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Inside This Issue

The Trump Board: What the Future May Hold for Employer Conduct Rules at the NLRB

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Introduction

The National Labor Relations Board (NLRB) under President Obama implemented many changes to the laws governing the relationship between employers, employees, and their labor unions. Nearly all of these changes were viewed as pro-labor. The Obama Board, for instance, implemented new rules that reduce the amount of time for employers to campaign before a union election is held,[1] declared unlawful arbitration agreements that prohibit class or collective actions,[2] held that student assistants at private universities are employees under the National Labor Relations Act[3] (NLRA) and have the right to unionize,[4] and created a new right for employees to use employer-provided e-mail accounts for union organizing and other NLRA-protected activities,[5] among numerous other changes. According to one study, the Obama Board "overturned a total of 4,105 collective years of precedent in 91 cases and rejected an additional 454 years collective years of case law by adopting comprehensive new [union] election rules."[6]

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1 79 Fed. Reg. 74308 (Dec. 15, 2014).

2 D.R. Horton, 357 N.L.R.B. 2277 (2012); Murphy Oil USA Inc., 361 NLRB No. 72 (2014).

3 29 U.S.C. § 151 et seq.

4 Trustees of Columbia Univ., 364 NLRB No. 90 (Aug. 23, 2016).

5 Purple Communications, Inc., 361 NLRB No. 126 (Dec. 11, 2014).

6 Michael J. Lotito et al., *Was the Obama NLRB the Most Partisan in Board History?*, Coalition for a Democratic Workplace and Littler's Workplace Policy Institute (Dec. 6, 2016), at 1, *available at* http://myprivateballot.com/wp-content/uploads/2016/12/CDW-NLRB-Precedents-.pdf.

(Continued on page 143)

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The Trump Board: What the Future May Hold for Employer Conduct Rules at the NLRB

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(Continued from page 141)

President Trump will be able to appoint, subject to Senate confirmation, a majority of the five-member NLRB.[7] As of this writing, the President had yet to announce any nominees to the Board. As a result, the current Board is still considered the Obama Board, consisting of Acting Chairman Philip Miscimarra (R), Mark Gaston Pearce (D), and Lauren McFerran (D), with two seats vacant. The President also will be able to appoint a new NLRB General Counsel, once the term of the current General Counsel, Richard Griffin, expires in November 2017. The General Counsel's office determines which cases to prosecute and, therefore, has considerable sway to shape the Board's docket and to determine the issues that come before it.

Despite occasionally populist campaign statements, President Trump's actions to date indicate that a more employer-friendly NLRB is on the horizon. First, President Trump appointed Member Miscimarra, the only sitting Republican Board member, as Acting Board Chairman on January 26, 2017. Member Miscimarra, who has served on the NLRB since 2013, frequently dissented to Obama Board opinions that favored labor unions by overruling existing precedent. In addition, President Trump has nominated Alexander Acosta for Secretary of Labor. Mr. Acosta served on the NLRB under President George W. Bush from December 2002 to August 2003 and participated in over 120 decisions, often siding with employers in key cases.[8]

Perhaps not surprisingly, several conservative-leaning organizations have advocated reforms at the NLRB that range from returning to pre-Obama Board case law and legislative reforms[9] to permitting companies to request periodic "re-election" votes to determine whether a majority of represented employees continue to support unionization.[10]

Among the most significant areas for likely reform under the Trump Board relates to employer conduct rules - a sphere that has generated controversy among employers and organized labor alike, not to mention the Board itself. Nearly all private sector employers, whether unionized or not, are subject to the NLRA and maintain rules governing the conduct of the workforce. The Board's decisions in this frequently confusing and controversial area of the law apply broadly. Anticipated changes to the Board's standards regarding employer conduct rules would affect employers across the country.

The Current Standard

The Board currently reviews employer rules under the *Lutheran Heritage Village-Livonia* standard.[11] Under that test, a facially neutral work rule - i.e., one that does not explicitly restrict activity protected by Section 7 of the NLRA – is unlawful if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[12] Most of the controversy has involved the first, "reasonably construe," prong. Although the standard requires the Board to "give the rule a reasonable reading," to "refrain from reading particular phrases in isolation, and . . . [to] not presume improper interference with

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7 29 U.S.C. § 153(a).

8 Vin Gurrieri, *6 Acosta NLRB Opinions Employers Need To See*, Law 360 (Feb. 17, 2017), *available at* https://www.law360.com/articles/893434/6-acosta-nlrb-opinions-employers-need-to-see.

9 U.S. Chamber of Commerce: Labor, Immigration & Employee Benefits Division, *2017 Labor Policy Recommendations* (Dec. 9, 2016), *available at* https://www.uschamber.com/sites/default/files/documents/files/2017_labor_policy_recommendations.pdf.

10 James Sherk, *The NLRB Can Protect Worker Voting Rights Administratively*, The Heritage Foundation, Backgrounder No. 3174, at 2. (Jan. 19, 2017), *available at* http://origin.heritage.org/research/reports/2017/01/the-nlrb-can-protect-worker-voting-rights-administratively.

11 Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 646-47 (2004); *see also* Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998) (work rules that "would reasonably tend to chill employees in the exercise" of protected activity are unlawful).

12 *Lutheran Heritage*, 343 N.L.R.B. at 647.

employee rights,"[13] the Board frequently has come under fire for doing what its own standard seemingly counsels against, i.e., failing to read rules in the context in which they were created.

In one oft-cited decision, the D.C. Circuit Court of Appeals took the Board to task for holding that a company's rule prohibiting "abusive or threatening language to anyone on company premises" violated the NLRA.[14] In the NLRB's view, the rule "could reasonably be interpreted as barring lawful union organizing propaganda."[15] The court's criticism was poignant:

> Under the Board's reasoning, every employer in the United States that has a rule or handbook barring abusive and threatening language from one employee to another is now in violation of the NLRA, irrespective of whether there has ever been any union organizing activity at the company. This position is not "reasonably defensible." It is not even close. In the simplest terms, it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to abusive or threatening language.[16]

Citing state and federal anti-harassment laws, the court continued: "We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here."[17]

The Obama Board's Hostility to Workplace Rules

Notwithstanding the D.C. Circuit's criticism almost 16 years ago, the Obama Board continues to hold that employer rules violate federal law without considering evidence as to how employees have interpreted them or even knew about them, much less that the rules have actually interfered with employees' NLRA-protected rights. Indeed, many of the rules the Obama Board has invalidated appear innocuous, with a strained, at best, connection to NLRA Section 7's "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" or to refrain from such activities.[18]

In the past several months alone, for example, the Board has invalidated employer rules prohibiting "insubordination or other disrespectful conduct,"[19] "boisterous or other disruptive activity in the workplace,"[20] "[d]isclosure of confidential Company information . . . ,"[21] "clothing with words, slogans and/or pictures that may be offensive to other employees or guests of the company. . . . ,"[22] and "clothing containing statements that are 'confrontational, . . . insulting, or provocative,'"[23] among others, on the grounds that they interfere with employees' rights under a statute that Congress enacted to further the free flow of commerce "by encouraging the practice and procedure of collective bargaining. . . ."[24]

The General Counsel's Attempt at Guidance

In an attempt to provide some guidance, Mr. Griffin, the NLRB's General Counsel, issued a memorandum in March 2015 that summarized and compared employer rules that his office viewed as lawful and unlawful.[25] Though not binding, memoranda by the General Counsel are relied upon to indicate which cases will be prosecuted versus those that will be dismissed at an early stage. Though welcomed at the time, the memorandum did little in terms of offering long-term guidance to employers seeking to "review their

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13 343 N.L.R.B. at 646-47.

14 Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB, 253 F.3d 19, 25 (D.C. Cir. 2001) (citing Adtranz, ABB Daimler-Benz Transp., N.A., Inc., 331 N.L.R.B. 291, 293 (2000)). Though decided prior to *Lutheran Heritage*, the D.C. Circuit's *Adtranz* decision is frequently cited in decisions applying the first prong of the *Lutheran Heritage* test.

15 *Adtranz*, 253 F.3d at 25.

16 *Adtranz*, 253 F.3d at 25-26.

17 *Adtranz*, 253 F.3d at 27.

18 29 U.S.C. § 157.

19 Component Bar Prods., Inc., 364 NLRB No. 140, slip op. at 1 (Nov. 8, 2016).

20 364 NLRB No. 140, slip op. at 1.

21 Andronaco, Inc., 364 NLRB No. 142, slip op. at 1 (Nov. 4, 2016).

22 364 NLRB No. 142, slip op. at 1.

23 Medco Health Solutions of Las Vegas, Inc., No. 28-CA-022914, 2016 NLRB LEXIS 662, at *2 (Aug. 27, 2016) (slip. op.).

24 29 U.S.C. § 151.

25 Richard F. Griffin, Jr., General Counsel, NLRB, Memorandum GC 15-04, Report of the General Counsel Concerning Employer Rules, (Mar. 18, 2015) (Memorandum GC 15-04), *available at* https://www.aaup.org/sites/default/files/NLRB%20Handbook%20Guidance.pdf.

handbooks and other rules, and conform them, if necessary, to ensure that they are lawful," as Mr. Griffin advised employers to do based on his guidance.[26]

For example, the General Counsel's office found that a rule that prohibited the "unauthorized disclosure of 'business secrets or other confidential information" was lawful[27] and, therefore, decided not to prosecute an unfair labor practice charge alleging that the rule was overbroad. Nonetheless, on November 24, 2015, shortly after the March 2015 memorandum, the General Counsel issued a complaint in *Andronaco, Inc*.,[28] where an administrative law judge (ALJ) subsequently agreed with the General Counsel that a rule was unlawful on the basis that it prohibited "[d]isclosure of confidential Company information. . . ."[29] The Board affirmed the ALJ's finding, notwithstanding the similarities between the supposedly lawful rule in the General Counsel's memorandum and the allegedly unlawful rule in *Andronaco*.[30] As *Andronaco* suggests, employers who may have reviewed and revised their policies in light of the General Counsel's memorandum should not be confident that his office will approve of their revised rules.

A Call for Reform

In the widely read dissenting opinion in 2016's *William Beaumont Hospital* decision, Member Miscimarra proposed a new standard for assessing employer rules.[31]

The facts in *William Beaumont* arose from the tragic death of an infant at a hospital. The investigation that followed uncovered that the infant's death resulted, in part, from inadequate communication between hospital employees. The investigation also revealed that two nurses, though not related to the patient care incident, had separately engaged in a pattern of negative, intimidating, and bullying behavior.[32] The hospital terminated the nurses, and the Board unanimously upheld the terminations as lawful.

