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Discrimination Law

Ninth Circuit applies McDonnell Douglas burden-shifting to summary judgment motion in age-discrimination case. In *Shelly v. Geren*, 666 F.3d 599 (2012), the plaintiff sued the Secretary of the Army and the United States Army Corps of Engineers (the Corps) for violating the U.S. Age Discrimination in Employment Act (ADEA) by failing to interview him and rejecting his applications for two promotions. The district court granted the Corps' motion for summary judgment. The district court declined to analyze the motion in accordance with the burden-shifting approach adopted in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), finding it inapplicable to ADEA cases after the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). The Ninth Circuit reversed and held that the district court incorrectly applied *Gross*, which concerned instructions at trial rather than the parties' burden on summary judgment. The Ninth Circuit stated that *McDonnell Douglas* remains good law on summary judgment.

Court of Appeal vacates pregnancy-bias award because it was prejudicial error for the trial judge not to give a "business judgment" jury instruction. In *Veronese v. Lucasfilm LTD.*, A129535, the Court of Appeal vacated a jury's award of damages and found that the trial court committed prejudicial error by rejecting a "business judgment" jury instruction requested by the defendant, Lucasfilm LTD. In this case, Julie Veronese was offered a one-month trial position as the assistant to Sarita Patel, the manager of George Lucas's estate. Before starting, Veronese learned she was pregnant, and her start date was eventually postponed twice. During this same period of time, there was construction work taking place on the estate, and Patel sent an email to the human resources department stating her concern that the "stress that is around here" could negatively impact a pregnant woman's health. The human resources department agreed with the tryout plan, but shortened the period to three weeks. In response to the shortened trial period, Veronese sent Patel an email stating her concern that "things have changed because [she is] pregnant." Patel and Veronese agreed that the position would not be a good fit.

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During trial, Lucasfilm proposed jury instructions that included “you cannot find liability for discrimination or retaliation if you find that Lucasfilm made an error in business judgment. Instead, Lucasfilm can only be liable to Julie Gilman Veronese if the decisions made were motivated by discrimination or retaliation related to her being pregnant.” However, the instructions proposed by Veronese were the instructions given. Those instructions included “A potential hazard to a fetus or an unborn child is not a defense to pregnancy discrimination.” The sole authority that Veronese cited in support of the instruction was *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), in which the Supreme Court held that a policy that extended to any woman capable of bearing children could not pass muster. The Court of Appeal held that Lucasfilm had no such policy and that it was prejudicial error not to give the instructions proposed by Lucasfilm because Patel was entitled to exercise her business judgment, without second-guessing. The instructional error permitted the jury to construe the employer’s genuine concern for the employee’s pregnancy as unlawful discrimination.

Retaliation Law

Employers may discipline or terminate an employee for making false charges. In *Joaquin v. City of Los Angeles*, 202 Cal. App. 4th 1207 (2012), the Court of Appeal held that in appropriate circumstances an employer may discipline or terminate an employee for making false charges, even where the subject matter of those charges was an allegation of sexual-harassment. In *Joaquin*, the plaintiff police officer sued the City of Los Angeles, alleging that his termination violated the FEHA because it was in retaliation for his having filed a sexual-harassment complaint against a sergeant. The Court held that the employer’s articulated reason for the termination – that the officer fabricated the sexual-harassment complaint – was a legitimate, nonretaliatory reason for the adverse employment action. The Court held that the officer failed to provide substantial evidence that the termination was otherwise motivated by a retaliatory animus.

Partner may sue partnership for retaliation for opposing sexual harassment of employee. In *Fitzsimons v. California Emergency Physicians Medical Group*, 205 Cal. App. 4th 1423 (2012), the Court of Appeal held that a partner has standing to assert a claim for retaliation under the FEHA against the partnership. The plaintiff was a partner in defendant California Emergency Physicians Medical Group (CEP). She alleged that CEP retaliated against her because she reported to her supervisors that certain officers and agents of CEP had sexually harassed female employees of CEP’s management and billing subsidiaries. The Court of Appeal held that the plaintiff, although a partner, was a “person” protected from retaliation under Government Code Section 12940. While the partnership was not in an employment relationship with the plaintiff, the partnership was the employer of the people who were the purported victims of the alleged harassment that this plaintiff reported.

