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EMPLOYMENT LAW CHANGES IN the United States, Canada & Europe

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Changes in Employment Laws for 2011
United States, Canada, and Europe

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United States

Changes in Federal Employment Laws
New Safe Harbor Provision for Employers Under Title II of GINA

On May 21, 2008, the President signed the Genetic Information Nondiscrimination Act of 2008 ("GINA"). GINA includes two titles. Title I: which amends portions of the Employee Retirement Income Security Act ("ERISA"), the Public Health Service Act, and the Internal Revenue Code, addresses the use of genetic information in health insurance. Title II of GINA was passed to protect job applicants, current and former employees, labor union members, and apprentices and trainees from discrimination based on their genetic information, except if that information is obtained inadvertently.

GINA requires the Equal Employment Opportunity Commission ("EEOC") to issue regulations implementing Title II of the Act. After waiting for over a year, the EEOC finally issued a final rule to implement Title II. Effective January 10, 2011, the regulations may expose employers to significant liability for GINA violations. However, there is a "safe harbor" provision in the regulations that is critical for employers who inadvertently receive genetic information in response to a lawful request for medical information. Under the regulations, such an acquisition of genetic information will only be considered inadvertent if the request for medical information explicitly notifies the employee or health care provider not to respond with genetic information. Employers may include the following EEOC-approved language in their requests for medical information to satisfy this notice requirement:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Although employers will be protected from GINA liability by including this safe harbor language in their medical requests, the employer still must treat the inadvertently-obtained information as confidential and may not use the information in employment decisions.

New Mental Health Parity Requirements under MHPAA
On October 3, 2008, President Bush signed Federal Mental Health Parity and Addiction Equity legislation as part of the Emergency Economic Stabilization Act of 2008 (the "MHPAA"). The new law took effect on January 1, 2010, and requires that health plans apply the same treatment (visit) and financial (cost-sharing) limits to mental health and substance abuse benefits as it does to medical and surgical benefits. The new law applies to employers with more than 50 employees and puts an

end to limits on mental health coverage such as 30-day hospital visit stays and 35 visits a year to a mental health professional. More specifically, as your health plan provider, employers are required to:

- Apply the same out-of-pocket costs (copayments, coinsurance and deductibles) to mental health and substance abuse treatment as we do to medical or surgical benefits;
- Apply the same inpatient (hospital) and outpatient (provider) visit limits to mental health and substance abuse services as we do to medical or surgical services; and
- Cover out-of-network mental health and substance abuse services the same as out-of-network medical and surgical benefits where those benefits are covered under your contract. Out-of-network services are those rendered by hospitals, physicians and other providers who are not in our network.

Under the MHPAA, employers must decide which medical disorders to cover and which ones not to cover. With this in mind, employers should be looking at their benefits plans to ensure that they are in compliance.

New Military Leaves Under FMLA

On October 28, 2009, the President signed into a law the National Defense Authorization Act ("NDAA") for Fiscal Year 2010, which again expanded Family Medical Leave Act ("FMLA") rights for military families. The new law expands "exigency leave" benefits to include family members of active duty service members, in addition to the family members of National Guard and Reservists covered under the current law. It also expands "caregiving leave" to include veterans who are undergoing medical treatment, recuperation or therapy for serious injury or illness that occurred any time during the five years preceding the date of treatment.

Extended COBRA Benefits

On December 21, 2009, the President signed the Defense Appropriations bill, which included a provision extending federal Consolidated Omnibus Budget Reconciliation Act ("COBRA") subsidies. Specifically, COBRA extended the eligibility period for the American Recovery and Reinvestment Act ("ARRA") premium reduction for an additional two months (through February 28, 2010) and the maximum period for receiving the subsidy for an additional six months (from nine to 15 months). Thus, millions of unemployed Americans were allowed to keep their health benefit coverage because of this new law.

Individuals who had reached the end of the reduced premium period before the legislation extended it to 15 months had additional time to pay the reduced COBRA premiums related to the extension. To continue their coverage, they were required to pay the 35% of COBRA premium costs while employers subsidized the remaining 65%. Employers were required to seek reimbursement of the subsidy from the Federal government. In addition, the annual income of the individual was required to be less than $125,000 if single, or $250,000 if married. Once an employee qualifies for coverage under another group health plan or Medicare, his or her eligibility for this coverage will end.

Al Franken Amendment

On February 17, 2010, the anti-arbitration "Franken Amendment" went into effect, barring many defense contractors from utilizing pre-dispute arbitration agreements as a condition of employment. This provision of the Department of Defense Appropriations Act of 2010 ("DDAA") prohibits employers from receiving contracts for over $1 million if they enter into or enforce certain arbitration agreements. Specifically, contractors cannot receive funds if they enter into or enforce

agreements that require, as a condition of employment, that employees or independent contractors arbitrate their claims under Title VII or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

After June 17, 2010, a similar restriction on subcontractors went into effect, barring defense appropriations funds from being spent on contractors unless they require each subcontractor to agree not to enter into such arbitration agreements with respect to any employee or independent contractor performing work related to the subcontract. The amendment broadly applies to all contractor employees and independent contractors, not just those working on a defense contract. In contrast, the requirement for subcontractors only applies to individuals performing work related to the defense subcontract. The ban on pre-dispute arbitration agreements does not apply to contracts for the acquisition of commercial items or commercially available off-the-shelf items. The provision also allows the Secretary of Defense to waive this bar for a particular contract or subcontract if necessary to avoid harm to national security interests. Contractors and subcontractors will not have to rewrite their existing employment agreements, but they are prohibited from enforcing the arbitration clause in an existing agreement. Federal defense contractors who have or are considering entering into arbitration agreements with their employees must carefully consider how to comply with this new provision.

Employer Obligations under the Healthcare Reform Act

On March 23, 2010, the President signed into law the U.S. Senate's Patient Protection and Affordable Care Act and the Health Care and Education Affordability Reconciliation Act of 2010 (the "Healthcare Reform Act"). The total legislation package has far-reaching effects on employers. Although much of the healthcare reform takes effect years down the road, there are a number of provisions which are of immediate impact to employers.

First, all employers should understand that the healthcare reform law dramatically expands whistleblower protections in the workplace. For example, an employee who makes a complaint about a perceived violation of the new healthcare law is protected from retaliation. Similarly, if an employee opts out of an employer's plan and chooses to be covered in one of the new healthcare exchanges scheduled to start in 2014, that employee act is protected from retaliation.

Second, in addition to the creation of whistleblower protections under the Fair Labor Standards Act ("FLSA"), the new law requires the right to privacy for workplace nursing. Employers must provide unpaid, reasonable break time to non-exempt nursing mothers to express breast milk and a place to express breast milk that is not a bathroom, is shielded from view, and free from intrusion. An employer with fewer than 50 employees will not be required to implement this provision if doing so would cause the employer an "undue hardship." However, an employer with more than 50 employees will be required to follow the law, even if its employees are working on a client's premises or at a location where it is difficult to provide privacy. The nursing mother protections created by the law are available for one year after the child's birth.

