



LABOR AND EMPLOYMENT LAW  
ON BEHALF OF MANAGEMENT  
AND RELATED LITIGATION

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

TELEPHONE:  
818-508-3700

FACSIMILE:  
818-506-4827  
818-985-8167

E-MAIL:

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Dear Clients and Friends of the Firm:

The several weeks since the September 11 terrorist attacks have been painful and trying for all Americans. Employers faced difficult challenges of their own, including heightened security concerns and economic problems. In this issue of the EMPLOYMENT LAW UPDATE, our lead story discusses another issue of immediate concern for employers – the need to prevent a backlash of job bias based on national origin and religion. The federal Equal Employment Opportunity Commission has made this issue a high priority, and is calling upon all employers to promote workplace tolerance. This issue of the UPDATE also includes articles on the following topics:

- U.S. Supreme Court Roundup
- Legislative Update
- Disability Discrimination
- Family and Medical Leave
- Workplace Harassment
- Employment Contracts
- ADR Developments
- Labor Relations
- Immigration Violations
- Sex/Pregnancy Discrimination
- Transgender Bias

We wish you a safe and productive year end.

**Richard S. Rosenberg, Editor**

# EEOC URGES WORKPLACE TOLERANCE IN WAKE OF TERRORIST ATTACKS

The U.S. Equal Employment Opportunity Commission (“EEOC”), the agency which enforces federal job bias laws, has called on all U.S. employers to effectively promote tolerance and guard against unlawful workplace bias – especially discrimination based on national origin or religion. The EEOC’s statement was issued in response to the September 11 terrorist attacks. Cari M. Dominguez, the Chairperson of the EEOC, states: “We should not allow our anger at the terrorists responsible for [the] heinous attacks [of September 11] to be misdirected against innocent individuals because of their religion, ethnicity, or country of origin. In the midst of this tragedy, employers should take time to be alert to instances of harassment or intimidation against Arab-American and Muslim employees. Preventing and prohibiting injustices against our fellow workers is one way to fight back, if only symbolically, against the evil forces that assaulted our workplaces [on September 11].” EEOC has specifically encouraged all employers to do the following: (1) reiterate workplace policies against harassment based on religion, ethnicity, and national origin; (2) communicate procedures for addressing job discrimination and harassment; (3) urge employees to report any such improper conduct; and (4) provide training and counseling, as appropriate. President George W. Bush expressed similar sentiments: “We must be mindful that as we seek to win the war [against terrorism] we treat Arab-Americans and Muslims with the respect they deserve.” The EEOC’s statement is posted on its website, [www.eeoc.gov](http://www.eeoc.gov).

## U.S. SUPREME COURT ROUNDUP

- ***Retaliation Claims.*** The United States Supreme Court has handed down a surprising decision which strictly limits the types of retaliation claims employees may bring under federal job bias laws such as Title VII. The Court unanimously ruled that Shirley Breeden, who sued for retaliation for complaining about alleged sexual harassment, did not have a valid claim because she had no “reasonable belief” that she was the victim of unlawful harassment. Breeden was employed by the Clark County School District in Nevada. She claimed that she met with her male supervisor and another male employee to review the psychological evaluation reports of four job applicants and that one of the men made a sexual remark about her. Evidently, one of the reports they were reviewing disclosed that one of the applicants had commented to a co-employee, “I hear making love to [Ms. Breeden] is like making love to the Grand Canyon.” At the meeting, Breeden’s supervisor read this comment aloud, looked at Breeden and stated, “I don’t know what that means.” The other employee replied, “I’ll tell you later,” and both men chuckled. Breeden complained about the comment and asserted that she was

later given a transfer in retaliation for her complaints. A federal district judge dismissed Breeden's lawsuit, but our Ninth Circuit U.S. Court of Appeals voted 2-1 to overturn that decision and send the case back for trial. The U.S. Supreme Court strongly disagreed with the Ninth Circuit's action – so much so that the High Court took the extremely rare step of “summarily reversing” the Ninth Circuit's decision without full briefing or oral argument. By a 9-0 vote, the Supreme Court ruled that the comments and chuckling by Breeden's male colleagues were, at worst, an “isolated incident” that was not “extremely serious.” As such, Breeden could not have reasonably believed she was the victim of unlawful sexual harassment, and her complaints about the incident were not protected under the law.

The Court also rejected Breeden's retaliation claim. Breeden claimed that she was retaliated against because she filed her lawsuit and her complaint with the U.S. Equal Employment Opportunity Commission. The School District stated that it was already planning to transfer Breeden *before* she filed her suit. The Court ruled that “[e]mployers need not suspend previously planned transfers upon discovering that a [job bias] lawsuit has been filed.” In addition, Breeden's transfer was 20 months after she filed her complaint with the EEOC. The Court found this time lapse was too long to support the conclusion that Breeden was retaliated against for her EEOC complaint. Accordingly, the Court ruled that the School District was entitled to judgment in its favor on Breeden's retaliation claim. (*Clark County School District v. Breeden*)

- ***Labor Arbitration.*** In another major setback for the Ninth Circuit, the U.S. Supreme Court ruled that a labor arbitrator's decision must be upheld even if it is factually incorrect. The claim in this case was brought by former LA Dodger - San Diego Padre Steve Garvey. Garvey alleged that the Padres refused to extend his contract to the 1988 and 1989 seasons because of illegal collusion with other Major League Baseball teams. He filed an arbitration claim and sought \$3 million in damages. In support of his claim, Garvey submitted a letter from the Padres' then-president stating that the Padres had offered Garvey a contract extension through 1989. However, the arbitrator discredited this letter and denied Garvey's claim. The Ninth Circuit vacated the arbitrator's decision because it was “inexplicable” and “irrational,” and then instructed the arbitration panel to enter an award in favor of Garvey. By an 8-1 vote, the U.S. Supreme Court once again took the highly unusual step of “summarily reversing” the Ninth Circuit without full briefing or oral argument. The Supreme Court ruled that courts are “not authorized” to overturn a labor arbitrator's decision, even if the arbitrator commits a serious factual error or grossly misinterprets the parties' agreement. In such circumstances, the only remedy is to send the case back for further arbitration proceedings. (*Major League Baseball Players Assn. v. Garvey*)

- ***Front Pay In Federal Job Bias Cases.*** In a case primarily of interest to employers outside California, the U.S. Supreme Court has ruled that the \$300,000 cap

on damages for most federal job bias claims does *not* apply to so-called “front pay.” This term refers to economic damages from the time a court enters a job bias judgment in favor of an employee until the time the employee is reinstated to his or her former job, or for an additional period of time if no reinstatement is ordered. Federal law does not place any cap on awards of “back pay” (from the time an employee is discharged to the time a court enters judgment in the employee’s favor). The Supreme Court unanimously ruled that “front pay” awards are similarly exempt from the damage cap. However, the cap still applies to awards of compensatory damages (such as emotional distress) and punitive damages in most federal job bias claims, except those involving race discrimination. (*Pollard v. E.I. DuPont de Nemours & Co.*) Notably, California’s job bias laws place no limit at all on the amount of damages which may be awarded.