Wage And Hour Law

California Supreme Court issues meal and rest period decision. In *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), the California Supreme Court issued its much awaited meal and rest period decision. Two



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meal period issues were before the Court – (1) the extent of an employer's duty to provide meal periods and (2) the timing requirements for meal periods. With respect to the first issue, the Court held that, as long as an employer provides, and relieves employees of all duty during, a legally required meal period, the employer will not be liable for an additional hour of pay (a "meal premium") when an employee nonetheless elects to perform work during the meal period. "At most," the Court noted, the employer will be liable for "straight pay" if it "knew or reasonably should have known that the worker was working through the authorized meal period." If the employer does not relieve the employee of all duty or the nature of the employee's work precludes him or her from taking a required meal period, then a meal premium will be owed.

Regarding the timing of meal periods, the Court rejected the plaintiff's position that a 30-minute meal period is required whenever an employee works five or more consecutive hours (the so-called "rolling five" contention). The Court concluded that a first 30-minute meal period must be provided "after no more than five hours of work in a day" and a second meal period must commence after no more than ten hours of work. (For motion picture industry employees and manufacturing industry employees covered by a collective bargaining agreement, the law permits the first meal period to commence after six hours of work.) Thus, even if an employee takes his or her first meal period early in a shift and then works five or more consecutive hours, a second meal period is not required unless the employee has worked ten or more hours.

Interpreting the rest period requirements, the Supreme Court held that California employees are entitled to one 10-minute rest period for any shift lasting from 3-1/2 to 6 hours, two 10-minute rest periods for shifts from 6-10 hours, and three 10-minute rest periods for shifts of more than 10 hours. Employees are not entitled to a rest period for shifts lasting longer than 2 but less than 3-1/2 hours. The Supreme Court also rejected the plaintiff's contention that employers must provide these rest periods in the middle of work periods and that the first rest period always must precede the first meal period. Rather, the Court held that the requirement to provide rest periods in the middle of work periods "insofar as practicable" means that employers are required "to make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible." The Court did not, however, express any opinion as to "what considerations might be legally sufficient to justify such a departure."

Justice Werdegar, who authored the unanimous decision of the Court, also wrote a concurring opinion joined by one other Justice and noted that, if an employer's timekeeping records do not show clocking out and back in for a meal period, "a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." Also, with respect to those meal periods that may be waived (i.e., the first when an employee will complete the day's work in six or fewer hours and the second if the employee will complete the day's work in twelve or fewer hours), the concurrence places the burden of proof on employers to establish that employees voluntarily waived meal periods.



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Pharmaceutical sales representatives are exempt under the FLSA. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), the U.S. Supreme Court held that pharmaceutical sales representatives who call on physicians and encourage them to prescribe products are "outside salesmen" exempt from the Fair Labor Standards Act overtime requirements. The Court found that, although pharmaceutical reps do not sell products directly to physicians, they nonetheless are exempt because they are primarily engaged in sales, which includes "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

A prevailing party in action for meal and rest period compensation is not entitled to recover attorney fees. In *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal. 4th 1244 (2012), the California Supreme Court held that a defendant cannot recover its attorney fees when it prevails in an action for meal and rest period compensation under California Labor Code § 226.7. The Court held that a § 226.7 claim is not a claim for which attorney fees can be awarded to a prevailing employee under Labor Code §§ 1194 or 218.5. Section 1194 allows successful plaintiffs to recover attorney fees in actions for the "legal minimum wage or the legal overtime compensation." The Court rejected the plaintiff's argument that the required extra hours of payment for missed meal or rest periods is tantamount to a statutorily prescribed minimum wage. Similarly, the Court held that an action under 226.7 does not constitute an "action brought for the nonpayment of wages" within the meaning of Section 218.5.

California Court of Appeal limits application of the administrative exemption from overtime pay. In *Harris v. Superior Court*, 207 Cal. App. 4th 1225 (2012), the Court of Appeal held that insurance claims adjusters were not exempt from the payment of overtime. The Court of Appeal viewed the adjusters' duties as nonexempt "production" duties. The Court noted that, in order for an employee to be subject to the administrative exemption under the applicable IWC Wage Order, he or she must be primarily engaged in work that qualitatively is "directly related to management policies or general business operations." According to the Court, adjusting insurance claims is just carrying out the day-to-day "production" work of an insurance company and is not directly related to management policies or general business operations. However, on October 24, 2012, the California Supreme Court denied review and granted depublication in this case, which means that the Court of Appeal decision may not be cited as precedent. Accordingly, the exempt status issue of insurance adjusters is still an open question in other cases.