Against this background, the Board majority found unlawful two rules in the hospital's Code of Conduct aimed at facilitating positive and constructive interactions among hospital personnel - the same conduct that was at issue in the patient care incident. First, the Board majority found overbroad (and therefore unlawful) a rule prohibiting conduct that "'impedes harmonious interactions and relationships'" on the basis that it is "'sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7.'"[33] And second, the Board found overbroad a rule prohibiting "'negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors'" because it "would reasonably be construed to prohibit expressions of concerns over working conditions."[34] In other words, according to the majority, both rules are unlawful under the *Lutheran Heritage* standard because employees would reasonably construe the language to prohibit Section 7 activity.

Member Miscimarra vigorously dissented to the majority's holdings that the two rules violate the NLRA. He called on the Board to abandon the *Lutheran Heritage* "reasonably construe" standard, which he faulted for several reasons, including:

- It "entails a single-minded consideration of NLRA-protected rights, without taking into account the legitimate justifications of particular policies, rules and handbook provisions. This is contrary to Supreme Court precedent and to the Board's own cases."[35]
- It stems from "a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks. . . . In this respect, *Lutheran Heritage* requires perfection that literally has become the enemy of the good."[36]
- The existing "test improperly limits the Board's own discretion. It renders unlawful every policy, rule and handbook provision an employee might

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26 Memorandum GC 15-04, *supra* note 25, at 2.

27 Memorandum GC 15-04, *supra* note 25, at 6.

28 Complaint and Notice of Hearing, Andronaco, Inc., Case No. 07-CA-160286, National Labor Relations Board, Div. of Judges (Nov. 24, 2015).

29 ALJ Decision, Andronaco, Inc., Case No. 07-CA-160286, National Labor Relations Board, Div. of Judges, at 3-4 (Apr. 20, 2016).

30 *Andronaco*, 364 NLRB No. 142, slip op. at 4-5.

31 William Beaumont Hospital, 363 NLRB No. 162 (Apr. 13, 2016).

32 363 NLRB No. 162, slip op. at 8.

33 363 NLRB No. 162, slip op. at 2 (quoting 2 Sisters Food Group, 357 N.L.R.B. 1816, 1817 (2011)).

34 363 NLRB No. 162, slip op. at 2.

35 363 NLRB No. 162, slip op. at 8.

36 363 NLRB No. 162, slip op. at 8.

'reasonably construe' to prohibit any type of Section 7 activity."[37]

- It "does not permit the Board to differentiate between and among different industries and work settings."[38]
- It "has defied all reasonable efforts to make it yield predictable results" and "has been exceptionally difficult to apply, which has created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers."[39]

In place of the *Lutheran-Heritage* reasonably construe test, Member Miscimarra proposed a new standard for facially neutral employer policies. Under the proposed standard, the Board would "evaluate at least two things:"

(i) the potential adverse impact of the rule on NLRA-protected activity, *and*

(ii) the legitimate justifications an employer may have for maintaining the rule.[40]

Member Miscimarra stated that "the Board must engage in a meaningful balancing of these competing interests, and a facially neutral rule should be declared unlawful only if the justifications are outweighed by the adverse impact on Section 7 activity."[41]

In conducting this analysis, the Board would distinguish protected activities that are "deemed central to the Act" from those that are more "peripheral," and would need to give more weight to employer justifications for implementing a rule.[42] Thus, "justifications for rules dealing with discrimination, harassment, safety or security, for example, might be afforded greater weight than those for rules aimed at increasing sales or productivity."[43] In addition, the Board would be required to "make reasonable distinctions between and among different industries and work settings, and it should take into consideration any specific events that might be relevant to a particular policy, rule or handbook provision."[44] Lastly, the new standard would recognize that some policies lawfully could be maintained, such as those calling for courtesy or professionalism in the workplace, even if their application would be unlawful in certain circumstances, such as through discriminatory enforcement.[45]

Member Miscimarra's proposed standard, if adopted by the Board, almost certainly would reduce the number of facially neutral work rules that the Board invalidates simply because they are maintained by an employer. Instead, the Board likely would uphold more work rules that, even though theoretically could be read to prohibit Section 7 activity, have not been interpreted by employees as interfering with their rights or applied by management to suppress protected activity. On the other hand, balancing tests also can come with unpredictability concerns similar to those that prompted, in part, Member Miscimarra's call for reform in the first place.

While implementing an entirely new standard would represent a significant reform in the area of employer rules, this relatively dramatic step is unlikely to occur, if at all, until the composition of the Board changes. If Member Miscimarra's standard - or some other framework - is not put in place, the Trump Board is likely to apply the ambiguous *Lutheran Heritage* "reasonably construe" standard in a manner that upholds more employer rules.

Conclusion

In his 2015 guidance memorandum, General Counsel Griffin recognized "that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act."[46] Employers, for the most part, want to comply with the law. The current NLRB's aggressive yet varying interpretations of employer rules has made it nearly impossible for most employers to do so confidently. Reform, whatever form it takes, likely would help bring welcome clarity to the adoption of workforce conduct rules.

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The statements and opinions in this article are the author's and do not necessarily reflect those of Jones Day or its clients.

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37 363 NLRB No. 162, slip op. at 9.

38 363 NLRB No. 162, slip op. at 9.

39 363 NLRB No. 162, slip op. at 9.

40 363 NLRB No. 162, slip op. at 9.

41 363 NLRB No. 162, slip op. at 9.

42 363 NLRB No. 162, slip op. at 19.

43 363 NLRB No. 162, slip op. at 19.

44 363 NLRB No. 162, slip op. at 19.

45 363 NLRB No. 162, slip op. at 19.

46 Memorandum GC 15-04, supra note 25, at 2.

Wage & Hour Advisor: California Assembly Bill Seeks to Raise Salary Threshold for White Collar Exempt Employees

Aaron Buckley

Introduction

On March 28, 2017, a California Assembly bill was amended to raise the salary threshold for employees classified as exempt from overtime under the three so-called "white collar" (executive, administrative and professional) exemptions. Under the bill, the salary threshold would be pegged at either twice the state minimum wage for full-time employment (the current standard), or equivalent to a monthly salary of $3,956 ($47,472 per year), whichever amount is higher. The bill appears to be an effort to accomplish, at least in California, the former Obama Administration's goal of raising the federal salary threshold to a level of $47,476 per year through administrative rule-making, an effort which has been blocked by the courts and which the Trump Administration may abandon.

California's Current Salary Threshold and Scheduled Increases

Both federal and California law exempt from minimum wage and overtime requirements any employee employed in a bona fide executive, administrative, or professional capacity.[1]

California's salary threshold for these "white collar" exempt employees is set at twice the state minimum wage for a 40-hour work week.[2] California's state minimum wage is currently $10.50 per hour, resulting in a salary threshold for white collar exempt employees of $840 per week ($43,680 per year).[3] California's state minimum wage is scheduled to gradually rise to $15 per hour by 2022 and, by doing so, cause corresponding increases in the salary threshold for white collar exempt employees according to the following schedule:

Effective Date	Minimum Wage	Salary Threshold
January 1, 2017	$10.50 per hour	$840 per week / $43,680 per year
January 1, 2018	$11.00 per hour	$880 per week / $45,760 per year
January 1, 2019	$12.00 per hour	$960 per week / $49,920 per year
January 1, 2020	$13.00 per hour	$1,040 per week / $54,080 per year
January 1, 2021	$14.00 per hour	$1,120 per week / $58,240 per year
January 1, 2022	$15.00 per hour	$1,200 per week / $62,400 per year[4]

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1 29 U.S.C. § 213, subd. (a); *see, e.g.,* Cal. Code Regs., tit. 8, § 11040, section 1(A).

2 *See, e.g.,* Cal. Code Regs., tit. 8, § 11040, sections 1(A)(1)(f), 1(A)(2)(g), 1(A)(3)(d).

3 Cal. Lab. Code § 1182.12.

4 Cal. Lab. Code § 1182.12.

The Effort to Raise the Federal Salary Threshold Is in Doubt

In May 2016, the Obama Administration announced a final rule to increase the salary threshold for white collar exemptions under the Fair Labor Standards Act[5] (FLSA) from its current level of $455 per week ($23,660 per year), where it has remained since 2004, to $913 per week ($47,476 per year) effective December 1, 2016, and to establish a mechanism to automatically increase the salary threshold every three years based on changes in the Consumer Price Index.[6]

In September 2016, 21 states filed a lawsuit to block implementation of the rule, contending the United States Department of Labor (DOL) exceeded its authority when it established a salary test.[7] Over 50 business organizations filed a companion lawsuit that included similar arguments.[8] On November 22, 2016, Judge Amos Mazzant of the United States District Court for the Eastern District of Texas agreed with the plaintiffs, finding that while the FLSA grants the DOL authority to establish a duties test, there is no statutory authority for the DOL to establish a salary test or an automatic updating mechanism.[9] The court issued a preliminary injunction prohibiting the DOL from implementing or enforcing the new rule.[10]

The new rule is currently tied up in litigation, and it is unclear whether it will ever be implemented, or even whether the Trump Administration will continue to defend it. If the Trump Administration abandons the new rule, it is possible that the current threshold of just $455 per week ($23,660 per year) will continue indefinitely, or that there may no longer be any federal salary threshold at all.

Assembly Bill 1565

On March, 28, 2017, Assembly Bill 1565 was amended to provide for a hike in the current salary threshold.[11] Under the amended bill, the minimum salary for white collar exempt employees would be either twice the state minimum wage for full-time employment, or equivalent to a monthly salary of $3,956 ($47,472 per year), *whichever amount is higher.*[12] Given the scheduled increases to the salary threshold noted above, a salary threshold of $47,472 per year would apply until January 2019.

Conclusion

It is impossible to say at this point whether AB 1565 will ever become law, either in its current form or some other form. It's possible that given the already-scheduled increases to the California salary threshold, the bill will fail to gain support. It is also possible the bill could be further amended to include a mechanism to periodically increase the salary threshold, such as the one included in the blocked federal rule. Time will tell. In the meantime, California employers should continue to plan for the annual increases to the state salary threshold noted above, and be aware the schedule could change if AB 1565 becomes law.

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5 29 U.S.C. § 201 et seq.

6 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391 (2016) (to be codified at 29 C.F.R. pt. 541).

7 State of Nevada v. U.S. Dep't of Labor, No. 4:16-CV-00731, 2016 U.S. Dist. LEXIS 162048 (E.D. Tex. Nov. 22, 2016), at *8.

8 2016 U.S. Dist. LEXIS 162048, at *9.

9 2016 U.S. Dist. LEXIS 162048, at *15-27.

10 2016 U.S. Dist. LEXIS 162048, at *32-33.