Lastly, 2010 posed a one-time opportunity to grandfather a health plan from many of the changes required under the new healthcare law. Healthcare plans that were in existence as of March 23, 2010 (the day the law was enacted) could be exempted from a multitude of requirements imposed by healthcare reform so long as the plan did not substantially change the benefits offered, change insurers, or increase employee costs by a significant percentage (as defined in the regulations).

Employers should talk to their insurance brokers or carriers to determine whether grandfathering makes sense. The benefit to grandfathering is an employer can avoid mandated changes such as first dollar coverage of preventive care, and new recordkeeping requirements. The downside is that grandfathering means severe limits to passing on rate increases to employees, and an inability to shop carriers for a better rate. With the seemingly annual rise in costs, these limits will make grandfathering a bad deal for many employers.
The following insurance reforms applied to all plans, including grandfathered plans:

- Elimination of lifetime limits. Plans are prohibited from imposing lifetime limits on "essential health benefits."
- Restriction of annual limits. Plans may place restricted annual limits on "essential health benefits" only until January 1, 2014, when annual limits on such benefits are completely prohibited.
- Prohibition on rescissions. Plans may not rescind coverage in most circumstances. They may do so only in cases of fraud or intentional misrepresentation.
- Coverage for adult dependent children. Plans that cover dependent children must extend coverage to adult children until they turn 26. Grandfathered plans aren't exempt from this requirement, but until January 1, 2014, they don't have to extend such coverage to dependent children who are eligible for other employer-sponsored coverage.
- Elimination of preexisting condition exclusions for children. Plans may not impose preexisting condition exclusions or limitations on health plan participants who are under the age of 19.

The following insurance reforms applied only to new plans and did not apply to grandfathered plans:

- Preventive care coverage. New health plans must cover certain evidence-based preventive care without cost sharing. In other words, plans can't charge patients copayments, coinsurance, or deductibles for such services (if a network provider supplies the services).
- Nondiscrimination rules. The nondiscrimination rules for "highly compensated" employees that previously applied only to self- insured health plans will now apply to fully insured group health plans.
- Patient protections. Non-grandfathered plans are also subject to requirements relating to an individual's choice of health care professional (including primary care providers and pediatricians) and access to obstetrical and gynecological care and emergency services.
- Claims and appeals process. Plans are required to create and maintain a claims and appeals process that includes not only an internal review but also an external review. The new process will allow individuals to appeal decisions made by their insurance companies or health plans.
- Miscellaneous other provisions. Non-grandfathered plans will also be subject to requirements regarding cost reporting and rebates, transparency, and ensuring quality of care.

In addition to the foregoing, employers should also be aware of the following health care reforms that were implemented in 2010:

(1) Small-business Tax Credits
Certain small employers that contribute at least 50 percent of their employees' health care premiums were eligible to receive tax credits. The credits were available to small businesses with no more than 25 employees, and the amount of the credit was based on the number of employees and the average annual employee compensation. Small businesses could receive credits of up to 35 percent (or up to 50 percent starting in 2014) of their premiums.

(2) Early Retiree Reinsurance Program
The U.S. Department of Health and Human Services accepted applications for the Early Retiree Reinsurance Program. The program provided $5 billion for employer health plans that offered coverage to early retirees ages 55 to 64. Reimbursement was made to plans on behalf of early retirees and their spouses, surviving spouses, and dependents for up to 80% of certain claims between $15,000 and $90,000. The program will end in 2014 (unless the $5 billion program limit runs out before then), and assistance will be offered on a first-come first-served basis.

(3) Tax Exclusion for Adult Children
The health care reform legislation expanded the income tax exclusion for employer-provided health coverage to include employees' children who are under age 27. The legislation did this by extending the definition of "dependent" to include children who will not turn 27 at any time during the applicable tax year.

(4) Adoption Assistance
The adoption assistance tax exclusion increased from $10,000 to $13,170.

Effect of New Federal Health Care Law on Black Lung Benefits

Federal health care reform, enacted into law in 2010 as "the Patient Protection and Affordable Care Act of 2010" ("PPACA"), contains amendments to the Black Lung Benefits Act ("Benefits Act") which significantly impact the entitlement of coal miners and their spouses or dependents to federal black lung benefits.

Federal Black Lung benefits are administered by the Department of Labor. Enacted in the 1969 as the Federal Coal Mine Health and Safety Act, the Benefits Act was originally intended to provide wide-spread benefits to miners disabled by Black Lung disease. Under the Benefits Act, the federal government is responsible for the payment of benefits to eligible miners in situations where a coal mine operator or its successor cannot be located or is financially unable to make payment. In part due to an increasing number of claims and payments by the federal government throughout the 1970s, the Benefits Act was amended in 1981. The effect of the 1981 amendments to the Benefits Act was to shift the burden of proof in both living miners' and survivors' claims. Prior to 1981, if a living miner worked in the coal mines for 15 years and was able to produce medical evidence of a disabling pulmonary or respiratory impairment, there was a rebuttable presumption that the miner was entitled to benefits. The presumption could be rebutted by the coal mine operator or the Department of Labor. Also prior to 1981, the spouse of a miner who received benefits at the time of his death was not required to file a claim for a survivor's benefits; those benefits were derivatively awarded to the spouse. The 1981 Amendments to the Benefits Act removed the 15 year rebuttable presumption for living miners' claims. Miners were required to prove the existence of Black Lung disease and total disability to Black Lung disease to receive benefits. The 1981 Amendments also

removed the automatic derivative entitlement to survivors' benefits, such that a spouse or dependent of a coal miner had to prove that the miner died due to Black Lung disease.

On March 23, 2010, the PPACA resurrected the 15 year rebuttable presumption for living miners and the automatic derivative entitlement for survivor's benefits for "all claims filed after January 1, 2005 which were pending on March 23, 2010." Because of the "look back" period for claims, numerous coal mine employers have filed lawsuits challenging the Constitutionality of the amendments to the Benefits Act on the grounds of Due Process. We are unaware of any dispositive ruling on the issue, although we anticipate that a decision will ultimately originate from the Third, Fourth or Sixth Circuit US Court of Appeals, and the United States Supreme Court may be asked to address the issue.

CALIFORNIA
California Legislature Demonstrates Restraint in 2010

For California private sector employers, there are only a limited number of new employment laws with which to become familiar. The major issue concerning an employer's obligations to provide meal and rest breaks was not decided legislatively and the California Supreme Court is expected to provide guidance sometime in 2011.

The following are the most significant employment law changes for California private sector employers:

1) New Labor Code sections 1508, et seq. This law requires private employers to permit employees to take a leave of absence with pay, not exceeding 30 days, for the purpose of organ donation, and not exceeding five days for bone marrow donation. Additionally, employers are required to restore an employee returning from leave for organ or bone marrow donation to the same position held by the employee when the leave began, or an equivalent position. Likewise, an employer is prohibited from interfering with an employee taking organ or bone marrow donation leave and from retaliating against an employee for taking that leave. Although not required by the new statute, California employers should update their employee handbooks to reflect this additional employee right.