Class Action / Arbitration Law

NLRB finds employer arbitration policies barring class actions violate the NLRA. In *D.R. Horton, Inc.*, 357 NLRB No. 184 (January 1, 2012), the NLRB held that an employer violated Section 8(a)(1) of the NLRA when it required its employees to sign, as a condition of employment, an arbitration agreement that precluded them from bringing "joint, class, or collective claims" related to their employment in either arbitration or the courts. The NLRB held the employer's arbitration agreement troubling because it was a mandatory condition of employment and because it prohibited collective or class actions in any forum. The NLRB contended the agreement impinged upon a core substantive right protected by the NLRA – a worker's right to engage in concerted action for mutual



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aid or benefit. As a remedy, the NLRB ordered the employer to either rescind the arbitration agreement entirely or revise it to make clear that the arbitration agreement did not constitute a waiver of employees' right to bring employment-related class actions and/or to file charges with the NLRB. The NLRB stated that the United States Supreme Court's holding in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), was not controlling because that case did not involve either the waiver of rights protected under the NLRA or even an employment agreement.

NLRB Judge finds 24 Hour Fitness arbitration clause violates federal labor law despite opt out provision. In *24 Hour Fitness USA Inc.*, 20-CA-35419 (November 6, 2012), an NLRB Administrative Law Judge (ALJ) held 24 Hour Fitness USA Inc.'s arbitration policy unlawful in spite of a clause saying workers could opt out. The policy required new employees to agree in writing to submit all employment-related claims to individual arbitration. Employees were also prohibited from discussing such claims with their coworkers. Citing the NLRB's *D.R. Horton* decision, the ALJ held that both the class-action ban and the nondisclosure restriction unlawfully limited employees from exercising their rights under federal labor law.

The ALJ also rebuffed the employer's contention that its policy was distinct from *D.R. Horton*'s mandatory agreement because it included a provision giving employees a 30-day window to opt out. The ALJ called the opt-out provision "an illusion" and held that requiring employees to affirmatively act to preserve rights already protected by the NLRA through an opt-out process is unlawful. As a remedy, the ALJ not only called for 24 Hour Fitness to stop maintaining and enforcing its arbitration policy but also to notify any arbitral or judicial tribunal in which it pursued enforcement of the policy since August 15, 2010, that it desires to withdraw any such action and that it no longer objects to its employees bringing or participating in class or collective actions

New U.S. Supreme Court arbitration decision may shed light on future of employment class-action waivers. In *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), decided two days after *D.R. Horton*, the Supreme Court of the United States considered whether the Credit Repair Organizations Act (CROA) precludes enforcement of an arbitration agreement in a lawsuit alleging violations of that statute. The plaintiffs brought the matter as a class action, despite having previously agreed to resolve all disputes by binding arbitration. The Supreme Court rejected their efforts to avoid arbitration, finding that, unless the Federal Arbitration Act's (FAA) mandate has been "overridden by a contrary congressional command," agreements to arbitrate must be enforced "according to their terms." The Supreme Court held that, because the "CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms."

The NLRB's prior attempt in *D.R. Horton* to read into the NLRA a prohibition of class-action waivers is undermined by the Supreme Court's decision in *CompuCredit*. Since there is no "congressional command" in the NLRA that prohibits enforcement of an arbitration agreement according to its terms, arbitration agreements likely will be enforced as written.



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Court of Appeal affirms order compelling individual arbitration of California wage claims. In *Nelson v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115 (2012), a property manager filed a putative class action against her employer alleging violations of various California wage and hour laws. The plaintiff had signed an agreement to arbitrate any disputes with her employer. The Court held that the arbitration clause was enforceable.

The Court cited a number of cases holding that *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), overturned *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), but assumed, without deciding, that *Gentry* is still good law. In *Concepcion* the Supreme Court held that the Federal Arbitration Act (FAA) preempts a California Supreme Court decision prohibiting class-action waivers in consumer arbitration agreements. *Concepcion* provides legal support for upholding class-action waivers in employee arbitration agreements. *Gentry* holds that class arbitration waivers should not be enforced if a trial court determines, based on certain factors, that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration. In this case, the Court held that *Gentry* applied but that the plaintiff had failed to make the factual showing required under *Gentry* that classwide arbitration was required to vindicate her rights.