- ***Punitive Damage Awards.*** The U.S. Supreme Court has made it easier for defendants in lawsuits to overturn massive awards of punitive damages. This issue is particularly important to employers because of the large punitive damage awards juries have handed down in lawsuits for job discrimination, harassment, wrongful termination and the like. In the past, the Supreme Court has stated that some punitive damage awards may be so excessive that they violate the Eighth Amendment to the U.S. Constitution, which prohibits excessive fines and cruel and unusual punishment. Under the Eighth Amendment, punitive damage awards cannot be grossly disproportionate to other damages awarded in a case. The Court has now ruled that appellate courts must independently scrutinize punitive damage awards to determine whether they comply with the constitutional standard. The case before the Court involved claims for false advertising between two tool manufacturers. The jury issued an award of \$50,000 in compensatory damages and \$4.5 million in punitive damages. Our Ninth Circuit U.S. Court of Appeals basically “rubber-stamped” the punitive damage award without independently evaluating whether the award of punitive damages was warranted. According to the Supreme Court, this was wrong. The Supreme Court sent the case back to the Ninth Circuit to conduct a “thorough and independent review” of the punitive damage award. (*Cooper Industries v. Leatherman Tool Group*)

## LEGISLATIVE UPDATE

Governor Gray Davis has recently signed several new labor and employment bills into law. Each of these new laws takes effect January 1, 2002.

- ***Prohibitions On English-Only Policies.*** For the third year in a row, the California Legislature and Governor Davis have dramatically expanded the reach of our state’s job bias law, the Fair Employment and Housing Act (“FEHA”). Under the “California Workplace Language Policies Act” (AB 800), employers are prohibited from

adopting or enforcing any language restriction in the workplace, such as an “English-only” policy, unless: (1) the policy is “justified by business necessity”; **and** (2) the employer gives notice of the circumstances and the time when the policy must be observed, and of the consequences for violating the policy. The “business necessity” test may be difficult, if not impossible, for most employers to satisfy. It applies only where: (1) the policy “is necessary to the safe and efficient operation of the business”; (2) the policy “effectively fulfills the business purpose it is supposed to serve”; **and** (3) there are **no** less discriminatory alternatives. AB 800 goes far beyond the guidelines issued by the U.S. Equal Employment Opportunity Commission, which permit “English-only” policies that serve “legitimate business purposes.” The enactment of AB 800 received very little media coverage because Governor Davis signed the bill on September 12, the day after the terrorist attacks on the East Coast. Davis praised AB 800 as “a balanced measure that protects the rights of employees and employers.” In fact, however, AB 800 probably outlaws the vast majority of English-only policies in California. Employers who violate AB 800 may be sued under FEHA, and could be required to pay massive money awards, including attorneys’ fees and punitive damages. Opponents of AB 800 have argued that the bill violates the English-only amendment to the state Constitution which the voters approved in 1986 (Proposition 63). Thus, it is likely that AB 800 will be challenged in court. For now, the law is scheduled to take effect January 1, 2002. Employers must be extremely careful to prevent their managers and supervisors from adopting or enforcing any workplace language restrictions – whether written or unwritten – unless all elements of the strict “business necessity” standard can be satisfied. Employers wishing to implement English-only policies should consult their contact at the Firm.

- ***Lawful Off-Work Activities.*** AB 1015 makes it illegal for employers to terminate or otherwise retaliate against an employee or job applicant for engaging in ***any*** “lawful conduct occurring during non-working hours away from the employer’s premises.” Such retaliation is also prohibited by AB 1015 if it is based on the employee’s or applicant’s political affiliations. However, these provisions do not invalidate properly-worded conflict-of-interest provisions in “***signed***” employment contracts or union contracts if “breach of that contract would actually constitute a material and substantial disruption of the employer’s operation.” This bill expands a previous law Governor Davis signed in 1999 regarding lawful off-work activities of employees. AB 1015 now makes such retaliation a misdemeanor. Employees who claim their rights under AB 1015 have been violated may bring a claim before the Labor Commissioner or file a civil lawsuit. It is even possible that AB 1015 will provide the basis for lawsuits for personal injury-type damages. Once again, this law dramatically limits employers’ rights to terminate and discipline their employees. It also provides a new incentive for employers to enter into written employment agreements with strict prohibitions against conflicts of interest.

- ***Domestic Partner Benefits.*** Gay rights groups scored a major victory when Governor Davis signed AB 25 into law. Among other things, this new law expands sick leave, health coverage, tax benefits and disability pay for domestic partners of employees receiving such coverage. For many of these benefits, domestic partners now have the same rights as spouses, children and parents of employees on these matters. In particular, group health care plans and group disability insurance policies must now offer coverage for domestic partners on the same terms and conditions as dependents. Employers need not purchase such coverage, but if they do, the carrier must enroll the domestic partner. AB 25 also amends the “kin-care” law enacted in 1999, which requires employers to allow employees to use up to half of their accrued sick leave to attend to an illness of a spouse, child or parent. Domestic partners have been added to this list for kin care benefits. To be eligible for these new benefits, domestic partners must file a Declaration of Domestic Partnership with the Secretary of State.

- ***Break Time To Express Breast Milk.*** AB 1025 requires employers to give female employees a “reasonable” amount of break time to express breast milk for the employee’s infant child. If possible, this break time shall coincide with the break time the employee already receives. If the employee needs additional break time to express breast milk, it shall be unpaid. In addition, the employer must make “reasonable attempts” to find a private location – other than a toilet stall – for the employee to express her breast milk. Employers need not comply with these requirements if they can prove it would “seriously disrupt” their business operations. However, employers who violate AB 1025 may be fined up to \$100 per violation and face citation by the Labor Commissioner.

