



LABOR AND EMPLOYMENT LAW
ON BEHALF OF MANAGEMENT
AND RELATED LITIGATION

10 UNIVERSAL CITY PLAZA
SIXTEENTH FLOOR
UNIVERSAL CITY,
CALIFORNIA
91608-1097

TELEPHONE: FACSIMILE: E-MAIL:
818-508-3700 818-506-4827
818-985-8167

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Dear Clients and Friends of the Firm:

Our lead article in this issue of the EMPLOYMENT LAW UPDATE discusses what employers might expect during the administration of President George W. Bush. One positive sign for employers has been the congressional repeal of strict federal OSHA ergonomics regulations which took effect in the final days of Bill Clinton's administration. Employers also have reason to be optimistic that Bush will be sympathetic to management on labor relations issues, but it is less certain where Bush will stand on other matters, such as wage/hour and job bias laws. This edition of the Update also contains articles on the following topics:

- Job Bias Charges On The Rise
- Disability Discrimination
- \$97M Contingent Worker Settlement
- Labor Relations
- ADR Developments
- Wrongful Termination
- Age Discrimination
- Employer Liability For Rape
- Workers' Compensation Fraud
- Pregnancy Discrimination
- Transgender Bias

Best wishes for a productive and enjoyable Spring.

Richard S. Rosenberg, Editor

THE BUSH AGENDA

President George W. Bush has kept a relatively low profile on labor and employment issues during the first few weeks of his administration, as he did during last year's election campaign. Employers are expecting that the new president will follow policies which are more favorable to management than those implemented during Bill Clinton's presidency. Initial signs are that the Bush administration will move in a pro-employer direction on some issues, but may maintain the *status quo* on others.

- ***Repeal Of Federal OSHA Ergonomics Rules.*** Just before we went to press, President Bush signed a bill that will repeal sweeping new ergonomics standards which were implemented by the federal Occupational Safety and Health Administration ("OSHA") late last year. This is a major victory for business groups, who criticized the new standards as overly complex and unworkable. As reported in previous editions of the UPDATE, these standards would have impacted 102 million employees at 6 million work sites nationwide, and covered a wide variety of jobs that usually require lifting, repetitive arm movements or use of computer keyboards. Estimates as to the cost to employers of implementing these sweeping new rules varied from \$4.5 billion to a staggering \$125.6 billion per year. Union leaders are furious at the Congress and the President for repealing these rules, and have vowed to seek revenge in the next election. Meanwhile, the new Labor Secretary, Elaine Chao, has indicated that she may push for a more moderate set of ergonomics standards in the future. Of course, California employers still must contend with our state's comprehensive ergonomics regulations, which are not impacted by the repeal of the federal standards.

- ***Labor Relations.*** President Bush has shown that he is willing to take positions which are unpopular with unions. Recently, Bush signed two executive orders which drew praise from management groups and cries of protest from union activists. One of these orders requires companies that contract with the federal government to post notices informing union members of their rights under the U.S. Supreme Court's 1988 *Beck* decision. This executive order is similar to one that Bush's father signed in 1992, but which President Clinton revoked the following year. Under *Beck*, employees who are not union members, but are represented by a union and pay agency fees, cannot be forced to contribute to any union expenditures which are unrelated to a union's core functions of collective bargaining, contract administration and grievance processing. The precise form of the notice will be set by the new Labor Secretary, Elaine Chao, and will be included in every government contract, except certain collective bargaining agreements and purchasing contracts. This executive order will take effect on April 15, 2001. Bush also supports so-called "paycheck protection" legislation which would require unions to obtain their members' explicit authorization before spending their dues

money on political activity. However, Congress would have to approve such legislation before it could go into effect, and the prospects for its passage are uncertain at best.

Another Bush executive order affecting unions bans “project labor agreements” on federal construction projects. This means that federal agencies are now prohibited from discriminating against non-unionized contractors who bid for federal projects. Bush also has revoked two executive orders that were issued by Clinton. One of these orders required federal agencies to form labor-management partnerships, while the other required successive contractors working on public buildings to offer a right of first refusal of employment to employees of the previous contractor.

In addition, Bush has issued a general freeze on the passage of new regulations. This move essentially blocks regulations issued in the final days of the Clinton Administration which would have barred the granting of federal contracts to any company who has hired labor consultants to give advice in responding to union organizing campaigns, as well as any company who has ever been *accused* of labor relations violations – regardless of whether the accusations had any merit. Bush also has rebuffed a Department of Labor initiative which would have drastically expanded the Labor Management Reporting Disclosure Act (“LMRDA”), which requires all entities acting as “persuaders” in the context of a union organizing campaign to register with the federal government. Towards the end of the Clinton Administration, the Labor Department issued a sweeping re-interpretation of LMRDA which would have required consultants and attorneys to register as “persuaders” if they simply prepare a speech, handout, letter, or video for an employer’s use in response to union organizing efforts. However, Bush has put this interpretation of LMRDA on hold for at least the next 60 days, and will likely attempt to kill it altogether.

Bush also will have the opportunity in the next few months to make as many as four appointments to the five-member National Labor Relations Board, including a new Chairman. Traditionally, the NLRB has been comprised of two Republicans, two Democrats and a Chairman who is a member of the President’s party. In addition, Bush will likely appoint a Republican to the influential post of NLRB General Counsel. The NLRB General Counsel has complete and unreviewable discretion to decide whether to issue an NLRB complaint against an employer. Employers are hopeful that the Bush-appointed Board members and General Counsel will be more sympathetic to management interests than many of Clinton’s appointees.