The Court also held that the NLRB decision of *D.R. Horton* was incorrectly decided and did not apply because the NLRA does not apply to an "individual employed as a supervisor." The Court concluded that the plaintiff's title as a "property manager" likely excluded her from coverage by the NLRA.

California Court of Appeal holds that *Gentry* remains good law despite the U.S. Supreme Court rulings in *Stolt-Nielsen* and *Concepcion* upholding contractual class-action waivers. In *Franco v. Arakelian Enterprises, Inc.*, B232583 (2012), the California Court of Appeal held that *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), is still good law and was not overruled by *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *Gentry* set forth several factors to be applied on a case-by-case basis to determine whether a class-action waiver should be enforced or whether class arbitration would be a more effective way of vindicating the rights of affected employees. The Court concluded that *Gentry* remains good law because, as required by *Concepcion*, it does not establish a categorical rule against class-action waivers but, instead, establishes several factors to be applied on a case-by-case basis to determine whether a class-action waiver precludes employees from vindicating their statutory rights. *Stolt-Nielsen* held that class arbitration is not permitted unless the parties have expressly or implicitly agreed to it. The Court held, as required by *Stolt-Nielsen*, that when a class-action waiver is unenforceable under *Gentry*, the parties have not agreed to allow class arbitration and plaintiff's claims must be adjudicated in court.

California Court of Appeal holds trial court erred in not certifying wage and hour class action. In *Bradley v. Networkers Int'l, LLC*, D052365, the Court of Appeal held that the trial court erred in denying class certification with respect to plaintiffs' claims for overtime and rest and meal break pay, but affirmed denial of class certification for claims based on alleged off-the-clock work. This case was on remand from the California Supreme Court with directions to reconsider in light of *Brinker*.



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The employer in this case had characterized its workers as "independent contractors" but later had its workers sign "employment" agreements. The Court of Appeal stated the evidence relevant to whether the class members were employees or independent contractors was common among all class members and that the "critical fact is that the evidence likely to be relied upon by the parties would be largely uniform throughout the class." The employer had also never promulgated any policy specifically authorizing meal and rest breaks. Originally, the trial court had denied certification and the appellate court upheld the denial on the ground that it would be necessary to individually determine which workers had the opportunity to take breaks and whether they had voluntarily chosen to waive the breaks. The Court of Appeal noted that under *Brinker* class certification of the meal and rest period claims was required. *Brinker* clarified that employers have a legal obligation to affirmatively provide breaks, and not having a policy is itself a common classwide practice that warrants class certification.

The Court of Appeal rejected the plaintiffs' assertion that the trial court abused its discretion by failing to certify a class on their claims that the employer violated state law by requiring the workers not to record all of their work time given that the factual record did not show the employer had a uniform policy requiring each employee to work off the clock.

Class certification does not establish collateral estoppel against absent class members. In *Bridgeford v. Pacific Health Corporation*, __ Cal. App. 4th 1034, the Court of Appeal held that denial of class certification in one action does not prevent absent class members from filing a second class action making the same allegations. *Bridgeford* followed the U.S. Supreme Court's lead in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011). *Smith* held that "the unnamed putative members of a class that was never certified cannot be bound by collateral estoppel."

Other Case Law Impacting Employers

California Supreme Court holds unions may picket on private property. In *Ralphs Grocery v. United Food & Commercial Workers Union Local 8*, No. S185544, the California Supreme Court held that the parking area and walkway in front of a Ralph's grocery store's entrance is not a "public forum" property on which picketing is protected under the California Constitution. However, the Supreme Court also held that, although the United Food & Commercial Workers Union (UFCW) could not invoke constitutional protections to justify its picketing, the UFCW could invoke the statutory protections provided by the Moscone Act and Labor Code Section 1138.1. The Moscone Act aims to promote worker rights to the collective bargaining process and to reduce judicial interference in labor disputes by providing that certain labor-dispute activities cannot be enjoined. The protected activities include "peaceful picketing or patrolling involving any labor dispute." Section 1138.1 applies where the Moscone Act does not and prohibits injunctions unless the victim of the picketing overcomes various procedural hurdles. The Court held that both laws are constitutional even though they afford preferential treatment to speech concerning labor disputes over speech about other issues. The Court held that the labor laws allowing picketing on private sidewalks are "justified by the state's interest in promoting collective bargaining to resolve labor disputes, the recognition that union picketing is a component of the collective bargaining process, and the



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understanding that the area outside the entrance of the targeted business is "the most effective point of persuasion." This decision means that it will be very difficult for California employers to obtain injunctions against union trespassers on their private property, unless the union pickets engage in unlawful activity, such as blocking ingress and egress or violence.