- ***Unemployment Benefits To Skyrocket.*** SB 40 will cause the maximum weekly unemployment insurance benefit to nearly ***double*** over the next three years. Currently, the maximum benefit is \$230 per week. This weekly benefit will increase to \$330 by January 1, 2002; to \$370 by January 1, 2003; to \$410 by January 1, 2004; and to \$450 by January 1, 2005. SB 40 also makes it easier for unemployed persons to receive the maximum weekly benefit, by increasing the “replacement rate” (the rate of wages which may be replaced by unemployment benefits) from 39% to 50%. In addition, SB 40 allows persons who are only available for part-time work to recover unemployment benefits. SB 40 creates further problems for employers who engage in a mass layoff but fail to comply with the strict notice requirements under federal Worker Adjustment Renotification and Training Act (“WARN Act”). Under SB 40, any payments made by an employer who does not comply with the WARN Act ***will not be counted*** against the employee for purposes of calculating unemployment benefits.

- ***Displaced Janitors.*** The “Displaced Janitor Opportunity Act” (SB 20) places new restrictions on contractors and subcontractors who provide janitorial services. Once a company is awarded a janitorial service contract or subcontract on a job site, the company must retain certain employees who worked on that site for the previous

contractor or subcontractor for at least 60 days. The law applies to all contractors with 25 or more employees, and protects janitors who work at least 15 hours per week and who are not managers or supervisors. During the 60-day transition period, janitors cannot be discharged except for “cause,” which “shall be based only on the performance or conduct of the particular employee.” After the 60-day period, all janitors may be terminated at-will, with or without cause. SB 20 will apply to all contracts or subcontracts entered into on or after January 1, 2002.

## DISABILITY DISCRIMINATION

- **Reasonable Accommodations.** The U.S. Supreme Court has agreed to review a major decision by our Ninth Circuit U.S. Court of Appeals which drastically expanded an employer’s duty under the Americans with Disabilities Act (“ADA”) to accommodate persons with disabilities. (*U.S. Airways v. Barnett*) As reported in the November 2000 UPDATE, the Ninth Circuit in *Barnett* stated that an employer could be required to give an employee a transfer to another job as a reasonable accommodation, even if this would violate the company’s seniority system for non-union employees. The Ninth Circuit also ruled that the ADA requires employers to engage in an “interactive process” with disabled employees in evaluating potential reasonable accommodations. The U.S. Supreme Court decided to review the seniority system issue, but *not* the “interactive process” question. A final decision in the *Barnett* case is expected by next June.

- **Performance Of Manual Tasks.** The U.S. Supreme Court also has announced it will decide whether an employee who is substantially limited in performing a number of manual tasks associated with a specific job qualifies as “disabled” under the ADA. (*Toyota Motor Mfg. v. Williams*) The Sixth Circuit U.S. Court of Appeals ruled in the *Williams* case that the plaintiff’s physical difficulties in using her hands, arms and shoulders, as required by her job, constituted a disability. Other courts have disagreed and found that the ability to perform such manual tasks is not a “major life activity.” The U.S. Supreme Court is expected to decide the *Williams* case by next June. However, California employers should note that manual tasks *are* defined as a “major life activity” under regulations issued by the state Fair Employment and Housing Commission under California’s job bias statute.

- **“Continuing Violations.”** The California Supreme Court has set a new standard for determining when the statute of limitations begins to run in disability accommodation and harassment cases where the employee has alleged a “continuing violation.” Under California law, an employee who alleges job bias must file either a lawsuit or an agency complaint within one year after the discriminatory conduct occurred.

However, plaintiffs' lawyers have often succeeded in getting around the statute of limitations by arguing that conduct which occurred in the distant past should be permitted as part of a lawsuit because it is part of one big "continuing violation." In *Richards v. CH2M Hill*, the state Supreme Court applied the "continuing violation" theory for the first time in the context of a disability accommodation lawsuit. Lachi Delisa Richards, who has multiple sclerosis, claimed that her former employer failed to accommodate her condition on several occasions over a five-year period, and that she was subjected to harassment based on her disability. Among other things, Richards alleged that the employer continually failed to fix her problems with wheelchair access and neglected to prepare an adequate fire escape plan. A jury agreed and awarded Richards \$1.4 million in damages on her harassment and accommodation claims. However, the California Court of Appeal threw out the verdict and ruled that most of Richards's claims were barred by the one-year statute of limitations.

The state Supreme Court then decided to review the case, and has now adopted a new standard for "continuing violations" which is more plaintiff-friendly than the test used by the Court of Appeal. Specifically, the Supreme Court declared that "an employer's persistent failure to reasonably accommodate a disability, or to eliminate a hostile work environment targeting a disabled employee, is a continuing violation" if three conditions are satisfied. **First**, the employer's unlawful actions must be "sufficiently similar in kind." **Second**, the acts must "have occurred with reasonable frequency." **Third**, the conduct must have "**not** acquired a degree of permanence." The Court in *Richards* found sufficient evidence that the harassment and failures to make reasonable accommodation **were** sufficiently similar and frequent. The Court also explained that the employer's conduct would be sufficiently "permanent" to start the limitations period once the conduct has stopped, or whenever the employer' "statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile." However, the Court did **not** decide whether the conduct in the *Richards* case had become permanent enough to require Richards to file her suit within one year of the conduct. Instead, the Supreme Court ordered the case sent back to the trial judge for further consideration. It therefore remains to be seen whether Richards's \$1.4 million jury verdict will survive. In the meantime, the *Richards* decision will make it more difficult for California employers to win dismissal of harassment and disability accommodation lawsuits under our state's job bias law based on the statute of limitations.

**NOTE:** The U.S. Supreme Court is scheduled to decide a case involving the "continuing violation" theory under **federal** job bias laws. (*National Railroad Passenger Corp. v. Morgan*) The Ninth Circuit U.S. Court of Appeals ruled in this case that Abner Morgan may sue his former employer, Amtrak, for harassment based on events which occurred outside the statute of limitations, so long as such events were "sufficiently

related” to acts which occurred within the limitations period. This is a far more anti-employer standard than the California Supreme Court adopted in the *Richards* case. In asking the U.S. Supreme Court to take the *Morgan* case, Amtrak argued that the Ninth Circuit’s decision opens the door to job bias lawsuits by employees who *knowingly* allow the statute of limitations to expire. Other federal courts have taken a more restrictive view than the ones adopted in *Richards* or *Morgan*, and have ruled that the limitations period starts running whenever the employee has reason to know that he or she has been the victim of unlawful job bias. The U.S. Supreme Court is expected to decide the *Morgan* case by June 2002. However, the final ruling in *Morgan* will not affect the California Supreme Court’s recent decision in *Richards*. By the same token, the U.S. Supreme Court is free to ignore the *Richards* decision when it rules on the *Morgan* case. It is therefore possible that employers will be subjected to *different* standards for “continuing violations” under state and federal law.

