunion employers, has continued unabated in 2015. Key areas of NLRB focus continue to include any provision in handbooks that might “chill” employees from exercising their protected rights under section 7 of the NLRA, which provides employees with the right to form unions, bargain collectively and engage in “concerted activities” for their mutual benefit concerning the terms and conditions of their employment.

In Hyundai America Shipping Agency v. NLRB, a federal appellate court reviewed the NLRB’s treatment of handbook provisions that contained blanket confidentiality requirements in workplace investigations, restrictions on non-work activities during working hours (as opposed to working time), employee use of non-confidential company information, and an open-door policy that urged employees to talk to supervisors about concerns instead of co-workers. In the Hyundai case, the Court of Appeals found that the NLRB correctly held that a blanket confidentiality requirement in investigations, restrictions on non-work activities during rest and meal breaks (which the NLRB includes within the term “working hours”), and prohibitions against using non-confidential company information were over-broad, had a chilling effect on employee rights under section 7, and were therefore unlawful. The court found that the open-door policy encouraging but not requiring employees to share concerns with supervisors instead of coworkers could not reasonably be interpreted by employees as preventing them from discussing concerns among themselves and was therefore permissible.

What Should Employers Do Now?

- Review Employee Handbook policies with an eye toward section 7 issues – As they review and update their Employee Handbooks for 2016, employers should pay particular attention to policies that may affect employees’ right to engage in “concerted activities” under section 7 of the NLRA. Concerted activities can include anything such as complaining about working conditions, payroll practices, safety in the workplace, or the actions of a supervisor. Since the definition of “concerted activities” is so broad, the actions that an employer can take in violation of section 7 are also very broad. In particular, any handbook provision that may be interpreted by employees as restricting their rights to file charges, or share

concerns with coworkers, or take action based on their “mutual aid and comfort” should be analyzed carefully. In many instances, employers can accomplish their policy objectives and reduce risk at the same time by considering relatively minor modifications in wording.

Micro-Units Becoming All The Rage

In 2011, the NLRB ruled in Specialty Healthcare that small groups of employees sharing a community of interest could be an appropriate bargaining unit even if other appropriate bargaining units existed. In such circumstances, an employer opposing the so-called “micro-bargaining unit” must then attempt to prove that the small unit was inappropriate or that an “overwhelming” community of interest existed between the employees in question and an identifiable group of excluded employees. As can be imaged, proving a standard of “overwhelming” community of interest can be, well, overwhelming.

In the Volkswagen case, the company failed to prove an “overwhelming” community of interest in a representation petition filed by the United Auto Workers that included only the maintenance employees and not the production employees. Over the objections of Volkswagen, the NLRB Regional Director ordered an election for the maintenance workers. That election resulted in a union victory for Volkswagen’s 152 Chattanooga-based maintenance workers in early December 2015.

What Should Employers Do Now?

- Maintain positive relations with employees – Unions increasingly favor micro-bargaining units because they believe that discreet sub-groups of employees are more easily organized and these micro-units can now be certified by the NLRB. Employers seeking to oppose a micro-bargaining unit face a stiff challenge in proving that the community of interests between a small group of employees seeking representation and other employees is “overwhelming.” In many instances, employers will be more successful by making a genuine effort to improve employee relations than by attempting to challenge the validity of micro-bargaining units.

Buying More Than Bargained For: New Successorship Rules Change Equation In Displaced Worker Laws

When a company expands by acquiring some or all of another entity, it is obligated to accept the other entity’s collective bargaining agreement with unionized employees in certain circumstances. Traditionally, the acquiring company determines whether it has a duty to recognize and bargain with the other entity’s union after it has acquired a “full complement” of employees from the transaction. If a majority of the employees in the “full complement” were represented by a union, the company will be obligated to honor the acquired entity’s collective bargaining agreement.