2) Amended Labor Code section 98.2. This law requires an employer wishing to appeal an administrative judgment of the Department of Labor Standards Enforcement to first post a bond in the Superior Court.

3) Amended Government Code section 12940. This law provides that California's Fair Employment Housing Act does not prevent an employer from providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the retiree becomes eligible for Medicare benefits.

4) Amended Labor Code section 512. Generally, California employers are required to provide a meal period within the first five hours of work. This law exempts employees in a construction occupation, commercial drivers, security officers, employees of electrical and gas corporations, if those employees are covered by a valid collective bargaining agreement that expressly provides for the wages, hours of

work, and working conditions of employees, and expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning application of its meal period provisions, premium wages for all overtime hours worked, and a regular hourly rate of pay of not less than 30% more than the state minimum wage rate.

5) Amended Unemployment Insurance Code section 1030. This law specifies that unemployed persons are eligible for unemployment benefits if the employee left their employment to protect his/her family from domestic violence abuse.

COLORADO

Colorado employment law developments in 2010 include passage of C.R.S. § 8-75-201, et seq. which establishes the Colorado "Work Share Program". This program allows payment of unemployment compensation benefits to eligible employees who have received a reduction in work hours. This program applies to employees of a particular work unit whose work hours have been reduced at least 10%, but not more than 40%. The Act also specifies that benefits payable under the work share program are not in addition to the total maximum allowable regular unemployment benefits in a benefit year.

Another development in Colorado is passage of an Act pertaining to Employee retirement plans and includes employer relief from liability for investment decisions. C.R.S. § 8-5-105, et seq. allows wage deductions for contributions attributable to automatic enrollment in an employee retirement plan (plan) regardless of whether the federal "Employee Retirement Income Security Act of 1974", as amended (ERISA), applies to the plan. "Automatic enrollment" is defined to allow an employee to specify the amount of his or her wage deduction, or, in accordance with the federal "Pension Protection Act of 2006", to elect affirmatively to have no wage deduction under a plan. Employers or other plan officials are relieved from liability related to investment decisions if the following conditions are met:

- The plan allows the participating employee at least quarterly opportunities to select investments for the employee's contributions among investment alternatives available under the plan;
- The employee is given notice of the investment decisions that will be made in the absence of participant direction, a description of all the investment alternatives available for employee investment direction under the plan, and a brief description of procedures available for the employee to change investments; and
- The employee is given at least annual notice of the actual default investments made of contributions attributable to the employee.

A third development in Colorado employment law in 2010 is the creation of the pay equity commission within the Department of Labor and Employment. C.R.S. § 8-5-106, et seq. establishes the pay equity commission (commission) within the Colorado department of labor and employment (department). The commission consists of 11 members with specific background or expertise as specified in the Act.

The commission was to convene its first meeting by September 1, 2010, and is charged with performing the following tasks:

- Educating employers in the state about issues or practices that may contribute to pay inequities;
- Working with business groups and educational institutions to develop and maintain an inventory of best practices for encouraging equal pay;
- Encouraging employers to implement equal pay best practices;
- Studying other state models of equal pay practices that achieve pay equity;
- Developing a program recognizing employers who pursue pay equity practices;
- Conducting outreach and education to employees and employers regarding pay equity; and
- Working to establish Colorado as a model employer with regard to pay equity.

FLORIDA

Bifulco v. Patient Business & Financial Services, Inc., 39 So.3d 1255 (Fla. 2010) - Former employee sued former employer on claim of retaliation for filing claim for workers' compensation in violation of sec. 440.205, Fla. Stats. The former employer was a nonprofit corporation established solely to perform billing services for a medical center which was a special taxing district of the State of Florida. The trial court awarded summary judgment in favor of the former employer concluding that the former employee failed to provide presuit notice pursuant to sec. 768.28(6), Fla. Stats., which provides, in part, a waiver of sovereign immunity. The appellate court reversed the trial court's summary judgment holding that the presuit notice requirements were inapplicable to claims under sec. 440.205. The appellate court reasoned that the sovereign immunity statute applied only to common law torts. As there was conflict among the district courts, the Florida Supreme Court granted review to resolve. The Court found that Chapter 440, Fla. Stat. actually contained a waiver of sovereign immunity independent of the waiver contained in sec. 768.28, Fla. Stats., which did not include any presuit notice requirements. As such, the Court approved the appellate court's holding and remanded for further proceedings.

Carlucci v. Demings, 31 So.3d 245 (Fla. 5th DCA 2010) - Employees of Sheriff's Office filed a class action lawsuit seeking to enforce a General Order, that had provided generous health benefits to employees, when it was discontinued by the Sheriff. The appellate court confirmed that an employer's unilateral act of implementing an internal policy that is subject to unilateral amendment or cancellation cannot create a contract. The court reasoned that such an instance does not provide sufficient consideration for the employee to create a contract. Likewise, the court held that there was no specific language in the General Order expressing the parties' explicit and mutual agreement that the order constitute a separate employment agreement. The appellate court affirmed the granting of the trial court's final summary judgment in favor of the Sheriff.

Magill v. Bartlett Towing, Inc., 35 So.3d 1017 (Fla. 5th DCA 2010) - Driver filed suit against tow truck company alleging that it was responsible for one of its employees pushing her to the ground and stealing her vehicle (driver had not called for any towing service). Driver alleged that the tow truck company was liable for her damages since its employee used the truck's overhead emergency lights and wore his company uniform during the incident. The lower court dismissed the complaint. For negligent hiring and retention, the injured party must first establish that the employer owed a legal duty to that person to exercise reasonable care in hiring and retaining safe and competent employees. The appellate court found that the use of the emergency lights and a company uniform were insufficient to create the necessary legal duty to hold the employer responsible. The dismissal of the complaint was affirmed.

Grogan v. Heritage NH, LLC, ____ So.3d ___, 35 Fla.L.Weekley D1412 (Fla. 3d DCA June 23, 2010) - Employee sued employer for supervisor's conduct that she believed was harassing. Specifically, employee alleged that supervisor was making excuses to be near her and to call her at home. There were no allegations that supervisor made any sexual advances toward employee although employee complained that supervisor followed her to and from work. Further, supervisor offered to help employee update her resume and sent employee flowers. The trial court entered summary judgment in favor of the employer and employee appealed. The appellate court affirmed summary judgment holding that the alleged conduct was not sufficient. The court held that a reasonable person in the employee's position would not have considered the supervisor's conduct so severe or abusive that it interfered with the employment relationship. The court found that the supervisor never made any sexual advances and did not obstruct the employee's ability to perform the job.

IDAHO

Summary: Notable legislation passed in the 2010 session of the Idaho Legislature included a law extending "conscience protections" to health care professionals in certain circumstances. This new statute extending conscience protections is codified as Idaho Code Section 18-611.