- ***Limitations on Major Life Activities.*** As reported in the November 2000 UPDATE, California’s disability bias law was significantly broadened last year by AB 2222. Among other things, AB 2222 provided that a disabling condition need only “limit” one or more “major life activities,” and rejected prior court decisions which required an employee to prove a “substantial limitation.” Most California employers and commentators viewed AB 2222 as broadly expanding our state’s disability bias laws. However, California appellate courts have issued conflicting opinions on just how dramatic this change was. One appellate panel recently found that California law *never* required a “substantial limitation” in physical disability cases, but instead has always protected employees with “mere limitation[s]” on major life activities. The court thus found AB 2222 did *not* result in “a ‘radical change’ to California’s disability civil rights law.” (*Wittkopf v. County of Los Angeles*) By contrast, another appellate panel came to the opposite result, and relied on numerous cases decided prior to the passage of AB 2222 which stated that an employee had to prove a “substantial limitation” in order to establish a physical disability. The court also ruled that AB 2222 does not apply retroactively to claims which arose in the year 2000 or earlier. (*Colmenares v. Braemar Country Club*) The California Supreme Court recently announced that it will review both the *Colmenares* and *Wittkopf* cases, which means that employers can expect a final resolution on these important issues once and for all. Meanwhile, there is no question that the *current* version of our state’s disability bias law protects employees with physical or mental conditions which impose “mere limitation[s]” in major life activities, and requires California employers to provide “reasonable accommodations” to such employees.

In contrast to California law, the ADA still requires that an employee prove a “substantial limitation” with respect to one or more major life activities. In one recent case, the Ninth Circuit U.S. Court of Appeals rejected the ADA claim of a former part-time newspaper reporter for the Fresno Bee, Jacalyn Thornton, who suffered from carpal

tunnel syndrome. Thornton's condition restricted her ability to engage in keyboard and handwriting activities. However, Thornton provided no evidence that she was precluded from working in a broad class of jobs, while the employer offered evidence that Thornton remained able to work as a freelance journalist and a teacher. The court found that Thornton was *not* substantially limited in the major life activity of working. Thornton also argued she was substantially limited in the performance of "manual tasks," but the court disagreed, noting that Thornton could perform a wide variety of such tasks, such as shopping, driving, making beds, doing laundry and dressing herself. The court also found that Thornton was not "regarded as" disabled, because there was no evidence that the employer viewed her as having any substantial limitations. (*Thornton v. McClatchy Newspapers*) This case illustrates the extreme breadth of California's new disability bias and accommodation provisions. Under our state's current law, Thornton could have proven she was disabled merely because she was "limited" in performing her reporter job with the Fresno Bee. Thornton's lawsuit did include a claim under California law, but her case arose before AB 2222 was enacted. The Ninth Circuit chose not to decide whether AB 2222 applies to cases decided before 2000, and instead sent the case back to the lower court to address the issue.

- ***Essential Job Functions And Business Necessity.*** Under both state and federal law, an employee is not protected against disability discrimination unless he or she is "qualified" to perform the "essential functions" of the job in question. The San Jose Police Department has maintained that the ability to make forcible arrests and subdue fleeing suspects are essential functions of most police officer positions. Despite the apparent logic of this position, the Ninth Circuit U.S. Court of Appeals has rejected it. The court reinstated a lawsuit under state and federal disability bias laws filed by 6 San Jose police officers who claim they were unlawfully excluded from lucrative "specialized assignments" (such as investigative and training positions) because they are disabled. The city requires officers to serve on "beat-patrol" for at least one year before going on specialized assignments, and to return to beat-patrol after about 3 years on specialized assignments. However, the plaintiffs' disabilities render them unable to serve on beat-patrol, because they cannot forcibly arrest or subdue criminal suspects. As such, the city's policy prevents the disabled officers from serving on specialized assignments, even though some of those assignments do not necessarily require the officers to make forcible arrests or subdue suspects. Instead, the city places its disabled officers on "modified duty" assignments, which are allegedly far less desirable than specialized assignments. The city's policies also make it difficult, if not impossible, for disabled officers to obtain promotions, since service on beat-patrol is generally necessary for such promotions. The Ninth Circuit found there was a factual dispute as to whether the ability to make forcible arrests or subdue suspects was an "essential function" of all specialized assignments on the police force. The court also concluded that the city's policies tended to exclude disabled officers from specialized assignments and promotions, and that the city could not

establish the requisite “business necessity” for its policies. Although there may be a business necessity for officers on specialized assignment to be able to perform patrol duties, the court found no such necessity for applying this requirement to **disabled** officers. The Ninth Circuit sent the lawsuit back to the lower court, where a jury trial will probably be necessary to decide the officers’ claims. (*Cripe v. City of San Jose*)

- **“After-Acquired Evidence” of Lack of Qualifications.** The California Court of Appeal recently ruled that an expert medical opinion in a disability discrimination case which was provided **after** an employee filed his lawsuit can be used to show the employee was not qualified to perform essential job functions. In the case before the court, plaintiff Terry Finegan was removed from his position as a nurse in the psychiatric ward of Harbor- UCLA Medical Center. One of the essential functions of this job was the ability to physically intervene when patients became disruptive. Finegan suffered from a back condition which limited his ability to lift heavy objects or engage in certain repetitive movements. The Hospital eventually concluded that Finegan was no longer able to perform the essential functions of his job due to his physical condition. Finegan sued for disability discrimination, but a jury found in favor of the Hospital. During the course of Finegan’s lawsuit, the Hospital obtained expert testimony from a doctor who agreed that Finegan was unable to perform his essential job functions at the time he was removed from his position. Finegan argued that the doctor’s testimony constituted “after-acquired evidence” and should not have been permitted at his trial. The appellate court disagreed and ruled that an employer may use medical evidence obtained after-the-fact to show that an employee was not qualified for the job. (*Finegan v. County of Los Angeles*)