11 A.B. 1565, 2017-2018 Reg. Sess. (Mar. 28, 2017).

12 A.B. 1565, 2017-2018 Reg. Sess. (Mar. 28, 2017).

Robotics and Automation in the Workplace

Karen Y. Cho & Caitlin V. May

Introduction

It is indisputable that technology has a major impact on daily life in the 21st century and will continue to do so. The Pew Research Institute's 2014 Future of the Internet survey uncovered wide agreement that robotics and artificial intelligence will permeate most aspects of daily life by 2025, including health care, transportation, customer service, and home maintenance.[1] Yet, when it comes to the workforce, experts disagree as to whether technology will ultimately create or displace more jobs. Of the 1,896 experts surveyed by the Pew Research Institute, 48 percent envisioned a future in which robots and related technologies displaced blue- and white-collar workers, leading to further income inequality and unemployment.[2] However, 52 percent of experts responded that even if robots took over human jobs, technology would lead to the creation of new jobs and industries.[3] Other studies have painted a similar picture, such as Oxford's 2013 study, which indicated that 47 percent of American jobs are at "high risk" of being taken over by computers in the next 10 to 20 years.[4] Experts indicate that industries hit the hardest may include automotive, manufacturing, and food services.[5]

Even though the full impact of robotics and automation on the workplace may be unknown, one thing is certain – employers should be aware of potential legal landmines and start planning now. This article focuses on areas of employment law that may see the biggest impact, and key issues employers should consider when integrating these new technologies.

Examples of Robotics and Automation

Robotics and automation are beginning to impact a wide swath of industries. Self-driving vehicles have already received widespread coverage. Many transportation companies and automobile manufacturers are committing significant resources to developing and rolling out these technologies. Last year the White House predicted that automation may eventually replace 1.3 to 1.7 million heavy and tractor-trailer truck-driving jobs.[6] Manufacturing is another area where workers are already commonly working beside robots and automated technology. Retailers even use robots to quickly and efficiently fulfill and ship online orders.[7]

But robots are not just taking on manual labor and manufacturing roles; they are also performing human resource related tasks, such as conducting job interviews and acting as customer service representatives.[8]

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1 Aaron Smith & Janna Anderson, *AI, Robotics, and the Future of Jobs*, Pew Research Center (August 6, 2014), *available at* http://www.pewinternet.org/2014/08/06/future-of-jobs/.

2 Smith, et al., *supra* note 1.

3 Smith, et al., *supra* note 1.

4 Carl Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation?* University of Oxford (Sept. 17, 2013), *available at* http://www.oxfordmartin.ox.ac.uk/downloads/academic/The_Future_of_Employment.pdf.

5 Christie Nicholson, *Our Rising Robot Overlords: What Is Driving the Coming Upheaval* (August 24, 2011), *available at* http://www.zdnet.com/article/our-rising-robot-overlords-what-is-driving-the-coming-upheaval/.

6 Alana Semuels, *When Robots Take Bad Jobs*, The Atlantic (February 27, 2017), available at https://www.theatlantic.com/business/archive/2017/02/when-robots-take-bad-jobs/517953/.

7 Sam Shead, *Amazon Now Has 45,000 Robots in its Warehouses*, Business Insider (Jan. 3, 2017), *available at* http://www.businessinsider.com/amazons-robot-army-has-grown-by-50-2017-1.

8 *See, e.g.,* Cameron Scott, *As Robots Evolve the Workforce, Will Labor Laws Keep Pace?* Singularity Hub (Mar. 16, 2014), *available at* https://singularityhub.com/2014/03/16/robots-entering-the-workforce-but-are-labor-laws-keeping-up/ (discussing "Sophie" the human resources interviewing robot that measures interviewees' "psychological responses" to questions, such as their eye movement, along with their verbal answers); *see also* News Release, *Lowe's Introduces LoweBot – The Next Generation Robot to Enhance the Home Improvement Shopping Experience in the Bay Area*, PR Newswire (Aug. 30, 2016), *available at* http://www.prnewswire.com/news-releases/lowes-introduces-lowebot—the-next-generation-robot-to-enhance-the-home-improvement-shopping-experience-in-the-bay-area-300319497.html (discussing Lowe's new robot that can assist employees and customers by, for example, helping them locate products in the store).

The medical field has also seen an influx of robots performing neurological, orthopedic, and general surgery – and even reducing surgical complications by up to 80 percent.[9] Without question, robotics and automated technology are permeating many industries, and they will continue to do so in the years to come.

Potential Issues of Workplace Compliance

Ongoing technological developments in areas such as robotics and automation could have a potentially significant impact on several areas of labor and employment law. In some ways, these technologies may improve opportunities for individuals in the workforce, but they also may lead to widespread displacement of certain workers and new areas of liability.

Wage and Hour

Several areas of wage and hour law are likely to be impacted by technological advancements in robotics. With the incorporation of robots, more employees may be able to perform their jobs remotely through telemanipulation. Employees may perform jobs by controlling robots or automated systems from different rooms, worksites, states, or even countries than where the robot is physically located. However, when workers perform their jobs remotely there can be wage and hour consequences. Most employees in the United States are covered by federal employment laws, such as the Fair Labor Standards Act[10] (FLSA), in addition to the wage and hour laws implemented by many states and municipalities. Generally, the law of the state where the work is performed applies. For example, the California Supreme Court has held that even when an employee may live and work primarily out of state, California's wage and hour laws may apply when the employee performs work within the state for an entire day.[11] Employers may now have to ensure compliance with employment laws in additional, or even multiple, jurisdictions for the same employee within a given pay period. If employees travel consistently and work remotely, this could further complicate the application of employment laws. As remote work trends develop, perhaps an argument can be made that the location of the robot is where the physical work is actually being performed.

These technologies will also likely create jobs where employees have substantial downtime, e.g., an employee simply oversees a robot performing its job and only has to respond when an error occurs. In theory, remote employment could substantially reduce the amount of compensable time worked by eliminating the obligation to compensate employees for down-time formerly spent at the workplace. However, under current employment laws, like the California Labor Code, "on-call" time may still be compensable depending on the amount of control the employer exerts over the employee's ability to engage in personal activities.[12]

Workplace Displacement

The main concern for most individuals in the workforce is the potential displacement of jobs by robots and automation. While employers are not prohibited from redesigning their workforce to eliminate human jobs, employers should plan for and take appropriate steps to ensure a smooth transition. For example, where human jobs have been eliminated, employers could provide severance agreements in exchange for releases from employees who are affected by a reduction in force (RIF), or retrain employees for alternative positions within the company. For employers with more than 100 employees, replacing the workforce with robots may trigger legal obligations under the Worker Adjustment and Retraining Notification Act[13] (WARN Act). Under the WARN Act, certain employers may be required to provide 60 days advance notice to employees, union representatives, and state and local government officials if they decide to (1) close a plant that would result in a loss of 50 or more employees during a 30-day period, or (2) institute a mass lay-off at a site that would result in a loss of 500 or more employees (or in the case of 50 to 499 employees, if 33 percent of the active workforce is affected). In addition, some states, such as California, have a state WARN Act with which an employer may have to comply.[14]

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9 Denise Johnson, *The Impact of Robots Replacing Humans in the Workplace*, Carrier Management (Aug. 27, 2015), *available at* http://www.carriermanagement.com/features/2015/08/27/144510.htm.

10 29 U.S.C. § 201 et seq.

11 Sullivan v. Oracle Corp., 51 Cal. 4th 1191, 1206 (2011).

12 Mendiola v. CPS Security Solutions, Inc., 60 Cal. 4th 833, 840 (2015).

13 29 U.S.C. § 2101 et seq.

14 *See, e.g.*, California Worker Adjustment and Retraining Notification Act, Cal. Lab. Code § 1400 et seq.

Discrimination

Mass lay-offs may also have an unintended consequence on a protected group of individuals. Courts recognize two separate theories of discrimination in the workplace: disparate treatment and disparate impact. The traditional understanding of discrimination that is familiar to most lay persons is the disparate treatment theory, where an employer intentionally discriminates against an employee on the basis of a protected characteristic, such as the employee's race, sexual orientation, gender, disability, age, religion, etc. However, even when an employer has no discriminatory animus, there is a danger that the policies, practices, rules or other systems used in a RIF may appear innocuous or neutral on their face, but result in a disproportionate impact on a protected group. A reduction in force that disproportionately impacts a protected group, such as older workers or women – two groups that have historically been underrepresented in the technology and engineering field, may lead to disparate impact discrimination claims on either individual or class-action bases.

Accommodations for Employees with Disabilities

Under the Americans with Disabilities Act[15] (ADA), employers are required to provide reasonable accommodations to qualified employees with disabilities.[16] Generally, this means providing an accommodation that does not cause an undue hardship to the employer's operations.[17] With the introduction of advanced robotic systems and related technologies, there may be a significant increase in the number and types of jobs that persons with disabilities will be able to perform. In addition, we are likely to see the idea of what accommodations are "reasonable" evolve over time. Robotics and automation will probably become more affordable as they become the norm; thus, expanding the reasonable accommodation options for employees, and making some undue hardship defenses less viable for employers. For example, in the foreseeable future, it may be a reasonable accommodation for an employer to provide employees who are confined to a wheelchair or have lifting restrictions with exoskeletons that will assist them with performing manual operations. Thus, an employer's obligation to engage in an interactive discussion may include the consideration of expanded accommodation options inspired by creative new technologies.

Health and Safety

The federal Occupation Safety & Health Act[18] (OSHA), as well as some equivalent state statutes - such as the California Occupational Safety and Health Act of 1973[19] (Cal/OSHA), dictate health and safety standards for workplaces. Currently, OSHA does not have any standards that specifically target robotics and automation in the workplace.[20] One concern is that workers performing their jobs alongside robotic systems could be injured by the system itself or by human error. Whereas heavy robots used to typically do their work within a safety cage, companies are more commonly using collaborative, light-weight robots that work alongside their human counterparts. Such proximity may increase the physical interaction between workers and machines.[21] As companies incorporate these technologies, they should ensure appropriate safety mechanisms and training programs are in place, including presence or proximity detectors that halt all robotic motion when they detect the presence of body parts or other objects in close proximity to the robot, or to moving or otherwise hazardous parts. Additionally, experts actually report a positive impact on safety due to robotics – the increase in automation has actually led to the fall of workplace fatality rates.[22] Robots and automation may also be used to protect workers from repetitive stress injuries or to improve ergonomics.

What Should Employers Do?

Robotic technology, which was once just the stuff of science fiction, is closer to reality than many people may realize. Recent booms in development, such as improvements in cloud computing, sensor technology and data analytics, coupled with falling prices, have led

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15 42 U.S.C. § 12101 et seq.

16 42 U.S.C. § 12112 et seq.

17 42 U.S.C. § 12112 et seq.

18 29 U.S.C. § 651 et seq.