- ***New Labor Secretary And Other Bush Appointees.*** Elaine Chao is the new Secretary of Labor. Chao is widely believed to be less anti-union than Bush’s initial nominee for the position, Linda Chavez, who withdrew her name from consideration

after a controversy arose involving an undocumented immigrant who once lived in Chavez's home. Chao has stated her view that the Labor Department "represents all workers, both those who choose to join unions, and those who do not." However, Chao also has made some statements that may be less pleasing to employers. She has indicated that the Bush administration supports raising the federal minimum wage, which is currently \$5.15 per hour, and that the administration wants to expand on the Americans with Disabilities Act ("ADA"). According to Chao, the administration will propose "a New Freedom Initiative that will harness the latest technologies to give disabled Americans even greater access to work opportunities." Bush himself has praised the ADA, which was signed into law by his father in 1990, so it seems unlikely that he will approve of any measures to reduce the scope of this law.

As we go to press, Bush has not indicated whom he plans to select to head several key agencies responsible for enforcing federal employment laws, such as the U.S. Equal Employment Opportunity Commission, the Occupational Safety and Health Administration and the Wage-Hour Division of the Labor Department. As these appointments are announced, employers will have a clearer sense of the priorities of the new administration with respect to labor and employment issues.

JOB BIAS CHARGES ON THE RISE

The EEOC reports that it received almost 80,000 individual charges of discrimination in 2000, an increase of nearly 3 percent from 1999. Despite this increase, EEOC statistics reveal that nearly 6 in 10 cases filed have no merit whatsoever. Here are the numbers. The most common type of EEOC charge last year was for race discrimination (36%), followed by sex discrimination (31.5%), retaliation (27%), age bias (20%) and ADA charges (19.9%). The EEOC also reported that it closed over 93,000 cases in 2000. Notably, over 58 percent of these resolutions were "no cause" findings in favor of the employer, meaning that EEOC found no merit in the case. Only 8.5 percent of the cases resulted in monetary settlements. The EEOC filed 325 lawsuits in 2000. The total of all monetary payments by employers in EEOC litigation last year was over \$47.5 million.

DISABILITY DISCRIMINATION

- ***Reasonable Accommodation.*** The California Court of Appeal recently issued a decision which dramatically expands employers' duties to "reasonably accommodate" their disabled employees. Leanne Jensen claimed to suffer from post-traumatic stress syndrome after being the victim of an attempted robbery at a branch

bank she managed. Jensen's doctor said that her condition prevented her from working in any bank branch, performing sales work or even working with money. Wells Fargo allowed Jensen to apply for several open positions elsewhere in the organization, but in each case the bank selected other, more qualified individuals. Jensen sued Wells Fargo under our state's job bias law for failing to adequately accommodate her disability by automatically giving her one of the available positions that she could do with her work restrictions. A lower court dismissed the case, but the Court of Appeal sent it back for a jury to decide. According to the appellate court, Wells Fargo did not satisfy its "reasonable accommodation" duty when it allowed Jensen to *apply* for other jobs. Instead, the court declared that "when reassignment of an existing employee is the issue, the disabled employee is entitled to preferential consideration." In other words, it's not enough to allow disabled employees to compete for open positions. If there is an open position which they can perform, they must get it. The court also stated that it was not good enough for Wells Fargo to offer Jensen a temporary job when she was seeking a permanent position. Wells Fargo argued that Jensen was not cooperating in good faith in the interactive process of seeking an accommodation. However, the appellate court said it would be up to the jury to decide whether Jensen or Wells Fargo was to blame for the breakdown in the accommodation process. (*Jensen v. Wells Fargo Bank*)

- ***Obsessive Compulsive Disorder.*** Our Ninth Circuit U.S. Court of Appeals recently ruled that a California employer may be liable for violating state and federal disabilities laws because it refused to allow an employee diagnosed with obsessive compulsive disorder to work out of her home. Carolyn Humphrey worked as a medical transcriptionist for Memorial Hospitals Association ("MHA"). Humphrey was an excellent employee, but had difficulty getting to work on time, or in some cases, at all. Humphrey would engage in a series of obsessive rituals each morning. For example, she washed and rinsed her hair repeatedly, she dressed very slowly, and repeatedly checked and rechecked for papers she needed to take to work. When Humphrey realized she was late, she would panic and become embarrassed, making it even more difficult for her to leave her house and get to work. When MHA disciplined Humphrey for tardiness, her mental obsessions and peculiar rituals only grew worse. At Humphrey's request, MHA paid for her to see a psychiatrist, who eventually diagnosed Humphrey with obsessive compulsive disorder. Upon learning of this diagnosis, MHA offered to place Humphrey on a medical leave of absence, but she wanted to continue working. MHA then tried to accommodate Humphrey by permitting her to report to work within 24 hours of her start time. Unfortunately, Humphrey's attendance did not improve. Humphrey finally asked if she could work at home. MHA had a policy of allowing some of its medical transcriptionists to work at home. However, MHA denied Humphrey's request based on a policy that said people with disciplinary warnings could not work at home. After Humphrey missed work two more times, MHA terminated her employment. Humphrey

sued MHA for disability discrimination. The trial court threw out her case, but the Ninth Circuit ruled there was clear evidence that Humphrey was “disabled.” The court also stated that MHA had an affirmative duty (which was not met here) to continue exploring other reasonable accommodations after its initial efforts proved ineffective. The court also found that Humphrey’s past discipline should not have made her ineligible to work at home because the discipline arose from her disability. The court reinstated Humphrey’s case and returned it to the lower court for a jury to decide. (*Humphrey v. Medical Hospitals Ass’n*)