- **Drug and Alcohol Abuse.** While some courts have found that drug addiction and alcoholism may be protected “disabilities” the ADA allows employers to discipline or discharge employees for poor performance or misconduct which is related to an employee’s use of drugs or alcohol. The Ninth Circuit U.S. Court of Appeals recently relied on these provisions in rejecting the ADA claim of Karen Brown, who was jailed in November 1996 for driving under the influence of alcohol and for possession of methamphetamine. Six days after her arrest, Brown’s employer, Lucky Stores, terminated her for abandoning her job. The Ninth Circuit ruled that Lucky did not violate the ADA by terminating Brown. The court noted there was no evidence that Lucky terminated Brown because of her status as an alcoholic, rather than because of job abandonment. Brown argued that she was protected under a provision of ADA which provides a “safe harbor” for employees who successfully complete a drug rehabilitation program **and** refrain from illegal use of drugs. However, the court stated that an employee must refrain from drug or alcohol use “for a significant period of time.” Here, Brown started a rehabilitation program just **one day** before she was terminated, and five days after her drunk driving arrest. The court found that Brown had not refrained from

drug or alcohol use for a sufficient time period, and thus was not protected by the ADA's "safe harbor" clause. (*Brown v. Lucky Stores, Inc.*)

- ***Grooming Standards.*** A recently-filed lawsuit in Northern California has renewed the debate over whether some grooming standards may violate job bias laws and disability accommodation requirements. The city of Berkeley has threatened to terminate Harry Vernon, who has worked for 23 years as a firefighter for the city, unless he shaves his beard. Vernon is an African-American who suffers from a skin condition that causes painful ingrown hairs after close shaves. This skin condition affects nearly half of all African-American men. When Vernon has tried to shave in the past, he developed painful bumps on his face which took several weeks to heal and which prevented him from using face mask respirators which firefighters must wear while battling blazes. Vernon now maintains a modest beard which he refuses to shave. In response to the city's threats of termination, Vernon filed a lawsuit in Alameda Superior Court in early July against the city and the state for race discrimination and failure to make disability accommodations. If the case proceeds to a trial or appeal, it may set an important precedent on the legality of grooming standards in the workplace.

## FAMILY AND MEDICAL LEAVE

- ***Supreme Court To Decide Validity Of Labor Department Regulation.*** The U.S. Supreme Court has decided to review a case which challenges the validity of a controversial Department of Labor ("DOL") regulation under the federal Family and Medical Leave Act ("FMLA"). As reported in previous issues of the UPDATE, this regulation provides that an employee's leave of absence cannot be counted against the annual allotment of 12 weeks' FMLA leave unless the employer has expressly designated the leave as FMLA leave. In *Ragsdale v. Wolverine Worldwide*, the Eighth Circuit U.S. Court of Appeals rejected this DOL regulation as an invalid expansion of the rights granted by FMLA. However, the Sixth Circuit U.S. Court of Appeals came to the opposite conclusion in *Plant v. Morton International* and upheld the DOL regulation. As a result, the employee in *Plant* was given an **additional** 12 weeks of FMLA leave, above and beyond the 12 weeks provided in the statute. The U.S. Supreme Court has now agreed to review the *Ragsdale* case and is expected to resolve the validity of the DOL regulation once and for all. The High Court will hold arguments in the case this Fall and should render its decision no later than June 2002.

- ***Calculating Eligibility For Family Leave.*** The Ninth Circuit U.S. Court of Appeals recently issued one of the most anti-employer FMLA decisions in the brief history of the law. The court's decision in *Bachelder v. America West* dramatically expands employer liability under the FMLA and creates traps for employers in calculating

eligibility for family leave. The court noted that DOL regulations give employers four ways in which to calculate FMLA eligibility. These methods are: (1) the calendar year, beginning January 1; (2) a fixed, 12-month “leave year,” beginning on any date; (3) a 12-month period measured *forward* from the employee’s first date of FMLA leave; and (4) a “rolling” 12-month period measured *backward* from the date an employee uses any FMLA leave. Under the Ninth Circuit’s ruling, an employer must *explicitly state* in writing which of these methods it decides to use. The consequences for failing to comply with this requirement will be extremely severe. The Ninth Circuit ruled that if an employer fails to specify the option it seeks to use, the courts will impose the method that results in “*the most beneficial outcome for the employee.*”

America West fell victim to this harsh standard in the *Bachelder* case. The airline’s employee handbook contained language which quite clearly indicated that it used the “rolling” method of calculating FMLA eligibility. For the Ninth Circuit, however, the language was not clear enough, so the court saddled America West with the method most favorable to the plaintiff in this case, Penny Bachelder. America West had terminated Bachelder in part because of excessive absenteeism, including 16 absences in early 1996 due to the illnesses of her baby and herself. Under the “rolling” method, Bachelder’s absences were not protected under FMLA, because she already had taken the maximum 12 weeks’ leave in mid-1995. However, Bachelder’s absences *were* protected under the “calendar year” method, which focused only on her 1996 absences. America West contended that it had two other performance-related reasons for terminating Bachelder, and that it had a “good faith” belief that Bachelder’s 1996 absences were not protected under FMLA. The Ninth Circuit rejected both arguments. Instead, the court ruled that FMLA is violated whenever an employer uses protected leave as “a negative factor” in making an adverse employment decision – even if the employer has several other reasons for making that decision, and even if the same decision would have been made *regardless* of the employee’s FMLA leave. This is a far more stringent standard than that used under state and federal job bias laws. The court also stated that “good faith” is *not* a defense to liability under FMLA, although it may limit an employer’s exposure to liquidated damages under the statute. As a result of these legal rulings, the Ninth Circuit found that America West violated FMLA and that Bachelder was entitled to judgment in her favor *without a jury trial*.

The Ninth Circuit’s *Bachelder* decision is certain to spark wide controversy in the employment community. For now, employers must be more careful than ever before in crafting handbook language on family leave policies to ensure that they avoid the same fate that befell America West. Employers also must exercise extreme caution before terminating employees for absenteeism – especially if the employee’s absences might qualify for protection under FMLA. You may consult your contact at the Firm with any questions on FMLA-related issues.