U.S. Supreme Court holds that an arbitrator, and not the state court, must decide the validity of a noncompete agreement. In *Nitro-Lift Technologies, LLC v. Howard*, 568 U. S. __ (2012), the U.S. Supreme Court held that the Oklahoma Supreme Court's decision that noncompete agreements are unenforceable, despite an arbitration clause dictating that all disputes be resolved by an arbitrator, must be vacated. The Supreme Court held the state court failed to adhere to the correct interpretation of the Federal Arbitration Act. By declaring the noncompetition agreements in "two employment contracts null and void, rather than leaving that determination to the arbitrator in the first instance, the state court ignored a basic tenant of the Act's substantive arbitration law."

An employee's misuse or misappropriation of information does not violate the CFAA. In *United States v. Nosal*, 676 F.3d 854 (2012), the Ninth Circuit held that a former employee who assists a current employee in violating the employer's computer-use policy does not violate the federal Computer Fraud and Abuse Act (CFAA). The CFAA provides a civil remedy and criminal penalties for "exceeding authorized access" of a computer. Defendant Nosal, who had worked for a recruitment firm, allegedly conspired with that firm's current employees to gain information in order to start a competing company. The firm's computer policy allowed access to its computer systems for official purposes only, subject to disclosure limitations. The Court held that "exceeds authorized access" in the CFAA is limited to violations of restrictions on access to information and does not extend to the misuse or misappropriation of information rightfully obtained. Because Nosal's accomplices had permission to access the company database and obtain its information, the government's charges failed to meet the element of "exceeds authorized access."

Employer's decision not to extend or renew a fixed-term employment contract will not subject employer to wrongful termination claim. In *Touchstone Television Productions v. Superior Court*, 208 Cal. App. 4th 676 (2012), the California Court of Appeal, reversing the trial court, held that a television studio's decision not to exercise its option to extend an actress' contract for an additional season was not a "termination" for purposes of asserting a claim for wrongful termination in violation of public policy. As the Court stated: "A cause of action for wrongful termination in violation of public policy does not lie if an employer decides simply not to exercise an option to renew a contract. In that instance, there is no termination of employment but, instead, an expiration of a fixed-term contract. . . . To hold otherwise would require the creation of a new tort for nonrenewal of a fixed-term employment contract in violation of public policy. We decline to do so." The prevailing defendant in this case was represented by MSK.

Employment arbitration agreement that applies only to disputes arising out of breach of that agreement does not compel arbitration of statutory discrimination claims. In *Grey v. American Management Services*, 204 Cal. App.



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4th 803 (2012), the California Court of Appeal reversed a judgment entered on an arbitration award, holding that the trial court should not have compelled the employee to arbitrate his claims for sexual-orientation discrimination. As part of his employment application, the employee signed an agreement containing a broad arbitration clause that encompassed all employment-related disputes. On being hired, he also signed an employment contract, which included a more limited arbitration clause and an integration clause. The Court held that the employment contract was the final expression of the parties' agreement with respect to employment and therefore superseded the earlier agreement, in accordance with the terms of the integration clause. Given that the employment agreement's limited arbitration agreement applied only to disputes "arising out of the alleged breach of any other provision of this Agreement," and the plaintiff's claims were for statutory violations, the Court held that the employee was not required to arbitrate his discrimination claim.

EEOC Developments

EEOC releases Strategic Enforcement Plan for FY 2012-2016. The EEOC released a draft of its Strategic Enforcement Plan for Fiscal Years 2012 through 2016. This plan went into effect on October 1, 2012. It describes the EEOC's strategy for targeted enforcement and the integration of administrative and legal enforcement activities. The Plan outlines the nationwide priorities for EEOC enforcement efforts in private, state and local government, and federal sectors. These priorities include: eliminating systematic barriers in recruitment and hiring, which includes targeting not only class-based intentional hiring discrimination, but also facially neutral hiring practices that have an adverse impact on certain protected groups such as pre-employment testing, background screening, and date-of-birth screenings on Internet applications; and protecting immigrant, migrant, and other vulnerable workers by targeting practices such as disparate pay, job segregation, harassment, and trafficking, as well as policies that may include discriminatory language.