- ***Interactive Process.*** A recent case out of Pennsylvania shows that the ADA’s “interactive process” is a “two-way street,” and that employers and employees alike must participate in the process. Denise Davis learned this lesson the hard way. Because she failed to cooperate in her employer’s efforts to accommodate her disability, the judge threw out a \$1.5 million jury verdict in her favor. Davis was afflicted with Crohn’s disease, a chronic inflammation of the intestines and bowels. Her employer, Guardian Life Insurance, had accommodated Davis’s condition for several years. In particular, Guardian allowed Davis to work two days per week in the office and three days out of her home; installed a computer, fax and dedicated phone line in her home; paid for a courier to take documents between her home and the office; and allowed Davis to change her days of working at the office when she requested. Guardian eventually asked Davis to sign a written proposal which confirmed these accommodations, but also stated that Davis would inform Guardian by Friday which two days of the next week she planned to work in the office. Davis rejected this proposal without even discussing it with Guardian. Instead, she filed for long-term disability benefits, without ever returning to work, and sued Guardian for violating the ADA. A jury found that Guardian’s written proposal was too inflexible under the ADA’s accommodation guidelines and awarded Davis \$1.3 million in lost wages and \$200,000 in emotional distress damages. After the trial, the judge threw out the entire jury award because of Davis’s total unwillingness to even discuss the proposed written accommodation plan with Guardian. According to the judge, her behavior resulted in the total breakdown of the accommodation process. (*Davis v. Guardian Life Ins.*)

- ***Direct Threat Defense.*** Under the Americans with Disabilities Act, a person whose disability poses a “direct threat” to the safety of others is not eligible for ADA protection. This defense is particularly important in cases where a disabled employee works in a safety-sensitive job. In one recent case, the Tenth Circuit U.S. Court of Appeals in Denver rejected the ADA claim of Dennis Borgialli, who worked as a mine blaster for Thunder Basin Coal Company. Borgialli began to develop physical and mental problems after a co-worker, with whom Borgialli had a contentious relationship, was promoted to be Borgialli’s supervisor. Borgialli suffered migraine

headaches, dizziness, anxiety and contemplated suicide. The company placed Borgialli on a leave of absence and referred him to two psychiatrists. The first psychiatrist determined that Borgialli's disorders made it impossible for him to perform his job safely. The second psychiatrist did not go quite that far, but doubted that Borgialli ever would be able to work with his supervisor. Based on these partially conflicting reports, Thunder Basin requested that Borgialli see a third psychiatrist. He was terminated when he refused to cooperate any further in the mental evaluation. The court ruled that Thunder Basin was entitled to rely on the advice of the two psychiatrists and to terminate Borgialli when he refused the company's request that he obtain a third opinion. The court stated that "the ADA does not require employers to take unnecessary risks when dealing with a mentally or physically impaired employee in an inherently dangerous job." The court ruled in favor of Thunder Basin on Borgialli's ADA claim because the evidence demonstrated that Borgialli presented a direct threat to himself and other employees. (*Borgialli v. Thunder Basin Coal Co.*)

- ***Unqualified Plaintiffs Forfeit Jury Awards.*** Two different California appellate courts have thrown out favorable jury verdicts for plaintiffs in disability discrimination lawsuits. In both cases, the courts concluded that the plaintiffs were not "qualified" for the jobs in question. One of the cases was brought by Teg Diffey, who was denied a job with the Riverside County Sheriff's Department because he is "color-blind" or "color deficient." Because of this affliction, Diffey was unqualified to perform field duty. A jury decided that Diffey was not disabled, but that the County "regarded" him as disabled, and it therefore awarded Diffey \$307,244 in damages. However, the appellate court found no evidence that the County regarded Diffey's color deficiency as a disability. Rather, all the County did was conclude that Diffey was unqualified to be a deputy sheriff due to his condition. Because the County had the right to make this determination, the appellate court threw out the entire jury award for Diffey. (*Diffey v. Riverside County Sheriff's Dep't*)

Another Court of Appeal panel ruled that a hearing-impaired individual, Eugene Quinn, was not qualified to be a police officer. Quinn had failed a Los Angeles Police Department medical examination because of his hearing impairment. However, because of a clerical error, he was permitted to report for further tests. Quinn passed all of the other tests and actually graduated from the police academy. The LAPD terminated Quinn upon learning of his hearing impairment. Quinn sued the department for disability discrimination and won a jury verdict of over \$500,000. When the LAPD appealed, the appellate court threw out this award because there was no evidence that Quinn was actually "qualified" to be a police officer in light of his hearing impairment. (*Quinn v. City of Los Angeles*)

- ***Blanket Ban On Truck Drivers With Monocular Vision Unlawful.*** A federal judge in Northern California has ruled that United Parcel Service violated the ADA by imposing a blanket rule excluding all job applicants with monocular vision from all truck driver positions, regardless of their individual records or abilities. The lawsuit was brought by the U.S. Equal Employment Opportunity Commission on behalf of three unsuccessful applicants for truck driver jobs with UPS. All three were rejected because of their monocular vision. In an extraordinary move, the EEOC went so far as to argue that the ability of a UPS driver to drive safely is *not* an essential function of the job. Not surprisingly, the judge summarily rejected this argument. However, the judge also ruled that a blanket rule such as UPS's went too far. According to the judge, UPS should have made individualized employment decisions and allowed otherwise qualified applicants with monocular vision to try to demonstrate that they could indeed drive safely. (*EEOC v. United Parcel Service*)

- ***States Immune From ADA Lawsuits.*** The United States Supreme Court has once again ruled that states have more rights than private employers when it comes to certain federal job bias laws. In a hotly-debated 5-4 decision, the High Court ruled that states cannot be sued in federal court for violations of the ADA. However, the ruling will have little effect in California, where the state can be sued under our Fair Employment and Housing Act. (*Board of Trustees of the University of Alabama v. Garrett*)

- ***EEOC Guidance On Contingent Workers.*** Shortly before President Clinton left office, the Equal Employment Opportunity Commission issued its long-awaited enforcement guidance on how the ADA applies to so-called "contingent workers," also known as "temporary employees." The guidance discusses ADA issues of concern to "staffing firms" – a term that includes temporary employment agencies, contract firms, facilities staffing firms, lease-back firms and welfare-to-work programs – and their client employers. Not surprisingly, EEOC takes the position that staffing firms *and* their clients may be liable under ADA if either or both entities participate in the discrimination or knew (or should have known) of the discrimination and failed to take corrective action within their control. EEOC went on to say that even if a staffing firm's client is not the employer, it may still face ADA liability for what EEOC might consider to be interfering with an employee's ADA rights. Under the guidance, ADA liability may also apply to a staffing firm that acts as an "employment agency" referring potential employees to employers or gives employers names of potential employees. The Contingent Workers Guidance also outlines specific situations where a staffing firm or its client may be liable under ADA, such as where one or both entities makes impermissible disability-related inquiries, imposes unlawful preemployment medical examinations, fails to make the requisite reasonable accommodation, or uses other

questionable qualification standards, employment tests and selection criteria. An employer that utilizes a staffing firm should become familiar with these obligations. This guidance is available on the EEOC's website at www.eeoc.gov. If you have specific questions on ADA issues concerning contingent employees, please consult your contact at the Firm.