Also noteworthy in 2010 were two amendments to existing unemployment law. First, the amendment to Idaho Code Section 72-1312 requires that eligible unemployment claimants, who also receive workers' compensation benefits for lost wages, must treat those lost wages as earnings to be assessed against the calculation of the employee's weekly unemployment benefit. Second, the amendment to Idaho Code Section 72-1351 discharges the employer's duty to pay unemployment benefits when the employer offers suitable employment to a laid-off employee who is currently in training, and the worker turns it down to complete the training.

Conscience Protections for Health Care Workers: Previously, in 1973, the Idaho Legislature enacted liability protections for hospitals and doctors specific to the provision of or assistance in abortions. The new legislation passed in 2010 extends conscience protections to licensed health care professionals in certain circumstances. Idaho law forbids discrimination by employers against health care professionals in circumstances in which the professional declined to provide a health care service that violated his or her conscience. Idaho Code § 18-611. The Legislature defined "conscience" as the religious, moral or ethical principles sincerely held by any person. A "health care professional" is any person licensed, certified or registered by the state of Idaho to deliver health care. Prior to the new 2010 law, only physicians and hospitals were permitted to refuse certain services to patients. Idaho Code § 18-612. Under the new statute, the services that may be refused by the health care provider are: an abortion, dispensation of an abortifacient drug, human embryonic stem cell research, treatment regimens utilizing human embryonic stem cells, human embryo cloning or end of life treatment and care.

Of significance to employers, Idaho Code Section 18-611(3) requires employers of health care professionals to accommodate the conscience rights of their employees, provided the health care professional gives advanced written notification to the employer. The employee does not have to specify the reason for refusing to provide the service (unlike I.C. § 18-612), and makes it unlawful for the employer to discriminate against any health care professional employee based on the declination to provide a health care service that violates the employee's conscience, unless the employer can demonstrate that such accommodation poses an undue hardship. The law also provides that the employer cannot be held liable for an employee health care professional's refusal

to provide health care services that violate the employee's conscience, except for life-threatening situations. In a life-threatening situation where no other health care professional capable of treating the emergency is available, any health care professional who invokes the conscience right, must provide care and treatment until an alternative health care professional capable of providing emergency treatment is found.

Amendments to Idaho's unemployment laws, Sections 72-1312 and 72-1351: These amendments were passed in the 2010 Legislative Session. These amendments will affect only a small number of Idaho employers and are expected to have a positive (though minimal) impact on the Unemployment Insurance Trust Fund. The legislation amended existing law, Idaho Code Section 72-1312, to reduce the amount of benefits paid in a compensable week by the amount equal to temporary disability benefits received under a worker's compensation law of any state or under a similar federal law. Idaho Code Section 72-1351 was amended to provide that a covered employer's account will not be charged for benefits paid to a worker who turns down an offer of suitable work because of participation in an approved job training program pursuant to the requirements of Idaho Code Section 72-1366(8). The changes were effective July 1, 2010.

INDIANA

There were no significant changes to Indiana employment statutes in 2010. Below is a summary of notable Indiana employment law cases:

Employment at Will & Retaliatory Discharge

The Indiana Supreme Court recognized the viability of a claim of retaliatory constructive discharge under certain circumstances in the case of *Baker v. Tremco*, 917 N.E.2d 650 (Ind. 2009). In this case, the Plaintiff, Baker, advised his employer, Tremco, that he disagreed with the way that the company conducted business and ultimately he quit to form his own company. Baker subsequently filed a lawsuit against Tremco alleging that he was forced to resign due to failure to participate in unlawful activities to defraud his customers, public schools, and that he was defamed by his supervisor who accused him of "inappropriate sales practices."

The trial court granted Summary Judgment for Tremco and the individually named supervisor. On Appeal, the Indiana Court of Appeals affirmed in part and reversed in part (*Baker v. Tremco*, *Inc.* 890 N.E.2d 73 (Ind. Ct. App. 2008). The Indiana Supreme Court granted transfer and upheld the Trial Court's decision.

The Supreme Court recognized for the first time that there is a cognizable claim for retaliatory constructive discharge under certain circumstances. The Court found that based upon certain facts, "it is merely retaliatory discharge in reverse. The constructive discharge doctrine acknowledges the fact that some employee resignations are involuntary and further prevents employers who wrongfully force an employee to resign to escape any sort of liability for their actions." *Id.* at 655. In order to prevail on such a claim, however, the Court found that the claim must be raised in the context of recognized public policy exceptions as set forth under *Frampton* or *McClanahan.* In Baker's case, the Court determined that his refusal to participate in what he considered to be unlawful activities was not within the narrow public policy exceptions to the employment at will doctrine.

In the case of *Tony v. Elkhart County*, 918 N.E.2d 363 (Ind. Ct. App. 2009), the Indiana Court of Appeals reversed the trial court's dismissal of the case holding that the employee's allegations that he

was forced to resign as a result of exercising the statutory right to file a workers' compensation claim stated a cause of action for constructive retaliatory discharge. The case was remanded back to the trial court where again the Court granted summary judgment finding that the employee had failed to submit sufficient evidence establishing that he was constructively discharged. On a second appeal, the Court of Appeals concluded that the employee had presented sufficient evidence to support such a claim. The Court of Appeals concluded that a constructive discharge claim requires a showing that the employee's working conditions were even more egregious than a high standard for hostile work environment claims because an employee ordinarily is expected to remain employed while seeking redress for the alleged discrimination or unfair treatment. In this case, the Court found that the employee's evidence, which included that his supervisors verbally ridiculed him about his injuries, directed him on more than one occasion to perform job duties that were outside of his medical restrictions, and that those work directives caused him increased pain, were sufficient to support his claim of constructive retaliatory discharge and overcome a Summary Judgment Motion.

Perhaps more significant is the fact that the Court rejected the employer's claim that the employee failed to report or take sufficient actions to complain about his working conditions. The Court found that in light of the evidence, the employee was relieved of any requirement to follow the employer's formal complaint procedure. Therefore, the Court concluded that the employer failed to establish as a matter of law that the employee was not constructively discharged and the case was remanded for trial.

The Indiana Court of Appeals opened the door for hospital by-laws to constitute a contract between it and its medical staff in the case of *W.S.K. v. M.H.S.B.*, 922 N.E.2d 672 (Ind. Ct. App. 2010). In this case, the Plaintiff physician had been employed for a number for years at a medical facility. Over the course of his employment, the doctor had been the subject of numerous peer reviews and progressive disciplinary sanctions stemming from unprofessional conduct, including nursing staff relations, failing to see patients on a daily basis, failing to respond to pages, and falsification of medical records. Following a suspension, the doctor applied for staff privileges at a hospital located in another city. Although specifically asked, the doctor failed to disclose the prior suspension of disciplinary actions on the application. Ultimately, the doctor's application for privileges was rejected. The doctor was given an opportunity to withdraw his application because rejected applications and the reasons for the rejection (in this case his failure to disclose the suspension and the reasons for the suspension), are reportable to the National Practitioner Databank. The doctor declined and requested a hearing.