NLRB Developments

NLRB holds that employers may not ask employees not to discuss ongoing workplace investigations. In *Banner Health System*, 358 NLRB No. 93 (July 30, 2012), the NLRB held that an employer's practice of asking employees not to discuss ongoing workplace investigations with their coworkers violated the employees' Section 7 rights under the National Labor Relations Act ("NLRA"). Section 7, which applies to all employees whether or not represented by a union, protects the right of employees to engage in "concerted activities" for their mutual aid and protection. Employers who want to keep their workplace investigations confidential must now establish, at the outset of the investigation, that there is a legitimate business reason for doing so. A generalized concern with protecting the integrity of the investigation is insufficient. Before an employer may lawfully request that an investigation remain confidential, it must determine whether: (a) witnesses need protection; (b) there is a danger of evidence being destroyed; (c) there is a danger of testimony being fabricated; or (d) there is a need to prevent a "cover-up." The employer must make such determination(s) at the outset of the investigation, which is not always easy or possible to do.



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NLRB limits employer regulation of employee online speech. In *Costco Wholesale Corp.*, 358 NLRB No. 106 (September 7, 2012), the NLRB held that a provision in Costco's electronic communications and technology policy that prohibited employees from posting statements electronically that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement unlawfully interfered with the employees' Section 7 rights. The NLRB held that, although Costco's rule did not explicitly reference protected Section 7 activity, which protects the right of employees to engage in "concerted activities" for their mutual aid and protection, the broad prohibitions against making statements that "damage the Company, defame any individual or damage any person's reputation" clearly encompassed concerted communications. The NLRB held that, in these circumstances, employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications. The NLRB suggested, however, that the policy would have been lawful if it were limited only to statements that were malicious, abusive, or unlawful.

NLRB finds employer "courtesy" policy violates the NLRA. In *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (September 28, 2012), the NLRB affirmed an ALJ's finding that a car dealership had not violated the NLRA when it discharged a salesperson for posting photographs and sarcastic remarks about a workplace accident. At the same time, however, the Board concluded that the employer had violated the NLRA by maintaining a "courtesy" policy, which the Board determined could have a "chilling effect" on employee rights. The dealership's "courtesy" policy required employees to "be courteous, polite and friendly" and proscribed the use of "disrespectful" or profane language injurious to the "image or reputation of the Dealership." The NLRB objected to the policy because employees could "reasonably construe its broad prohibition against 'disrespectful' conduct and 'language which injures the image or reputation of the Dealership' as encompassing Section 7 protected activity," such as statements to "coworkers, supervisors, managers, or third parties" objecting to working conditions or seeking assistance in improving them.

NLRB clarifies that at-will provisions that do not require employees to agree that the at-will nature of their employment can never be changed or to refrain from seeking to change it are lawful. On October 31, 2012, the NLRB's Office of the General Counsel issued two advice memoranda addressing at-will provisions in employee handbooks. Before the advice memoranda were issued, an ALJ found that an employment-at-will provision in the employee handbook of the American Red Cross unlawfully interfered with employees' rights under the NLRA. The ALJ in that case found the statement that the at-will employment relationship could not be modified in any way violated an employee's right under the NLRA to "advocate concertedly ... to change his/her at-will status."

Subsequently, the NLRB's Acting General Counsel issued the two advice memoranda to provide guidance to employers about how to draft employment-at-will disclaimers without violating the NLRA. Responding to a request for advice concerning unfair labor practice charges challenging the at-will employment disclaimers of two employers, Mimi's Café and Rocha Transportation, the Acting General Counsel concluded that both disclaimers were lawful, in part because their language did not require employees to agree that the at-will nature



of their employment could never be changed or to refrain from seeking to change it.

The disclaimer in Mimi's Café's handbook stated that "[n]o representative of the Company has authority to enter into any agreement contrary to the foregoing 'employment at will' relationship." The NLRB's Acting General Counsel found this language simply clarified that the employer's representatives are not authorized to change the at-will nature of the employment.

The language in Rocha Transportation's handbook was similar, stating that "[n]o manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing." Like the language in Mimi's Café's handbook, this language clarified that certain employees could not change the at-will nature of the employment. This provision, however, explicitly stated the president of the company could change the at-will nature of the employment if he/she did so in writing. Significantly, the Acting General Counsel found no language in either of the at-will provisions that required employees to refrain from seeking to change their at-will status or to agree that their at-will status could never be changed.