\$97M CONTINGENT WORKER SETTLEMENT

Microsoft Corporation has agreed to pay a whopping \$97 million to settle a class-action employee benefits lawsuit brought by former "temporary" employees. Each of these plaintiffs worked at Microsoft for at least 9 months. Despite their temporary status, the temporary workers claimed that they really functioned as "regular" full-time employees, but that Microsoft classified them as "temps" to avoid giving them benefits. Their main concern was that Microsoft denied them participation in the company's employee benefits program such as the company's lucrative stock-purchasing and 401(k) plans. Microsoft had argued that the plaintiffs were "independent contractors" rather than "employees," and thus were not entitled to any employee benefits. However, in 1990, the Internal Revenue Service ruled that the individuals were, indeed, "employees" for tax purposes. Microsoft never contested this IRS ruling. In the late 1990's, our Ninth Circuit U.S. Court of Appeals issued a trio of decisions in the case which likewise found that the temps were really "employees" under the law. Microsoft decided to settle the case rather than risk an even larger money award at trial. Under the terms of the settlement agreement, the plaintiffs will be compensated for having been excluded from Microsoft's stock-purchase plan, but will not be included in the 401(k) plan or receive other benefits. The company also has promised to use only temporary employment agencies that provide good benefits, and has pledged to reevaluate how it uses temporary labor. The Microsoft case provides yet another lesson to employers on the need to carefully review how temporary or other so-called "contingent" workers are utilized.

LABOR RELATIONS

- ***Hotel Bargaining Units.*** For the first time in more than 15 years, the National Labor Relations Board has published a pro-employer decision concerning the scope of collective bargaining units at hotels. BRG&S founding partner Kenneth R. Ballard and senior associate Matthew T. Wakefield represented the hotel in this case, which ultimately resulted in the defeat of a union organizing drive. The case began last fall, when the Hotel Employees & Restaurant Employees International Union ("HERE") announced that it would begin attempting to organize hotel employees in Columbus,

Ohio, a city in which the union no longer has much of a presence. Most major Columbus hotels were unionized back in the 1960s. Today, however, only the housekeeping employees of one small, limited service hotel are represented by a union. HERE is attempting to change that, according to an October 2000 front-page article in the *Columbus Dispatch*. HERE's first target was the Holiday Inn City Center, which is located in downtown Columbus on the site of the American Federation of Labor's first headquarters. In September 2000, the union filed a petition with the NLRB to represent only the hotel's food and beverage and housekeeping employees. The hotel argued that the petition for a unit was inappropriate based on the hotel's operational structure. The NLRB Regional Director in Cincinnati agreed with the hotel and ordered that the hotel's maintenance engineers also must be permitted to vote. The NLRB in Washington, D.C. upheld the Regional Director's ruling. That same day, the union withdrew its election petition, leaving the hotel union-free. (*Holiday Inn City Center*)

- ***Unfair Labor Practice Injunction Against Joint Employers.*** A New Jersey federal judge has granted the National Labor Relations Board's request for an injunction against two companies accused of committing unfair labor practices during a union organizing campaign. The judge ruled that the two companies – Dunkin' Donuts Mid-Atlantic Distribution Center, a non-profit purchasing and delivery cooperative, and Aldworth Co., a supplier of employees – were "joint employers" who were attempting to discourage unionization at the distribution center, in violation of federal labor law. In particular, the judge found that Dunkin' Donuts and Aldworth engaged in intimidation tactics and threatened a number of things, such as discharge, plant closure, stricter working conditions and loss of benefits. According to the judge, an injunction was necessary because the companies' pattern of behavior would likely linger in the minds of employees long enough to have a prejudicial effect on the outcome of any future union election. The judge ordered the companies to recognize and bargain with the union, reinstate a number of workers, rescind certain programs, and stop threatening to fire employees who wore union T-shirts and pins. (*Moore-Duncan ex rel. NLRB v. Aldworth Co.*)

- ***NLRB About-Face On Employer Handbills.*** In a reversal of one of its earlier rulings, the NLRB has ruled that General Electric Co. did **not** violate federal labor law when it distributed anti-union handbills during an organizing drive at one of its plants in West Virginia. When the union in this case began its organizing drive in 1989, employees at this West Virginia plant were receiving 11 holidays a year and a 2 percent vacation bonus. A national agreement between GE and the union was automatically applied to each newly-organized bargaining unit of employees if the union members in that unit approved the agreement. However, this national agreement provided for only 10 annual holidays and included different procedures for determining vacation pay.