19 Cal. Lab. Code § 6300 et seq.

20 However, note that OSHA did issue such guidelines in 1987, which are now vastly outdated. *See* OSHA, *Guidelines for Robotics Safety*, Instruction Pub. No. STD 01-12-002 (PUB 8-1.3), (Sept. 21, 1987) ("OSHA Guidelines"), *available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1703. In addition, Section IV: Chapter 4 of OSHA's Technical Manual also addresses Industrial Robots and Robot System Safety (*available at* https://www.osha.gov/dts/osta/otm/otm_iv/otm_iv_4.html) and OSHA's Concepts and Techniques of Machine Safeguarding, OSHA 3067 (1992) (Revised) contains a chapter on Robotics in the Workplace *(available at* https://www.osha.gov/Publications/Mach_SafeGuard/toc.html).

21 OSHA Guidelines, *supra* n.20, at App. A, sec. A-5.

22 OSHA Guidelines, *supra* n.20, at App. A, sec. A-2.

to exponential growth in robotics, automation and artificial intelligence. Employers in all industries should start planning now.

As companies incorporate robotics and automation into their labor pools, they should involve their human resources and legal departments to consider potential areas of risk or liability. Human resource and legal professionals can help strategize how to overcome potential workplace issues and implement policies and procedures to reduce risk. Companies at the forefront of this new technological revolution may also consider working to shape the development of legislation and related regulations.

Employers should also consider taking proactive steps to plan for potential workforce displacement events. For example, employers may develop training programs to help workers develop complementary skills and knowledge, or move into different roles that are not being automated.

Despite the unique workplace issues created by technological advancements, employers who are proactive will likely see positive impacts on their business as a result of robotics and related technologies.

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CASE NOTES

APPOINTMENT OF NLRB GENERAL COUNSEL

NLRB v. SW General, Inc., No. 15-1251, 197 L. Ed. 2d 263, 2017 U.S. LEXIS 2022 (March 21, 2017)

On March 21, 2017, the U.S. Supreme Court ruled that the acting general counsel of the National Labor Relations Board became ineligible under 5 U.S.C. § 3345 to perform the functions of the office requiring presidential appointment and senate confirmation upon being nominated by the President to fill the vacant position, since the prohibition against a nominee from serving in an acting capacity extended to any person serving as an acting official and was not limited to first assistants who became acting officials by operation of law.

The National Labor Relations Board ("NLRB") is charged with administering the National Labor Relations Act. By statute, its general counsel must be appointed by the President with the advice and consent of the Senate [29 U.S.C. § 153(d)]. In June 2010, the NLRB's general counsel—who had been serving with senate confirmation—resigned. The President directed Lafe Solomon ("Solomon") to serve temporarily as the NLRB's acting general counsel, citing the Federal Vacancies Reform Act of 1998 ("FVRA") as the basis for the appointment. Solomon satisfied the requirements for acting service under Subsection (a)(3) of the FVRA [5 U.S.C. § 3345(a)(3)] because he had spent the previous 10 years in the senior position of director of the NLRB's Office of Representation Appeals.

The President had bigger plans for Solomon than acting service. On January 5, 2011, he nominated Solomon to serve as the NLRB's general counsel on a permanent basis. The Senate had other ideas. That body did not act upon the nomination during the 112th Congress, so it was returned to the President when the legislative session expired. The President resubmitted Solomon's name for consideration in the spring of 2013 but to no avail. The President ultimately withdrew Solomon's nomination and put forward a new candidate, whom the Senate confirmed on October 29, 2013. Throughout this entire period, Solomon served as the NLRB's acting general counsel.

Solomon's responsibilities included exercising "final authority" to issue complaints alleging unfair labor practices [29 U.S.C. §§ 153(d) and 160(b)]. In January 2013, an NLRB Regional Director, exercising authority on Solomon's behalf, issued a complaint alleging that SW General, Inc. ("SW General")—a company that provided ambulance services—had improperly failed to pay certain bonuses to long-term employees. An administrative law judge concluded that SW General had committed unfair labor practices, and the NLRB agreed.

SW General filed a petition for review in the U.S. Court of Appeals for the District of Columbia ("DC") Circuit. It argued that the unfair labor practices complaint was invalid because, under Subsection (b)(1) of the FVRA [5 U.S.C. § 3345(b)(1)], Solomon could not legally perform the duties of general counsel after having been nominated to fill that position. The NLRB defended Solomon's actions. It contended that Subsection (b)(1) applies only to first assistants who automatically assume acting duties under 5 U.S.C. § 3345(a)(1), not to acting officers who, like Solomon, serve under 5 U.S.C. § 3345(a)(2) or 5 U.S.C. § 3345(a)(3).

The DC Circuit granted SW General's petition for review and vacated the NLRB's order. It reasoned that the text of 5 U.S.C. § 3345(b)(1) squarely supported the conclusion that the provision's restriction on nominees serving as acting officers applies to all acting officers, no matter whether they serve pursuant to 5 U.S.C. § 3345(a)(1), (a)(2) or (a)(3). As a result, Solomon became ineligible to serve as acting general counsel once the President nominated him to be general counsel. The U.S. Supreme Court granted certiorari.

The U.S. Supreme Court concluded that the prohibition in 5 U.S.C. § 3345(b)(1) applies to anyone performing acting service under the FVRA. It is not, as the NLRB contended, limited to first assistants performing acting service under 5 U.S.C. § 3345(a)(1). The text of the prohibition extends to any "person" who serves "as an acting officer ... under this section," not just to "first assistants" serving under Subsection (a)(1). The phrase "notwithstanding subsection (a)(1)" does not limit the reach of Subsection (b)(1), but instead clarifies that the prohibition applies even when it conflicts with the default rule that first assistants shall perform acting duties. The statute, 5 U.S.C. § 3345(a)(1) sets the rule

that first assistants "shall perform" the vacant office's "functions and duties . . . in an acting capacity." But the "notwithstanding" clause in 5 U.S.C. § 3345(b)(1) means that, even if a first assistant is serving as an acting officer under this statutory mandate, he must cease that service if the President nominates him to fill a vacant office requiring presidential appointment and senate confirmation ("PAS"). The fact that Subsection (b)(1) also applies to acting officers serving at the President's behest was already clear from the broad text of the independent clause—they are all "persons" serving "under this section."

The U.S. Supreme Court held that applying the FVRA to the instant case was straightforward. Solomon was appointed as acting general counsel under 5 U.S.C. § 3345(a)(3). Once the President submitted his nomination to fill that position in a permanent capacity, 5 U.S.C. § 3345(b)(1) prohibited him from continuing his acting service. This did not mean that the duties of general counsel to the NLRB needed to go unperformed; the President could have appointed another person to serve as the acting officer in Solomon's place. And he had a wide array of individuals to choose from: any one of the approximately 250 senior NLRB employees or the hundreds of individuals in PAS positions throughout the government. The President, however, did not do so, and Solomon's continued service violated the FVRA.

Accordingly, the U.S. Supreme Court affirmed the DC Circuit's judgment.

References. See, e.g., Lareau, *National Labor Relations Act: Law and Practice*, § 1.02[.01][6], *29 U.S.C. § 153—National Labor Relations Board and Its General Counsel* (Matthew Bender).

CALIFORNIA PUBLIC RECORDS ACT

City of San Jose v. Superior Court, No. S218066, 2 Cal. 5th 608, 2017 Cal. LEXIS 1607 (March 2, 2017)

On March 2, 2017, the California Supreme Court ruled that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act [Gov't Code § 6250 et seq.].

In June 2009, Ted Smith ("Smith") requested disclosure of 32 categories of public records from the City of San Jose ("City"), its redevelopment agency and the agency's executive director, along with certain other elected officials and their staffs. The targeted documents concerned redevelopment efforts in downtown San Jose and included e-mails and text messages "sent or received on private electronic devices used by" the mayor, two city council members, and their staffs. The City disclosed communications made using City telephone numbers and e-mail accounts but did not disclose communications made using the individuals' personal accounts. Smith sued for declaratory relief, arguing that definition of "public records" under the California Public Records Act ("CPRA") encompasses all communications about official business, regardless of how they are created, communicated, or stored. The City responded that messages communicated through personal accounts are not public records because they are not within the public entity's custody or control. The trial court granted summary judgment for Smith and ordered disclosure, but the California appellate court issued a writ of mandate. The appellate court concluded that CPRA does not require public access to communications between public officials using exclusively private cell phones or e-mail accounts.

On review, the California Supreme Court held that a city employee's writings about public business are not excluded from CPRA simply because they have been sent, received, or stored in a personal account. Employees' communications about official agency business may be subject to CPRA regardless of the type of account used in their preparation or transmission. In reaching its conclusion, the Court analyzed the four aspects of a public record: (1) a writing, (2) with content relating to the conduct of the public's business, which is (3) prepared by, or (4) owned, used, or retained by any state or local agency. The Court stated that e-mail, text messaging, and other electronic platforms permit writings to be prepared, exchanged, and stored more quickly and easily.

The California Supreme Court further stated that whether a writing is sufficiently related to public business will not always be clear. Resolution of the question, particularly when writings are kept in personal accounts, will often involve an examination of several factors, including the content itself; the context in, or purpose for which, it was written; the audience to whom it was directed; and whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment.

With respect to the City's claim that all communications in personal accounts were beyond the reach of CPRA, the Court stated that the content of specific records was not before it and any disputes over this aspect of the "public records" definition await resolution in future proceedings. However, the Court clarified that to qualify as a public record under CPRA, at a minimum, a writing must relate in some substantive way to the

conduct of the public's business. This standard, though broad, is not so elastic as to include every piece of information the public may find interesting. Communications that are primarily personal, containing no more than incidental mentions of agency business, generally will not constitute public records.

The California Supreme Court stated that a writing prepared by a public employee conducting agency business has been "prepared by" the agency within the meaning of Gov't Code § 6252(e), even if the writing is prepared using the employee's personal account. Furthermore, the Legislature's repeated use of the singular word "official" in Gov't Code § 6259 indicates an awareness that an individual may possess materials that qualify as public records. In addition, the broad term "public official" encompasses officials in state and local agencies, signifying that CPRA disclosure obligations apply to individuals working in both levels of government.

The California Supreme Court stated that an agency's actual or constructive possession of records is relevant in determining whether it has an obligation to search for, collect, and disclose the material requested. Under the City's interpretation of CPRA, a document concerning official business is only a public record if it is located on a government agency's computer servers or in its offices. Indirect access, through the agency's employees, is not sufficient in the City's view. However, the Court had previously stressed that a document's status as public or confidential does not turn on the arbitrary circumstance of where the document is located. Therefore, the Court concluded that a city employee's communications related to the conduct of public business do not cease to be public records just because they were sent or received using a personal account. This result was supported by the sound public policy.