A fair hearing panel proceeding was conducted and the denial of the application upheld. The doctor then filed a lawsuit against the hospital claiming multiple counts including race discrimination, defamation and breach of contract. The Trial Court granted Summary Judgment in favor of the hospital and the doctor appealed.

The Court of Appeals determined that the doctor had failed to establish the elements of a prima facie case of race discrimination, in particular, that he was qualified for the position he held. As such, the dismissal of that claim was upheld. The Court also rejected the doctor's claim that the hospital's by-laws constituted a contract upon which he could bring a breach of contract claim. This rejection however was simply due to the fact that the doctor was not a member of the staff. The Court noted that under certain circumstances, hospital staff by-laws may constitute a contract between the hospital and its medical staff. The Court rejected all claims of defamation because the

information associated with the suspension and the doctor's failure to report the suspension in his application were true.

Indiana Wage & Hour Developments

The Indiana Wage Statute, much like all other States, requires that an employer pay his employees all wages earned within a timely basis. I.C. Sec. 22-2-5-1(a)(b). Failure by an employer to make payment in compliance with this statute will result in an award of liquidated damages and reasonable attorney's fees. I.C. Sec. 22-2-5-2. The Wage Claim Statute and Wage Payment Statute set forth different procedural paths and apply to different classes of claimants. The Wage Claim Statute applies to terminated employees or those whose work is suspended as a result of an industrial dispute and the Wage Payment Statute applies to current employees or those who have voluntarily left their employment. Under the Wage Payment Statute, those employees may proceed directly into Court for relief as compared to those which fall under the Wage Claim Statute who must file a claim with the Indiana Department of Labor or obtain appropriate statutory authorization from the Indiana Department of Labor in order to proceed with a private cause of action.

Several recent cases have been published in Indiana which address these wage statutes. In the case of *Reel, et al v. Clarion Health Partners, Inc.,* 917 N.D.2d 714 (Ind. Ct. App. 2009), the Court of Appeals reviewed this matter for a second time. During the initial review by the Court of Appeals in 2007, it held that paid time off constituted "wages" and therefore was required to be paid pursuant to the Wage Payment Statute's ten (10) day rule rather than the fourteen (14) days as stated in the employee manual. On remand, the employees who had obtained letters from the Indiana Department of Labor allowing them to individually pursue claims under the Wage Claims Statute sought class certification for approximately one hundred (100) other similar individuals. The trial court denied the Motion and the second appeal followed.

The Court of Appeals affirmed the trial court's holding that the filing for class certification did not allow putative class members to avoid compliance with the statute. The statute needed to be followed which required the Department of Labor's review of the wage claim and determination of whether or not the claim should be referred to the Attorney General. As such, the Court upheld the dismissal of the proposed class of former employees.

In *Fort Wayne Metro Human Relations Comm. v. Marathon Gas Station*, 926 N.E.2d 1085 (Ind. Ct. App. 2010), a female employee filed a charge of employment discrimination with the Ford Wayne Metro Human Relations Commission alleging that she had been subjected to sexual harassment and retaliation. The Commission ultimately issued a Finding of Probable Cause which allowed either party to elect to have the case determined by a Trial Court rather than proceeding before the Commission. In this matter, the employer elected to proceed before the Trial Court and the Commission dismissed its case and then filed its own Complaint and Demand for a Jury Trial against the employer. The trial court granted the employer's Motion to Strike the Jury Demand and the Human Rights Commission sought an interlocutory appeal.

On appeal, the Court of Appeals noted that the Commission's rule allowing either party to elect to have the case proceed before a trial court conflicted with the Indiana Civil Rights Law requiring both the Respondent and Complainant to agree in writing to have the claim decided in a Court of law. Moreover, the Indiana Civil Rights Law specifically prohibits a trial by jury. The Commission attempted to argue that pursuant to the Home Rule Act, I.C. Sec. 36-1-3, local agencies, like the Human Rights Commission, have the power to enact rules for the effective operation of the local

affairs. The Court of Appeals rejected this argument as the Home Rule Act expressly provides that where a statute requires an agency to exercise its power in a specific manner, the agency must do so.

The Court of Appeals ultimately held that because the Commission's rule was inconsistent with the Indiana Civil Rights Law, it was therefore invalid. Because the Complainant and Respondent had not agree in writing to have the matter tried in a court of law, procedurally the trial court lacked jurisdiction to hear the case and the matter was remanded with instructions to dismiss.

In late December 2010, the Court of Appeals, confirmed the validity of the two wage statutes by barring a direct action filed by former Calcars' employee Jeffrey Gavin. *Gavin v. Calcars AB, Inc.,* 938 N.E.2d 1270 (Ind.Ct.App. 2010). Gavin worked for Calcars from 2004 until his involuntary termination from employment in April 2007. On June 6, 2007, Gavin filed a complaint against Calcars alleging that he and others similarly situated to him were not timely paid their wages and had improper deductions taken from their wages in violation of the Wage Deductions Statute. In 2010, Calcars moved for summary judgment alleging that Gavin's claims fall under Indiana's Wage Claims Statute, which requires claimants to submit claims to the Indiana Department of Labor prior to filing a complaint with the trial court. Calcars argued that because Gavin did not first submit his claims to the Department of Labor, his complaint was barred as a matter of law. The trial court granted that motion and Gavin appealed.

The Court of Appeals affirmed the dismissal finding that although Gavin could have brought a direct action during his employment, he did not. It is the claimant's status at the time suit is filed that determines whether the Wage Payment Statute or Wage Claims Statute applies to the wage claim. Where, as here, Gavin waited to bring a wage dispute after being involuntarily terminated from employment, he must bring his claim under the Wage Claims Statute and could not proceed directly to the trial court.

IOWA

I. State Statutes

A. Iowa Worker Adjustment and Retraining Notification Act (Iowa WARN Act), HF 681, 2010 Iowa Acts ch. 1085 (to be codified at Iowa Code ch. 84C (2011)).

The Iowa WARN Act, signed by Governor Culver March 22, 2010, significantly expands the circumstances under which employers must provide WARN notices to employees. Since 1989, there has been a federal Worker Adjustment and Retraining Notification (WARN) Act, which, generally speaking, requires employers with 100 or more workers to give workers a written notice 60 days before the date of a plant closing or mass layoff. A plant closing is a shutdown that will result in an employment loss for 50 or more employees during any 30-day period. A mass layoff is a layoff that will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer's active workforce

The Iowa WARN Act, which becomes effective July 1, 2010, applies to any person who employs 25 or more employees, excluding part-time employees (those who are employed for an average of fewer than 20 hours per week, and those employees who have been employed for fewer than 6 of the 12 months preceding the date of the

required notice). Under the Iowa WARN Act, employers must give written notice to employees within 30 days of a business closing or mass layoff. The Iowa WARN Act defines "business closing" as a permanent or temporary shutdown that will result in an employment loss for 25 or more employees (other than part-time employees). The Act defines "mass layoff" as a layoff that results in an employment loss for 25 or more employees (other than part-time employees).