During the union organizing drive, GE issued a handbill that warned of the possibility of “long bitter negotiations” and the possibility of a “long and ugly strike” if the union won the election. GE also made statements about eliminating the 11th holiday and vacation bonus, and the plant general manager warned employees “we won’t have a business here 10 years from now” and that GE might stop investing in the plant if the employees voted to unionize. The union lost the election and filed election objections and unfair labor practice charges with the NLRB. Originally, the Board ruled that GE’s handbills and oral statements were unlawful attempts to discourage unionization. However, on appeal, the U.S. Court of Appeals in Washington, D.C. ruled that all of the oral statements were legal because they were factually valid. (A union victory would have resulted in the employees losing a holiday and a vacation bonus, and would have created the risk of strikes and made it more difficult for GE to maintain a competitive business position.) The court returned the case to the NLRB to reconsider whether the anti-union handbills were unlawful. The Board did an “about-face” and ruled that the handbills were legal after all because the handbills did not contain any threats or coercion, were based on objective facts, and acknowledged GE’s obligation to engage in collective bargaining if the employees voted for the union. The NLRB dismissed the unfair labor practice charges against the company. (*General Electric Co.*)

- ***Pre-Election Raffle.*** The NLRB has changed its long-standing rules about pre-election raffles conducted by employers to induce employees to vote. The NLRB ruled that an employer violated federal labor law by announcing it would conduct a raffle for two trips to Walt Disney World if at least 1,450 out of 1,690 eligible voters participated in an upcoming union election. The Board found that the employer unlawfully used the raffle as an inducement to vote against the union. The employer did not help matters by posting some signs regarding the potential raffle near its own “Vote No” posters. The union lost the election. Last August in the *Atlantic Limousine* case, the NLRB ruled that federal labor law prohibits both the union and the employer from conducting raffles in which eligibility is tied to voting or being present in the voting area. The Board reasoned that the opportunity to win a prize could be perceived by employees as a favor from the employer, obligating them to vote against the union. In this case, the Board went further and stated that raffles are prohibited even where an employee’s eligibility for the raffle is tied to overall voter turnout, rather than whether the individual herself actually voted. To remedy the matter, the Board ordered a new election. One Board member disagreed with this ruling, noting that the raffle at issue did not give the employer any way of knowing whether or how each employee voted, and the prize was not so lucrative that it diverted employees’ attention from the election. (*Ryder Student Transp. Servs.*)

- **Arbitration Awards.** A recent decision by the United States Supreme Court shows how difficult it is to overturn an award issued by a labor arbitrator. Generally, arbitration awards may be thrown out if they are contrary to “public policy.” However, this exception is extremely narrow, according to the Supreme Court. The Court ruled that the arbitrator did not violate public policy by ordering reinstatement of an employee who twice tested positive for marijuana. The employee, James Smith, works for Eastern Associated Coal Corp. as a member of a road crew, a job which requires him to drive heavy truck-like vehicles on public highways. Eastern terminated Smith after each of his positive drug tests. The first time, an arbitrator ordered Smith reinstated on the condition that he accept a 30-day suspension without pay, participate in a substance abuse program, and undertake drug tests for the next five years. The second time, the arbitrator still ruled Eastern had no “just cause” to terminate Smith, given that Smith had made a credible and “very personal appeal under oath . . . concerning a personal/family problem which caused this one time lapse in drug usage.” The arbitrator again ordered Smith to be reinstated, this time on the grounds that he accept a three-month suspension, reimburse Eastern and the union for the costs of both arbitration proceedings, continue in a substance abuse program, continue to undergo random drug testing, and provide Eastern with a signed, undated letter of resignation, to take effect if Smith again tested positive within the next five years. Eastern decided that the arbitrator had gone too far in ordering reinstatement and tried to block enforcement of the award in federal court. The case eventually got to the Supreme Court, which ruled that the arbitrator was within his authority to reinstate Smith, despite the two positive drug tests. The Court noted that the contract between Smith’s union and Eastern gave the arbitrator authority to interpret what constitutes “just cause” for termination. For this reason, the arbitrator’s decision could not be overturned unless it violated a clearly-stated public policy. Although there is certainly a strong public policy against drug usage, the Supreme Court focused on the more narrow question of whether public policy requires termination for an employee who operates heavy equipment and who has failed two drug tests. The Court concluded that the transportation statutes and regulations require that such employees be suspended, but stop short of requiring outright termination. The Court therefore ruled that the arbitrator’s order of reinstatement had to be enforced. (*Eastern Associated Coal Corp. v. United Mine Workers of America*)

ADR DEVELOPMENTS

- **Pre-Dispute Arbitration Agreements.** As we reported in our September 2000 UPDATE, the California Supreme Court issued its long-awaited decision in the *Armendariz* case, setting forth the requirements for enforcing so-called pre-dispute agreements to arbitrate job bias claims. Now the United States Supreme Court has weighed in on the issue. In *Circuit City Stores v. Adams*, the Court ruled that most

agreements to arbitrate employment disputes are enforceable under the Federal Arbitration Act (“FAA”). The plaintiff in the *Circuit City* case argued that the FAA does not apply to employment disputes at all. However, by a 5-4 vote, the Court rejected this argument, and instead ruled that only transportation employees are excluded from coverage under the FAA.

The *Circuit City* decision gives a “green light” for most employers to enforce pre-dispute arbitration agreements. However, due to the differences in how the issue plays out under federal and state law, it is too soon to predict how the courts will apply the new case.

Meanwhile, in the aftermath of *Armendariz*, our state Court of Appeal has published several decisions which clarify when these arbitration agreements are enforceable under state law. In *Pinedo v. Premium Tobacco*, the court ruled that the arbitration agreement could not be enforced because it contained provisions that were extremely one-sided in the employer’s favor. The agreement in the *Pinedo* case limited the available remedies which the arbitrator could consider to job reinstatement and six months’ back pay; required the employee to pay *all* arbitration fees; disallowed any recovery of attorney fees (which successful plaintiffs almost always recover under the state job bias law); and provided that the arbitration would be held in Oakland, despite the fact that the employee in this case worked and lived in Los Angeles. In addition, the agreement only required the employee, but not the employer, to submit claims to arbitration. The court ruled that this agreement was too one-sided to be enforced, and allowed the employee to pursue her civil suit for discrimination. By contrast, in *Craig v. Brown & Root, Inc.*, the Court of Appeal ruled that an arbitration agreement was enforceable and the employee had to go to arbitration in lieu of filing an action in court. The arbitration provision in *Craig* was contained in a brochure which the company mailed to its employees. Christine Craig protested that she never even received the arbitration brochure, much less signed it. However, the court found that because the arbitration brochure was mailed, it could be presumed that Craig received it, and that she was therefore bound by the arbitration provisions even though she *never* signed them. Further, the court ruled that the arbitration provision satisfied all the requirements of *Armendariz*. In particular, the arbitration provision in *Craig* allowed recovery of all available damages and attorney fees, and only required the employee to pay a \$50 fee.