With respect to the City's argument that the "public records" definition reflects a legislative balance between the public's right of access and individual employees' privacy rights, and had to be interpreted categorically, the California Supreme Court stated that the City's interpretation would allow evasion of CPRA simply by the use of a personal account. The Court was aware of no California law requiring that public officials or employees use only government accounts to conduct public business. If communications sent through personal accounts were categorically excluded from CPRA, government officials could hide their most sensitive, and potentially damning, discussions in such accounts. The City's interpretation would not only put an increasing amount of information beyond the public's grasp but also encourage government officials to conduct the public's business in private.

Finally, the California Supreme Court stated that the whole purpose of CPRA is to ensure transparency in government activities. If public officials could evade the law simply by clicking into a different e-mail account, or communicating through a personal device, sensitive information could routinely evade public scrutiny.

Accordingly, the California Supreme Court reversed and remanded the appellate court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 51.30, *Constitutional Protection* (Matthew Bender).

DISABILITY RETIREMENT BENEFITS

Flethez v. San Bernardino County Employees Retirement Assn., No. S226779, 2017 Cal. LEXIS 1608, 2 Cal. 5th 630 (March 2, 2017)

On March 2, 2017, the California Supreme Court ruled that disability retirement benefits under the California County Employees Retirement Law of 1937 were not due to a county employee before the county retirement board received his application and made a determination of his eligibility, and the employee experienced a wrongful withholding of his benefits when the board erroneously denied his application for a retroactive disability retirement allowance under the inability to ascertain permanency clause of Gov't Code § 31724, thus necessitating his mandamus action.

In 1990, Frank Flethez ("Flethez") became an employee of San Bernardino County ("County"), where he worked as an equipment operator from 1991 until 2000. In 1998, he was injured while performing his job duties, for which he underwent spinal surgery on February 1, 2000. His last day of work was on January 28, 2000 and his last day of regular compensation was July 14, 2000. Flethez underwent additional surgeries in 2001 and 2002 and received physical therapy through 2004. On June 12, 2008, Flethez filed an application with San Bernardino County Employees Retirement Association ("SBCERA") for a service-related disability retirement and allowance, which was rejected for omission of a signed medical records authorization. Flethez then filed a complete application, including a signed medical records authorization and a supporting physician's report. SBCERA granted Flethez's application for service-related disability retirement benefits, effective as of the date of his initial application in 2008. That is, Flethez's retirement allowance was made effective under the general rule of

Gov't Code § 31724 granting retroactive benefits back to the date of his June 2008 application.

Flethez then filed a request for review and reconsideration limited to the question of the starting date for his benefits. Flethez did not dispute that this was the first time he contended that his retirement allowance had to be retroactive, under the inability to ascertain permanency clause of § 31724, to July 15, 2000, the date following his last day of regular compensation. When SBCERA, in April 2011, maintained its original decision setting June 12, 2008, as the commencement date for his benefits, Flethez requested a formal administrative hearing on the issue. After the administrative hearing, the hearing officer subsequently issued proposed findings of fact, conclusions of law, and a recommended decision denying Flethez's request for benefits retroactive to July 15, 2000. SBCERA adopted the hearing officer's proposed decision and maintained the original June 2008 date as the effective date of Flethez's disability retirement benefits. Flethez filed a petition for writ of mandate in the trial court pursuant to Code Civ. Proc. § 1094.5, seeking a writ ordering SBCERA to set aside its decision and grant him service-related disability retirement benefits effective as of July 15, 2000 [Gov't Code § 31724]. He also sought interest at the legal rate on all retroactive amounts. The trial court determined that SBCERA wrongfully denied Flethez the correct starting date for his disability retirement allowance. The court issued a peremptory writ commanding SBCERA to grant Flethez a service-connected disability retirement allowance retroactive to July 15, 2000. The trial court then awarded Flethez prejudgment interest under Civ. Code § 3287(a) as part of his damages, to be retroactively calculated from the same starting date. SBCERA challenged only the calculation of the prejudgment interest award before a California appellate court.

The California appellate court agreed with SBCERA that the trial court erred in its calculation of prejudgment interest and reversed the trial court's judgment to the extent it awarded § 3287(a) interest on all of Flethez's retroactive disability retirement benefits starting from the first date of those benefits—July 15, 2000. The California Supreme Court granted review to consider how prejudgment interest under § 3287(a) should be calculated when a retroactive award of service-connected disability retirement benefits under the County Employees Retirement Law of 1937 ("CERL") [Gov't Code § 31450 et seq.] is ordered in an administrative mandamus proceeding.

The supreme court determined that Flethez first applied for a service-related disability retirement in June 2008. He did not at that time request a starting date for his benefits earlier than his actual application date. In accordance with its duties under the CERL, SBCERA evaluated and granted his application for benefits retroactive to June 2008. Only then, did Flethez request an earlier starting date for his benefits pursuant to the inability to ascertain permanency clause of Gov't Code § 31724. If SBCERA had thereafter granted him the requested start date, as the trial court later determined it should have done, Flethez would have received an additional lump-sum payment for benefits calculated retroactively from the new deemed application date in July 2000. However, Flethez would not have been entitled to receive the benefit payments in 2000 or in any of the years preceding the decision of SBCERA. SBCERA could not by law pay Flethez any benefits before he applied for them [Gov't Code § 31722] and carried his burden of demonstrating his eligibility to SBCERA's satisfaction [Gov't Code § 31724].

The supreme court held that Flethez was not wrongfully denied the use of the benefit moneys in any of the years prior to SBCERA's decision on his request. Flethez was injured only when SBCERA erroneously denied his request for a starting date under the inability to ascertain permanency clause of § 31724. For purposes of prejudgment interest as a component of damages under Civ. Code § 3287(a), until the SBCERA made its eligibility determination on his request, there were no damages stemming from an underlying monetary obligation "capable of being made certain" and his right to an award of retroactive disability benefits under the inability to ascertain permanency clause did not vest. As amicus curiae contended, county employees do not have a vested right to disability retirement benefits before such time; however, the "vested right" members possess is to have their CERL retirement board make an "eligibility-to-benefits determination."

The supreme court concluded that Flethez's disability retirement benefits under the CERL were not due before SBCERA received his application and made a determination of his eligibility. Flethez experienced a wrongful withholding of his benefits when SBCERA erroneously denied his application for a retroactive disability retirement allowance under the inability to ascertain permanency clause, thus necessitating this mandamus action. His entitlement to prejudgment interest under § 3287(a) commenced on the date of wrongful denial. However, because the record before the court was not entirely clear as to that date, the court remanded the matter for such factual determination.

Accordingly, the supreme court affirmed the appellate court's judgment and remanded the matter to that court.

References. See, e.g., Wilcox, *California Employment Law*, § 80.102[3][a][vi], *Prejudgment Interest on Wrongfully Denied Unemployment Benefits* (Matthew Bender).

EMPLOYEE BENEFIT PLANS

DB Healthcare, LLC v. Blue Cross Blue Shield of Ariz., Inc., Nos. 14-16518, 14-16612, 2017 U.S. App. LEXIS 5082 (9th Cir. March 22, 2017)

On March 22, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled that the district court properly dismissed the Employee Retirement Income Security Act of 1974 ("ERISA") actions brought by health care providers designated to receive direct payments from employee health plan administrators for medical services because neither direct statutory authority nor derivative authority through assignment authorized the providers to bring suit in federal court under ERISA's civil enforcement provisions.

Plaintiffs in first case were 12 medical facilities located in and around Phoenix, Arizona, and 10 nurse practitioner employees of those facilities (collectively, "DB Healthcare Providers"). Plaintiff in second case was Advanced Women's Health Center, Inc. ("Advanced Women's Health Center"), a medical facility in Bakersfield, California ("Center"). Defendants in two cases were Blue Cross Blue Shield of Arizona, Inc. ("Blue Cross") and Anthem Blue Cross Life and Health Insurance Company ("Anthem"), who are health insurers, plan administrators, and/or claims administrators for the relevant employee benefit plans. In 2010 and 2011, plaintiffs performed certain blood tests and related services for plan subscribers and submitted reimbursement claims to defendants. Defendants processed the claims and reimbursed plaintiffs. On completion of post-payment reviews, however, defendants determined that plaintiffs were not entitled to reimbursement for the blood tests, albeit for different reasons. In the first case, Blue Cross determined that the tests were investigational and thus excluded from coverage. In the second case, Anthem determined that the Center used faulty practices to bill for the tests and so was not entitled to reimbursement.

At that point, defendants informed plaintiffs that the prior reimbursements for the blood tests were in error and requested repayments totaling $237,000 and $295,912.87, respectively. Plaintiffs disputed defendants' authority retroactively to recoup the reimbursements and refused to pay. Blue Cross responded by restating its payment demand to DB Healthcare Providers, threatening to withhold recredentialing for the in-network nurse practitioners, refusing to credential newly hired nurses, and threatening to terminate the relevant provider agreements. Anthem went one step further, withholding reimbursements from Advanced Women's Health Center in 2013 for unrelated claims as a means of recouping the disputed past payments.

DB Healthcare Providers alleged two causes of action under Employee Retirement Income Security Act of 1974 ("ERISA") in their complaint. First, they sought injunctive relief regarding Blue Cross's refusal to credential nurse-practitioners and its threat to cancel provider agreements, alleging that Blue Cross violated ERISA's prohibition against retaliation for the exercise of rights guaranteed by employee benefit plans. Second, they sought a declaratory judgment that Blue Cross's recoupment efforts violated the ERISA Claims Procedure [29 U.S.C. § 1133], and the ERISA Claims Procedure regulation [29 C.F.R. § 2560.503-1], which provide procedural protections for ERISA claimants. Specifically, DB Healthcare Providers alleged that Blue Cross violated the requirement that plan administrators notify claimants of adverse benefit determinations within 30 days of receiving a claim.

Advanced Women's Health Center also challenged Anthem's recoupment efforts, asserting four causes of action in its complaint, three under ERISA and one under the Declaratory Judgment Act ("DJA") [28 U.S.C. § 2201]. Under ERISA, the Center: (1) sought a declaratory judgment that Anthem's reversal of benefit determinations and offsetting of asserted overpayment against other reimbursements violated ERISA's Claims Procedure, and the ERISA Claims Procedure regulation, and an injunction precluding such offsetting; (2) sought monetary damages for past recoupments; and (3) requested declaratory and injunctive relief regarding Anthem's alleged violation of its fiduciary duty to plan beneficiaries and participants. Invoking the DJA, the Center alleged that the government employee benefit plans administered by Anthem were also subject to the ERISA Claims Procedure regulation and sought a declaratory judgment that Anthem's recoupment of payments for claims made under those plans was unlawful.

