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LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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NO IFS, ANDS, OR BUTTS: MICHIGAN ENACTS SMOKE FREE LAW

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After more than 10 years of legislative debate, Governor Granholm signed into law a bill prohibiting smoking in most public places, including places of employment and food service establishments.[1] The new law, which is officially named for and is referred to as the "Dr. Ron Davis Law," took effect May 1, 2010.[2] Dr. Davis was the Chief Medical Officer of the Michigan Department of Community Health, former President of the American Medical Association, and the former Director of the Office of Smoking and Health at the Centers for Disease Control. He fought tirelessly to rid Americans of bad habits like smoking.[3] The ban is more commonly referred to as the "Smoke Free Law."

Although it has been frequently described as a "public smoking ban," the Smoke Free Law applies to the vast majority of public and private workplaces and, as such, employers will have to take note of and comply with the new protections that being afforded to employees in Michigan.

I. What Kind of "Smoking" Is Banned?

The Smoke Free Law defines "smoking" or "smoke" as "the burning of a lighted cigar, cigarette, pipe, or any other matter or substance that contains a tobacco product."[4] Thus, the law does not appear to restrict the use of chewing tobacco or electronic cigarettes, since neither involve the burning of a tobacco product.[5]

The Smoke Free Law will be enforced by the Tobacco Section of the Michigan Department of Community Health ("MDCH") although it is expected to delegate its enforcement authority to local health departments throughout Michigan.[6] The Michigan Department of Agriculture is responsible for enforcing the ban with respect to food service establishments.[7]

II. To Which Types of Establishments Does the Smoke Free Law Apply?

1. Public Places

A state or local government agency, or a person who owns, operates, manages or controls an enclosed, indoor area used by the general public or serving as a meeting place for a public body cannot permit smoking within any such public buildings.[8] The Smoke Free Law defines a "public place" broadly to include a "place of employment" which is defined as "an enclosed indoor area that contains 1 or more work areas for 1 or more persons employed by a public or private employer."[9] A "work area" is defined as "a site within a place of employment at which 1 or more employees perform services for an employer."[10]

Defining a "place of employment" in such a broad fashion begs the question of whether an employer may be able to allow smoking in dedicated indoor smoking rooms, such as smoking lounges or break rooms, where no employees perform work. In response to this question, the MDCH has publicly stated that it will enforce the law against any employer who allows smoking anywhere within an enclosed building (4 walls and a roof), but will allow smoking by employees to occur in outside smoking "shacks" that are not fully enclosed and detached from the building.

2. Food Service Establishments

The Smoke Free Law also has provisions that prohibit smoking in a "food service establishment," which is defined as any place where food or drink is served to the public.[11] "Food service establishment" also encompasses private clubs that serve food or drink. And, even if they do not serve food or drink, private clubs may also constitute a place of employment where at least one person is employed. [12]

Unlike public places, the smoking ban in food service establishments is not limited to enclosed, indoor areas. For example, according to the MDCH, smoking is prohibited on an outdoor patio, or rooftop where food or drink is being served.[13]

3. Exemptions

The Smoke Free Law contains few exemptions. Exempt places include: the gaming areas of casinos (casino bars, restaurants, and hotel rooms are not exempt),[14] cigar bars,[15] tobacco specialty retail stores,[16] home offices used for the homeowner or lessee and no other employees, and motor vehicles (e.g., truck drivers and telecommuters whose "workplace" is their automobile or truck).[17] It is not sufficient to simply designate a business as a "cigar store" or "tobacco specialty retail store" in order to avoid application of the smoking ban to a particular establishment. The Smoke Free Law sets forth several criteria – all of which must be satisfied – in order for a business to qualify for the cigar bar, or tobacco specialty retail store exemption.

To qualify for the cigar bar exemption, a person who owns or operates a cigar bar must file an affidavit within 30 days of the May 1 enactment and by January 31 annually thereafter that satisfies each of the following requirements: (1) the cigar bar generates 10% or more of its total gross income from the on-site sale of cigars and the rental of on-site humidors; (2) the cigar bar is located on premises that are physically separated from any areas where smoking is prohibited by the law and where smoke does not infiltrate into those nonsmoking areas; (3) the cigar bar has installed an on-site humidor on its premises; (4) the cigar bar prohibits entry to all persons under age 18 during business hours; (5) the cigar bar only allows smoking of cigars that retail for over $1.00 per cigar; and (6) the cigar bar prohibits the smoking of all other tobacco products.[18] The MDCH has issued a memorandum concluding that cigar bars that meet these criteria are exempt from

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the smoking ban and will be allowed to serve food and drink.[19]

To qualify for the tobacco specialty retail store exemption, a person who owns or operates a tobacco specialty retail store must file an affidavit within 30 days of the May 1 enactment and by January 31 annually thereafter that satisfies each of the following requirements: (1) the store generates 75% or more of its total gross income from the on-site sale of tobacco products and smoking paraphernalia; (2) the store is located on premises that are physically separated from any areas where smoking is prohibited by the law and where smoke does not infiltrate into those nonsmoking areas; and (3) the store prohibits entry to all persons under age 18 during business hours.[20] The Michigan Department of Community Health takes the position that hookah bars can only qualify for the tobacco specialty retail store exemption, and not the cigar bar exemption. Consequently, restaurants may no longer allow their patrons to smoke hookahs.[21]

III. What Steps Must Be Taken To Comply?

Anyone in control of a food service establishment, casino, or a public place, such as a place of employment, is required to:

1. Conspicuously post "No Smoking" signs or symbols at the entrances to and in every building or other area where smoking is prohibited.

2. Remove all ashtrays and any other smoking paraphernalia from anywhere smoking is prohibited.

3. Inform individuals smoking in violation of the law (including persons such as an employee, customer, or vendor visiting a workplace) that they are in violation of state law and subject to penalties.

4. Ask any employee or other individual smoking in violation of the law to stop smoking, and, if the employee or individual refuses, ask him or her to leave the public place, food service establishment, or nonsmoking area of the casino.[22]

There is no requirement to report any observed smoking violations to the MDCH, police or any other governmental authority.

IV. What Are the Penalties for Not Complying With the No Smoking Law?

The MDCH and local health departments are authorized to seek enforcement of the law by levying fines and pursuing compliance either by issuing a citation, or filing a lawsuit. Individuals may be fined $100 for the first violation and up to $500 for subsequent violations.[23] There are no direct fines authorized against a business whose employees smoke in violation of the Smoke Free Law.

The MDCH emphasizes that its goal is compliance, not citations. To that end, it has published Complaint Procedure Guidance outlining the "graduated protocol" the MDCH will follow regarding reported violations of the law. It appears from this Guidance that fines will not be imposed upon individual business owners, mangers, operators, or persons in control until at least the ninth step in the protocol.[24]

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In addition, any person who visits a public place, child caring institution, or child care center where smoking occurs may file a civil action within 60 days of using the place in question to request injunctive relief ordering an alleged violator to comply with the ban.[25] While the right to file a private lawsuit does not apply to food service establishments, a food service establishment may, however, be ordered by a local health department to cease operations until it has fully complied with the ban.[26]

Finally, the Smoke Free Law specifically prohibits any retaliation against an employee or applicant who seeks to enforce his or her rights under the law.[27] Thus, if an employee complains about his supervisor smoking in her office, an employer is prohibited from taking any adverse action against the employee for making a complaint. This new "anti-retaliation" protection will certainly require employers to proceed more cautiously with respect to disciplining, or taking other adverse action against any employees who have previously complained about smoking in the workplace. It will also provide an employee with a potential opportunity to file a claim under the Michigan Whistleblowers' Protection Act where the employee can establish that he or she either reported, or was about to report a violation of the No Smoking Law to the MDCH.[28]

V. How Does the Smoke Free Law Coordinate with Local Ordinances and Collective Bargaining Agreements?

To the extent a local "no smoking" ordinance is more restrictive, employers should ensure that they comply with not only the new Smoke Free Law but any more restrictive no smoking requirements set forth in local ordinances as well.[29] For example, many local ordinances prohibit smoking within a specified distance outside of a workplace entrance even though the Smoke Free Law does not. An employer will have to make sure that if any employees go outside its building to smoke a cigarette that allowing such smoking does not violate any local laws.

The Smoke Free Law is silent with respect to its impact on existing collective bargaining agreements. The MDCH's position is that the new law "trumps" any contrary collective bargaining provisions and must be followed. To the extent an employer bargains with a union in the future over any new "no smoking" restrictions, it may not negotiate any restrictions in conflict with the new law, but can negotiate restrictions more stringent than the new law, if necessary.

VI. What Should Employers Be Doing To Effectively Handle the Ban?

While the Smoke Free Law does not require an employer to adopt a written "no smoking" policy, it is still recommended that employers update their personnel policies and handbooks to advise employees of the new restrictions on smoking, their rights to complain about smoking in the workplace, and their right to complain without retaliation. The revised policy should also provide notice that employees who smoke in violation of the law will be subject to discipline, up to and including discharge from employment.

Employers should also train all supervisors regarding any newly-adopted "no smoking" policy requirements so they understand and are able to properly enforce them. Supervisors should also be trained on how to properly handle any complaints regarding smoking in the workplace and educated on how any employee who complains is protected by the anti-retaliations provision of the new law.

In order to zealously defend any potential lawsuit or administrative citations, employers should also document each time they enforce the ban so they have evidence of good faith efforts to police the workplace and comply with the ban.[30]

— END NOTES —

1 H. B. 4377, 95th Leg. (2009) (enacted).

2 MCL 333.12603(4).

3 *See www.ama-assn.org/ama1/pub/upload/mm/37/bio-davis.pdf* (last visited Apr. 28, 2010).

4 MCL 333.12061(1)(r); MCL 333.12905(7)(c).

5 *See Electronic Cigarettes (E-Cigarettes) Fact Sheet, available at:* http://www.michigan.gov/mdch/0,1607,7-132-2940_2955_2973_55026---,00.html (last visited Apr. 29, 2010). See also Robin Erb, Rules on high-tech smokes unclear, DETROIT FREE PRESS, Apr. 1, 2010, at A4 ("A spokesman for the Attorney General's Office said questions like those will be referred to Michigan Department of Community Health. And there, spokesman James McCurtis said the department hasn't had time to consider them.").

6 MCL 333.12613(2).

7 *See Memo of Agreement between MDA and MDCH, available at:* http://www.michigan.gov/mdch/0,1607,7-132-2940_2955_2973_55026---,00.html (last visited Apr. 29, 2010).

8 MCL 333.12603(1).

9 MCL 333.12601(1)(o) & (q)(iii).

10 MCL 333.12601(1)(v).

11 MCL 333.12601(1)(g). A food service establishment is defined in section 1107(n) of the food law of 2000, 200 PA 92, MCL 289.1107 as:

> a fixed or mobile restaurant, a coffee shop, a cafeteria, short order café, luncheonette, grill, tearoom, sandwich shop, soda fountain, tavern, bar, cocktail lounge, nightclub, drive-in, industrial feeding establishment, private organization serving the public, rental hall, catering kitchen, delicatessen, theater, commissary, food concession, or similar place in which food or drink is prepared for direct consumption through service on the premises or elsewhere, and any other eating or drinking establishment or operation where food is served or provided for the public.

12 *See Smoke Free Law Business Presentation, available at:* http://www.michigan.gov/mdch/0,1607,7-132-2940_2955_2973_55026---,00.html (last visited Apr. 29, 2010).

13 *See Frequently Asked Questions, available at:* http://www.michigan.gov/mdch/0,1607,7-132-2940_2955_2973_55026---,00.html (last visited Apr. 29, 2010). "Casino" is defined in section 2 of the Michigan gaming control and revenue act, MCL 432.202. "Casino does not include a casino operated under the Indian gaming regulatory act, 25 USC 2701 to 2721." MCL 333.12601(1)(a). (emphasis added).

14 MCL 333.12606b.

15 MCL 333.12606a(1).

16 MCL 333.12606a(2).

17 MCL 333.12601(1)(o)(i) & (iii).

18 MCL 333.12606a(1).

19 *Cigar Bar Guidance, available at*: http://www.michigan.gov/mdch/0,1607,7-132-2940_2955_2973_55026---,00.html (last visited Apr. 29, 2010) The Michigan Department of Community Health reasoned that a literal interpretation of the statute would render the exemption for cigar bars meaningless, stating:

> The distinction between cigar bars and tobacco specialty retail stores is all the more evident in light of the Legislature's requirement that in order for a cigar bar to be exempt from the smoking ban, it must generate "10% or more of its total gross annual income from the on-site sale of cigars and the rental of on-site humidors." Tobacco specialty retail stores, on the other hand, must generate 75% or more of their total gross annual income from the on-site sale of tobacco products and smoking paraphernalia. MCL 333.12606a(2)(b).
>
> It would be inconsistent with the purpose and policies of the Act for the Legislature to exempt cigar bars from the smoking prohibition in part 126 but not to exempt them from the smoking prohibition in part 129. Indeed, eating and drinking in cigar bars was permitted before the Legislature enacted the Act. To fail to recognize how cigar bars will generate the other 90% of their total gross annual income would be absurd. A literal interpretation of unambiguous statutory language may not produce an absurd and unjust result that is inconsistent with the purpose and policies of the statute. *People v Bewersdorf,* 438 Mich 55, 68 (1991). An interpretation that would force cigar bars

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to forgo the service of serve food and liquor would essentially render the exemption for tobacco specialty stores as unnecessary or meaningless. Every word of a statute should be read to give it meaning; thus, interpretations that render words unnecessary or meaningless must be avoided. *In re MCI Communications*, 460 Mich 396, 415 (1999).

20 MCL 333.12606a(2).

21 *See* www.michigan.gov/documents/mdch/Business_Presentation_316396_7.pdf (last visited Apr. 29, 2010).

22 MCL 333.12603(2).

23 MCL 333.12905(6); MCL 333.12611. These fines may be levied against individuals who refuse to comply with the ban and individuals who own, operate or manage, or who are in control of the public place and who do not make a reasonable effort to prohibit individuals from smoking.

24 *Responding to Complaints in Worksites and Public Places, Part 126, available at:* http://www.michigan.gov/mdch/0,1607,7-132-2940_2955_2973_55026---,00.html (last visited Apr. 29, 2010).