EMPLOYERS NOTE: A 1998 ruling by our Ninth Circuit U.S. Court of Appeals still outlaws enforcement of pre-dispute agreements to arbitrate claims under *federal* anti-bias laws. (*Duffield v. Robertson, Stevens & Co.*) In light of the controversial *Duffield* decision, a federal judge in Los Angeles recently issued a permanent injunction preventing an employer from even requiring its employees or job

applicants to sign pre-dispute agreements as a condition of employment. The injunction also prevents the employer from attempting to enforce any such agreements in court. (*EEOC v. Luce, Forward, Hamilton & Scripps*) It remains to be seen what the United States Supreme Court will have to say about the *Duffield* decision.

- ***Arbitration Of Employee Benefit Disputes.*** Some employee benefit plans contain provisions requiring disputes to be submitted to binding arbitration. The Ninth Circuit U.S. Court of Appeals recently ruled that such agreements *are* enforceable. However, the court added that a plan administrator has a fiduciary duty to give timely and adequate notice to beneficiaries of the existence and terms of any arbitration clause in an employee benefit plan. The court indicated that it may not be enough for the plan to simply provide a written summary plan description that includes a description of the arbitration provision. In the case before the court, James Chappel submitted medical bills to his wife's health insurance plan, which denied coverage. Chappel filed an internal appeal that was denied by letter. However, this letter did *not* inform Chappel that his only available relief was to file an arbitration demand, or that he had a 60-day deadline for seeking arbitration. Chappel sued the plan under the federal employee benefit law (ERISA). A federal district judge threw out the lawsuit because Chappel failed to exhaust his arbitration remedy. The Ninth Circuit agreed, but ruled that Chappel should have been allowed to add a claim against the plan administrator for breach of fiduciary duty, based on the lack of adequate notice of the arbitration requirement. The Ninth Circuit sent the case back for further proceedings. (*Chappel v. Laboratory Corp. of America*) Notably, the Department of Labor recently issued comprehensive revised regulations under ERISA, which expressly permit employee benefit plans to require arbitration of claims under certain limited circumstances.

WRONGFUL TERMINATION

- ***Unlawful Non-Compete Agreement.*** California law is well known for its protection of employee rights. California law outlaws most non-compete agreements. Employers who have unenforceable non-compete policies or agreements face additional risk if they attempt to force their employees to sign such agreements. In one recent case, the California Court of Appeal ruled that Playhut, Inc. may be liable for a so-called "public policy" wrongful termination when it terminated an employee after the employee refused to sign a confidentiality agreement containing an illegal non-compete provision. The court ruled that the employee was within his rights when he refused to sign the unlawful agreement and his subsequent termination was unlawful. (*D'Sa v. Playhut, Inc.*)

- **Whistleblowers.** The California Labor Code prohibits all employers in this state from retaliating against “an employee for disclosing information to a government or law enforcement agency,” where the employee reasonably believes that the information discloses a violation of state or federal law. But what if the employee works for the *same* government agency where she filed the complaint? The City of Los Angeles argued that this law only applies when the employee makes a complaint or report of illegal activity to an *outside* government agency. However, the California Court of Appeal disagreed, and ruled that an employee of the City’s Housing Authority, Margaret Gardenhire, was entitled to make her complaints of unlawful activity directly to the Housing Authority, rather than to a different agency. Gardenhire claimed that the City retaliated against her for making internal complaints about potentially unlawful activity by an individual who had contracts with the Housing Department. Although Gardenhire was not terminated or demoted, she claimed she lost a promotion and was forced to give up her use of a Housing Authority automobile. A jury found in favor of Gardenhire and awarded her a whopping \$1.3 million dollars, almost all of it for emotional distress damages. The Court of Appeal upheld the entire award. (*Gardenhire v. Housing Authority*)

AGE DISCRIMINATION

- **Reductions In Force.** Lawsuits for age discrimination pose one of the greatest risks to companies who undergo workforce reductions. Even employers who implement layoffs in a fair and unbiased manner often will find themselves incurring legal fees to defend baseless age bias claims. In one hotly-contested case, our Ninth Circuit U.S. Court of Appeals recently rejected the age bias claims of Jerry Jeney, Joseph Gentile and Perry Coleman, who were laid off from their jobs with The Quaker Oats Company during a series of workforce reductions in the mid-1990’s. The plaintiffs were ages 49 to 55 when they were laid off. Both Jeney and Gentile were passed over for job openings in the Phoenix area in favor of other employees who had higher scores on their human resources evaluations. Jeney later sought a Customer Manager position within Quaker, but the position instead went to a 34-year-old employee who a company manager described as “young and promotable.” Although Jeney claimed that this phrase was strongly suggestive of age bias, the court disagreed, noting that Quaker had a right to expect its Customer Managers to be promotable. The court also emphasized that the same person who decided to lay off Jeney had actually saved Jeney from layoff just one year earlier – a fact which further suggested that Jeney was not laid off because of his age. In addition, the court placed little weight on the fact that Quaker used “subjective evaluations” to make its layoff decisions, and that Quaker did not reveal all the details in support of its decisions at the time of the layoffs. According to the court, this was “weak” evidence of age bias, at best.