The district courts in both cases dismissed the claims, holding that plaintiffs lacked authority to bring claims under ERISA. In the second case, the district court also dismissed the claim brought under the DJA, holding that government plans are, by their terms, exempt from the ERISA Claims Procedure regulation. Plaintiffs in both cases appealed before the Ninth Circuit.

The Ninth Circuit reaffirmed the holding of *Spinedex Physical Therapy USA Inc. v. United Healthcare of*

Arizona, Inc.[1] that health care providers are not "beneficiaries" within the meaning of ERISA § 502(a) and may not bring suit under ERISA in that capacity.

The Ninth Circuit held that providers are not "beneficiaries" expressly authorized to sue to enforce ERISA's provisions, and they cannot bring their claims derivatively as assignees on behalf of plan beneficiaries. Providers therefore are not authorized to bring their claims in federal court under ERISA. In the instant case, plaintiffs lacked derivative authority to sue under ERISA § 502(a)(1)(B) or § 502(a)(3) given the nature of the governing agreements and of the purported assignments. Therefore, the court affirmed the district courts' dismissals of the ERISA claims in both cases.

The Ninth Circuit further held that the district court properly dismissed the Center's claims under the DJA [28 U.S.C. § 2201(a)], disapproving Anthem's recoupment program with respect to government employee benefit plans. The government employee benefit plans are governed by the Patient Protection and Affordable Care Act, not by ERISA. The Center did not have authority to bring its claims directly under ERISA—because, among other reasons, the government plans are not covered by ERISA § 502(a), and also because the Center was not, in any event, an ERISA beneficiary. The Center could not sue derivatively via patient assignment either. Nor could the Center be considered a "beneficiary" under the government plans themselves, for essentially the same reasons that it was not a "beneficiary" under ERISA.

Accordingly, the Ninth Circuit affirmed the judgments of the district courts in both cases.

References. See, e.g., Wilcox, *California Employment Law*, § 41.93, *Bonafide Employee Benefit Plans* (Matthew Bender).

HONORABLY RETIRED PEACE OFFICERS

Bonome v. City of Riverside, No. E064925, 2017 Cal. App. LEXIS 264 (March 24, 2017)

On March 24, 2017, a California appellate court ruled that under the plain language of Penal Code § 16690, a city police officer who applied for and was granted disability retirement prior to a termination hearing was honorably retired and thus eligible under Penal Code § 25450(a) to obtain a retirement identification badge bearing an endorsement to carry a concealed weapon because the only peace officers excluded from the definition of "honorably retired" were those accepting service retirement in lieu of termination, which made clear that those accepting disability retirement were honorably retired under any circumstances.

Camillo Bonome ("Bonome") was hired as a police officer by the City of Riverside ("City") on April 14, 1995, and was authorized to carry a concealed weapon on and off duty as a peace officer as defined in Penal Code § 830.12. A memorandum of finding was sustained against Bonome for failing to properly investigate and report an incident involving a sexually abused girl in June 2012. Sergio Diaz ("Diaz"), Riverside Police Chief, recommended that Bonome be terminated. Prior to the hearing on his termination, Bonome applied for and was granted disability retirement by the California Public Employees' Retirement System for a back injury he sustained while on duty.

Upon his disability retirement being effective, Bonome requested his retirement identification badge and that the badge include a carry concealed weapon ("CCW") endorsement. Bonome's request was denied because Diaz and the City (collectively, "defendants") did not consider him to be "honorably retired" as that term is defined in Penal Code § 16690. Defendants asserted that Bonome was not entitled to a hearing to dispute the finding. Bonome filed a petition for writ of mandate, contending that he was honorably retired and entitled to a CCW endorsement, and if the endorsement was denied for cause, he was entitled to a good cause hearing. Defendants filed opposition to the writ. Defendants interpreted § 16690 to provide that honorably retired did not include those who accepted retirement in lieu of termination. They alleged that Bonome was facing termination and took a disability retirement in lieu of termination. Defendants also filed a request for judicial notice of the legislative materials for Assembly Bill No. 578 ("Assembly Bill 578"), which pertained to former Penal Code § 12027, from which Penal Code § 16690 was derived. The trial court agreed with Bonome and granted the writ. The trial court issued a written order, commanding defendants to issue Bonome's identification certificate with CCW endorsement; or issue Bonome an identification certificate noting "No CCW privilege" and providing Bonome with a good cause hearing as set forth in the Penal Code to challenge the denial of his CCW privileges. Defendants appealed the trial court's order before a California appellate court.

The California appellate court noted that § 16690 defines "honorably retired" as any peace officer who has qualified for service or disability retirement.

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[1] 770 F.3d 1282, 1289 (9th Cir. 2014), *cert denied*, United Healthcare of Ariz. v. Spinedex Physical Therapy USA, Inc., 136 S. Ct. 317, 193 L. Ed. 2d 227 (2015).

However, it excludes only those who accept service retirement in lieu of termination. The statute makes clear that those who accept disability retirement are honorably retired under any circumstances.

The California appellate court held that the trial court did not err when it determined that Bonome was "honorably retired" within the meaning of § 16690. This interpretation did not lead to an absurd result. Bonome was not able to negotiate a disability retirement in order to avoid termination; he was either disabled or he was not. Nothing in the legislative materials supported that the Legislature clearly intended to exclude those who were granted disability retirement from those considered honorably retired. Furthermore, the Legislature amended Penal Code § 12027 in 1993 to define the term "honorably retired." In the legislative materials provided by defendants for Assembly Bill 578, it was repeatedly stated, "It would specifically exclude those who have accepted a service retirement in lieu of termination [or punitive action]." The bill was amended several times but continued to only exclude those who agreed to a service retirement in lieu of termination or punitive action. This language made it clear that the only exclusion contemplated by the legislation were those who sought service retirement in lieu of their termination.

The California appellate court stated that a person cannot simply choose to take disability retirement in order to avoid termination. Bonome had been evaluated and it was recommended that he be given disability retirement. This was not a retirement in lieu of termination; Bonome was disabled and could not perform his duties as a peace officer.

Accordingly, the California appellate court affirmed the trial court's order granting the petition for writ of mandate.

References. See, e.g., Wilcox, *California Employment Law*, § 41.67, *Retirement or Pension Plans and Benefits* (Matthew Bender).

HOSTILE WORK ENVIRONMENT

Anderson v. CRST Int'l, Inc., No. 15-55556, 2017 U.S. App. LEXIS 5224 (9th Cir. March 24, 2017)

On March 24, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled that a truck driver's employer was improperly awarded summary judgment on a hostile work environment claim under Title VII of the Civil Rights Act of 1964 because a jury could have found that the driver subjectively perceived her work environment to be hostile and that it reasonably would have been perceived as hostile, and a jury could have concluded that the employer's remedy of separating the driver from a co-worker was ineffective.

Robin Anderson ("Anderson") brought claims against defendants, CRST International, Inc., CRST Van Expedited, Inc. (collectively, "CRST"), and Eric Vegtel ("Vegtel"), alleging sex discrimination under California's Fair Housing and Employment Act ("FEHA") [Gov't Code § 12940 et seq.], and Title VII of the Civil Rights Act ("Title VII") [42 U.S.C. § 2000e]. She also brought a claim against CRST alleging retaliation under Title VII. The district court granted summary judgment to defendants on all claims. Anderson appealed the district court's judgment before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit held that the text of the FEHA does not provide for its extraterritorial application, nor does its "purpose, subject matter or history" suggest that the legislature intended it to apply to extraterritorial transactions. Thus, Anderson's claims under the FEHA failed because they were based on conduct that occurred outside the state.

The Ninth Circuit held that no Title VII cause of action existed against Vegtel because Anderson had sued him in his individual capacity.

The Ninth Circuit reversed the district court's grant of summary judgment to CRST on Anderson's Title VII claim alleging hostile work environment. First, Anderson presented evidence from which a jury could determine both that Anderson subjectively perceived her work environment to be hostile and that a reasonable woman in Anderson's position would have perceived the environment to be hostile. Second, Anderson presented sufficient evidence to create a material dispute as to whether CRST provided an effective remedy. Anderson presented evidence that CRST never actually investigated her sexual harassment complaint against Vegtel and never informed Vegtel of the fact that he was prohibited from driving with female truck drivers in the future. With respect to Anderson's allegation that CRST failed to reassign her to a new truck or new routes after she and Vegtel were separated, the court found that although CRST insisted that it attempted to reassign Anderson by sending her an email with a list of female drivers, the email provided no explanation of what the list was or how it had to be used. On these facts, a jury could conclude that CRST's remedy put Anderson in a worse position and was thus not effective.

Finally, the Ninth Circuit reversed the district court's grant of summary judgment to CRST on Anderson's Title VII claim alleging retaliation. Under the burden-shifting

framework of *McDonnell Douglas Corp. v. Green*,[2] Anderson had made out a prima facie case of retaliation. Accordingly, the burden shifted to CRST to state a "legitimate, nondiscriminatory reason" for firing her. Although CRST argued that Anderson failed to report to work, Anderson insisted that after filing her complaint she never received any work assignments, and there was no evidence to suggest that she was obligated to find her own route assignments from CRST. If Anderson did not abandon her job, then CRST had failed to proffer a non-retaliatory reason for her termination. Therefore, a reasonable jury could conclude that CRST actually fired Anderson in retaliation for submitting a complaint against Vegtel.

Accordingly, the Ninth Circuit affirmed in part, reversed in part, and remanded the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 41.81[1][b], *"Hostile Work Environment" Harassment* (Matthew Bender).

RETALIATION

Somers v. Digital Realty Trust, Inc., No. 15-17352, 2017 U.S. App. LEXIS 4079 (9th Cir. March 8, 2017)

On March 8, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled that the district court properly denied an employer's motion to dismiss a whistleblower claim brought under the Dodd-Frank Act's anti-retaliation provision [15 U.S.C. § 78u-6(h)(1)(A)(iii)] because in using the term whistleblower, Congress did not intend to limit protections to those who disclosed information to the Securities and Exchange Commission, but rather, the anti-retaliation provision also protected those who were fired after making internal disclosures of alleged unlawful activity under the Sarbanes-Oxley Act and other laws, rules, and regulations.

Paul Somers ("Somers") was employed as a vice president by Digital Realty Trust, Inc. ("Digital Realty") from 2010 to 2014. Somers asserted that he made several reports to senior management regarding possible securities law violations by Digital Realty, soon after which Digital Realty fired him. Somers was not able to report his concerns to the Securities and Exchange Commission ("SEC") before Digital Realty terminated his employment. Somers subsequently sued Digital Realty, alleging violations of various state and federal laws, including Section 21F of the Securities Exchange Act of 1934 ("Exchange Act"). Section 21F entitled "Securities Whistleblower Incentives and Protection" includes the anti-retaliation protections created by the Dodd-Frank Act ("DFA"). Digital Realty sought to dismiss the DFA claim on the ground that, because Somers only reported the possible violations internally and not to the SEC, he was not a "whistleblower" entitled to DFA's protections. The district court denied Digital Realty's motion to dismiss the DFA claim. The district court deferred to the SEC's interpretation that individuals who report internally only were nonetheless protected from retaliation under DFA. The district court certified the DFA question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and the U.S. Court of Appeals for the Ninth Circuit subsequently granted Digital Realty's petition for permission to appeal.