25 MCL 333.12613(3); MCL 333.12613(4)("The remedies . . . are independent and cumulative. The use of 1 remedy by a person shall not bar the use of other lawful remedies by that person or the use of a lawful remedy by another person.").

26 MCL 333.12905(4).

27 MCL 333.12606.

28 MCL 15.362.

29 *See Frequently Asked Questions, available at:* http://www.michigan.gov/mdch/0,1607,7-132-2940_2955_2973_55026---,00.html (last visited Apr. 29, 2010).

30 Further, it is an affirmative defense to a prosecution or a civil or administrative action that the owner, operator, manager, or person in control of a hotel, motel, or other lodging facility made a good faith effort to prohibit smoking by complying with the Smoke Free Law. To assert this affirmative defense, the owner, operator, manager or person in control must file a sworn affidavit setting forth his or her efforts to prohibit smoking and comply with the Smoke Free Law. MCL 333.12603(3). ■

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U.S. SUPREME COURT HOLDS THAT TWO MEMBER NLRB LACKED STATUTORY AUTHORITY TO DECIDE CASES

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On June 17, 2010, the United States Supreme Court, in a 5-4 Decision with Justice Stevens writing for the majority and joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito, with a dissenting opinion authored by Justice Kennedy, joined by Justices Breyer, Ginsberg and Sotomayor, held that the National Labor Relations Board did not have the statutory authority to issue two-member decisions.

In the 1947 Taft-Hartley Amendments to the National Labor Relations Act, Congress established a five member NLRB and the statute states that a quorum of three members is necessary to decide cases. Faced with impending vacancies in 2007, the four remaining Board Members attempted to delegate all of their powers to a group of three members, one of whose terms expired a few days later. Subsequently, the Board, relying on an opinion from the U.S. Department of Justice, continued to decide cases on the premise that the remaining two members could continue to issue decisions as a quorum of the three member sub-group even though one of the members was no longer on the Board.

Employers and unions challenged the Board's authority to issue decisions with only two members with the DC Circuit holding that the Board did not have such authority and the First, Second, Fourth, Seventh and Tenth Circuits holding that the Board's delegation was authorized by the statutory language.

In rejecting the Board's position, Justice Stevens explained that the first sentence of Section 3(b) expressly authorizes the NLRB to delegate its powers only to a group of three or more members. Stevens, writing for the majority, stated that the clause is best read to require that the delegee group maintain a membership of at least three in order for the delegation to remain valid. He further stated that the most logical way to harmonize the sections of 3(b) regarding delegation, vacancies, quorum requirements, and the group quorum provision was to require that the Board be composed of three members in order to decide cases. Stevens acknowledged that in a particular case one of the three members might be disqualified but in that instance the other two could still function and render a decision. Stevens noted that if Congress had intended to authorize two members to act as a quorum of the Board on an ongoing basis, it has had the opportunity to enact such language, but did not.

Justice Stevens characterized the Board's attempted delegation as a "Rube-Goldberg style delegation mechanism" and noted that "…delegating to a group of three, allowing a term to expire, and then continuing with a two-member quorum of a phantom delegee group – is surely a bizarre way for the Board to achieve the authority to decide cases with only two members."

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Stevens noted that during a previous two month period in 1993-1994, and a one month period in 2001-2002, the Board had only two members and did not issue decisions. He also emphasized that the Board historically had reconstituted panels when a member's term expired or a vacancy in office existed. The Court noted that this two member Board extending over two years was "unprecedented" in the history of the post-Taft-Hartley Board and that "if Congress had wanted to allow the Board to continue to operate with only two members, it could have kept the Board quorum requirement at two" which was the quorum requirement when the Board was composed of three members from 1935 to 1947. In conclusion, Justice Stevens stated "If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances. Section 3(b), as it currently exists, *does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died."*

Justice Kennedy, for the dissenters, noted that "the objectives of the statute, which must be to ensure orderly operations when the Board is not at full strength as well as efficient operations when it is, are better respected by a statutory interpretation that dictates a result opposite to the one reached by the Court."

In the wake of the Court's decision a number of significant legal issues are likely to be raised and are open questions. For instance, how will the decision affect the parties to prior adjudications? In the *New Process Steel v. National Labor Relations Board* decision, the Supreme Court reversed the Seventh Circuit and remanded for further consideration consistent with its opinion. A more interesting question is what happens to cases that became final during the period of 2007-2010. Res judicata principles would seem to preclude reopening a final judgment, but there is certainly an argument that those principles would not apply to a final judgment issued by a body lacking jurisdiction to enter the judgment. In addition, a party's failure to challenge the Board's lack of quorum would normally forfeit the right to raise the objection later, but subject matter jurisdictional defects are normally not waived.

According to the Board, 69 cases are pending in U.S. Courts of Appeal, five other cases raising the two member issue were on the Supreme Court's docket, and another approximately 500 cases ere decided by the two member Board. On June 28, 2010, the Supreme Court ordered the remand of *Snell Island* to the Second Circuit and *Northeastern Land Services, LTD* to the First Circuit for further consideration in light of *New Process Steel*. Interestingly, although the Supreme Court conference on the DC Circuit Opinion in *Laurel Baye* was scheduled for June 24, 2010, the Court issued no order with respect to *Laurel Baye*. In the two other cases pending in the Supreme Court, the briefing schedule is not complete.

In what appears to be the first application of *New Process* by a Court of Appeals, the Second Circuit, prior to the remand of *Snell Island*, in a per curium opinion in *NLRB v. Talmadge Park*, held that "In *Snell Island SNF LLC v. National Labor Relations Board*, 568 F.3d 410 (2d Cir. 2009), we held that two Board members may exercise the Board's authority in such circumstances as a quorum of a three-member delegate group. See id. at 424. However, the Supreme Court has since overridden that holding in *New Process Steel, L.P. v. National Labor Relations Board*, No. 08-1457, 2010 WL 2400089 (June 17, 2010). See id. at *8. Recognizing that, on this point, *Snell Island* yields to *New Process Steel*, we conclude that the Board as constituted did not have the authority to issue the May 27, 2009 order against *Talmadge Park*. The Board's petition is denied."

Interestingly, the employer in *Talmadge Park* had not challenged the Board's authority to issue two member decisions and had stipulated to entry of a consent judgment enforcing the Board's order. The Eighth Circuit summarily dismissed two cases pending in that circuit following the release of *New Process*. These developments suggest that at least some circuit courts may view the *New Process* case as jurisdictional, which would potentially have broad and far reaching implications. On the other hand, the Sixth Circuit, in *Galicks, Inc. v. NLRB*, sua sponte, remanded a pending case to the Board "for proceedings consistent with (*New Process Steel*)." Apparently, the NLRB intends to file requests for remand in all cases pending in the circuits because the Sixth Circuit's *Galicks* opinion noted that the Clerk of the Sixth Circuit had been advised by the Board that it would be filing motions to remand any cases pending in the Sixth Circuit. As of the June 28, 2010 Sixth Circuit action in *Galicks*, the Board had not yet filed its motion.

In the wake of the Supreme Court's ruling, initial reactions by the Circuit Courts, the legal strategies foreshadowed by the NLRB's motion to remand in the Sixth Circuit, and advice that is being given to parties who were part of the almost 600 two member decisions, it seems likely that *New Process* is the opening chapter and not the conclusion with respect to the legality of two member decisions that were rendered from the end of 2007 to the beginning of 2010.

— END NOTE —

The authors of this article represent an Amici which filed a brief in the U.S. Supreme Court arguing that the two member Board lacked statutory authority to decide cases and also challenged the statutory authority of the two member NLRB in the DC Circuit. The opinions expressed in this article are solely those of the authors. ■

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SUPREME COURT EFFECTIVELY VOIDS SOME 600 NLRB DECISIONS

William M. Saxton
Butzel Long

The Taft-Hartley Act, enacted in 1947, increased the size of the National Labor Relations Board (the "Board") from three members to five members. The Act further increased the quorum requirement for the Board from two to three members and allows the Board to delegate its authority to groups at least three members:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise... A vacancy in the Board shall not impact the right of the remaining members to exerise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. 29 U.S.C. § 153(b)

In December 2007, the five member Board had four members and one vacancy. Two of the four members, however, were recess appointees whose terms would expire in December 2007, which would leave the Board with only two members. Anticipating the expiration of the terms of the two recess appointees, on December 20, 2007 the then four member Board delegated to a three member group all of the Board's powers. the Board was of the opinion that this action would permit two Board members to exercise the powers of the Board because the two members would constitute a quorum of the three member group to whom the powers of the Board had been delegated.

As of January, 2008 there were only two Board members and this situtation endured until March 2010 when the President made two recess appointments to the Board. During the 27 month period when the Board had only two members it decided some 600 cases.

In September, 2008 the two-member Board issued decisions sustaining two unfair labor practice complaints against New Process Steel.[1] New Process Steel appealed challengring the authority of the two member Board to issue the orders.

The Seventh Circuit Court of Appeals upheld the Board, holding that the two-member Board cosntituted a valid quorum of the three member group to whom the Board had delegated its authority.[2] In a 5-4 decision the Supreme Court reversed.[3] Writing for the majority Justice Stevens stated that:

> Interpreting the statute to rquire Board's powers to be vested at all times in a group of at least three members is consonant with the Board quorum requirement, which requires three participating members "at all times" for the Board to act. *New Process Steel, LP v. NLRB,* 560 U.S. (2010)

So long as the Board has a quorum, i.e. three members, the three members can authorize two members to issue a decision as a quorum of the three member group. But for two members to act the Board must maintain a membership of three.

There are reportedly some 75 cases pending in the courts of appeals challenging the legitimacy of the two-member Board decisions.These cases will likely be remanded to the Board for reconsideration by a properly constituted quorum of Board members.

Another 500 or so cases involve appeals that do not raise the two-member Board issue or are cases in which no appeal was taken from the two-member Board decisions and the parties have either complied with the Board's order or are in the process of complying.

All of the two-member decisions of the Board are void by virtue of the Supreme Court decision in *New Process Steel*. In the end, however, that may be of slight consequence.

To the extent the two-member Board decisions are reconsidered by a properly constituted quorum of the current Board a different outcome is highly unlikely. The two-member decisions were made by one republican oriented Board member and one democrat oriented Board mmber. Should a case now be reassigned to a three-member panel of the current Board, with two recess appointees, adoption of the two Board member decision is a virtual certainty.

Many parties, especially those who have already complied with the two-member Board's orders, may well decide that the cost of pursuing further legal redress, the gravity of the issue(s) involved and the likelihood of success weigh against contesting the Board's order.

— END NOTES —

1 *New Process Steel, LP,* 353 NLRB No. 25 (2008); *New Process Steel, LP,* 353 NLRB NO. 13 (2008).

2 *New Process Steel v. NLRB,* 564 F.3d, 840, 845-847 (CA7 2009)

3 In an unusual alignment, Justice Stevens joined Justice Roberts, Scalia, Thomas and Alito to comprise the majority. ■

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MISCLASSIFICATION OF EMPLOYEES IN MICHIGAN: CONNECTING THE DOTS

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The awareness of the impact of employers' misclassification of individuals as independent contractors instead of employees on tax revenue is not a recent phenomenon. The state's coordinated efforts in identifying and in addressing the issue is.

The Department of Energy, Labor and Economic Growth issued a fact sheet in November 2007 entitled "Employee Misclassification: A Problem that Hurts Everyone."[1] The position statement identified consequences that exist for misclassified workers; for employers who misclassify their employees; and for the government and taxpayers. With respect to employers who misclassify their employees, the fact sheet noted that they avoid paying income taxes; FICA taxes; unemployment taxes; and worker's compensation premiums which, in turn, creates an unfair competitive advantage. It allows them to underbid employers who do not misclassify employees. The fact sheet also stated that the U.S. Government Accountability office estimated that underpayment of Social Security taxes, unemployment insurance and income taxes due to worker misclassification amounted to approximately $72 billion nationally in 2006.

The Unemployment Insurance Agency began receiving information from the Internal Revenue Service in April of 2006, consisting of a state-wide listing of employers who are issuing 1099 statements. The UIA field auditors are using the information to investigate employee misclassification; recoup unpaid state UI taxes; and to make it fair for employers who comply. The UIA also uses data from the IRS in conjunction with other information to select those employers it will audit for misclassification. The agency has also partnered with the IRS in a project-Questionable Employment Tax Practices. This partnership has resulted in coordinated efforts in other tax areas to ensure that appropriate taxes are being fairly paid by all employers.

On February 1, 2008, Governor Granholm issued Executive Order 2008-1 which established the Task Force.[2] Among the charges given to the Task Force were the following:

1. Examine and evaluate existing misclassification enforcement mechanisms and create a system for sharing information related to suspected employee misclassification to the extent possible under existing Michigan law.
2. Establish a protocol for sharing information related to suspected employee misclassification under the own statutory or administrative authority or refer matters to other Task Force members for assessment of potential liability under other relevant authority.
3. Identify barriers to information sharing under current law and recommend proposed executive or legislative actions to overcome the barriers.
4. Develop strategies for systematically investigating employee misclassification within industries which misclassification is most common.
5. Identify significant cases of misclassification which should be jointly investigated and to the extent possible under Michigan Law forum joint enforcement teams to utilize collective investigative and enforcement capabilities.
6. Work cooperatively with business, labor and community groups interested in reducing employee misclassification by seeking ways to prevent misclassification through education and enhancement of mechanisms for identifying and reporting instances of misclassification.

The Task Force was also charged with submitting a report to the Governor each July 1st. In its first report, the Task Force reviewed the establishment of sub-committees in the areas of legal, education and communications and research as well as the establishment of a website. The report also reviewed the ramifications of misclassification and tools for enforcement of each of the task force agencies. The Task Force included in its report meeting notes from three public meetings which were held.[3]

In its report to the Governor on July 1, 2009, the Task Force was able to provide more substantive information based on its efforts over the last year and a half. The report contained information concerning 1099 audits which had been conducted UIA from 2003 to 2007 and noted in that period of time, it had conducted 1,078 audits and found 4,219 misclassified workers resulting in misclassified wages of $5,600,377.28 which, in turn, resulted in over $2 million of misclassified taxable wages.[4]

The Task Force reviewed a study from the School of Labor and Industrial Relations at MSU entitled "The Social and Economic Cost of Employee Misclassification in the Michigan/Construction Industry" prepared by Dale L. Bellman and Richard Block. The report found that, on average, 30% of Michigan employers misclassify employees as self-employed or under-report employee payroll. One-fifth of the employees who are misclassified are either erroneously classified as self-employed or receive payments that are not reported as part of payroll. According to the report, 8% of all Michigan employees are misclassified as self-employed or receive undeclared income. With respect to specific industries, the report broke down the misclassifications as follows:

Construction	26.4%
Trucking	24.4%

The Task Force concluded that misclassification is an epidemic problem in Michigan and throughout the country. The Task Force concluded that there is no single definition of independent contractor that is commonly used throughout various statutory, regulatory, or court decisions applicable to the agencies in Michigan. The Task Force stated that as the economic crisis continues, misclassification is more likely to occur as workers seek any available means of earning a living while employers seek to cut costs whenever possible[5]

While the agencies participating in the Task Force have enforcement divisions to deal with these issues, there are statutory barriers to enter agency communications due to existing privacy laws regulations. As a result, there are no established inter-agency communication channels, and there is no centralized clearinghouse for handling complaints for handling misclassification issues and following it up for monitoring.