- ***Flu May Be Covered Under Family Leave Laws.*** It has been commonly understood that influenza is not a “serious health condition” covered by federal or state family leave laws. However, this assumption may not be valid in all cases, according to the Fourth Circuit U.S. Court of Appeals. While recognizing that the flu “normally” does not qualify as a serious health condition, the court found an exception to this rule in the case of Kimberly Miller, who came down with a particularly severe case of the flu. As a result, Miller was unable to work for several days and needed continuing treatment from her doctor. Miller’s former employer, AT&T, terminated her based on her flu-related absences. Miller sued AT&T for violation of the FMLA. A federal district judge ruled in favor of Miller. By a 2-1 vote, the Fourth Circuit affirmed this judgment and found that AT&T violated the FMLA when it terminated Miller. (*Miller v. AT&T Corp.*) *Miller* appears to be the first appellate court decision to find that the flu may be covered under the FMLA, but it probably will not be the last word on this issue. No California appellate court has decided whether the flu may be covered under our state’s version of the family leave law.

## WORKPLACE HARASSMENT

- ***Same-Sex Harassment.*** Federal job bias laws prohibit discrimination based on sex or gender, but do not apply to sexual orientation discrimination. Because of this distinction, same-sex harassment cases have proven to be especially difficult to analyze under federal law. The Ninth Circuit U.S. Court of Appeals has recently reached differing results in two same-sex harassment lawsuits with remarkably similar facts. In one case, the court found that Antonio Sanchez had a valid claim for sex harassment under federal law. Sanchez was employed as a food server at a restaurant in Washington State. He testified that his co-employees regularly subjected him to anti-gay insults, and also referred to him as “she” and “her” and mocked him for acting “like a woman.” Sanchez claimed that he was harassed because he was perceived as effeminate and for failing to conform to male stereotypes. The court ruled that a man who is discriminated against for acting “too feminine” is the victim of sex bias, just like a woman who is treated differently for acting “too masculine.” The court took the drastic measure of throwing out a trial verdict in favor of the employer, and ruled that judgment should be entered in favor of Sanchez on his sex harassment claim. (*Nichols v. Azteca Restaurant Enterprises*) Conversely, in another case, the court rejected the job bias claims of Medina Rene, an openly gay man formerly employed at the MGM Grand Hotel in Las Vegas. Rene claimed his male co-employees constantly subjected to physical and verbal harassment of a sexual and graphic nature. However, Rene admitted that he believed the harassment occurred solely because he is gay. In a 2-1 decision, the Ninth Circuit ruled that such harassment, while “appalling,” does not violate federal law. (*Rene v. MGM*

*Grand Hotel*) The full Ninth Circuit has now voted to **withdraw** the decision in the *Rene* case, and to have the appeal reviewed by an expanded, 11-judge “*en banc*” panel of the court. It may take a year or more before the Ninth Circuit reaches a final decision in the *Rene* case. In any event, these cases demonstrate once again that employers must proceed carefully when faced with complaints of same-sex harassment. This is particularly true in California, where the law prohibits discrimination based on sex **and** sexual orientation.

- ***Employee’s Failure To Use Anti-Harassment Policies.*** As reported in previous editions of the UPDATE, the U.S. Supreme Court’s 1998 decisions in the landmark *Faragher* and *Ellerth* cases allow employers to avoid liability under **federal law** for “hostile environment” sex harassment committed by supervisors, if the employer shows that: (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. In a surprisingly favorable development for employers, the Ninth Circuit U.S. Court of Appeals recently ruled that this defense is also available under **state law** in California. The court thus rejected the sex harassment claim of Leslie Kohler, who alleged she was subjected to sexually offensive conduct by her male supervisor, but quit her job without ever making a complaint under her employer’s written sex harassment policy. Kohler relied on California state court decisions which state that an employer is “strictly liable” for sex harassment committed by supervisors. However, the Ninth Circuit ruled that these decisions do not preclude an employer from avoiding liability if it implements a comprehensive anti-harassment policy which the employee does not bother to use. The court thus ruled in favor of the employer on Kohler’s sex harassment claim under California state law. (*Kohler v. Inter-Tel Technologies*) It should be noted that the Ninth Circuit’s decision is not binding on California state appellate courts, which will have the final word on this issue. Nevertheless, the *Kohler* decision should further encourage California employers to implement thorough and effective policies against workplace harassment.

- ***Employer Liability For Rape Committed By Client.*** A recent decision by the Ninth Circuit underscores the need for employers to properly respond to **all** sex harassment complaints made by employees – even where the harassment is allegedly committed by a customer or client, and especially where the act of harassment is rape. The court reinstated a sex harassment and retaliation lawsuit by Maureen Little against her former employer, Windemere Relocation, Inc., in Washington state. Little worked as a Corporate Services Manager, a job which required her to establish business relationships with corporate clients and potential clients. In September 1997, Little had dinner with a Starbucks Human Resources Director, Dan Guerrero, to discuss the Starbucks account. According to Little, she became ill during dinner and passed out. When she awoke, Guerrero was raping her in his car. Little alleged that Guerrero raped

her two more times in his apartment. Because of the importance of the Starbucks account, Little claimed she was reluctant to tell anyone at Windemere about the rapes. Eventually, Little spoke with two company managers, but both advised her not to tell anyone about the rapes, especially the company's president, Gayle Glew. The company never investigated Little's allegations. Little was told she no longer had to work on the Starbucks account, but Glew continued to ask Little about the status of the account. Finally, Little told Glew about the rapes. Glew allegedly responded by saying he did not want to hear anything about it and that Little's salary was being cut by one-third. When Little complained that the pay cut was unacceptable, Glew sent her home for two days "because he did not want any clouds in the office." When Little returned to work, Glew said she should move on and "clean out her desk." Little sued Windemere under federal and state law. A lower court dismissed Little's claims, but the Ninth Circuit overturned this ruling and sent the case back for trial. The appellate court stated that the rapes clearly constituted "severe" sexual harassment, and that Windemere could be held responsible because it failed to take any remedial or corrective action. In addition, the court found ample evidence that Windemere retaliated against Little for complaining about the rapes. (*Little v. Windemere Relocation, Inc.*)