The Ninth Circuit concluded that DFA's anti-retaliation provision [15 U.S.C. § 78u-6(h)(1)(A)(iii)] should be read to provide protections to those who report internally as well as to those who report to the SEC. The court also agreed with the decision of the U.S. Court of Appeals for the Second Circuit in *Berman v. Neo@ Ogilvy LLC*[3] that, even if the use of the word "whistleblower" in the anti-retaliation provision creates uncertainty because of the earlier narrow definition of the term, the agency responsible for enforcing the securities laws had resolved any ambiguity and its regulation was entitled to deference. In 2011, the SEC issued Exchange Act Rule 21F-2 [17 C.F.R. § 240.21F-2] pursuant to its rule-making authority under 15 U.S.C. § 78u-6(j). Rule 21F-2 accurately reflects Congress's intent to provide broad whistleblower protections under DFA. It provides that anyone who does any of the things described in subdivisions (i), (ii), and (iii) of the anti-retaliation provision is entitled to protection, including those who make internal disclosures under the Sarbanes-Oxley Act. They are all whistleblowers.

The Ninth Circuit agreed with the district court that the SEC's regulation was consistent with Congress's overall purpose to protect those who report violations internally as well as those who report to the SEC. Therefore, the district court properly denied Digital Realty's motion to dismiss the whistleblower claim.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 60.03[2][c], *Whistleblowing Activities* (Matthew Bender).

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[2] 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[3] 801 F.3d 145 (2d Cir. 2015).

SECOND MEAL PERIOD WAIVER

Gerard v. Orange Coast Memorial Medical Center, No. G048039, 2017 Cal. App. LEXIS 255 (March 1, 2017)

On March 1, 2017, a California appellate court ruled that second meal period waivers signed by health care employees were valid and enforceable, notwithstanding Lab. Code § 512(a), because Section 11(D) of Industrial Welfare Commission Wage Order No. 5-2001 that allows health care employees to waive their second meal periods on shifts longer than 12 hours is valid.

Jazmina Gerard ("Gerard"), Kristiane McElroy ("McElroy"), and Jeffery Carl ("Carl") (collectively, "plaintiffs") were health care workers formerly employed by Orange Coast Memorial Medical Center ("hospital"). They sued the hospital in the instant putative class action and private attorney general action ("PAGA") for alleged Labor Code violations and related claims. A hospital policy allowed health care employees who worked shifts longer than 10 hours caring for patients to voluntarily waive one of their two meal periods, even if their shifts lasted more than 12 hours. However, Industrial Welfare Commission ("IWC") issued an order authorizing employees in the health care industry to waive one of those two required meal periods on shifts longer than eight hours. Plaintiffs alleged that the hospital's conduct violated the applicable IWC Wage Orders and Lab. Code §§ 226.7 and 512(a). The hospital moved for summary judgment against Gerard on all of her individual and PAGA claims. The trial court granted summary judgment, finding that there was no disputed issue of material fact as to plaintiffs' cause of action for meal period violations because plaintiffs were provided meal periods as required by law. The hospital next moved to deny class certification and to strike the class allegations. The trial court granted the motion, stating that plaintiffs had failed to show that they had any claim against the hospital. Plaintiffs appealed the trial court's judgment before a California appellate court.

The California appellate court reversed the trial court's judgment, concluding that the IWC order was partially invalid to the extent it authorized second meal break waivers on shifts over 12 hours. After the California Supreme Court granted the hospital's petition for review, the Court transferred the case back to the appellate court with directions to vacate the Court's decision and to reconsider the cause in light of the enactment of Statutes 2015, chapter 506 [Sen. Bill No. 327 (2015–2016 Reg. Sess.] ("Sen. Bill 327").

The California appellate court determined that Wage Order No. 5, § 11(D) is valid. It was specifically authorized by the Assem. Bill No. 60 (1999–2000 Reg. Sess.) § 6 version of Lab. Code § 516(a) in effect on the date it was adopted, even though it conflicts with Lab. Code § 512(a) to the extent it sanctions second meal period waivers for health care employees on shifts of more than 12 hours. Therefore, the IWC did not exceed its authority by adopting Wage Order No. 5, § 11(D), and the hospital's second meal period waiver policy did not violate Lab. Code § 512(a).

The California appellate court determined that Sen. Bill 327 reinforced its conclusion that Wage Order No. 5, § 11(D) is valid. The Legislature's unmistakable focus in Sen. Bill 327 was the disruptive effect of the opinion issued in the previous appeal on the long-standing and widespread use of second meal period waivers by employees and employers in the health care industry. Further, the obvious import of Sen. Bill 327 was that the Legislature intended its provisions to apply immediately to existing second meal period waivers, including those at issue in the instant case. Therefore, Sen. Bill 327 represented a clarification of the law before its decision in the previous appeal rather than a change in the law. Consequently, the court accepted Sen. Bill 327 as the "legislative declaration of the meaning" of Lab. Code §§ 512(a) and 516(a), and gave the Legislature's action its intended effect.

The California appellate court concluded that the second meal period waivers signed by plaintiffs in the instant case were valid and enforceable on and after October 1, 2000, and continued to be valid and enforceable [Lab. Code § 516(b)]. Thus, the trial court did not err by granting summary judgment denying class certification and striking the class allegations.

Accordingly, the California appellate court affirmed the trial court's judgment and order.

References. See, e.g., Wilcox, *California Employment Law*, § 2.08, *Meal Periods* (Matthew Bender).

WAGE AND HOUR

Iontchev v. AAA Cab Serv., No. 15-15789, 2017 U.S. App. LEXIS 5326 (9th Cir. March 27, 2017)

On March 27, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled that when cab drivers alleged that they were entitled to timely and minimum wages under the Fair Labor Standards Act [29 U.S.C. § 206] and Arizona law [Ariz. Rev. Stat. §§ 23-351 and 23-363], the cab companies were entitled to summary judgment because they showed by clear and convincing evidence that the drivers were independent contractors.

Several drivers ("plaintiffs") brought the instant consolidated class action against several cab companies ("defendants"), alleging failure to pay timely and minimum wages in violation of the Fair Labor Standards Act ("FLSA") [29 U.S.C. § 206], and Arizona law [Ariz. Rev. Stat. §§ 23-351, 23-363]. The district court issued an order denying plaintiffs' motion for partial summary judgment and granting summary judgment in favor of defendants on all claims. Plaintiffs appealed the district court's order before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit found that defendants had established by clear and convincing evidence that plaintiffs were independent contractors under the FLSA and Arizona law. Defendants had relatively little control over the manner in which plaintiffs performed their work. Defendants did not maintain attendance logs, establish plaintiffs' work schedules, or mandate a minimum number of hours plaintiffs had to spend at Phoenix Sky Harbor International Airport ("Airport"). They had very few records regarding the hours worked or fares earned by each plaintiff, and their disciplinary policy primarily enforced the Airport's rules and regulations governing plaintiffs' cab operations and conduct.

The Ninth Circuit found that plaintiffs' opportunity for profit or loss depended upon their managerial skill. Plaintiffs typically paid a flat fee to lease taxicabs from defendants, could work as much or as little as they wanted, kept all earnings from passenger fares except in very limited circumstances, were free to provide taxi services away from the Airport, could pass out business cards to passengers and develop their own clientele, and could share their taxicabs with authorized relief drivers with whom they personally negotiated the number of hours each driver would use the cab and how they would split up the fuel and lease costs.

The Ninth Circuit found that the service rendered by plaintiffs did not require a special skill. Plaintiffs did not need extensive training, special technical knowledge, or highly developed skills to provide taxicab services at the Airport. Furthermore, the working relationship was often lengthy. Although plaintiffs could take prolonged vacations, those who did usually hired relief drivers to cover their taxicabs in their absence. Also, the service rendered by plaintiffs was an integral part of defendants' business of providing taxicab services at the Airport.

In sum, the Ninth Circuit concluded that plaintiffs were not economically dependent upon defendants. Rather, as a matter of economic reality, they were in business for themselves when they leased their taxicabs from defendants and utilized them to earn a profit. Thus, the district court properly held that, as a matter of law, plaintiffs were not employees under the FLSA and Arizona law.

Accordingly, the Ninth Circuit affirmed the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 1.04[2][b], *Employees Covered* (Matthew Bender).

Brunozzi v. Cable Communs., Inc., Nos. 15-35623, 15-35744, 2017 U.S. App. LEXIS 4997 (9th Cir. March 21, 2017)

On March 21, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled that the diminishing bonus device in an employer's pay plan for its employees, who installed cable television and Internet, violated the overtime provision of Fair Labor Standards Act because it miscalculated the regular hourly rate during weeks when the employees worked overtime and allowed the employer to pay less during those weeks.

Matteo Brunozzi ("Brunozzi") and Casey McCormick (collectively, "plaintiffs") worked as technicians for Cable Communications, Inc. ("CCI") installing cable television and internet services. They filed separate lawsuits against CCI alleging that CCI's compensation plan violated the overtime provisions of the Fair Labor Standards Act ("FLSA") [29 U.S.C. § 207], and Oregon's statutory requirement that an employer pay all wages earned and unpaid after terminating an employee [Or. Rev. Stat. § 652.140]. Brunozzi additionally alleged that CCI violated Oregon's laws prohibiting discrimination against a private employee who engages in whistleblowing [Or. Rev. Stat. § 659A.199] and wage-claim discussions [Or. Rev. Stat. § 652.355]. The district court granted summary judgment in favor of CCI on those claims. Plaintiffs appealed the district court's judgment before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit determined that the diminishing bonus device in the pay plan for plaintiffs violated the FLSA's overtime provision because it miscalculated the regular hourly rate during weeks when plaintiffs worked overtime and allowed CCI to pay less during those weeks. Therefore, the court reversed the district court's orders granting summary judgment in CCI's favor on plaintiffs' FLSA claims. Consequently, the court also reversed the district court's order granting summary judgment in CCI's favor on plaintiffs' claims under Or. Rev. Stat. § 652.140.

The Ninth Circuit determined that the Oregon legislature intended the term "reported" in Or. Rev. Stat. § 659A.199 to mean a report of information to either an external or internal authority, and thus, plaintiffs' reporting to CCI that they were not properly paid for overtime was covered by the statute.