To address the deficiencies, the Task Force made a number of recommendations, including the following:

1. Legislation similar to that proposed in Pennsylvania identifying misclassification of employees in construction and commercial carriers industries as conduct subject to civil and criminal sanction.
2. Legislation removing any statutory or regulatory barriers to cross-agency communication on misclassification efforts.[3]. Creation and implementation of Memoranda of Understanding between the involved agencies facilitating information exchange.
4. Creation of a central clearing house to receive and to direct

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MISCLASSIFICATION OF EMPLOYEES IN MICHIGAN: CONNECTING THE DOTS

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complaints and inquiries to various agencies, to coordinate efforts and investigation and pursuit of violations and to monitor progress of investigations.[6]

The legal subcommittee set forth its own recommendations with respect to specific legislation. Those recommendations included protection of individuals making complaints regarding misclassification and legislation removing any statutory or regulatory barrier which suppresses agency communication. With respect to the Worker's Compensation Act, the subcommittee recommended that legislation should be introduced specifically providing that contractors in the trucking and construction industries should be considered "employees" unless the contractor is free from direction and control of the principal; services performed are out of the ordinary course of the business of the principal; the service being performed is outside the usual course of the principal; and the contractor is customarily engaged in an independently established occupation or business. Violation of the statute should subject the principal to criminal sanctions, and enforcement actions may be brought by any improperly classified contractor union or other organization is a civil action, including class actions. In the future, the legal subcommittee recommended consideration of extending the presumption of employee status under the Worker's Compensation Act to other industries.[7]

By forming its Task Force, Michigan joined a number of other states which also formed task forces in 2008.[8] In June of 2009, the Attorney Generals from Iowa, Kentucky, Missouri, Montana, New Jersey, Ohio, Rhode Island, and Vermont sent a letter to Federal Express expressing joint concern over misclassification of individuals and request that the company work with states with respect to its business model and compensating for past illegal practices.[9]

The Task Force itself has not formulated any specific language as to possible amendments of existing statutes or enactment of a new statute. A recently enacted law in Illinois may become a model for Michigan and appears to be the model for the legal subcommittee. The Illinois Employee Classification Act, which became effective as of January 1, 2008 is directed at the same misclassification concerns as identified by the Task Force.[10] The statute addresses the issue of employee classification by stating that a traditional employee designation applies to all construction workers unless it is established at the individual performing services is free from control or direction; that the services provided are outside the usual course of services of provided by the contractor; the individual is engaged in an independently established trade or profession; and that the individual is deemed a legitimate sole proprietor or partnership.

In December of 2009, the Illinois Department of Labor issued a final determination and notice of violation against an Illinois-based contractor. The determination found that the company failed to classify 18 individuals as employees and failed to maintain the proper records. As a result, a civil penalty of $328,500 was assesses based on a fine of $1,500 per day for a total of 218 days of misclassification plus an additional $1,500 for failure to maintain proper records. Since the statute was enacted, the Illinois Department of Labor has assessed penalties of approximately $700,000 in eight cases

There is a national trend towards taking effective action against employee misclassification on a state level. Michigan is a part of that trend. Employers would be well-advised to carefully check their use of independent contractors to ensure that the classification is appropriate.

CAT SCRATCH FEVER: THE "CAT'S PAW" THEORY AND THE NLRA

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Under the category of you learn something new every day, while serving as a panelist with distinguished employment law experts U.S. District Judge Rebecca Pallmeyer for the Northern District of Illinois and Regional Attorney John Hendrickson of the Equal Employment Opportunity Commission in Chicago, the term "cat's paw" became a central theme of their presentations in discussing recent discrimination cases. The panel, titled "Labor & Employment Law Update 2009: A Year in Review," was organized by the Young Lawyers Section of the Chicago Bar Association.

Admittedly, discrimination cases under the National Labor Relations Act, dealing mostly with union activity and protected concerted activity, are rather narrowly focused and constitute only a small segment of the types of discrimination that may be unlawful under federal and state statutes. However, there is oftentimes considerable cross-pollination between the various fields of employment cases in analyzing whether a protected class of employees has been discriminated against.

I professed ignorance of the "cat's paw" theory during the panel discussion, but vowed to do a Westlaw search of the term in Board cases upon my return to the office. Turns out there is good reason why I'm not familiar with the term. Despite the prevalence of the "cat's paw" theory in other employment discrimination contexts, only one reported case has applied the theory under the NLRA, and that occurred before I joined the Agency more than 30 years ago.

For those labor and employment practitioners whose focus is as narrow as mine at the NLRB, a definition of the "cat's paw" theory and a little history about its origination are in order. In a nutshell, in proving that discriminatory animus caused an adverse employment action, the "cat's paw" theory can be invoked where causation may be established if the plaintiff shows that the decisionmaker followed the biased recommendation of another person who is not a decisionmaker without independent investigation of the employee's asserted misconduct. In these circumstances, the recommender of the adverse employment action, although not the decisionmaker, is using the decisionmaker as a mere conduit, or "cat's paw," to give effect to the recommender's discriminatory motive. E.g., *Hyundai Motor Manufacturing Alabama LLC*, 187 LRRM 3452 (11th Circuit 2010).

Now for a little history. The Seventh Circuit in *Staub v. Proctor Hospital*, 560 F.3d 657 (2009), did as good of a job as anyone in explaining it:

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—END NOTES—

1 The fact sheet can be accessed from the DELEG home page by clicking on "Employee Misclassification Task force" in the Spotlight section.
2 The Governor's Executive order can be viewed at http://www.michigan.gov/gov/0,1607,7-168-21975-184817—,00.html
3 The July 1, 2008 Task Force report can be accessed as a .PDF document on the Task Force's website.
4 The July 1, 2009 Task force report can be accessed as a .PDF document on the Task Force's website.
5 p. 17 of 2009 Report.
6 Task Force Recommendations, 2009, p. 18.
7 Exhibit 5 of 2009 report, p. 52.
8 Massachusetts, New Jersey, Iowa, and New York.
9 NELP Summary of Independent Contractor Reforms – New State Activity, July 2009, p. 3.
10 820 ILCS 185/1 *et seq.* (2008). ■

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> One would guess that the chances are pretty slim that the work of a 17th century French poet would find its way into a Chicago courtroom in 2009. But that's the situation in this case as we try to make sense out of what has been dubbed the "cat's paw" theory. The term derives from the fable "The Monkey and the Cat" penned by Jean de La Fontaine (1621-1695). In the tale, a clever- and rather unscrupulous-monkey persuades an unsuspecting feline to snatch chestnuts from a fire. The cat burns her paw in the process while the monkey profits, gulping down the chestnuts one by one. As understood today, a cat's paw is a "tool" or "one used by another to accomplish his purposes." *Webster's Third New International Dictionary* (1976).

In the only reported case arising under the NLRA discussing the "cat's paw" theory, *Zarda Bros. Diary, Inc.*, 234 NLRB 93 (1978), the Board reversed the administrative law judge's reliance on the "cat's paw" theory to find that the immediate supervisor, who made the decision to discharge a union activist and had no knowledge of the employee's union activities, was being used by the plant manager, who had knowledge of the employee's union activities, as a cat's paw to seize upon a fortuitous opportunity to discharge the union activist. While the Board expressed no concern with the ALJ's use of the "cat's paw" theory, it found the ALJ's rationale in applying the theory was unsupported by the record and internally inconsistent.

Although the Board in this one particular case relegated the "cat's paw" theory to the litter box, it's curious why it has not resurfaced. The answer may lie in how the Board analyzes discrimination cases under the NLRA. Under *Wright Line*, 251 NLRB 1083 (1980), *enfd*. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the General Counsel bears the burden of showing that union animus was a motivating or substantial factor for the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. If the General Counsel satisfies the burden, the burden shifts to the employer to show that they would have taken the same employment action even absent the union activity.

However, even if union animus or knowledge of union activities can not be directly attributed to a decisionmaker, the Board can attribute unlawful motivation for an adverse employment action to an employer without resort to a "cat's paw" theory. For instance, the Board has found adverse employment action unlawfully motivated where union animus can not be traced directly to the decisionmaker, but can be attributed to either a subordinate supervisor or superintending manager who has no involvement in the adverse action. I suppose this could be referred to as the "stray cat" theory. A stray anti-union remark by a supervisor might be enough to attribute a discriminatory motive for an adverse employment action.

The Board also relies upon other theories, such as the "small plant doctrine" to infer that management of a small firm is likely to know about union activities taking place at its facility. Other factors, such as shifting defenses or pretextual reasons for an adverse action can be enough to establish discriminatory motive if the three elements of a prima facie case are present.

Member Schaumber's suggestion for adding an independent fourth element to the *Wright Line* test; the necessity for there to be a causal nexus between the union animus and the adverse employment action, sounds similar to a cat's paw requirement. See e.g. *Camelot Terrance Inc*., 354 NLRB No. 24, slip op. at pg. 1, fn. 5 (2009).

But, there may be good reason why the Board does not regularly use the "cat's paw" theory. We deal frequently enough with inflatable rats in the context of labor disputes. Adding a cat's paw to the mix would certainty create volatility.

The views expressed are those of the author and are not the official policy or practice of the General Counsel or the National Labor Relations Board. ■

EXPANDED FEDERAL EMPLOYMENT RIGHTS UNDER THE MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT AND GENETIC INFORMATION NONDISCRIMINATION ACT

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NEW MENTAL HEALTH PARITY REQUIREMENTS FOR EMPLOYER SPONSORED GROUP HEALTH PLANS

The ***Mental Health Parity and Addiction Equity Act of 2008*** (MHPAEA), which took effect January 1, 2010 (for calendar year plans beginning on or after October 3, 2009), amended existing federal legislation to create new requirements for mental health and substance use disorder benefits in, among other things, employer sponsored group health insurance plans. Subject to certain exceptions, most insured or self-insured employer group health plans with 51 or more employees are covered by MHPAEA.

While retaining existing federal requirements for parity in the application of aggregate lifetime and annual dollar limits for mental health benefits, the MHPAEA adds several new requirements to group health plans and their employer sponsors, including:

- Group health insurance plans that offer medical/surgical benefits and mental health and/or substance use disorder benefits are prohibited from imposing financial requirements (deductibles and co-pays) and treatment limitations (number of doctor visits or days of coverage) more restrictive for mental health and/or substance use disorder treatment than the predominant financial requirements or treatment limitations that apply to substantially all medical/surgical benefits.
- Mental health benefits and substance use disorder benefits may not be subject to any separate cost sharing requirements or treatment limitations that apply to substantially all medical/surgical benefits.
- Group health plans that provide medical/surgical benefits and mental health benefits and/or substance abuse disorder benefits, that provide for out of network medical/surgical benefits, must provide for out of network mental health benefits and/or substance use disorder benefits, as applicable.

The MHPAEA does not bar insurance plans from limiting addiction and mental health treatment services, but the limits must be no more restrictive than those applicable to medical /surgical benefits covered the plan.

Until federal regulatory rules implementing the MHPAEA are issued, plan sponsors are required to make a reasonable good faith effort to comply with the law. Any employer who sponsors a group health insurance plan should review their medical benefit plans and take steps to revise them as necessary consistent with the requirements of the MHPAEA.

TITLE I of GINA PROHIBITS DISCRIMINATION IN GROUP HEALTH PLANS

Title I of the ***Genetic Information Nondiscrimination Act of 2008*** (GINA), which prohibits discrimination in group health plan coverage based on genetic information, took effect January 1, 2010 for employer/plan sponsors who utilize calendar year plans (For other plans, the effective date was May 21, 2009).

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EXPANDED FEDERAL EMPLOYMENT RIGHTS

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The statute defines "genetic information", with respect to any individuals, information about: 1) genetic tests of such individual; 2) genetic tests of family members of such individual; and 3) the manifestation of diseases or disorders in family members of individual.

Title I of GINA prohibits a group health plan and group health insurance issuer from:

- Basing premiums for an employer or a group of similarly situated individuals on genetic information.
- Requesting or requiring an individual or family member to undergo a genetic test. However, a health care professional providing health care service to an individual is permitted to request a genetic test. In addition, genetic testing information can be requested to determine payment of a claim for benefits, although only a minimum amount of information necessary to determine payment obligations may be sought.
- Collecting, requesting, requiring, or purchasing genetic information (including family medical history) prior to or in connection with enrollment in a health plan or for underwriting purposes. An exception exists for fro incidental collection, provided the information is not used for underwriting purposes.

Until Final Rules are issued, plan sponsors are required to comply with the U.S, Departments of Treasury, Labor, and Health and Human Service's jointly issued "Interim Final Rules Prohibiting Discrimination Based on Genetic Information in Health Insurance Coverage and Group Health Plans", effective December 7, 2009.

TITLE II of GINA CREATES NEW PROTECTED CLASS UNDER FEDERAL DISCRIMINATION LAW

Effective November 21, 2009, Title II of GINA creates an entirely new class of employees not previously protected under Federal discrimination law.

The statute prohibits employers from discriminating against individuals based on genetic information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of compensation. Genetic information includes information about genetic tests of applicants, employees or their family members; "the manifestation of a disease disorder in family members (family medical history); and requests for or receipt of genetic services by applicants, employees, or their family members.

Title I of GINA bars employers from limiting, segregating, or classifying employees, on the basis of genetic information, in any manner which would adversely impact their employment. GINA also severely restricts employers' acquisition of genetic information and strictly limits disclosure of genetic information. Employers in possession of genetic information concerning employees must treat it as a confidential medical record and maintain it in separate medical files.