A covered employer who violates the notice requirements is subject to a civil penalty of not more than $100 for each day of the violation, which is the exclusive remedy for any violation of the Iowa WARN Act. Additionally, both the Iowa House and the Iowa Senate passed HF 2522, which was sent to Governor Culver on March 30, 2010, but has not yet been signed. This bill provides that the 30-day notice requirement may be reduced by the number of days for which severance payments or wages in lieu of notice are paid by the employer to the employee for work days occurring during the notice period. A severance payment or wages in lieu of notice must be at least an amount equivalent to the regular pay the employee would earn for the work days occurring during the notice period.

B. Veterans Day for Veterans, HF 2197, 2010 Iowa Acts ch. 1172 (to be codified at Iowa Code § 91A.5A (2011))

An amendment to the Iowa Wage Payment Collection Law requires employers to provide employees who are veterans paid or unpaid time off for Veterans Day, November 11, "unless providing time off would impact public health or safety or would cause the employer to experience significant economic or operational disruption."

Under the statute, veteran employees who want to take Veterans Day off are required to provide written notice to their employers at least a month in advance—i.e., by October 11—and to document their veteran status to their employers by providing a copy of their federal certificate of release or discharge from active duty, or such similar federal document. Employers must, no later than November 1, notify the veteran employees who requested Veterans Day off if their request is granted and whether the time off will be paid or unpaid. If an employer cannot grant all requests without impacting public health or safety or causing significant economic or operational disruption, the employer must grant as many requests as it can while maintaining minimum operational capacity and without impacting public health or safety.

C. Unemployment for Military Spouses, HF 2110, 2010 Iowa Acts ch. 1048 (to be codified at Iowa Code § 96.5(1)(b) (2011))

A 2010 amendment to the Iowa unemployment compensation statute provides that an individual is not disqualified from unemployment benefits if the individual's leaving was caused by the relocation of the individual's spouse by the military. However, the employer's account is not charged for such benefits.

II. Significant Employment Law Cases—Wrongful Termination in Violation of Public Policy

A. Ballalatak v. All Iowa Agriculture Ass'n, 781 N.W.2d 272 (Iowa 2010).

In Ballaltak, the plaintiff claimed he was terminated for internally complaining about his employer's handling of other employees' workers' compensation claims. Ballalatak, 781 N.W.2d at 276. Both the district court and the Iowa Supreme Court concluded this conduct was not protected by a clearly defined public policy of the State of Iowa and could not form the basis of a wrongful-discharge claim, noting that "Ballalatak was not fired for attempting to secure his own statutory rights nor was he fired for refusing to violate workers' compensation law." Id. Ballaltak is significant because it demonstrates the Iowa Supreme Court is now reticent to further expand the public policy exception to the employment-at-will doctrine.

B. Jasper v. H. Nizam, Inc., 764 N.W.2d 751 (Iowa 2009).

In Jasper, the Iowa Supreme Court held certain administrative regulations can serve as a source of a clearly defined Iowa public policy to support a claim for wrongful termination. Prior to Jasper, the court had "consistently rejected claims of wrongful discharge based on public policy when the public policy asserted by an employee was not derived from a statute." Jasper, 764 N.W.2d at 764. Not just any administrative regulation will do; rather,

> To support the tort, an administrative regulation must state a clear and well-defined public policy that protects an activity in the same way as a statute must state a clear and well-defined public policy to support the tort. Thus, the administrative regulation must not only relate to public health, safety, or welfare, but the regulation must also express a substantial public policy in a way that furthers a specific legislative expression of the policy.

MARYLAND

Notable Legislation

The Healthy Retail Employee Act. The Act, which was signed into law and will be effective March 1, 2011, requires retail establishments with fifty or more employees to provide certain breaks for employees. The duration of the required, nonworking breaks varies based on the number of hours worked:

(i) four to six consecutive hours requires a 15-minute break;
(ii) more than six consecutive hours requires a 30-minute break; and
(iii) eight consecutive hours requires an additional 15-minute break for every four consecutive hours worked beyond the eight hours.

The Act defines a "retail establishment" as a "place of business with the primary purpose of selling goods to a consumer who is present at the place of business at the time of sale" and specifically excludes: (i) wholesalers; (ii) restaurants; (iii) employees covered by a collective bargaining agreement or employment policy that includes shift breaks equal to or greater than those provided by the Act; (iv) employees who are exempt from overtime pay requirements; (iv) employees of a unit of the state, a county, or municipality; (v) employees who work in a corporate office, and (vi) employees

who work for at least four consecutive hours for an employer at a single location with five or fewer employees.

An employee may file a complaint with the Commissioner of Labor and Industry ("the Commissioner"). If a violation is found, the Commissioner may assess a civil penalty of $300 to $600 per employee. In certain circumstances, an employee may sue the employer and, if successful, be awarded three times the value of his or her hourly wage for each break violation, as well as attorneys' fees.

Modifications to Maryland's Wage Payment and Collection Act. Maryland's Wage Payment and Collection Act, which governs the payment of wages and the timing of wage payments, was amended effective October 1, 2010, adding "overtime wages" to the definition of "wages." Accordingly, if an employer withholds overtime wages, other than as a result of a bona fide dispute, the court may award treble damages and attorneys' fees. Previously, an employee could sue for overtime wages only under the Fair Labor Standards Act ("FLSA") and the Maryland Wage and Hour Law, but not under this statute.

The General Assembly also provided the Maryland Department of Labor, Licensing, and Regulation ("DLLR") with the authority to investigate and adjudicate wage claims of up to $3,000. This new authority allows the Commissioner to order an employer to pay wages after receiving a complaint. If the employer fails to pay wages as ordered, the Commissioner may bring a civil action in court to enforce the order. Notably, DLLR is not authorized to order attorneys' fees or treble damages, which would otherwise be available to an employee in court.

Notable Court Decisions

No Need to File Separate Retaliation Charge with the EEOC. The U.S. District Court for the District of Maryland (the "Court") held that once a party has properly filed an EEOC charge for discrimination, that party is not required to file a new charge for retaliation that was related to the claims made in the initial charge. Plunkett v. Potter, 2010 U.S. Dist. LEXIS 122426 (D. Md., Nov. 18, 2010).

No Need to File Charge of Discrimination with the Maryland Commission on Human Relations to Pursue a State Law Discrimination Claim. In this case, the plaintiff filed a charge of discrimination with the EEOC and the Baltimore City Community Relations Commission, but failed to cross-file or otherwise file a charge with the Maryland Commission on Human Relations. The defendant employer then moved to dismiss the plaintiff's state law claims. However, the Court held that a reasonable interpretation of the state law is that a party may meet the state law requirement of exhausting administrative remedies by filing a charge with the EEOC or the local commission within six months of the alleged discriminatory act. Ferdinand-Davenport v. The Children's Guild, 2010 U.S. Dist. LEXIS 106524 (D. Md., Oct. 6, 2010).