## EMPLOYMENT CONTRACTS

- ***At-Will Agreements.*** The California Court of Appeal has recently reaffirmed that the easiest way for an employer to maintain an at-will employment policy is to enter into express, written at-will agreements with its employees. The court rejected the constructive discharge lawsuit of Charles Starzynski, who worked as Program Director for Sacramento public radio stations KXPR and KXJZ from 1979 until he resigned in 1998. In December 1991, Starzynski signed an agreement which stated in part: "I understand and agree that my employment is At-Will and that either KXPR/KXJZ or I may terminate the employment relationship at any time, with or without cause or advance notice. I understand further that only the Board of Directors, by affirmative action, has the authority to change or make any agreement contrary to this at-will employment relationship." Despite this written agreement, Starzynski claimed his supervisor orally assured him, both before and after he signed the agreement, that he could only be terminated for "good cause." Starzynski claimed the radio station constructively discharged him due to "intolerable" working conditions, in violation of the alleged oral assurances made by his supervisor. However, the court found that Starzynski was bound by the written at-will employment agreement which he signed, and that the agreement clearly precluded Starzynski from relying on the oral statements his supervisor supposedly made. The court therefore ruled in favor of the radio station on all of Starzynski's claims. (*Starzynski v. Capital Public Radio, Inc.*)

- ***Court Enforces Agreement To Shorten Limitations Period.*** In a potentially ground-breaking decision, the Ninth Circuit U.S. Court of Appeals has enforced an employment contract provision which prohibited four California employees from bringing any employment-related lawsuit more than six months after the employees' termination dates. The four plaintiffs in this case sued their former employer, Western & Southern Life Insurance Company, for wrongful termination in violation of public policy. Under California law, a public policy lawsuit such as this may be brought within one year after termination of employment. However, the agreements signed by all four employees waived the one-year limitation period and replaced it with the shorter six-month period. The plaintiffs argued that the agreements should not be enforced, but the Ninth Circuit disagreed. Relying on several earlier appellate court decisions which upheld similar agreements, including a 1920 California Supreme Court case involving an employment contract with a six-month limitations period, the Court barred three of the employees' suits. However, the court struck down another clause in the contract which required employees to give the company 10 days' notice prior to filing any lawsuit. The court saw no legitimate purpose for this notice requirement, since 10 days is too short a time for the company to do anything about a proposed lawsuit. Instead, the court concluded that the notice requirement would only "maximize employer advantage" by increasing the likelihood that an employee's lawsuit would be barred for failure to comply with a procedural technicality. The court therefore revived the claim of a plaintiff who complied with the six-month limitations period but failed to give 10 days' notice. (*Soltani v. Western & Southern Life Ins. Co.*)

## ADR DEVELOPMENTS

- ***EEOC Lawsuits.*** The U.S. Supreme Court recently heard oral arguments in yet another case concerning the scope of mandatory agreements to arbitrate job bias claims. In *EEOC v. Waffle House, Inc.*, the Court is considering whether such arbitration agreements bar the Equal Employment Opportunity Commission from seeking "victim-specific" remedies for discrimination – such as backpay, reinstatement and compensatory damages – on behalf of the employee who entered into the arbitration agreement. The *Waffle House* case comes on the heels of the Supreme Court's decision last Spring in *Circuit City Stores v. Adams*, in which it ruled that most agreements to arbitrate employment disputes are enforceable under the Federal Arbitration Act. The Supreme Court should decide the *Waffle House* case in the next few months.

- ***Pre-Dispute Arbitration Agreements.*** A recent decision by the California Court of Appeal will make it easier for employers to win enforcement of agreements to arbitrate disputes which do *not* involve job bias claims. The state Supreme Court's decision last year in the *Armendariz* case established strict requirements for enforcing

arbitration agreements in the job bias context. However, in *Little v. Auto Stiegler, Inc.*, the Court of Appeal ruled that the *Armendariz* requirements did not apply because the employee, Alexander Little, was not suing for job bias. Instead, Little alleged he was demoted and terminated in retaliation for reporting acts of fraud by co-employees. Little sued for “public policy” wrongful discharge, breach of implied contract and related claims. The employer, Auto Stiegler, asked the trial court to send the case to arbitration based on three agreements which Little signed. The trial court refused to enforce the arbitration agreements because they did not comply with all the requirements of *Armendariz*. Among other things, the trial court noted that the arbitration agreements required Little to pay a pro-rated portion of the costs of arbitration. In job bias claims under *Armendariz*, such a requirement could not be enforced. However, the Court of Appeal ruled that *Armendariz* only applies to job bias claims. In this case, it was not unconscionable to require Little to pay his fair share of arbitration costs, especially because Little offered no evidence that he could not afford the cost of arbitration, or that arbitration would be more expensive than a civil lawsuit. The appellate court therefore ruled that the agreements were enforceable and ordered the case sent to binding arbitration.

## LABOR RELATIONS

- **Privacy Claims.** The Ninth Circuit U.S. Court of Appeals has overturned one of its previous decisions and has ruled that federal labor law governing union-management relations does not preclude unionized employees from suing for invasion of privacy under California state law. (*Cramer v. Consolidated Freightways, Inc.*) We reported the court’s earlier decision in this case in our May 2000 UPDATE. The case was brought by employees who accused the company of conducting surveillance in restrooms via two-way mirrors and video cameras, in violation of the California Penal Code. Originally, the court ruled 2-1 that the employees’ claims for invasion of privacy and emotional distress were barred by federal labor law because they were unionized employees under a collective bargaining agreement. However, a full panel of the Ninth Circuit has now voted 10-1 to set aside that decision and allow the employees to proceed with their claims in state court. The Ninth Circuit’s new decision states that because the surveillance in this case clearly violated the state Penal Code, the employees did not have to rely on their collective bargaining agreement in order to pursue their privacy and emotional distress claims. The court noted that the union contract contained no explicit provision which bargained away the employees’ privacy rights, even though the contract specifically provided for the use of video surveillance by the company. The company is expected to appeal this decision to the U.S. Supreme Court.

- ***NLRB Limits Employers' Rights To Withdraw Recognition Of Unions.***

The National Labor Relations Board has partially overturned a 50-year-old decision and ruled that an employer cannot withdraw recognition of a union unless the employer proves that the union has actually lost the support of a majority of its employees. (*Levitz Furniture Co. of the Pacific*) In its landmark 1951 decision in the *Celanese Corp.* case, the Board had ruled that if the employer had a good-faith reasonable doubt that the union retained majority support, the employer could: (1) withdraw recognition from the union and refuse to bargain; (2) petition the Board to conduct a new election; or (3) conduct an internal poll of employee support for the union. For years, employers and commentators have accused the Board of paying "lip-service" to the *Celanese* good-faith standard, but implicitly abandoning it in practice. With its recent decision in *Levitz Furniture*, the NLRB has now explicitly overruled the portion of the *Celanese* ruling that allowed an employer to withdraw union recognition based solely on a good-faith reasonable doubt that the union still retains majority support. Now, the employer must prove that no such support actually exists. Fortunately for employers, this ruling will only apply to cases arising *after* March 29, 2001, the date the *Levitz Furniture* decision was announced. In addition, the Board in *Levitz Furniture* upheld the ruling in *Celanese* that an employer could use a good-faith reasonable doubt as a basis for petitioning the Board to hold a new election. The Board in *Levitz Furniture* did not address the circumstances under which an employer may poll employees to ascertain the level of union support. For the time being, at least, employers still may conduct such polls based on a good-faith reasonable doubt that the union retains majority support.