Except for specified purposes enumerated in GINA (including, but not limited to Family and Medical Leave Act compliance requirements), employers are prohibited from requesting, requiring, or purchasing an employees or employee family member's genetic information or disclosing such information.

Until Final Rules are issued, the EEOC's Proposed Regulation Implementing Title I of GINA, published in the Federal Register March 2, 2009, should be used for guidance purposes. A Final EEOC Rule, effective January 6, 2010, amended existing EEOC regulations to include the references to GINA and incorporate the statute into existing EEOC complaint procedures. As a result, complaints filed under Title II of GINA are treated by the EEOC like any other discrimination complaint arising under its jurisdiction. ■

AN UPDATE ON THE LILLY LEDBETTER FAIR PAY ACT OF 2009

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I. Background

On January 22, 2009, President Barack Obama signed the Lilly Ledbetter Fair Pay Act ("FPA"). The FPA superseded, and criticized, the Supreme Court's ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). The Act established that with respect to discrimination in compensation after a discriminatory compensation decision or other practice is adopted each subsequent receipt of compensation affected by that discriminatory compensation decision or other practice is a new act of discrimination. The provisions added to section 3 of Title VII state:

a) For the purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

b) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

42 U.S.C. § 2000. As a result, with the issuance of every paycheck, the statute of limitations is restarted for each claim that alleges the current compensation would be more if not for the past discrimination. In addition to Title VII, the FPA applies to the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act of 1990 ("ADA"), and the Rehabilitation Act of 1974.

In the sixteen months following the enactment of the FPA, courts have attempted to define the scope of the FPA. Some cases have dealt with a clear cut application of the FPA to compensation discrimination claims. In these cases, courts have uniformly held plaintiff's claims timely as long as current compensation gives effect to a past discriminatory compensation decision. See *Rehman v. State Univ. of N.Y.*, 596 F. Supp. 2d 643 (E.D.N.Y. 2009) (holding plaintiff's discriminatory compensation claim timely under the FPA); see also *Hodge v. United Airlines*, 666 F. Supp. 2d 14 (D.C.D.C. 2009) (holding plaintiff's discriminatory compensation claim timely under the FPA).

Aside from cases applying the FPA to compensation claims, three other types of cases have emerged:

- cases interpreting the "other practice" element of the FPA
- cases involving the effect of the FPA on federal civil right statutes
- cases involving the effect of the FPA on state civil rights statutes

II. "Other Practice" Cases

The majority of courts have narrowly construed the "other practice" provision in the FPA. Currently, there have been nearly thirty district court cases addressing this issue, but only three circuits have

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addressed the "other practice" element of the FPA.

In a case decided just three months after President Obama signed the FPA, the DC Circuit remanded a failure to promote case for reconsideration in light of the FPA. *Lipscomb v. Winter*, No. 08-5452, 2009 U.S. App. LEXIS 7036 (D.C. Cir. Apr. 3, 2009). The DC Circuit has since had another opportunity to address the issue of what is an "other practice" as used in the FPA. This time, the court held that a failure to promote was not an "other practice" under the FPA. *Schuler v. PricewaterhouseCoopers, LLP*, No. 08-7115, 2010 U.S. App. LEXIS 2998 (D.C. Cir. 2010). The plaintiff filed an EEOC charge outside of the 300 day charging period and argued that the FPA should apply. Furthermore, he argued that a previous draft of the FPA did not contain the term "other practice" and therefore the final Act illustrated Congress' intent to go beyond the scope of compensation decisions.

The court rejected this interpretation stating that discrimination in compensation "means paying different wages or providing different benefits to similar situated employees, not promoting one employee but not another to a more remunerative position." Id. at *9-10. In order to find what Congress intended by "other practice," the court looked at the Ledbetter decision itself "for an example of a discriminatory 'other practice,' viz., giving an employee a poor performance evaluation based on her sex . . . and then using the evaluation to determine her rate of pay." Id. at *12. In *Schuler*, the court narrowly defined the scope of the FPA and excluded failure to promote claims from the definition of "other practice" under the FPA.

The Second Circuit also narrowly defined the scope of the FPA by excluding a failure to hire claim. *Miller v. Kempthorne*, No. 08-2466-cv, 2009 U.S. App. LEXIS 27952 (2nd Cir. Dec. 21, 2009). Without much discussion in an unpublished opinion, the court held that the FPA did not apply to the plaintiff's 1994 failure to hire claim or the claim that he was not converted to a permanent employee until 1999, but that the FPA did apply to the employer's 1999 decision to place him in a Wage Grade 2 rather Wage Grade 5 classification..

Similarly, in another unpublished opinion the Fifth Circuit found that the FPA did not apply to discrete acts without any analysis of the FPA. *Tillman v. Southern Wood Preserving of Hattiesburg, Inc.*, 2010 U.S. App. LEXIS 9181 (5th Cir. May 4, 2010).

The test that courts are developing for defining an "other practice" echoes Justice Ginsburg's dissent in *Ledbetter*. See *Richards v. Johnson & Johnson, Inc*., No. 05-3663, 2009 U.S. Dist. LEXIS 46117 (D.C.N.J. June 2, 2009); see also *Joseph v. Commonwealth of Pa., Dept. of Env't Prot.*, No. 06-4916, 2009 U.S. Dist. LEXIS 107136 (E.D. Pa. Nov. 16, 2009). As the dissent noted in Ledbetter, "pay disparities are thus significantly different from adverse actions 'such as termination, failure to promote, . . . or refusal to hire," all involving fully communicated discrete acts, 'easy to identify' as discriminatory." *Ledbetter*, 550 U.S. at 645 (quoting *Morgan*, 536 U.S. at 114). Discriminatory compensation decisions are treated differently because, generally, employees will not know they have been discriminated against in a compensation decision at the time the decision is made.

In *Richards*, the court held that the FPA does not apply to failure to promote claims. The court stated that although the FPA contains expansive language in superseding the holding in Ledbetter, it did not purport to overturn *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). *Richards*, 2009 LEXIS at *29. In *Morgan*, the Supreme Court held that the time to file an EEOC charge begins when the discriminatory act occurred. This rule applied to all discrete acts of discrimination, including discrimination in termination, failure to promote, denial of transfer, and refusal to hire, as opposed to hostile work environment claims. *Morgan*, 536 U.S. at 114. As the dissent in *Ledbetter* noted, discriminatory compensation claims were not discrete acts of discrimination, but were "claims . . . based on the cumulative effect of individual acts." *Ledbetter*, 550 U.S. at 648 (quoting Morgan, 550 U.S. at 115).

Using this rationale in *Richards*, the court held that the failure to promote was a discrete act, was independently actionable, and not part of a single continuing violation. *Richards*, 2009 LEXIS at *29. The statement in *Ledbetter* that "current effects alone cannot breathe new life into prior uncharged discrimination" is still binding for Title VII disparate treatment claims involving discrete discriminatory acts. *Richards*, 2009 LEXIS at *31. The Court also found, however, that even though discrete discriminatory acts that fall outside the statute of limitations period are still barred under the FPA, evidence of these discriminatory acts can be used as evidence to support a timely claim. Id. at *32.

A number of other courts have also held that discrete acts of discrimination did not fall within the scope of the FPA and were not considered an "other practice." See *Onyiah v. St. Cloud St. Univ*., 655 F. Supp. 2d 948 (D.C. Minn. 2009) (holding a failure to hire claim was not within the scope of the FPA); *Tryals v. Altairstrickland, LP,* No. H-08-3653, 2009 U.S. Dist. LEXIS 125335 (S.D. Tex. Feb. 26, 2009) (stating the FPA does not apply outside of discriminatory compensation claims, specifically to claims for retaliation and discrete acts of discrimination); *Holloway v. Best Buy Co.*, No. C 05-5056, 2009 U.S. Dist. LEXIS 50994 (N.D. Cal. May 28, 2009) (holding in a class action context that plaintiffs' claims regarding initial job assignments were discrete acts); *Powell v. Duval County Sch. Bd.*, No. 3:07-cv-361-J-32MCR, 2009 U.S. Dist. LEXIS 88956 (M.D. Fla. Sept. 28, 2009) (noting that plaintiff did not invoke the FPA, but if she had, it would not be applicable to her failure to promote claims); *Low v. Chu*, No. 09-CV-0505-CVE-PJC, 2009 U.S. Dist. LEXIS 111623 (N.D. Okla. Dec. 1, 2009) (holding the FPA does not apply to discriminatory hiring, promotion, or position-advertising practices).

A minority of courts, however, have held discrete discriminatory acts to be within the scope of the FPA. See *Gentry v. Jackson State Univ*., 610 F. Supp. 2d 564 (S.D. Miss. 2009); see also *Bush v. Orange County Corr. Dept*., 597 F. Supp. 2d 1293 (M.D. Fla. 2009). In *Gentry*, the plaintiff alleged she was denied tenure and a related salary increase because of her gender. The court held the denial of tenure was within the scope of the FPA. It acknowledged that other courts had held that the denial of a promotion was not within the scope of the FPA; however, the court reasoned that *Gentry* was different because the plaintiff alleged that the denial of tenure affected her pay. Because the plaintiff asserted the denial of tenure based on her gender resulted in a specific compensation action, the court held that the denial of tenure was within the scope of the FPA.

Based on the reasoning in *Gentry*, it is difficult to see how a failure to promote claim would not fall under the scope of the FPA because almost every promotion is accompanied with a resulting pay increase, a specific compensation action. Subsequent courts, however, have applied *Morgan* instead of the FPA to failure to promote claims because, they have held, a failure to promote is a discrete discriminatory act whether the plaintiff claimed an impact on compensation or not. The rationale is that a plaintiff who is not promoted knows she is not promoted at the time of the denial, making it a discrete act of discrimination. Although the majority of courts have declined to incorporate the failure to promote as an "other practice" under the FPA, this is likely to be a claim that continues to be litigated, at least until resolved at the appellate level.

If termination, failure to promote or failure to hire are not considered "other practices," the question then becomes what exactly is an "other practice" contemplated by the FPA. Most courts have only answered this question in the negative thus far; however, at least one "other practice" has been determined. In *Tomlinson v. El Paso Corp*.,

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AN UPDATE ON THE LILLY LEDBETTER FAIR PAY ACT OF 2009

(Continued from page 11)

No. 04-cv-02686-WDH-MEH, 2009 U.S. Dist. LEXIS 77341 (D.C. Colo. Aug. 28, 2009), the court held the rate of accrual of pension benefits was an "other practice" as described in the FPA. On the other hand, the court indicated that the payment of retirement benefits would be a discrete discriminatory act because the pension structure is applied only once when the employee retires and the pension checks merely flow from that application.

Courts are also likely to treat actions such as transfers, job assignments, and evaluations as "other practices" if they have adverse compensation consequences, particularly if those consequences are not known at the time.

III. Federal Law Cases

Courts have not extended the scope of the FPA to other federal civil right statues. Courts have explicitly declined to apply the FPA to 42 U.S.C. § 1983 claims, FMLA claims, and Equal Pay Act claims. See *Porter v. City of Columbus*, No. 2:06-cv-1046, 2009 U.S. Dist. LEXIS 80905 (S.D. Ohio Sept. 4, 2009); see also *Maher v. Int'l Paper Co.*, 600 F. Supp. 2d 940 (W.D. Mich. 2009); *Lerman v. City of Fort Lauderdale*, No. 09-10420, 2009 U.S. App. LEXIS 21380 (11th Cir. Sept. 28, 2009); *Dixon v. Univ. of Toledo*, 639 F. Supp. 2d 847 (N.D. Ohio 2009). At this time, there is no indication courts will extend the FPA to other federal civil rights statutes not specifically mentioned in the FPA.

IV. State Law Cases

Typically, state civil rights acts turn to their federal counterparts when interpreting the scope of their acts. Some courts have applied the FPA to state civil rights compensation discrimination claims, even where there is no corresponding amendment to the state civil rights act. See *Klebe v. Univ. of Texas Sys.*, 649 F. Supp. 2d 568 (W.D. Tex. 2009); see also *Schengrund v. The Pa. St. Univ.*, No. 4:07-CV-718, 2009 U.S. Dist. LEXIS 90349 (M.D. Pa. Sept. 30, 2009). No Michigan court has ruled on the application of the FPA to state civil rights compensation discrimination claims. Based on the ruling in *Garg v. Macomb County Community Mental Health Services*, 472 Mich. 263 (2005), Michigan courts are unlikely to apply the FPA to state law claims. In *Garg*, the Michigan State Supreme Court stated that federal case law "may often be useful as guidance," but "such [federal] precedent cannot be allowed to rewrite Michigan law. Id. at 283. The court held the three year statute of limitations provided for in MCL 600.5805 did not allow for claims outside of that period to be revived even if "sufficiently related" injuries occurred within the statute of limitations period. Id. at 281. This holding rejected the Supreme Court's holding in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977) and instead relied on the plain language interpretation of MCL 600.5805. The holding in *Garg* makes it highly likely that Michigan courts will not apply the FPA to state discrimination claims.

V. Impact

The FPA was enacted amid much fanfare and criticism. Critics feared a litigation explosion, and proponents lauded the passage and marked it as a critical victory for employees. Despite all of the media coverage and political claims surrounding its passage, the FPA will likely have a minimal impact on employment litigation. Due to the two year limitation on back pay, most cases will only involve modest economic damages. For example, an employee who has been paid $5.00 an hour less due to a discriminatory compensation decision will only have an economic damages claim for approximately $20,000. The promise of only a modest economic damage recovery will likely limit the number of actions under the FPA and lessen its impact on employment litigation. Moreover, an employee must prove that the compensation decision is the result of illegal discrimination. Finally, most employees still will not know how their compensation compares to their peers.