Many states and cities have enacted laws protecting employees who are affected by corporate mergers, acquisitions and re-organizations. Some of those laws require the acquiring company to retain the other entity’s employees for some period of time before terminating their employment. In GVS Properties LLC, a local law obligated the acquiring employer to maintain the employment of some unionized maintenance workers following a corporate transaction. The union demanded that GVS

immediately recognize the union and acknowledge the continuation of the collective bargaining agreement. GVS refused, saying the “full complement” of employees acquired through the transaction could not be determined until after the 90-day retention period had expired. Predictably, GVS terminated enough of the predecessor’s employees and hired sufficient new employees at the end of the 90-day period to reduce the number of employees in its “full complement” from the other entity to less than half. Just as predictably, the union charged GVS with an unfair labor practice.

The NLRB found that GVS became a successor to the acquired entity, and subject to its collective bargaining obligations, as soon as it acquired all of the employees of the predecessor employer, rejecting the notion that the “full complement” determination should be delayed until the displaced worker protections had expired. The NLRB reasoned that GVS knew about the displaced worker protection law and nevertheless made a conscious decision to proceed with the acquisition. Once the “full complement” was hired, even if only for the 90-day retention period, GVS had to recognize the union and accept the collective bargaining agreement.

What Should Employers Do Now?

- Be alert to successorship obligations that can arise from corporate transactions – California employers purchasing unionized companies or assuming the obligations of unionized companies under government contracts should determine whether displaced worker protection rules apply and whether they will be obligated to recognize the other entity’s union and accept any existing collective bargaining agreement.

NLRB Remains Protective of Employee Speech in Electronic Media

The law has long protected the right of employees to engage in certain forms of speech. As technology has evolved, the legal issues confronting employers in dealing with employee speech have become more complicated. Recent NLRB and court decisions demonstrate that common forms of employee speech in electronic media are protected by law to the same extent as more traditional forms of expression.

In September, an NLRB administrative law judge ruled in Verizon Wireless that an Employee Handbook provision prohibiting employee communications over the Internet that might “embarrass” the company was “overly broad” and therefore unlawful. A month later, a federal appellate court affirmed in Triple Play v. NLRB affirmed a controversial decision in which the NLRB treated an employee’s Facebook “like” as protected activity. In the Triple Play case, employees disparaged the company owner through a series of Facebook postings regarding alleged payroll mistakes. A coworker who “liked” the posting was terminated. The employer argued that the employees’ postings were not protected by law because they contained vulgar language and could be seen by customers. The court disagreed and held that the postings did not lose legal protection simply because they contained obscenities or were viewed by customers, recognizing the reality of social media postings and the fact that “almost all Facebook posts by employees have at least some potential to be viewed by customers.”

What Should Employers Do Now?

- Proceed with caution whenever considering disciplinary action based on employee speech or expression – Although employers may understandably be upset at employees who convey messages that may be defamatory or damaging to their

business, they must recognize that many forms of employee speech and expression are protected by law, and should confer with counsel before imposing any disciplinary action against an employee based on conduct that could be regarded as speech or expression.

Dissipating Evidence: Demanding A Union Representative Before Drug Testing

Courts have long recognized that employees who are members of a union are entitled to union representation during investigatory interviews. In Manhattan Beer Distributors, the NLRB addressed the issue in the context of drug testing.

The Manhattan Beer Distributors case arose from a delivery driver's refusal to submit to a drug test outside the presence of a shop steward after reporting to work with bloodshot eyes and smelling of marijuana. The steward was off work on the day in question. The employee refused to take the test without his steward and the company terminated him for insubordination. The NLRB held that the employee had the right to union representation during an investigatory interview such as a drug test even if meant that the drug test had to be delayed, potentially influencing its outcome. According to the NLRB, the employer committed an unfair labor practice by discharging the employee and it ordered that the employee be reinstated with full back pay.

What Should Employers Do Now?

- Recognize the broad scope of representation rights when seeking information from employees that could form the basis for discipline – Union members are entitled to representation from union representatives not only in the context of traditional verbal interviews, but also prior to drug tests. So-called “Weingarten rights” may also apply in other contexts in which employees are requested to provide information or evidence that could lead to disciplinary action against them.

Conclusion

We hope that this summary assists you in understanding some of the recent developments that will affect employers in 2016. Please recognize that this document does not contain a comprehensive listing of all new laws or decisions that regulate employment, and that the information provided is only a brief summary and should not be used as a substitute for legal advice tailored to a specific factual scenario.

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

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