- ***"Right to Work" Laws.*** Oklahoma recently became the 22nd state to pass a so-called "Right to Work" law. Such laws prohibit union officials from forcing employees to join a union or pay union dues as a condition of employment. Oklahoma voters approved the state's new Right to Work law in a referendum on September 25. Other Right to Work states include Arizona, Nevada, Utah, Idaho, Wyoming, Texas, Nebraska, Kansas, North and South Dakota, Iowa, Arkansas, Louisiana, Mississippi, Alabama, Georgia, Florida, Tennessee, North and South Carolina and Virginia. California is conspicuously absent from this list.

- ***Friendlier Labor Board?*** Employers are hopeful that President George W. Bush will appoint new members to the National Labor Relations Board who are sympathetic to the concerns of management. Bush recently promoted Peter J. Hurtgen to the position of NLRB Chairman. Hurtgen is a Republican who was originally appointed to the Board by former President Bill Clinton. The NLRB Chairman is primarily responsible for setting the Board's agenda on hearing cases and rulemaking. Bush also has as many as three more slots to fill on the five-member NLRB. Just before we went to press, Bush announced he will nominate R. Alexander Acosta, a conservative Republican, for one of the open positions on the Board. Once the Board is reconstituted, employers plan to challenge several decisions made by the Board during the Clinton era.

One issue which may arise is whether companies can prohibit the use of internal e-mail for union organizing efforts. Currently, such bans are unlawful unless the employer prohibits all nonwork computer usage during working hours. Bush also has appointed Arthur F. Rosenfeld as the NLRB's General Counsel. In this position, Rosenfeld will have the authority to review decisions made by the 32 Regional Directors of the NLRB across the country, and will have the final say on whether to issue unfair labor practice complaints against companies and unions.

## **IMMIGRATION VIOLATIONS**

California employers who violate the 1986 federal Immigration Reform and Control Act ("IRCA") now have even more to worry about, thanks to a recent decision by the state Court of Appeal. The court ruled that employees who are terminated in retaliation for reporting IRCA violations may sue the employer for "public policy" wrongful termination under California state law. Accordingly, the court upheld a jury verdict in favor of Fu E. Min and Lou Yu Jie, two Chinese immigrants who are husband and wife and were terminated from their employment in the garment business in Los Angeles. Min and Jie had their daughter make a report to the federal Immigration and Naturalization Service that their employers, Liang Tai Knitwear Co. and Hong Yuan Industrial Co., were employing undocumented immigrants in violation of IRCA. The INS raided the employers' business and arrested a whopping 40 percent of the work force as undocumented. Three months later, Min and Jie were told they were being "laid off" due to an alleged "slowdown" in business. However, the defendants did not lay off any other employees and, instead, continued to hire additional workers. Min and Jie sued the employers for "public policy" wrongful termination, claiming that the employers retaliated against them for making the report to the INS. A jury found in the plaintiffs' favor and awarded them a total of approximately \$275,000 in compensatory and punitive damages. The Court of Appeal upheld the entire jury award. (*Jie v. Liang Tai Knitwear Co.*)

## **SEX/PREGNANCY DISCRIMINATION**

In our April 2001 UPDATE, we reported on the EEOC's controversial ruling that health plans may violate federal sex and pregnancy bias laws if they do not cover the cost of female prescription contraceptives. A federal judge in Seattle has now found that Bartell Drug Company's self-insured prescription drug coverage plan, which excludes contraceptives, unlawfully discriminates against female employees. The judge therefore ruled in favor of the plaintiffs in a class-action lawsuit on behalf of all female, non-union employees using prescription contraceptives enrolled in Bartell's prescription benefit plan. The judge specifically asserted that "the availability of affordable and effective

contraceptives is of great importance to the health of women and children because it can help to prevent a litany of physical, emotional, economic, and social consequences” – particularly those related to “unintended pregnancies.” Bartell argued that the exclusion of contraceptives was merely a business decision designed to control costs. The judge was unpersuaded, and stated that the company “cannot balance its benefit books at the expense of its female employees.” Bartell also contended that its overall plan was non-discriminatory because it excluded all “family planning” measures, as well as fertility and impotency drugs such as Viagra. However, the court found that even if this was true, the exclusion of prescription contraceptives still provides female employees with “less complete coverage” than male employees. “Although the plan covers almost all drugs and devices used by men, the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate healthcare need uncovered.” The judge therefore ordered Bartell to include contraceptives in its prescription drug coverage plan. (*Erickson v. The Bartell Company*) The judge acknowledged that this is the first published court decision to find that the federal job bias laws include a right to prescription contraceptives. While it remains uncertain whether other courts will follow this decision, employers are now clearly at risk if their health plans exclude coverage of prescription contraceptives.

## TRANSGENDER BIAS

As previewed in our April 2001 UPDATE, San Francisco has become the first city in the United States to provide health-care coverage for sex-change operations and related care for city employees. The ordinance took effect July 1 after being approved by a 9-2 vote of San Francisco’s Board of Supervisors and signed by Mayor Willie Brown. About 15 of San Francisco’s 37,000 city employees are identified as transgender. The new coverage includes hormone treatment, psychotherapy and surgery to complete the sex-change operation. There is a \$50,000 lifetime cap per employee, which would cover the typical cost of male-to-female surgery (\$37,000) but not female-to-male surgery (\$77,000). To be eligible for this coverage, an employee must undergo a six-month screening process and obtain a doctor’s diagnosis that a sex-change is a “medical necessity.” In particular, the employee must be diagnosed with “gender dysphoria,” a condition which makes a person uncomfortable with his or her gender at birth.

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Editorial Staff: Richard S. Rosenberg and John J. Manier.