VI. Recommendations

As courts grapple with defining the scope of the FPA, employers can take the following steps to minimize their risk as a result of the open ended limitations period under the FPA. In fact, many of these steps should be taken to minimize risks in general:

- Review Current Compensation Schedules: Employers should audit existing compensation schedules to determine if there are discrepancies among employees in similar job classifications. If the discrepancies involve employees within protected categories, determine if there is a legitimate explanation for the discrepancy. If there is not, the employer should create a plan to address the discrepancy.
- Review Compensation Policies: By reviewing existing compensation policies and procedures with counsel, employers can reduce their risk by establishing clear guidelines for decisions.
- Implement a Review System: A review committee or Human Resources can review all compensation decisions to make certain that the potential risks created by compensation differences among employees is examined and to make certain the employer is consistent in its compensation decisions.
- Review Company Record Retention Policies: Records relating to compensation decisions should be retained for a longer period of time as the risk of an FPA claim can arise years into the future. Employers, however, will need to balance their costs for retaining records longer against the likelihood of increased litigation under the FPA.
- Document All Compensation Decisions: Make certain there is detailed documentation explaining the reason for all compensation decisions.
- Train Employees: Employees involved in the compensation decision process should have specific compensation decision training.

VII. Conclusion

The FPA has been in effect for a little more than a year, and the extent of its impact is being resolved in the courts. At this point, while the FPA addresses specific situations such as Lilly Ledbetter's where earlier compensation decisions result in subsequent pay discrimination, it may not have the dramatic impact that was anticipated. ■

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APPELLATE REVIEW OF MERC CASES
(MARCH 2009 – MARCH 2010)

D. Lynn Morison
Michigan Bureau of Employment Relations

I. 36TH DISTRICT COURT -AND- MICHIGAN AFSCME COUNCIL 25 -AND- MICHIGAN AFSCME LOCAL 3308. Court of Appeals No. 285123, issued September 29, 2009, affirming MERC decision issued April 9, 2008, 21 MPER 19 (2008).

In an unpublished opinion, the Court of Appeals affirmed MERC's decision finding that Respondent 36th District Court committed an unfair labor practice when it unilaterally changed the number of days in the work week during the term of its collective bargaining agreement with Charging Parties Michigan AFSCME Council 25 -and- Michigan AFSCME Local 3308 (AFSCME).

On appeal, respondent contended that MERC erred in concluding that respondent repudiated the parties' contract, that MERC erred in its interpretation of the contract's management rights clause and that the parties' dispute is one of contract interpretation over which MERC has no jurisdiction.

Respondent failed to cite any authority in support of its contention that it did not repudiate its contract with AFSCME and failed to explain why it contended that MERC erred in finding that there had been a repudiation of the contract. Noting that it is insufficient for a party to assert error and leave it up to the court to find authority to support or reject the party's position, the Court of Appeals concluded that respondent had abandoned its contention that it did not repudiate the contract. Nonetheless, the Court reviewed the law on contract repudiation and found MERC correctly held that the contract had been repudiated by respondent.

The Court of Appeals noted that had respondent reduced the workforce due to economic conditions, such action would have been permissible pursuant to respondent's managerial prerogative. However, the Court agreed with MERC that the contract's management rights clause did not permit respondent to change the length of the work week. Such a change was contrary to language of the contract that clearly and unambiguously defines the number of days in the work week. Moreover, the change in the length of the work week was a change in a mandatory subject of bargaining, which, therefore, had to be bargained with AFSCME before any change could be implemented.

The Court of Appeals rejected respondent's contention that the matter involved a bona fide dispute over interpretation of the contract and should be deferred to arbitration. The Court agreed with MERC that there was a clear and unambiguous definition of the work week contained in the parties' agreement and, thus, there could be no legitimate dispute about that term's interpretation. Accordingly, the matter was appropriately before MERC.

Finally, the Court affirmed MERC's holding that respondent was required to obtain AFSCME's consent before it could lawfully implement the change to a mandatory subject of bargaining. The Court held that while AFSCME was not required to agree to a mid-term modification of contract terms, respondent could not lawfully implement a mid-term modification without the charging party's consent.

Accordingly, the Court of Appeals affirmed MERC's finding that respondent repudiated the contract and violated its duty to bargain by implementing a mid-term modification of a mandatory subject of bargaining without first securing the charging party's agreement.

II. OAKLAND COUNTY -AND- OAKLAND COUNTY SHERIFF'S DEPARTMENT v OAKLAND COUNTY DEPUTY SHERIFFS ASSOCIATION, Michigan Supreme Court Case No. 138444, issued July 15, 2009.

In a very brief decision, the Supreme Court vacated the part of the Court of Appeals decision that said "it is well settled that county corrections officers and other employees who are not police officers are not subject to the hazards of police work." The Court otherwise denied the union's application for leave to appeal without further comment. The Court of Appeals decision in Docket No. 280075, was issued February 3, 2009, and affirmed the MERC decision issued August 7, 2007, 20 MPER 63 (2007).

A. The Court of Appeals' Majority Opinion

In a published opinion, the Court of Appeals majority affirmed MERC's decision severing the bargaining unit represented by the Oakland County Deputy Sheriffs Association (the union) into two separate units - one consisting of employees eligible for Act 312 binding arbitration, and the other consisting of employees ineligible for Act 312 arbitration. The Court majority also affirmed MERC's dismissal of the union's petition for Act 312 arbitration with respect to the part of the bargaining unit ineligible for Act 312 arbitration.

The union serves as the collective bargaining representative for approximately 750 uniformed employees of Oakland County and the Oakland County Sheriff's Department (the employer). The union filed an unfair labor practice charge in August 2006 against the employer along with a petition seeking Act 312 compulsory arbitration for its bargaining unit of "all sworn sheriff's department employees below the rank of sergeant." The employer filed a motion to dismiss the petition for arbitration, alleging that a substantial part of the bargaining unit is ineligible for Act 312 arbitration. In the alternative, the employer sought clarification of the existing bargaining unit and a declaration that certain employee classifications therein were ineligible for Act 312 arbitration. The Commission granted the employer's motion to dismiss in part and severed the bargaining unit into two groups based on Act 312 eligibility, both of which continued to be represented by the union.

On appeal, the union made the following contentions: (1) that MERC's severance of the preexisting bargaining unit was intended to punish the union for filing unfair labor practice charges; (2) that the proceedings below were procedurally flawed in that the administrative law judge (ALJ) abused his discretion by refusing to hold an evidentiary hearing; (3) that the ALJ exceeded his authority by directing the filing of briefs, turning an Act 312 issue into a unit clarification action, and entering an order of dismissal; (4) that the ALJ mischaracterized the facts; and (5) that the Commission erroneously construed MCL 423.232(1) by concluding that the statutory language "or subject to the hazards thereof" modifies only the phrase "engaged . . . in firefighting," and does not modify the phrase "engaged as policemen."

The Court began its analysis of this matter by acknowledging that the Commission did not err in its legal determination that an employer is permitted to unilaterally seek severance of a mixed bargaining unit in the absence of a request by an employee. The Court noted that MERC has a general policy against disturbing existing bargaining units and despite the fact that severance by request of an employer was an occurrence of first impression for the Commission, the Court recognized that MERC is permitted to reexamine prior decisions, depart from precedents, promulgate law through rulemaking, or reconsider previously established rules.

The Court further acknowledged that the Commission properly observed that Act 312 is intended to protect both employees and employers, and that, absent some law to the contrary, there is no basis under PERA or under Act 312 to hold that a covered employer may

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APPELLATE REVIEW OF MERC CASES

(Continued from page 13)

never seek severance of a mixed bargaining unit, where the circumstances make severance appropriate. The Commission is charged with deciding the unit appropriate for the purpose of collective bargaining that will best secure the employees' protected rights. The Court determined that in this case, MERC provided sufficient factual support for its conclusion that severance was appropriate because the continued existence of the mixed unit interfered with the normal and healthy give and take of bargaining anticipated under PERA and Act 312.

In addressing the union's argument that MERC's severance of the preexisting bargaining unit was intended to punish the union for filing unfair labor practice charges, the Court found that there was no support in the record for this contention. Rather, the Court determined that MERC's decision was intended to foster more productive bargaining for all affected employees in light of the obstructive effect that the parties' continued disagreement over Act 312 eligibility had on their ability to reach a collective bargaining agreement. The Court held that the Commission's ruling was neither arbitrary nor capricious, and it was supported by competent, material, and substantial evidence on the whole record.

The Court also found no merit in the union's contention that the ALJ abused his discretion by refusing to hold an evidentiary hearing. It observed that the ALJ gave the union several opportunities to show the existence of disputed factual issues, but the union repeatedly failed to do so, thereby eliminating the need to hold an evidentiary hearing. The union also argued that the ALJ exceeded his authority by directing the filing of briefs, turning an Act 312 issue into a unit clarification action, and entering an order of dismissal. The Court held that the ALJ's execution of these functions was clearly within the scope of authority granted him under the Commission's General Rules.

The Court also rejected the union's assertion that the ALJ mischaracterized the facts. Since the union advised the ALJ that there were no significant issues of fact and failed to present offers of proof or identify disputed issues of fact below, the Court held that the union was precluded from raising factual issues on appeal.

The Court found that it was unnecessary to address the union's final argument (that the Commission erroneously construed MCL 423.232(1) by concluding that the statutory language "subject to the hazards thereof" modifies only the phrase "engaged . . . in firefighting," and does not modify the phrase "engaged as policemen") because it was not necessary to the outcome of the case. However, the Court majority concluded that even if the language "subject to the hazards thereof" could be construed to modify the phrase "engaged as policemen" in the statute, it is well settled that county corrections officers and other employees who are not police officers are not subject to the hazards of police work. Moreover, the Court resolved that the union failed to take advantage of the opportunity to demonstrate why its corrections officers and other non-police-officer employees were factually unique such that they may be entitled to coverage under the "subject to the hazards thereof" language.

B. The Dissent in the Court of Appeals Opinion

The dissenting opinion concluded that MERC improperly denied the union its opportunity to have an evidentiary hearing on the issue of whether corrections officers are eligible for Act 312 arbitration. In arriving at this conclusion, the dissenting opinion reviewed the historical treatment of the issue of Act 312 eligibility for corrections officers.

The dissent explained that in Metropolitan Council No 23, AFSCME v Oakland Co Prosecutor, 409 Mich 299 (1980), the Supreme Court set forth the following two conditions that a union must establish before members of its bargaining unit are eligible for Act 312 arbitration: (1) the employees in question must be subject to the hazards of police work and (2) the employer of such employees must have as its principal function the promotion of the public safety, order, and welfare such that a work stoppage by those employees would threaten community safety. The dissent observed that before, and for a few years after, the Supreme Court decision in Metropolitan Council No 23, MERC held that corrections officers were indeed eligible for Act 312 arbitration based on the two conditions above.

The dissent concluded that more recently, the Commission has erroneously relied on Capitol City Lodge No 141, Fraternal Order of Police v Ingham Co Bd of Comm'rs, 155 Mich App 116, 119; 399 NW2d 463 (1986), in finding that corrections officers are not eligible for Act 312 arbitration. The dissent recognized that in Capitol City Lodge, the Court of Appeals challenged the Commission's findings that corrections officers could be eligible for Act 312 arbitration. In that case, the Court determined that the corrections officers at the Ingham County Jail could not be considered eligible for Act 312 arbitration because there was insufficient evidence to support a finding that a work stoppage in the jail would threaten community safety because the officers were readily replaceable. The dissent noted that although this determination by the Court was purely factual (and therefore, inappropriate for an appellate decision), MERC panels have interpreted this ruling as a legal determination supporting the proposition that if employees can be replaced, then a work stoppage does not present a threat to community safety. The dissent opined that MERC has expanded upon the original two-part test for Act 312 eligibility established in Metropolitan Council No 23, by adding the requirement that in the event of a work stoppage, the striking employees could not be adequately replaced.

The dissent concluded that the Commission has misinterpreted the extent of the Court's holding in Capitol City Lodge by expanding its meaning to preclude employees from Act 312 arbitration when they can be adequately replaced in the event of a strike. Furthermore, the dissent concluded that Capitol City Lodge does not support the conclusion that corrections officers must meet the three-part test developed and perpetuated by MERC panels to be eligible for Act 312 arbitration. The dissent suggested that while the degree to which an employee is replaceable is a factor that should be considered when determining whether a strike by corrections officers would threaten community safety, it is not a dispositive factor. Rather, the dissent recommended that the Commission employ "a totality-of-the-circumstances test," considering, at a minimum, the following factors:

(1) the size and safety of the inmate population; (2) whether the transfer of inmates to another facility is feasible; (3) whether inmates would be released early in the event of a strike; (4) the impact that moving road patrol officers to the jail would have on public safety; (5) the number of corrections officers needed to staff a jail in the event of a strike and whether it exceeds the number of police officers available; (6) whether police officers and corrections officers are on strike at the same time; (7) whether a corrections officer could be replaced with untrained personnel; (8) whether untrained replacements would create a risk to the public; and (9) the effect that replacing union employees with unqualified, non-union members would have on the morale and efficiency of the department.

Accordingly, the dissent concluded that the Commission's decision should be vacated and the matter remanded for an evidentiary hearing to obtain evidence that would enable the Commission to decide, based upon the totality of the circumstances, whether a strike by the corrections officers would threaten the community.

—END NOTE—

The author's appreciation is extended to Lee A. Powell, Jr. and Matthew Bedikian for their assistance with the preparation of these case summaries. ■

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OVERTIME PAY LITIGATION CONTINUES

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Claims by employees seeking overtime pay under the Fair Labor Standards Act (FLSA) continue to be litigated. Courts continue to hear claims of employees who allege that they are entitled to overtime pay, while the employer believes that the employees are exempt from overtime pay requirements.

Duty to Pay Overtime

Under the FLSA, covered employees must receive overtime pay for any compensable hours worked beyond 40 hours in a work week. Employers can avoid paying overtime for salaried employees, but only if they are salaried and work in positions which are considered to be exempt under the FLSA. Courts continue to hear claims regarding whether an employee is exempt and therefore not entitled to overtime pay.

One common subject of litigation is whether the person who seeks overtime pay is performing exempt duties. Four recent court decisions and an interpretation from the Department of Labor help to clarify this issue for professionals, administrators, outside sales and driving employees.

Professionals

A recent court of appeals decision found that helicopter pilots for a regional transportation authority were not exempt and were entitled to overtime pay because they did not fit under the professional exemption.[1] The employer was unable to meet its burden of showing that the pilots had specialized knowledge and unique skills required for the professional exemption. The pilots' abilities were acquired through experience and training rather than through academic, intellectual instruction.

This court adopted the position of the Department of Labor (DOL) that pilots are not exempt. The court failed to adopt the reasoning of a 1983 decision in which another court of appeals held that an airline pilot was exempt.[2] Even if a pilot has completed academic work, he or she is not exempt if such an education is not required of the pilot position.