The Ninth Circuit finally determined that Brunozzi's refusal to work additional overtime unless he was paid an overtime rate for those hours was a demand for future payment and did not qualify as a wage claim under Oregon law. However, Brunozzi's complaints that CCI had failed to properly compensate him for overtime were at least discussions or inquiries about a demand for past-due wages if not the actual making of such a demand. These complaints were precursors to Brunozzi's filing of a formal demand in court for past-due overtime wages, and they qualified for protection under Or. Rev. Stat. § 652.355. Thus, the court reversed the district court's order granting summary judgment in CCI's favor on Brunozzi's Or. Rev. Stat. § 652.355 claim.

Accordingly, the Ninth Circuit reversed and remanded the district court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 3.19, *Pay Plans That Circumvent Overtime Provisions* (Matthew Bender).

WAITING TIME PENALTIES

Gateway Community Charters v. Spiess, No. C078677, 9 Cal. App. 5th 499, 2017 Cal. App. LEXIS 201 (March 8, 2017)

On March 8, 2017, a California appellate court ruled that a charter school did not qualify as an "other municipal corporation" under Lab. Code § 220(b), and thus, the charter school was not exempt from assessment of waiting time penalties under Lab. Code § 203(a).

Gateway Community Charters ("Gateway") was a California nonprofit public benefit corporation that operated public charter schools, including the school at which Heidi Spiess ("Spiess") worked as an at-will employee. Gateway was the statutory "exclusive public school employer" of all the employees at the charter school, including Spiess. Following her termination, Spiess filed a claim with the labor commissioner alleging that Gateway failed to pay timely her wages due and owing as required by Lab. Code § 201. In its decision awarding Spiess $640 in wages, $128 in liquidated damages, $105.20 in interest, and $8,538 as a penalty pursuant to Lab. Code § 203, the labor commissioner expressly concluded that Gateway did not qualify as an "other municipal corporation" under Lab. Code § 220(b). Gateway appealed that decision to the trial court pursuant to Lab. Code § 98.2, claiming that it was exempt from Lab. Code § 203 penalties as an "other municipal corporation" pursuant to Lab. Code § 220(b). The trial court entered judgment finding that Gateway was not an "other municipal corporation" for purposes of § 220(b) and was not exempt from paying waiting time penalties pursuant to Lab. Code § 203. It ordered Gateway to pay Spiess $640 in wages, $128 in liquidated damages, $105.20 in interest, and $8,538 in waiting time penalties, plus costs, interest, and attorney fees. Gateway appealed the trial court's judgment before a California appellate court.

The California appellate court found that Gateway did not have the power to acquire property through eminent domain; it could not impose taxes and fees upon those who lived within its geographical jurisdiction; it had no geographical jurisdiction but existed pursuant to its charter; it had no independent regulatory or police powers but remained subject to the limitations of its charter throughout its existence; and its board of directors was not comprised of members elected by the public. Without these multiple crucial characteristics that are common to municipal and quasi-municipal corporations, the court could not conclude that Gateway was an "other municipal corporation" for purposes of § 220(b).

The California appellate court further found that without the publicly elected board, the geographical jurisdictional boundary, and the power to forcefully raise funds or acquire property from people within its geographical jurisdiction, Gateway bore little resemblance to a "county, incorporated city, or town" or to the quasi-municipal districts that had been deemed to qualify as "other municipal corporations." Therefore, it did not appear that the Legislature intended nonprofit public benefit corporations operating charter schools to be exempt from waiting time penalties as "other municipal corporations" pursuant to § 220(b).

The California appellate court found that the statutory designations identified by Gateway and California Charter Schools Association were clearly not intended to render charter schools public school districts for all purposes, nor was it likely that charter schools actually desired to be treated as public school districts for all purposes.

The California appellate court concluded that because Gateway did not qualify as an "other municipal corporation" under § 220(b), it was not exempt from assessment of waiting time penalties under Lab. Code § 203(a), and consequently Spiess was entitled to waiting time penalties.

Accordingly, the California appellate court affirmed the trial court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 4.01[2][d], *Penalty for Nonpayment on Discharge or Quitting* (Matthew Bender).

WORKERS' COMPENSATION

Marinwood Community Services v. Workers' Comp. Appeals Bd., No. A147582, 2017 Cal. App. LEXIS 278 (March 29, 2017)

On March 29, 2017, a California appellate court ruled that in a case in which the workers' compensation appeals board determined that a claimant was entitled to the benefit of the rebuttable presumption that his cancer arose out of his employment as a voluntary firefighter for a fire protection district, the Board's interpretation of Lab. Code § 3361, defining the term "volunteer fire department" language to encompass a fire department composed of both professional firefighters and volunteers, was reasonable.

Pete Romo ("Romo") worked as a firefighter for three different fire departments. He was a volunteer firefighter for Marinwood Fire Protection District ("Marinwood") from 1989 to 1991 and the San Antonio Volunteer Fire District in Sonoma County ("San Antonio") from 2002 to 2006. From 2006 through trial, he was employed full time as a paid firefighter for the City of Mill Valley ("Mill Valley"). While working for Mill Valley, Romo was diagnosed with prostate cancer. Romo filed a claim for workers' compensation benefits with each of the three fire departments for which he had worked. Mill Valley and San Antonio stipulated that the statutory presumption that Romo's cancer arose out of his employment as a voluntary firefighter would apply to them if the elements set forth in Lab. Code § 3212.1 were proven. Marinwood contested the application of the presumption. Two issues pertaining to Marinwood were tried before a workers' compensation judge ("WCJ"): (1) whether Romo was an employee and/or volunteer firefighter of Marinwood entitled to workers' compensation benefits under Lab. Code §§ 3352(i), 3361, 3365, 3361.5, 3212.1 and Health and Safety Code § 13802; (2) whether the presumption under Lab. Code § 3212.1 applied against Marinwood where Romo was not a public safety employee from the time he stopped volunteering at Marinwood sometime between 1989 and 1991 and the year 2002, which was more than 120 months following the date he last worked for Marinwood.

The WCJ concluded that Romo was an active volunteer firefighting member of Marinwood from mid-1989 to early 1991 within the meaning of Lab. Code §§ 3212.1 and 3361 and that he was entitled to the extension of the presumption under Lab. Code § 3212.1, since he was within 120 months of the "last date actually worked in the specified capacity." Marinwood sought reconsideration of the WCJ's decision by the Workers' Compensation Appeals Board ("WCAB"), arguing that it was not a "regularly organized volunteer fire department" within the meaning of Lab. Code § 3361, and thus firefighters who volunteered for it were not "employees" for workers' compensation statutes under Lab. Code § 3361 and that the extension of the presumption under Lab. Code § 3212.1 began to run as to Marinwood on the date Romo last worked for Marinwood. The WCAB denied Marinwood's motion for reconsideration. Marinwood petitioned to set aside the WCAB's decision before a California appellate court.

The California appellate court observed that the WCJ interpreted the "volunteer fire department" language in Lab. Code § 3361 to encompass a department composed of some professional firefighters and even more volunteers. In holding that the evidence supported a finding that Marinwood was a volunteer fire department, the WCJ stated that at trial, John Bagala ("Bagala"), Marinwood's Fire Captain and Training Officer, testified that Marinwood was a combination fire department, which according to him, meant that it had paid firefighters as well as volunteer firefighters. The volunteer firefighters, which at the time Romo worked there numbered 24 as compared to the 7 paid firefighters, were highly trained, considered "on call" 24 hours a day and took direction only from paid firefighters. The WCAB adopted and incorporated the WCJ's opinion as its own. The court found that the language "volunteer fire department" in § 3361 is ambiguous in regard to whether it extends to a department comprised predominantly, but not exclusively, of volunteers. Therefore, the WCAB's interpretation of § 3361 was reasonable and consistent with the purpose of the statutory scheme.

The California appellate court determined that the risk of cancer for Romo did not end when he left Marinwood because he continued to serve as a firefighter after that, for San Antonio and then Mill Valley. Therefore, the WCAB's interpretation of Lab. Code § 3212.1(d) concluding that the cancer presumption ran from the date Romo last worked as a firefighter for the Marinwood was reasonable.

Accordingly, the California appellate court affirmed the WCAB's decision.

References. See, e.g., Wilcox, *California Employment Law*, § 20.21, *Types of Injuries Within Coverage of Workers' Compensation* (Matthew Bender).

CALENDAR OF EVENTS

2017

May 4-5	NELI: *Employment Law Conference Mid-Year*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
May 7-12	CALBAR Litigation Section, *A Week in Legal London*	Various locations
May 18	CALBAR Business Law Section, Webinar: *Enforcement of Noncompetition, Confidentiality and Related Agreements in California*	12:00 PM – 1:00 PM
June 10-11	CALBAR Workers' Compensation Section, *Workers' Compensation Legal Specialization Boot Camp 2017*	Monterey Marriott Hotel 350 Calle Principal Monterey, CA 93940
July 12	NELI: *California Employment Law Update*	Catamaran Resort 3999 Mission Blvd. San Diego, CA 92109 (858) 488-1081
July 13-14	CALBAR: Labor & Employment Law Section, *34th Labor & Employment Law Annual Meeting & 7th Annual Advanced Wage and Hour Conference*	Hyatt Regency Los Angeles International Airport 6225 West Century Blvd. Los Angeles, CA 90045 (415) 538-2590
July 13-14	NELI: *Employment Law Update*	Catamaran Resort 3999 Mission Blvd. San Diego, CA 92109 (858) 488-1081

Aug. 17-18	NELI: *Public Sector EEO and Employment Law Conference*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Oct. 7	CALBAR Workers' Compensation Section, *6th Annual Rating Extravaganza*	The State Bar of California, 845 S Figueroa Street Los Angeles, CA (415) 538-2256.
Oct. 25	NELI: *Affirmative Action Workshop*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Oct. 26-27	NELI: *Affirmative Action Briefing*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Nov. 7	NELI: *Americans with Disabilities Act Workshop*	Luxe Sunset Blvd. Hotel 11461 Sunset Boulevard Los Angeles, CA 90049 (310) 476-6571
Nov. 8	NELI: *California Disability Law Workshop*	Luxe Sunset Blvd. Hotel 11461 Sunset Boulevard Los Angeles, CA 90049 (310) 476-6571
Nov. 18	CALBAR Workers' Compensation Section, *Workers' Compensation Section Fall Conference*	Hyatt Regency Los Angeles International Airport 6225 West Century Blvd. Los Angeles, CA 90045 (415) 538-2256

Nov. 30-Dec. 1	NELI: *Employment Law Conference*	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

2018

Mar. 25-28	NELI: *Employment Law Briefing*	Renaissance Indian Wells Resort & Spa 44-400 Indian Wells Lane Indian Wells, CA 92210 (760)773-4444

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