As for Coleman, the evidence showed that he was selected for layoff because one of the decision-making managers showed “favoritism” for a younger employee with a slightly-lower evaluation rating. However, the court found no evidence that this “favoritism” was motivated by age bias. Coleman also was denied another open position because he was “overqualified,” and because the position would have entailed a significant demotion and salary reduction. Quaker feared that morale would be damaged if Coleman were demoted to this open position. The court ruled that these considerations were legitimate and nondiscriminatory. Although calling an employee “overqualified” can sometimes be a mask for age bias, the court found no evidence to support such a conclusion in this case. (*Coleman v. The Quaker Oats Co.*)

- **“Ageist” Comments.** The Second Circuit U.S. Court of Appeals recently upheld a judgment for the New York Racing Association in an age bias lawsuit filed by one of its former employees, Dennis James, despite some “ageist” comments allegedly made by senior management. The employer laid off James as part of an 11 percent overall reduction in force. According to James, some of the managers expressed hope to save the business so that the “younger guys . . . could have a job in the future,” and also said that there were “too many older supervisors and some of them needed to retire.” However, the court found “overwhelming” evidence that the decision to terminate James was “motivated by the need to save large amounts of operating costs so as to avoid bankruptcy.” In this context, the court reasoned that the employer’s “concern with the elevated costs of senior employees does not constitute age discrimination.” (*James v. New York Racing Ass’n*) Employers should note, however, that the result in the *James* case probably would have been different if the lawsuit had been brought under California’s age bias law, which generally prohibits employers from using older workers’ high salaries as a basis for making termination decisions.

- **Settlement Agreements For Employees Over Age 40.** The Equal Employment Opportunity Commission recently issued a new rule which reinforces the need for employers to comply with the technical requirements of the federal Older Workers’ Benefit Protection Act (“OWBPA”) when entering into separation or settlement agreements with employees who are over 40 years old. Under such agreements, the employee typically receives severance pay in exchange for a release of all potential claims, including any claims under the federal Age Discrimination in Employment Act (“ADEA”). The OWBPA contains several technical requirements to make sure that older employees are not unfairly coerced or manipulated into waiving their rights under ADEA. In particular, for a waiver to be valid under OWBPA, it must be written in a clearly understandable manner; it must specifically refer to the employee’s rights under the ADEA; it must advise the employee to consult an attorney prior to signing the waiver; it must be given in exchange for money or other such consideration;

it cannot waive rights that arise after the signing of the waiver; and the employee must be given enough time to consider the waiver before signing it and to revoke the waiver after signing it. In its 1998 decision in the *Oubre* case, the United States Supreme Court ruled that if a release does not satisfy the technical requirements of OWBPA, the employee can keep the severance and sue the employer under the ADEA.

The EEOC's new rule expands on the *Oubre* decision in several ways. It prohibits employers from drafting release agreements that require the employee to refund the severance money as a condition for filing a lawsuit which contests whether the waiver of ADEA claims is valid under OWBPA. Under the new rule, such agreements cannot require the employee to pay financial penalties, such as damages or attorneys' fees, for filing a lawsuit challenging a waiver of ADEA claims under OWBPA. In addition, the employer cannot respond to such a lawsuit by unilaterally rescinding the release agreement. However, if the employee wins on an ADEA claim and is awarded money damages, the employer may be reimbursed in the amount of either (1) the severance money it paid to the employee or (2) the money damage award the employee won in court, whichever is *lower*. The EEOC's new rule may be found on the internet at <http://www.eeoc.gov/regs/tenderback.html>, and a list of frequently asked questions (with answers) is provided at <http://www.eeoc.gov/regs/tenderback-qanda.html>. Consult your contact at the Firm if you have further questions on this new rule.

EMPLOYER LIABILITY FOR RAPE

The California Court of Appeal has reaffirmed the rule that an employer cannot be held vicariously liable for the on-the-job sexual misconduct committed by its employees, unless the misconduct is committed within the "course and scope of employment." The court's ruling came in a case where a male security guard employed by Westec Residential Security allegedly raped a female motorist. The woman alleged that the guard, who posed as a police officer, pulled her over on Pacific Coast Highway, detained her by flashing a spotlight into her car, and asked her how much she had been drinking. The woman, a Swedish citizen living in California, testified that the guard threatened to deport her unless she cooperated. According to the woman, the guard said he was going to "take her to the station," but instead he took her to another location and raped her. The woman claimed that Westec was liable for the rape allegedly committed by the security guard. The Court of Appeal disagreed, and concluded that the guard's alleged misconduct fell outside the scope of his employment with Westec. The court specifically noted that Westec's written policy manual prohibited many of the acts the guard was accused of committing. Among other things, the policy manual required security guards to limit their involvement to Westec client-related incidents only, and prohibited guards from implying they were police officers, detaining individuals or using

their spotlight on moving vehicles. Despite the fact that the alleged rape occurred while the guard was on duty for Westec, it did not arise out of the performance of his duties. Instead, the misconduct was strictly personal and unrelated to the guard's duty to protect Westec clients. The court also found that the rape was not foreseeable based on the nature of the guard's duties, nor could it be attributed to any aspect of Westec's business operations. Accordingly, the court ruled that Westec could not be liable for the alleged rape as a matter of law. (*Maria D. v. Westec Residential Security*)