Outside Sales

A second federal court of appeals decision recently found that an account representative for a waste disposal firm was exempt and therefore not entitled to overtime pay.[3] Tammy Schmidt's duties involved contacting current and potential customers to sell the employer's services. Even though she spent approximately one quarter of her time in the office, she typically spent at least four and sometimes eight hours per day making sales calls and attending other events to promote sales. Even her work at the office was often related to her sales duties. The employer was able to show that her primary duty was making sales or obtaining orders away from the employer's place of business.

Administrators

Employers have had mixed success in showing that employees are exempt as administrators in recent decisions and a DOL interpretation. Johnson & Johnson was able to show that a senior sales representative was exempt based on her efforts to sell a prescription drug in her sales territory.[4] She made unsupervised visits to doctors 95% of the time, developed her own strategic sales plan, and had control over her marketing budget. Johnson & Johnson was able to show that she was exempt based on her exercise of discretion and independent judgment.

In contrast to this pharmaceutical sales representative, a regional director of advertising sales for a magazine was not exempt.[5] Her primary duty was making individual sales to specific customers rather than promoting the sale of advertising generally. Note that the sales representative could still be found to be exempt based on her outside sales, like the account representative discussed above.

A second employer was unable to convince the Department of Labor that its mortgage loan officers are exempt as administrators.[6] Loan officers are responsible for contacting potential customers and then collecting financial information from and about them. Officers also describe loan terms to customers. DOL was not convinced that the officers were exempt because the officers' primary duties did not go beyond "producing sales." The officers were trained in and evaluated on their sales. Even the collection of the customers' financial information was part of the sales process. DOL distinguished other cases, like the Johnson & Johnson case above, in which the courts found that other sales representatives were involved in promoting sales more generally.

Interstate Drivers

Shuttle drivers in Florida are not entitled to overtime under the U.S. Supreme Court's decision to allow a court of appeals decision to stand.[7] The Court of Appeals had held in 2009 that drivers for American Coach Lines of Miami were exempt even though almost all of the driving occurred within Florida. The FLSA exemption applies to employees who are employed (1) by a common carrier by motor vehicle; (2) engaged in interstate commerce; and (3) whose activities directly affect the safety of operations of such motor vehicles. The exemption was supported by the employer's license as an interstate passenger motor carrier, the 4% of total revenue gained from interstate transport, and the carrier's role as part of the "practical continuity of movement across state lines."

In light of these recent decisions, in determining whether overtime must be paid or the time of employees is compensable, employers should keep the following in mind:

- Failure to require advanced education may prevent employers from taking advantage of the learned professional exemption for payment of overtime.
- Sales persons may be exempt if they are engaged in promoting overall sales rather than making individual sales, or if they are mainly engaged in sales outside of the employer's location.
- Drivers may be exempt if the employer engages in some interstate transport.

—END NOTES—

1 *Pignataro v. Port Auth. of N.Y. and N.J.*, No. 08-3605 (3d Cir. Jan. 27, 2010).
2 *Paul v. Petroleum Equipment Tools Co.*, 708 F.2d 168 (th Cir. 1983).
3 *Schmidt v. Eagle Waste & recycling, Inc.*, No. 09-1902 (yth Cir. March 22, 2010)
4 *Smith v. Johhnson & Johnson*, No. 09-1223 (3d Cir. Feb. 2, 2010).
5 *Reiseck v. Universal Communications of Miami, Inc.*, No. 09-1632 (2d Cir. Jan. 11, 2010).
6 US DOL Administrator's Interpretation No. 2010-1, dated March 24, 2010.
7 *Walters v. Am. Coach Lines of Miami, Inc.*, No. 09-779 (cert. denied, April 5, 2010), upholding decision in 575 F.3d 1221 (11th Cir. 2009). ■

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FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

PROVISIONAL AWARDS?

Mediators often tell the parties what they would do in the case before them if they were hearing it as an arbitrator. It's a common settlement technique. But mediators are not arbitrators. They have no authority to issue awards. The exercise is purely hypothetical.

What would happen if arbitrators used the same technique? What would happen if arbitrators issued provisional awards?

Imagine a labor arbitration addressing the interpretation of a contract provision involving, say, layoff. The contract says layoff will be by seniority within classification. Position X is considered a member of classification A for some purposes and a member of classification B for other purposes. The contract is silent about which criterion is to be used in making layoff decisions. The employer makes a decision to apply one criterion or another and institutes layoffs. The union files a grievance, and the case goes to an arbitrator. The parties make arguments, cite authorities, write briefs, and the arbitrator makes a decision and writes an award.

What if, instead of writing a final and binding decision, the arbitrator wrote a draft decision and circulated it to the parties? Neutral arbitrators on tripartite panels do this all the time. In that context it is done to give the party-appointed arbitrators, the "wing men," a chance to lobby for changes. On the theory that a negotiated agreement is almost always preferable to an imposed solution and that the parties who have to live with the result are in the best position to craft it, this is a good thing.

An arbitrator, after all, has only a very limited range of freedom in crafting an award. Typically, either the employer's view prevails or the union's does. There is not much room for a nuanced approach to the particular situation on the shop floor. First, the arbitrator is not likely to know much about the situation on the shop floor, and second, even if he did, his decision is supposed to be based on principles of contract interpretation, not particular circumstances.

The two approaches may yield very different results. Principles of contract interpretation may require that the employer lay off Smith and retain Jones. The particular circumstances in the shop may make that course of action pointless or cruel or plain stupid. Smith may be about to have a baby, and Jones may be about to retire. It may be that laying off Smith and retaining Jones is not what anybody wants. In that case, if the parties get a look at the arbitrator's opinion before it becomes final it may open the door to a settlement that improves the outcome for everyone involved.

Some people believe that arbitrators have no business making deals. We can call this the Shut Up and Rule School. If the parties wanted a dealmaker, the argument goes, they would have contracted for one. This is a valid point. Arbitrators do have a duty to make rulings when they are called upon to do so. But an arbitrator who simply parachutes in from the Land of Contract Interpretation may do more harm than good. A richer and more productive view of the arbitration process sees it as an extension of collective bargaining, not just a substitute for litigation.

The point of collective bargaining is that the parties negotiate the terms of their relationship. From time to time it may be necessary to call in a third party neutral to resolve disputes, but the goal of that intervention should not be to supplant collective bargaining. It should be to assist it.

By issuing a provisional award, an arbitrator affords the parties an opportunity to engage in bargaining to improve the outcome of the case for both of them. The provisional award combined with the particular circumstances on the shop floor can be used to inform settlement discussions. If the parties choose to take the opportunity, the outcome can be improved and the collective bargaining relationship strengthened. If they choose not to take it, the provisional award becomes final and the parties are in the same position they would have been if there had been no provisional award. Where is the downside?

AGE DISCRIMINATION REGULATIONS PROPOSED

Stacy A. Hickox, ***Assistant Professor***
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The Equal Employment Opportunity Commission has issued proposed regulations that would help clarify how an older employee would prove a claim of age discrimination claim based on adverse impact. The Supreme Court held back in 2005 that the Age Discrimination in Employment Act (ADEA) bars liability for a claim of adverse impact if that impact on older employees was based on "reasonable factors other than age."[1] In that case, the Court allowed a city to implement a pay plan that provided relatively greater pay increases to younger workers, based on a comparison of their salaries to pay in other communities.

In a 2008 decision, the Supreme Court clarified that an employer bears the burden of persuasion to show that it relied on reasonable factors other than age in making the decision with an adverse impact on older employees.[2] According to the EEOC, the employer's defense depends on "the facts and circumstances of each particular situation and whether the employer acted prudently in light of those facts."[3]

The EEOC's proposed regulations define what would be a reasonable factor other than age that would justify an employer practice that has an adverse impact on older employees or applicants. A practice would be reasonable if it is "reasonably designed to further or achieve a legitimate business purpose and is reasonably administered to achieve that purpose."[4] The EEOC gives the employer practice in Smith, raising the salaries of less senior employees to attract new applicants, as an example of a practice with a legitimate business purpose.

A reasonable employer may rely on objective, non-age factors like salary and seniority, even if the practice has an adverse impact on older employees. An employer's practice may be deemed reasonable, under the proposed regulations, if it defined the factors accurately before relying on them in making decisions that had an adverse impact. For example, if a layoff decision is to be based on past performance, the employer should rely on "concrete examples of behavior" to evaluate performance. The fair and accurate application of the factors also makes it more reasonable.

In contrast, the EEOC states in support of its proposed regulations that "the unchecked use of subjective criteria that are subject to age-based stereotypes may not be distinct from age."[5] As an example, the EEOC states that an employer should not give managers the discretion to assume that older employees will be less able or willing to learn new computer skills, even if the ability to learn those skills is a legitimate basis for making lay off decisions. The EEOC recommends that supervisors be trained to "become aware of and avoid age-based stereotyping."[6]

Reasonableness also depends on the extent of the adverse impact on older employees. If the harm is significant, then a reasonable employer should attempt to reduce the impact, according to the EEOC. An employer should attempt to reduce the impact if other options are available and would not place a burden on the employer. The EEOC also notes that a reasonable employer would determine whether a practice has a disproportionate impact on its older employees. So a practice with an adverse impact may be unreasonable if the employer should have known that it would have an adverse impact.

—END NOTES—

1 *Smith v. Jackson*, 544 U.S. 228 (2005).
2 *Meachan v. Knolls Atomic Power Lab*, 128 S.Ct. 2395 (2008).
3 EEOC Proposed regulations issued Feb. 17, 2010, p. 10.
4 Id.
5 Id. at 19.
6 Id. at 21. ■

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DEPOSITION PAUSATION[1]

Stuart M. Israel
Martens, Ice, Klass, Legghio & Israel, P.C.

Mark Twain observed: "The right word may be effective, but no word was ever as effective as a rightly timed pause."[2] That was easy for him to say. He didn't have to deal with the Rule 30(d)(1) seven-hour deposition limit. A case in point:

Q. [Deposing counsel] Did you hear that phrase, "successorship clause"?
A. [Deponent] Yes, I have heard that before.
Q. In the context of January, February, two thousand and —
A. I don't remember.
Q. Do you hear me trying to say something, sir?
A. You know what? When you pause —
Q. I take —
A. You do that a lot.
Q. I do.
A. When you pause, I'm going to give you an answer.
Q. Please don't.
A. Because I don't want to hesitate. I want to give you an answer. And you're — and you're getting aggravated with me —
Q. No.
A. —because I'm answering when you're still asking the question. But if you pause, I'm going to answer the question. So don't pause. If you just keep giving — bringing your question to me, all right?
[Defending counsel]: Just leave her a bigger break. Okay? Let her —
THE WITNESS: Okay. All right. Okay,
[Defending counsel]: Let her have a big break.
A. You see, you keep correcting me. And I think you're asking for a response. When you hesitate and you ask your question and you stop and say something else, I don't know that you stopped to get my answer or you stopped because you're thinking of talking further on.
Q. Mr. [Witness] —
A. Okay.
Q. — let me explain two things.
A. Okay.
Q. And I'm not trying to be facetious when I say this.
A. I understand.
Q. Number one, I have to be able to breathe. I will pass out if I don't breathe.
A. Okay. I'm sorry.
Q. So you will find me pausing.
A. I will try to do better. Okay. I'm sorry.
Q. You will find me pausing, because I need to breathe.
A. Okay.
Q. Have you ever heard of Mr. Pavarotti, the great opera singer?
A. Oh, yeah. I know who he is.
Q. He had to breathe, too.
A. Absolutely.
Q. I have to breathe.
A. Okay.
Q. So I am not trying to trick you —
A. Okay,
Q. — into jumping in.
A. No. It's just when you — when you hesitate. When you ask a question and you hesitate, and then you go further, I am there with the response. And then you're correcting me for responding to your hesitation. Okay?
Q. I would like you to slow down.
A. I'll relax. Okay.
Q. So the first thing is, I have to breathe. And you may find me pausing to take a breath —
A. Okay.
Q. — during a question.
A. Okay,
Q. And I apologize if that's tripping you up.
A. Okay. No, I don't think you are trying to do that at all.
Q. I can't help it. Okay? I have to breathe.
A. Okay.
Q. Number two, our court reporter has to take everything down.
A. Uh-huh.
Q. And if I talk at top speed, her fingers are going to fall off.
A. And we don't want that to happen.
THE COURT REPORTER: No.
Q. Right.
A. Okay. I'm sorry. I mean, I apologize. I just — I'm trying to do this in the right manner. And I'm sorry if I'm interrupting you, because I don't mean to be. I don't mean to be. Okay?
Q. I know that. I know that.
A. Okay.
Q. I know you are trying to do your best?
A. Right. Okay.
Q. And so am I.
A. I know you are.
Q. All right. No need to apologize.
A. Okay.
Q. And I'm not trying to aggravate you. So let's move forward.
A. Okay. Let's do it.
Q. Now, in these meetings in January or February of 2005, the union meetings —
A. Uh-huh.
Q. — you heard the phrase "successorship clause" being used, is that right?
A. I'm not sure if I heard it in those meetings.[3]

—END NOTES—

1 Pausation is too a word. It is right there in the *Merriam-Webster Unabridged Dictionary.* It is a noun, from the Latin, meaning "the act of pausing."

2 *Mark Twain's Speeches.*

3 This dialogue was not written by David Mamet. It is an authentic deposition transcript in serious litigation. Seriously.

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UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Mark W. Jane
Butzel Long

Plan Administrators Given Deference in Interpretation of ERISA Plans

On April 21, 2010, the Court issued its opinion in *Conkright v. Frommert*, U.S. No. 08-810. In Conkright, the plaintiffs were employees who left Xerox Corporation ("Xerox") and participated in a pension plan sponsored by Xerox (the "Plan"). The plaintiffs left Xerox in the 1980s and received a lump sum distribution of benefits accrued up to the date of retirement. However, Xerox later rehired the plaintiffs. In order to account for the past distributions when calculating retirement benefits for the rehired participants (in order to avoid paying the rehired participants twice), the administrator of the Plan (the "Plan Administrator") interpreted the Plan to permit the calculation of benefits pursuant to a "phantom account" method (a method that calculates the hypothetical growth that the past distributions would have experienced had the distributed money remained in the trust, and the accrued benefit is then reduced to account for that amount.).