Cable Installers Were Not Comcast's "Employees" Under the FLSA. A group of cable installers brought suit for unpaid overtime against Comcast, and others, under the FLSA. The installers worked for separate installation companies that contracted with Comcast. The terms of the contracts between Comcast and the installation companies expressly provided that the technicians were independent contractors of Comcast. Comcast unquestionably played some role in hiring and firing technicians. It required that each technician pass a criminal background check and a drug test. Likewise, it reserved to itself the power to "deauthorize" technicians who installed its equipment.

Comcast also maintained specific standards to which the installation companies and technicians had to adhere, and regularly monitored the technicians to ensure that their performance satisfied Comcast's expectations. However, the Court noted that Comcast was not responsible for the day-to-day employee management of the technicians and did not have a role in setting the human resource policies or the technicians' working conditions. Thus, the Court determined that Comcast was not a joint employer and the installers could not pursue a FLSA claim against Comcast. By decision dated December 29, 2010, the Court certified this issue for an interlocutory appeal to the U.S. Court of Appeals for the Fourth Circuit. Jacobson, et al. v. Comcast Corp., 2010 U.S. Dist. LEXIS 102834 (D. Md., Sept. 18, 2010), interlocutory appeal certified 2010 U.S. Dist. LEXIS 136964 (D. Md., Dec. 29, 2010).

Court Allows Equitable Extension in Non-Compete Case. The Court upheld a fifty mile, eighteen month restrictive covenant in the case of a technical recruiter for a staffing firm. In analyzing the restrictive covenant pursuant to Maryland law, the court concluded that it was reasonable in terms of both geographic scope and duration, especially where, as here, the company operated on a nationwide and international level. The court awarded a permanent injunction barring the former employee from operating in the restricted area for eighteen months from the date of the court's order. The court concluded that Maryland law allows for such an equitable extension, even in the absence of a contract provision granting the employer this remedy. Teksystems, Inc. v. Bolton, 2010 U.S. Dist. LEXIS 9651 (D. Md., Feb. 4, 2010).

MICHIGAN

Chemo vs. Department of Human Services, Mich App 2009 WL4114149. This case decided in 2009 had a great impact in 2010 and held that while acts of discrimination occurring outside of the applicable three year statute periods are not actionable, it revised the holding in *Garg vs. Macomb County community Mental Health Services,* 472 Mich 263 (2205) amended 473 Mich 1205 (2005), *Chemo vs. Department of Human Services* allowed alleged acts of discrimination to be used as "background evidence" to establish a pattern of discrimination.

Brightwell vs. Fifth Third Bank of Michigan, 487 Mich 151 (2010). The Michigan Supreme Court held that claims for violation of the Elliot Larsen Civil Rights Act, discrimination occurred where the discriminatory decision was made as well as well as where it was implemented and that the appropriate venue lay where the employment was located, overruling *Barnes vs. International Machine Corp,* 212 Mich App 223. This law, which took effect May 1, 2010 is named after the former chief medical officer of the Michigan Department of Community Health and is also known as the smoke free law. This statute prohibits smoking within a public place. "Public place" is broadly interpreted to include a place of employment which is defined as an enclosed indoor area that contains one or more work areas for one or more persons employed by a public or private employer. The statute contains few exemptions, including gaming areas of casinos, (however, bars, restaurants and hotels in casinos or affiliated with casinos are not exempt), cigar bars, tobacco specialty retail stores, home offices used for the homeowner or lessee and no other employees and motor vehicles.

MISSOURI

Minimum Wage

The Missouri minimum wage rate will remain at its 2010 rate of $7.25 per hour for 2011. Employers engaged in retail or service businesses whose annual gross income is less than $500,000 are not required to pay the state minimum wage rate. Employers not subject to either the state or federal minimum wage law can pay employees wages of their choosing.

Missouri Supreme Court Recognizes the Public Policy Exception to the At-will Employment Doctrine in a Series of Three Cases

On February 9, 2010, the Missouri Supreme Court recognized for the first time the cause of action for wrongful discharge based upon the public policy exception for at-will employees. Previously, the Missouri courts had held that such a cause of action existed, but it was unclear under what circumstances the cause of action was available and what standard of proof was required for an employee to prevail.

In 2010, the Missouri Supreme Court formally adopted the public policy exception to the at-will employment doctrine holding that an employee may not be terminated: (1) for refusing to violate the law or any well established and clear mandate of public policy expressed in the constitution, statutes, or rules or regulations promulgated by a governmental body, or (2) for reporting wrongdoing to superiors or public authorities. The Court noted that not all constitutional provisions, statutes, or rules or regulations give rise to a wrongful discharge cause of action under the public policy exception; the provision must constitute a well-established and clearly mandated public policy. Further, the Court indicated that the provision relied upon by the employee must clearly prohibit the conduct at issue.

The employee now has a minimal burden of showing only that reporting the violations of law or refusing to violate the law was a "contributing factor" to the decision to discharge. The Court reversed prior case law holdings that a cause of action for wrongful discharge was not available to an employee who was employed under contract. The Missouri Supreme Court held that an employee who has a contractual relationship with an employer may pursue a cause of action for wrongful discharge in violation of public policy.

In Fleshner v. Pepose Vision Institute, P.C., No. SC90032 (Mo. Feb. 9, 2010);

In Keveneny v. Missouri Military Academy, No. SC89925 (Mo. Feb. 9, 2010); and

In Margiotta v. Christian Hospital Northeast, et al, No. SC90249 (Mo. Feb. 9, 2010)

City not Entitled to Offset for Unemployment Benefits Paid to Former Employee

In Echols v. The City of Riverside, No. WD 71560 (W.D.Mo. Dec. 21, 2010), Alonzo Echols was fired by the City of Riverside. Mr. Echols claimed his discharge was in retaliation for a complaint of discrimination he made to the Missouri Human Rights Commission. A jury found that the City did retaliate against Mr. Echols and awarded him $463.00, which amounted to one week's salary.

The City then sought to offset the $463.00 verdict by the amount of unemployment benefits paid to Mr. Echols. The trial court denied the City's request to amend its answer to add the affirmative defense of offset for unemployment benefits paid to Mr. Echols but nevertheless reduced Mr. Echols' award by the amount of unemployment benefits he had already received which reduced his actual damages verdict to zero.

On appeal, Mr. Echols argued that the trial court erred in reducing his $463.00 verdict to zero using unemployment benefits received as an offset because an offset is an affirmative defense that was waived by the City because it was not pled. The reviewing court agreed and further held that even if

the affirmative defense of offset had been properly pled unemployment benefits received should not serve to mitigate a jury award for back pay where the employer is being punished for illegal conduct.