NLRB holds union dues checkoff continues after contract expiration. In *WKYC-TV Inc.*, 359 NLRB No. 30 (December 12, 2012), a divided NLRB held that an employer's obligation to check off union dues from employees' wages continues after expiration of a collective-bargaining agreement that establishes such an arrangement. The majority stated that this obligation continues until "the parties have either reached agreement or a valid impasse permits unilateral action by the employer." The majority wrote that the *Bethlehem Steel* decision, 136 NLRB 1500, 50 LRRM 1013 (1962), and its progeny, which established that an employer's obligation to check off dues terminates upon expiration of a contract, "should be overruled to the extent they stand for the proposition that dues checkoff does not survive contract expiration under the status quo doctrine." The majority stated that an employer's obligation to honor dues checkoff arrangements post-contract expiration is consistent with "the language of the Act, its relevant legislative history, and the general rule against unilateral changes to terms and conditions of employment."

This decision overturns a policy that has existed for some 50 years. The majority stated that, because employers have relied on the former policy, the new policy will be applied prospectively and not in pending cases.

NLRB requires balancing of employer confidentiality interests and a union's need for information concerning employee discipline. In *American Baptist Homes of the West d/b/a Piedmont Gardens*, the NLRB held that employers are no longer automatically exempted when unions ask them to turn over witness statements related to employee discipline. Now the Board will balance the confidentiality interests of the employer against the union's need for the information. This decision overruled a 1978 NLRB decision, *Anheuser-Busch, Inc.*, 237 NLRB 982, which established a categorical exemption for witness statements in such cases. The *Piedmont Gardens* case involved a continuing-care facility in Oakland, California, where statements by two witnesses alleging that a



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certified nursing assistant was asleep on the job resulted in that person's termination. The union representing employees at the facility, SEIU, United Healthcare Workers-West, asked for information used in the termination, including witness statements, but the employer refused.

In its decision, the Board noted that the National Labor Relations Act imposes on an employer a "general obligation" to furnish a union with relevant information necessary to perform its duties. However, the Board must balance that need against "any legitimate and substantial confidentiality interests established by the employer." The NLRB also decided not to apply the new rule retroactively.

NLRB holds that comments about co-worker posted on social media are protected. In *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37, the NLRB found that Hispanics United of Buffalo ("HUB"), a New York nonprofit, social service organization, violated the NLRA by firing five non-union employees who had posted negative comments about a co-worker and their jobs on Facebook. After learning that the co-worker, Lydia Cruz, had complained about the job performance of several employees and had expressed her intent to take the complaints to management, one of those employees posted the following statement on her personal Facebook page:

Lydia Cruz, a coworker feels that we don't help our clients enough at HUB. I I about had it! My fellow coworkers how do u feel?

In response, several employees shared on Facebook their negative opinions about Cruz and Cruz's criticisms, as well as various aspects of their jobs, including workloads and staffing. None of the employees posted their comments during work time, and none of them used a work computer. The employer discharged the employees for harassing and bullying Cruz in violation of the employer's anti-harassment policy.

In analyzing whether social media comments are entitled to protection under the NLRA, the NLRB held that the same analytical framework that applies to oral communications among co-workers should be applied to comments made by workers using social media. Under this standard, employees' conduct is "protected concerted" activity if it is "engaged in with or on the authority of other employees" and concerns employment terms and conditions.

The NLRB held that the terminations were unlawful because the Facebook "conversation" was protected by the NLRA. The NLRB found that the employees' comments were the first step toward taking group action to defend themselves against accusations about their performance that they believed Cruz was going to make to management. Additionally, the Board reasoned that that comments did not rise to the level of harassment and bullying that was banned by the employer's policy. That policy, which prohibited harassment based on protected characteristics such as race and gender, was not violated because there was no evidence that Cruz was



harassed due to any such protected characteristic.

Miscellaneous Developments

Employers should prepare for on-site visits by USCIS. The U.S. Citizenship and Immigration Services ("USCIS") has increased its antifraud staff with contractor inspectors to perform thousands of on-site visits to U.S. companies that employ foreign workers under H-1B and L-1 visas. These on-site inspections illustrate the U.S. Department of Homeland Security's new attitude and enforcement efforts focusing on employer prosecution for noncompliance with U.S. immigration laws. The USCIS wants to confirm that the H-1B or L-1 foreign worker is actually working for a bona fide U.S. employer in the position and location and earning the salary stated in the corresponding petition filed with the USCIS.