The plaintiffs sued the Plan and the Plan Administrator for incorrectly calculating retirement benefits, taking the position that the Plan Administrator's use of the phantom account calculation method was an unreasonable interpretation of the Plan. The District Court for the Western District of New York ruled that the Plan Administrator's interpretation was entitled to deference, and held that the interpretation was reasonable. However, the U.S. Court of Appeals for the Second Circuit reversed the District Court, holding that the Plan Administrator's interpretation was unreasonable and that the rehired participants had not been adequately notified of the phantom account calculation method. On remand, the Plan Administrator submitted a new calculation method to the District Court, a method which accounted for the time value of money (similar to the phantom account method). The Plan Administrator argued that the District Court should not only apply a deferential standard of review to the new calculation method, but that the District Court should accept the new calculation method as a reasonable interpretation of the Plan. The District Court disagreed, finding the Plan to be ambiguous, and instead adopted a method proposed by the plaintiffs which did not account for the time value of money. The Second Circuit affirmed, holding that the District Court was correct not to apply a deferential standard on remand because the Plan Administrator had previously construed the same terms of the Plan unreasonably.

The Supreme Court granted certiorari and reversed the Second Circuit, ruling that the District Court should apply a deferential standard of review to the interpretation of the administrator of an employee benefit plan. Specifically, the Court took umbrage with the Second Circuit's "one-strike-and-you're out" approach to applying the deferential standard of review, reasoning that a single honest mistake should not strip the benefit plan administrator of deference. The Court found that nothing in the terms of the Plan, the principles of trust law, and the purposes behind ERISA, suggest that the Plan Administrator only has one opportunity to construe the terms of the Plan in the event of an honest mistake.

Enhancement to Fee Award Available Only in Extraordinary Circumstances

The Supreme Court issued its decision in *Perdue v. Kenny A.*, U.S. No. 08-970, on April 21. 2010. Perdue was a class action lawsuit brought by 3,000 children in Georgia's foster-care system against the Governor of Georgia and other state officials. The children claimed that deficiencies in the Georgia foster-care system denied them their constitutional and statutory civil rights. The District Court referred the case to mediation, which resulted in a consent decree. The only open issue after mediation was the amount of fees to which the plaintiff's attorneys' were entitled.

The plaintiff's attorneys sought $14 million in fees. Half of that amount was based on a lodestar calculation, the other half was a requested fee enhancement for superior work and results. The District Court ultimately awarded the plaintiffs' attorneys a fee amount which included an enhancement of $4.5 million based on the extraordinary results achieved and the fact that counsel advanced nearly $1.7 million in expenses and took the case on a strictly contingent basis. On appeal, the Eleventh Circuit affirmed. The Supreme Court granted certiorari to resolve the issue whether a "reasonable" attorneys' fee award under the Civil Rights Attorney's Fees Award Act allows fee enhancement over the lodestar calculation based on superior representation and exceptional results.

Justice Alito delivered the opinion of the Court. Justices Thomas and Kennedy concurred in separate opinions. Justices Breyer, Stevens, Ginsburg and Sotomayor joined, concurring in part and dissenting in part. The Court concluded that while "there is a 'strong presumption' that the lodestar figure is reasonable . . . that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that my properly be considered in determining a reasonable fee." For instance, an enhancement may be necessary when the hourly rate used in the lodestar calculation does not adequately measure an attorney's true market value. An enhancement may also be appropriate where the attorney made an "extraordinary outlay of expenses" in an "exceptionally protracted litigation." If there is an exceptional delay in the payment of fees an enhancement may also be appropriate.

While *Perdue* concerned attorneys' fees awarded in a case involving children in a foster care system, the Court's decision could have far-reaching implications in employment cases, since many employment law statutes permit an award of attorneys' fees applying the same standards as those in the Civil Rights Attorney's Fees Award Act. ■

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SOCIAL MEDIA: A NEW FRONTIER FOR EMPLOYMENT ISSUES

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The exponential growth in the use of social media is well documented and is inexorably invading the workplace. No electric or physical barrier can stop these species. Enterprising companies are constructively utilizing Facebook, blogs, Twitter, and other online communication vehicles to recruit employees, communicate with consumers, and issue press releases. Employees are increasingly utilizing social media, both inside and outside the workplace, to criticize employers, interact with co-workers, and, inevitably, to view and share material that is inappropriate and sometimes downright destructive for the employment setting.

The Federal Trade Commission recently issued new Guidelines that potentially govern employee comments about company products, and now the U.S. Supreme Court is about to weigh in on the electronic workplace this Term in a case, *Quon v. Arch Wireless*, et al., 529 F.3d 892 (9th Cir. 2008), cert granted, 130 S.Ct. 1011 (2009), involving the privacy rights of employees who use employer issued pagers to text personal messages.

The growing prevalence — both use and misuse — of social media presents new challenges for employers, and suggests that prudent employers should review their written policies and their unwritten practices as well.

Workplace Misconduct. News reports and publicized lawsuits from around the country demonstrate that employees are often utilizing social media in ways that are contrary to their employers' interests. Typical problem areas are the use of social media during paid work time, to harass co-workers, to disclose trade secrets or confidential information, to blog off-duty negatively about an employer or its products, to publish inappropriate materials linked to the employer, and to create embarrassing corporate and public relations issues.

One recent and highly publicized incident involved Domino's Pizza employees in North Carolina who made a video of food preparation so grotesque that it violated health code standards and disgusted viewers. The video was posted on YouTube, and Dominos had an instant public relations crisis on its hands.

Growing numbers of lawsuits are being filed by employees in which the underlying facts center on social media. These cases typically balance employee privacy rights against employer concerns related to productivity, harassment, confidentiality, and monitoring.

Quon v. Arch Wireless. The U.S. Supreme Court may soon furnish a measure of guidance regarding the intersection between employee privacy interests and the world of modern electronic communication. At this writing, we can only speculate about how far-reaching the decision will be.

The *Quon* case arose from the personal use of text message pagers issued to employees by the Ontario, California Police SWAT Team. The city promulgated a written policy prohibiting the personal use of city computers and emails. The policy expressly stated that employees should have no expectation of privacy in utilizing such devices. But, importantly, the policy did not by its terms extend to pagers or text messaging. Although officers were told that the policy applied to pagers, the SWAT team lieutenant also told his team members that he would not audit their use of pagers if they paid for any charges that exceeded a monthly character limit on each pager. So the facts pertaining to the policy and actual practice were somewhat murky.

As time passed, the lieutenant tired of chasing his officers to pay their excess charges, and, as a result, he began scrutinizing the texts. In doing so, he found sexually explicit messages being exchanged between officer Quon and his wife, and also between Quon and a co worker dispatcher who turned out to be Quon's mistress. You can imagine what happened when this became public.

Quon, his wife, the dispatcher, and another officer then filed a civil rights action alleging that the city and police officials had violated their Fourth Amendment rights against unreasonable searches; and they simultaneously sued Arch Wireless alleging that it had violated the federal Stored Communications Act, 18 U.S.C. § 2701 et seq. (SCA), by disclosing the text messages to the police department.

The U.S. District Court ruled in favor of Arch Wireless on the SCA claim, 445 F.Supp.2d 1116 (C.D. Cal. 2006), finding that it was acting as a remote computing service (RCS) by storing the text messages "for purposes of backup protection," as opposed to an electronic communications service (ECS) which stores the messages temporarily for purposes of transmission. For the former, consent of the service subscriber (the city) would be sufficient for disclosure, whereas for the latter the originator, addressee, or recipient must consent.

The U.S. Court of Appeals for the Ninth Circuit disagreed with the trial court, concluding that Arch Wireless actually provided ECS service to the city, and that the SCA prohibited Arch Wireless from knowingly divulging the contents of communications other than to the originator, addressee, or intended recipient. 529 F.3d 892 (9th Cir. 2008). Because Quon and the other plaintiffs had not consented, and Arch Wireless had knowingly divulged the contents, it was found liable notwithstanding that the pagers and associated phone numbers belonged to the city. Rehearing en banc was denied over a vigorous dissent. 554 F.3d 769 (9th Cir. 2009).

In assessing the plaintiffs' Fourth Amendment claims against the city and police officials, the Ninth Circuit held that the plaintiffs had a reasonable expectation of privacy in their text messages and, as a result, they enjoyed protection from unreasonable searches. Critical to this finding was the informal practice that text messages would not be audited if employees paid the excess charges. Although the court found it was reasonable to conduct a search to determine if the character limit was adequate to meet the SWAT team's needs, the search in question was deemed excessively intrusive.

The U.S. Supreme Court agreed to review the Fourth Amendment privacy ruling, but denied Arch Wireless' petition to review the ruling under the SCA. The lesson, for now at least, is that employers may want to get users' permission to obtain stored electronic messages from a third party provider, or risk possible liability under the SCA.

The Supreme Court's expected ruling will be limited to expectation of privacy issues under the Fourth Amendment, which does not apply to private employers. But federal and state wiretap statutes, as well as common law tort theories, are often guided by privacy tests that are virtually identical to the Fourth Amendment test. Consequently, the ruling in *Quon* may provide guidance to

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SOCIAL MEDIA: A NEW FRONTIER

(Continued from page 19)

private employers who wish to monitor electronic communications. The Court may also address whether persons who are not government employees, such as Quon's wife, can have a reasonable expectation of privacy in text messages sent to a government employee. The Quon case offers an opportunity for the Court to address employee privacy principles that have not been considered since the advent of the digital age.

Some Local Flavor. Michigan readers are familiar with the "sexting" scandal involving former Detroit Mayor Kwame Kilpatrick. The Kilpatrick text messages were obtained through a subpoena issued by an attorney in a lawsuit against the city and mayor. They were thereafter "leaked" to the press, which then led to perjury charges and eventual guilty pleas by Kilpatrick and his aide/mistress Christine Beatty. Former Mayor Kilpatrick has since filed suit against SkyTel in Mississippi for violation of the SCA. That case is still pending.

Michigan readers are also familiar with a civil lawsuit filed by the family of Tamara Greene against Detroit and Kilpatrick relating to the mysterious homicide of the exotic dancer (known as "Strawberry") who was rumored to have danced during a party at the mayor's city owned residence. In the discovery phase of the lawsuit, Greene's attorneys have sought disclosure of text messages from SkyTel. In an extensive and informative decision interpreting the SCA, Chief U.S. District Judge Gerald Rosen ordered limited discovery of the text messages, *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2009), whereupon a limited number were produced after the court's in camera inspection. Judge Rosen's opinion criticized the Ninth Circuit's analysis in Quon and instead followed the trial court judge's reasoning in finding that SkyTel could disclose the text messages to its subscriber without consent of the device's user.

Policy Implications For Employers. Although your long standing policies may still apply to most situations arising through cyberspace (e.g., Dominos did not need a new or special policy to fire the pizza miscreants), employers should make sure their policies keep up with technology. You should assess the proper level of accountability for social media use in your workplace, which will naturally depend on the industry and workplace culture. At a minimum, you should review existing policies that govern information technology, issuance and use of electronic communication devices, confidentiality, expectation of privacy, general codes of conduct, and co worker harassment, all with an eye toward how social networking sites, blogs, and other electronic media impact your workplace. Here are a few suggestions:

Emphasize that all computers, electronic devices, and the systems that run them belong to the employer, not the employee, and that the employer sets the rules.

Explicitly state that there is no expectation of privacy for either business or personal use, that communications may be monitored, and that they are subject to audit.

Determine the range of what you want to cover by your policies, and define things in broad terms.

Be aware that, unlike traditional emails, text messages customarily run through a third party service provider and are not stored on the employer's servers. Hence, traditional and possibly outdated email policies may be insufficient to monitor texts without consent.

Prohibit any business or personal use that is violative of other policies or is in any way contrary to the interests of your organization. ■

SIXTH CIRCUIT UPDATE

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Employees Did Not Knowingly and Intelligently Submit to ADR By Signing Application

In *Alonso, et al v Huron Valley Ambulance, Inc*, Docket No 09-1812 (Apr. 26, 2010), two former employees of Huron Valley signed employment applications in 2005 promising to submit any employment-related claims to the employer's five-member, internal Grievance Review Board ("Board"), which was responsible for issuing a final and binding decision on any such matter. Plaintiffs Alan and Kimberly Alonso sued Huron Valley in federal district court alleging, among other things, violations of the Uniformed Services Employment and Reemployment Rights Act and the Family Medical Leave Act, respectively. Alan had initiated the grievance process, but the Board ruled against him. Kimberly bypassed the grievance process altogether. The district court granted summary judgment in favor of Huron Valley, holding that, by signing the employment application, both plaintiffs had waived their rights to proceed in a judicial forum. On appeal, the Sixth Circuit reversed, holding that the plaintiffs did not "knowingly and intelligently" waive their rights because, although the Alansos were educated and had used the grievance process on previous occasions, the waiver did not include any information about the Board or its procedures. Thus, the Court concluded, "[a]t the time the Alansos signed waivers of their rights to a judicial forum, they had no idea what the [Board] process entailed."

Mere Fact of an Age Differential Between Laid Off Employee and Retained Employee Not Enough to Establish Prima Facie Case of Age Discrimination in RIF Context

In *Schoonmaker v Spartan Graphics Leasing LLC*, Docket No 09-1732 (Jan. 11, 2010), a 59-year-old bindery worker, Harriet Schoonmaker, lost her job at Spartan Graphics during an economically-driven downsizing. She was one of two workers let go from a four-person shift. The shift manager chose to retain a 29-year-old worker on the shift over Schoonmaker because Schoonmaker was often difficult to work with and the 29-year-old was a better team player. Schoonmaker sued under the ADEA, alleging disparate treatment. Affirming the lower court's decision to grant summary judgment in favor of Spartan Graphics, the Court held that Schoonmaker failed to establish her prima facie case of age discrimination because she did not present additional direct, circumstantial or statistical evidence needed to show that she was singled out for impermissible reasons, which, the Court explained, is required in a reduction-in-force context. That a substantially younger employee was retained instead of Schoonmaker, the Court concluded, was insufficient alone to carry her burden. According to the Court, Schoonmaker "would have to show that she possessed superior qualities to [the 29-year-old] in order to meet her burden of establishing a prima facie showing in the context of a reduction in work force…[but] [s]he has not made that showing."