WORKERS' COMPENSATION FRAUD

A recent decision by the California Court of Appeal sends a strong message to employees who attempt to exaggerate workplace injuries. The court upheld an order requiring an injured employee, Belquis Amin, to pay nearly \$30,000 in restitution to an insurance carrier she had defrauded in a workers' compensation action. Amin, who worked as a waitress at a hotel in Pleasanton, was injured on the job when she slipped on a lemon peel and fell down. Amin's personal physician, Dr. Jay Patel, diagnosed her with severe pain and declared her unable to walk or drive, or even function at home. The insurance carrier paid Amin \$43,486 for her injuries. However, the agreed medical examiner and a psychiatrist both suspected that Amin was exaggerating her injuries. The carrier conducted an investigation and came up with "smoking gun" evidence: a surveillance video which showed Amin engaging in activities she claimed she was physically incapable of performing. These included Amin driving her children to school, walking without any apparent restrictions (even in heels), leaving her home with a briefcase and driving her car. On one occasion, Amin was videotaped driving to the house of a friend who then drove Amin to a medical appointment. When Amin arrived at the appointment, she suddenly appeared severely injured, unable to walk without the use of a walker or without assistance of her friend, both upon entering and exiting the doctor's office. Less than one hour later, upon returning to her friend's house, Amin was suddenly able to walk again with no assistance, going down the staircase of the apartment without even using the handrail, and driving back to her own home. Based on these facts, a prosecutor filed a criminal complaint against Amin. Eventually, Amin pleaded guilty to one count of violating an Insurance Code section which makes it a crime to present a false or fraudulent statement in support of a workers' compensation claim. Amin was sentenced to probation and agreed under a plea bargain to pay restitution on all counts. The trial judge ordered Amin to pay \$29,983 to the carrier. Nearly \$10,000 of that amount was to reimburse medical expenses which the carrier had previously paid for Amin. The remaining \$20,000 covered attorney fees, investigation costs and court reporter fees. Remarkably, Amin appealed on the grounds that she should not have been ordered to pay restitution since she did, in fact, suffer a legitimate workplace injury. The appellate court gave short shrift to this argument in light of

Amin's plea bargain agreement. The court also ruled that the amount of the restitution award against Amin was not excessive. (*People v. Amin*)

PREGNANCY DISCRIMINATION

- ***EEOC Rules Health Plans Must Cover Birth Control.*** In a controversial development, the EEOC has ruled that health plans may violate the federal Pregnancy Discrimination Act of 1978 if they fail to cover the cost of female prescription contraceptives. The EEOC reasoned that when Congress passed the pregnancy bias law, it intended to “equalize opportunities for men and women and to address discrimination against female employees based on the assumption they would become pregnant.” According to the EEOC, because women control their ability to become pregnant by using contraceptives, a health plan commits discrimination by failing to cover contraceptives while it does cover other preventive measures or drugs. The EEOC's ruling came in a complaint brought by Planned Parenthood on behalf of two nurses, who claimed sex discrimination because their health plans covered the costs of Viagra prescriptions, sterilization and vasectomies for men, but not female prescription contraceptives. Employers should consult with their health plan administrators to be sure this important coverage is available.

- ***Non-Pregnant Employee Protected Against Bias.*** Pregnancy bias is no joking matter for employers – even when the joke is made by an employee who is not really pregnant at all. A federal judge in New York ruled that a woman who only joked that she might become pregnant in the future was protected against ***retaliation*** under the federal Pregnancy Discrimination Act. The plaintiff in this case, Joelle Gaugaix, worked as a consultant for a beauty products company. When Gaugaix had a job interview with the company's General Manager, Daniel Masson, she claimed she told Masson she would be getting married in a few months and wanted two weeks' off for her honeymoon. Masson did not object, but allegedly asked Gaugaix if she planned on becoming pregnant after her wedding, because he was openly against paying benefits to pregnant employees. Gaugaix assured him that she would not get pregnant anytime soon because she wanted to concentrate on her career. A few months after Gaugaix was hired, Masson allegedly overheard her telling a colleague that she felt ill and nauseous. Gaugaix claimed that Masson approached her with a “knowing smile,” and that she responded by assuring him she was not pregnant because she was not yet married. Masson allegedly responded that Gaugaix did not have to be married to be pregnant. One month later, Gaugaix and Masson discussed a skin care evaluation form which included a question relating to skin care clients' use of drugs taken every day. Gaugaix responded that birth control pills are taken every day and have an adverse effect on women's skin. Masson replied that if birth control pills caused an adverse effect on skin,

Gaugaix should stop taking them and have children. Gaugaix responded to this by stating, “yes, you are right, I think I will have some soon.” Six days later, Masson terminated Gaugaix. Masson tried to get the case thrown out prior to trial by denying that he made any of these pregnancy-related statements and claimed that he terminated Gaugaix for performance reasons. However, the judge stated that a jury would get to decide the case even though Gaugaix was not pregnant when she was terminated. The court ruled that she would be protected from “retaliation” under the Pregnancy Discrimination Act if a jury believed that her boss believed she would become pregnant in the immediate future and fired her for that reason. (*Gaugaix v. Laboratories Esthederm USA*)

TRANSGENDER BIAS

Employers and courts have struggled in recent years with how to deal with “transgender” employees, a term which covers both transvestites and transsexuals. Last year, the California Legislature considered a bill which would have expressly protected transgender employees, but the bill died in committee. Transgender employees also have attempted to gain relief under existing laws against sex discrimination. One recent case involved Karen Broadus, who was hired by State Farm Insurance Co. as a woman but was in the process of physically transitioning to a biological male. Broadus claimed to be the victim of “sex stereotyping.” Broadus claimed that his supervisor “treated him differently because of his gender identity or transgender issues,” and that he was treated differently “than other female employees because of his male looking appearance.” According to Broadus, the supervisor allegedly gave him suspicious “looks” and “glances,” refused to look him in the eye during conversations, called him on work-related matters rather than using e-mail, did not commend him for a presentation, and required him to drive to another location for meetings. Broadus sued State Farm under the federal job bias law, Title VII. The judge stated it was unclear whether transsexuals are protected under this law, but even if they are protected, Broadus’s facts were insufficient to establish his claim. (*Broadus v. State Farm Ins. Co.*) Meanwhile, as we go to press, San Francisco is expected to approve a controversial ordinance requiring City health plans to cover the medical expenses of sex-change operations and related care.

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Editorial Staff: Richard S. Rosenberg, John J. Manier, Matthew T. Wakefield and John P. Schaedel.