Worker Injured at Railway Facility Not an Employee of a "Common Carrier" under Federal Employers' Liability Act

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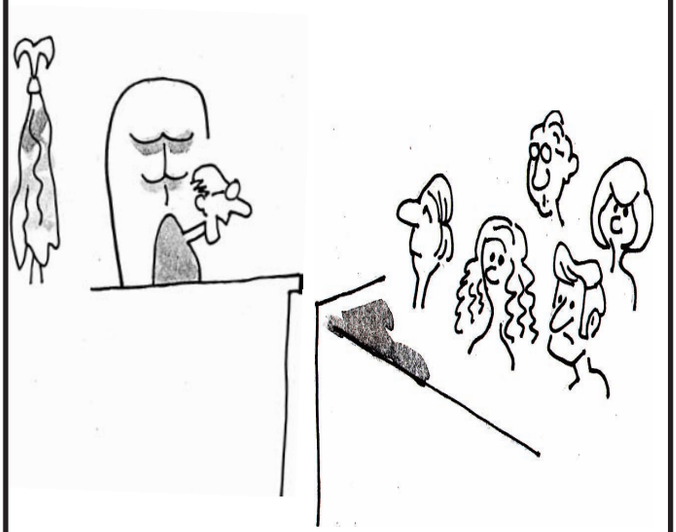
The plaintiff in *Campbell v BNSF Railway Co*, Docket No 09-5614 (Apr 9, 2010), Michael Campbell, was working for Pacific Rail Services, LLC when he suffered an injury after the Pacific Rail-owned transport vehicle he was driving was rear-ended at a rail yard owned by defendant BNSF. He sued BNSF for negligence under the Federal Employers' Liability Act ("FELA"), which applies only to "common carriers by railroad," alleging he was BNSF's employee because, as he admitted, Pacific Rail was not a covered employer under the statute. Pacific Rail operated intermodal rail facilities for railroad companies and, prior to Campbell's injury, entered into an agreement with BNSF at BNSF's Memphis terminal requiring Pacific Rail to, among other things, transport trailers, containers, and chassis between railcars. The agreement also required Pacific Rail to "provide the necessary supervisors and support personnel to ensure the facilities run safely, efficiently and effectively" 24 hours per day, to be responsible for hiring and firing decisions, and to direct the employees' work. Furthermore, the agreement provided that Pacific Rail was BNSF's independent contractor. Pacific Rail employed 140 employees at the Memphis facility, while BNSF employed one, a hub manager charged only with observing Pacific Rail workers to ensure timely completion of work and adherence to safety standards.

The Sixth Circuit affirmed the district court's grant of summary judgment in favor of BNSF. Explaining that FELA provides the exclusive remedy for employees of interstate railroads to recover for injuries incurred during the course of their employment, the Court concluded that Pacific Rail, not BNSF, was Campbell's employer. The Court rejected Campbell's argument that he was a "subservant of a company that was in turn a servant of the railroad" because, under traditional agency law principles, BNSF had no right to control, and nor did it attempt to exercise control over, the manner and details of Pacific Rail's work particularly because BNSF employed only one manager on site and Pacific Rail employed dozens of supervisors on site to direct the work. ■

KELMAN'S CARTOON



"This is a class action suit on behalf of all life on the planet against anything that might cause illness or unhappiness."

GRIEVANCE MEDIATION BY MERC MEDIATORS

Edmund Phillips and James Amar,
Mediation Supervisors
James Spalding, *Labor Mediator*
Michigan Employment Relations Commission

While virtually all labor relations advocates and representatives are familiar with the involvement of MERC mediators in both public and private sector collective bargaining negotiations, many are not aware of mediator involvement in grievance mediation. For several years, mediators working for the Michigan Employment Relations Commission have assisted parties by acting as a neutral third party to mediate grievance disputes that arise out of and during an existing labor contract.

Since 1939, when the Labor Relations and Mediation Act or the LMA (Act 176 of 1939) was enacted, grievance mediation has been a staple of the duties performed by MERC mediators. Section 26 of the LMA (MCL 423.26) refers to the role of the Employment Relations Commission in the mediation of grievances. As an efficient and cost-effective means of resolving many labor disputes, grievance mediation is a voluntary, non-binding process that utilizes a professional labor mediator to assist the parties to negotiate a mutually acceptable resolution of their contract interpretation dispute.

Grievance mediation is a free-of-charge service offered by MERC; as such, it alleviates the expense and time associated with potential or pending grievance arbitration. It is often contained as a step in the contractual grievance procedure – usually as the final step prior to the filing of a formal request for arbitration. Even if the applicable collective bargaining agreement does not include grievance mediation as a step in the grievance procedure, the parties may mutually agree to mediate the grievance and waive any time or other contractual constraints.

To request the assignment of a MERC mediator to conduct grievance mediation, a party to the dispute must file MERC's Grievance Mediation Request (see, Forms link on our web site at www.michigan.gov/merc) or other written request with our agency, indicating the existence of a grievance dispute. Any request should include all of the information required on MERC's official form. After the initial filing, the parties will be notified of the assigned mediator and relevant information, so that the appropriate contact may be made.

At the first grievance mediation conference, the parties will have the opportunity to present the facts that precipitated or support the filing of a grievance and those that served as the basis for the denial. Each party may present arguments to the mediator – either in the presence of the opposing party and/or their advocate, or in a private conference. Although grievance mediation is a less formal approach to resolving contract disputes, it operates under the identical umbrella of confidentiality that is present during contract negotiations; neither side may disclose to others information exchanged during a grievance mediation conference.

The mediator generally applies the same techniques used in mediating contract negotiations and offers his or her insight on the hurdles that parties may encounter if they are unable to resolve the grievance via mediation. An experienced mediator will take an unbiased look at the dispute, determine which party is most likely to prevail at arbitration, and explain his or her rationale for that determination to the parties. An argument that does not persuade the mediator may not persuade an arbitrator either. Confronted with a mediator's assessment of the case, one or both parties may be more inclined to seek a settlement. Significantly, a mediator has no binding authority and is not limited by the constraints of the contract.

Further, the mediator may be expected to ask probing questions about a dispute in an effort to uncover the real essence of the issue. With that knowledge, the mediator is often able to work with the parties and assist them in resolving the underlying issue, not simply the grievance at hand.

Unless the contract provides otherwise, the parties may still proceed to grievance arbitration if the issue is not resolved to their satisfaction. Thus, there is no risk to either side in mediating a grievance; yet, there a strong likelihood that the grievance can be amicably settled. By submitting the grievance to mediation, the parties avoid the costly and uncertain outcome of arbitration and avoid placing a potentially important decision in the hands of a third party.

Indeed, there are many advantages to grievance mediation, including: it is generally more expedient and cost effective, less adversarial and less formal, promotes cooperation and collaboration, is not tied to a contractual remedy, and tends to resolve the real issue behind the filing. Grievance mediation is a process that has proven to be successful as evidenced by the fact that labor and management representatives who participate in this service utilize it repeatedly as disputes arise. ■

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COURTING PUBLIC OPINION

Daniel Cherrin
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Companies today face increased challenges from regulatory and legislative authorities. Likewise, legal issues continue to permeate the headlines, often in inaccurate and oversimplified treatments placing brands, businesses and reputations at risk. In the past few months alone BJ's Wholesale Club settled a class action lawsuit with their midlevel managers and class actions were certified against Sprint, Tyson and TJMaxx. Locally, well known Schubot Jewelers filed for bankruptcy, while GM is preparing to partially pay off government loans from the United States and Canadian governments. Social and other web-based media enable citizen journalists, disgruntled employees, and the average consumer to bypass traditional media and take their messages directly to those interested with widely varied levels of accuracy. As a result, corporate, product, and individual reputations are often on the line and increasingly attorneys are being called to defend their client reputations in the public eye.

In today's economy, clients increasingly call on their lawyer to resolve issues where business, politics and public perceptions intersect and sometimes collide. Many lawyers, however, are uncomfortable offering their clients counsel about dealing with the media and in other realms beyond the courtroom and negotiating table. When the damage is done publicly, however, legal outcomes may become irrelevant.

In protecting a client's reputation, "an attorney's duties do not begin inside the courtroom door — he or she cannot ignore the practical implications of a legal proceeding for the client." *Gentile v. State Bar of Nevada*, 510 U.S. 1030, 1043 (1991) (Kennedy opinion). An attorney should take reasonable steps to defend a client's reputation, in court and out. This is particularly important in an environment where news is reported 24/7 and, at times, is delivered instantaneously, to our cell phones and by our cell phones. Also, with sales of newspapers & magazines at all-time lows, the media are hungry for a story, even if no story exists. Lawyers must be diligent in protecting client interests in the court of public opinion as well as in the court of law.

TODAY'S LEGAL STRATEGIES DEMAND PUBLIC RELATIONS

Lawyers need to be familiar with how perception is created within the public eye and how to use the media effectively to manage perception. For example, litigation, and even the potential for litigation, will have an impact on a company's image, reputation, investor relations, and future business opportunity. To protect clients legally and to preserve client reputations publicly, lawyers may need to engage public relations counsel to help develop and implement a comprehensive strategy. It is possible to talk to the media without revealing your legal strategy or jeopardizing privileged information, or otherwise adversely affect the legal outcome of case or regulatory matter, but doing this effectively requires practice, thought, familiarity with the practicalities of various media, and planning. A well-formed litigation communications plan blends legal expertise, media savvy, and political prowess serving the objective of framing by helping to coordinat messages during litigation.

The plan should provide for monitoring what others are saying about the case, the company, and the individuals involved, and work to control the message, so that the clients emerge from litigation with their reputations in tact. An effective litigation communications strategy also can enhance legal strategy, by providing clarity on complex legal issues. The goal of litigation communications is to align the client's public image with the legal team's strategy, ensuring the maximum advantage in and outside the courtroom.

PROTECTING A CLIENT REPUTATION

Should lawyers represent their client's outside the courtroom, they have to become comfortable in talking freely about their client's case without jeopardizing legal outcomes. Lawyers in general are trained to be reticent, answer only the questions asked and to give no more information than is necessary. In the face of the media and those who rely on it, however, expansive information and open communication can serve the client better than creating an appearance that the client has something to hide and, worse is hiding behind a lawyer. Public relations counsel can employ strategies to build, preserve, and protect client reputation, while reinforcing their client's legal strategy. In the public eye, we may be presumed guilty if we respond to a reporter's question with "no comment." To avoid this presumption of guilt, it is important to develop a message and answer questions, or appear to, while staying on that message.

CONCLUSION

In today's economy, lawyers need to provide their clients with more than just legal services. By learning how the media operates, lawyers can best serve their clients, by blending law, policy, politics and strategic communications to provide an integrated approach to addressing or better yet resolving legal problems. ■

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"EMPLOYEE" OR "INDEPENDENT CONTRACTOR"? TIME TO GET IT RIGHT

Jennifer A. Zinn
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President Obama released his budget proposal for 2011 on February 1, 2010, and included a recommendation that the U.S. Department of Labor (DOL) be given $25 million for the specific purpose of investigating and prosecuting employers who misclassify employees as independent contractors. This so-called "Misclassification Initiative" would permit the DOL to hire additional investigators and enforcement personnel. The budget also proposed legislation to shift the burden of proof to employers to demonstrate that their workers are classified correctly and to make misclassification a violation of the Fair Labor Standards Act (FLSA).

With the weakened economy and cost-cutting efforts everywhere, the temptation is great to classify workers as independent contractors rather than employees and thereby avoid the overtime, payroll tax, and benefit costs associated with employees. But the monetary consequence of misclassifying workers may outweigh the perceived advantages. Employers could face liability for unpaid overtime, minimum wage violations, lost benefits, and back payroll taxes, in addition to sanctions, penalties, and attorney fees.

There are several different tests for determining whether a worker is an independent contractor or an employee. In fact, the DOL and the Internal Revenue Service use different tests. The DOL has issued a Fact Sheet that purports to define what an "employment relationship" is under the FLSA: "In the application of the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by 'economic reality' rather than 'technical concepts.' It is not determined by the common law standards relating to master and servant." Crystal clear, right? According to the Fact Sheet, the factors to be looked at include:

- The extent to which the services rendered are an integral part of the principal's business;
- The permanency of the relationship;
- The amount of the alleged contractor's investment in facilities and equipment;
- The nature and degree of control by the principal;
- The alleged contractor's opportunities for profit and loss;
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and
- The degree of independent business organization and operation.

The Michigan Department of Energy, Labor & Economic Growth has issued a similar statement regarding misclassification and is making efforts to address the problem. The Michigan Unemployment Insurance Agency (UIA) uses listings of employers who are issuing 1099-MISC statements, obtained from the IRS, to identify employers that have potentially misclassified workers in order to recoup unpaid unemployment insurance taxes (and to educate employers). Other states have similarly intensified their own enforcement efforts to combat and punish worker misclassification.

In recent years, many companies have been challenged in the courts on their "employee" versus "independent contractor" classifications. For example, FedEx delivery drivers filed class action lawsuits in a number of states claiming misclassification. FedEx maintains that its drivers are small business owners who can own multiple routes and expand their businesses as they wish. In the past year, a federal multidistrict litigation judge certified eight of those class actions, in addition to 19 state actions that had previously been certified. The common legal element was each state's use of a "right to control" test to determine a worker's status. A California state court, noting FedEx's control over every detail of the driver's performance, concluded that the drivers are employees, not independent contractors; that case then settled for $27 million. But a Washington jury recently found that the same FedEx delivery driver arrangement lawfully categorized them as independent contractors. Confused?

Bear in mind that the plan for federal and state agencies cracking down on misclassification is an enforcement plan, not an education plan, and that it is unlikely that those agencies will forgive innocent confusion regarding this complex issue.

The bottom line in making classification decisions is that it is generally a question of control. In a true independent contractor relationship, the principal has a right to judge the result produced by the independent contractor — but not to direct or control the methods that produce the result. A true independent contractor generally has control over his or her operation, covers operating expenses, and experiences profit or loss. True independent contractors usually provide their services to more than one entity.

The monetary risks of worker misclassification — for both independent contractors as well as for supposedly FLSA-exempt workers — can be very significant, particularly when collective actions are filed. The volume of litigation in this area keeps growing — in large part because misclassification cases are lucrative for plaintiffs' lawyers. Employers should promptly analyze the soundness of their classification decisions, and conduct audits — preferably under the umbrella of the attorney-client privilege — to locate and eliminate areas of vulnerability. ■

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