NEW JERSEY

Alexander v. Seton Hall University, 204 N.J. 219 (2010) - Female university professors brought an action against the defendant university alleging age and gender discrimination in pay in violation of the New Jersey Law Against Discrimination. The New Jersey Supreme Court held that each payment of discriminatory wages constitutes an actionable wrong that is remediable under the New Jersey Law Against Discrimination. In addition, the two-year statute of limitations applies to each individual violation. Therefore, there exists a limit on the back period for which the plaintiffs could seek recovery under the New Jersey law Against Discrimination.

McGhee v. Pathmark Stores, Inc., Docket No. ATL-L-2459-08 (Superior Court of New Jersey, Law Division, Atlantic County, August 23, 2010) – The Law Division held that plaintiffs suing under the New Jersey Law Against discrimination do not put their mental state in controversy so as to be required to submit to an independent psychiatric examination merely by asserting claims for emotional distress damages. This matter is currently on appeal.

Nini v. Mercer County Community College, 202 N.J. 98 (2010) – The plaintiff, a former contract employee of the defendant community college did not have his contract renewed after twenty-six years of employment. The plaintiff filed an action alleging age discrimination and retaliation. The Supreme Court held that non-renewal of a term employment contract is equivalent to discharge of an at-will employee in the context of the New Jersey Law Against Discrimination's provision allowing employers to refuse to hire or promote employees over seventy years of age. In other words, an employer can be sued for age discrimination based on its refusal to renew the contract of an employee over the age of seventy, because that non-renewal is construed as a dismissal rather than a failure-to hire.

Donelson v. DuPont Chambers Works, 412 N.J. Super. 17 (App.Div.), certif. granted, 203 N.J. 95 (2010) – The plaintiff an employee of the defendant DuPont Chambers Works filed a suit contending the defendant retaliated against him after he made safety complaints to the Occupational Safety and Health Administration and to DuPont Management. The Appellate Division held that a plaintiff suing under the New Jersey Conscientious Employee Protection Act cannot be awarded post-employment economic damages without proving either actual involuntary termination of employment or constructive discharge, even if the defendant's unlawful conduct caused the plaintiff to become medically disabled from working, resulting in a disability retirement. The Supreme Court has granted plaintiff's petition for certification on this issue and the case remains pending before the Supreme Court.

Best v. C&M Door Controls, Inc., 200 N.J. 348 (2009) – The plaintiff employee brought an action his employer under the Conscientious Employee Protection Act ("CEPA") and Prevailing Wage Act claiming that he had been underpaid pursuant to the Prevailing Wage Act and that when he complained the defendant retaliated against him. At trial the jury found for the plaintiff on the Prevailing Wage Act Claim, but on the CEPA claim found for the defendant.

The Supreme Court held that in cases brought under fee-shifting statutes that allow prevailing plaintiffs to collect their attorneys' fees from defendants, a defendant cannot use the offer-of-

judgment court rule to force the prevailing plaintiff to pay its attorneys' fees. However, the court did hold that a plaintiff's refusal to accept a reasonable offer of judgment could be used as a factor in deciding the prevailing plaintiff's fee application.

Stengart v. Loving Care Agency, Inc., 201 N.J. 300 (2010) – The plaintiff employee filed an action against her employer for alleged violations for the New Jersey Law Against Discrimination. The plaintiff applied for an Order to Show Cause seeking to require the defendant employer to return all copies of e-mail messages exchanged between the plaintiff and her attorneys. These emails were exchanged over a work-issued laptop computer through the plaintiff's personal, password protected, web-based e-mail account. The Supreme Court held employers' policies do not trump the attorney-client privilege and that, therefore, employees have a reasonable expectation of privacy in e-mails sent to their attorneys through personal, password-protected, web-based e-mail accounts even if those e-mails are accessed on computers belonging to their employers.

Victor v. State of New Jersey, 203 N.J. 383 (2010) – The plaintiff, an African American state trooper brought this action against the State, State Police, and a group of separately named individuals who were either his supervisors or medical personnel employed by the state police alleging race and disability discrimination under the New Jersey Law Against Discrimination. The Supreme Court held that there may be circumstances in which a failure to accommodate claim in and of itself gives rise to a cause of action without being accompanied by an adverse employment consequence.

NEW YORK

Domestic Workers Bill of Rights

On August 31, 2010, New York State passed the Domestic Workers Bill of Rights, codified in the New York State Labor Law. New York is the first state to enact such extensive protections for domestic workers. These changes went into effect on November 29, 2010. This bill affords many protections to domestic workers that they are not afforded under the FLSA. Most notably, New York has expanded the definition of domestic worker to include those who serve as a companion for a sick, convalescing or elderly person in the home on a non-casual basis. New York Labor Law § 2 (16). This includes home health aides, home care aides and personal aides, all of whom are not covered under FLSA. However, the law exempts from the definition of domestic worker those aides who are employed by third party agencies, which, in effect, acts to afford them all the protections of the wage and hour laws. Id. This is especially notable since in 2007, the Unites States Supreme Court held that those home health care workers employed by third party agencies fall under the domestic worker exemption to the FLSA. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007).

New York has expanded the maximum hour protection for live-in domestic workers, who are exempted from the overtime protections of FLSA, so that they will now receive one and one half times their regular pay for every hour worked in excess of forty-four hours of work, whereas prior to 2010, they were only entitled to one and one-half times the minimum wage. New York Labor Law § 170. Furthermore, under New York Labor Law § 160 (3), domestics now enjoy the protections of an eight hour work day, and under New York Labor Law § 161, they are entitled to 24 hours of consecutive rest each week, overtime pay if the worker chooses to work a seventh day, and 3 paid days off per year after one year of work with the same employer. New York Labor Law § 693 provides for enforcement of these provisions through the Labor Commissioner.

Under the same Domestic Workers Bill of Rights, recognizing that domestic workers are not protected under Title VII of the Civil Rights Act of 1964 or New York Human Rights Law due to the fact that an employer must have the requisite number of employees in order to be covered, New York amended its Human Rights Law to protect domestic workers against sexual harassment and harassment based on gender, race, religion or national origin. New York Executive Law § 269-b. In order to effectuate this, New York changed the definitions of employer and employee under the Human Rights Law to expressly include those who employ domestic workers and domestic workers, respectively. New York Executive Law § 292 (5), (6).

Wage Theft Prevention Act

On December 13, 2010, Governor Patterson signed the Wage Theft Prevention Act which significantly increases an employer's liability for violations of the wage and hour provisions of the Labor Law. In order to ensure that employees will be protected against wage and hour violations, the Act expands the New York State Department of Labor's enforcement powers and imposes new notification requirements on employers.

The Act changes section 195 of the New York State Labor Law by requiring employers to provide more information to employees upon hire, with each subsequent year of employment, and with every payment of wages. Required information includes, among other things, pay rates, including the regular hourly rate and the overtime rate, how the employee will be paid (e.g., by the hour, per shift, per week, commission or salary), any allowances claimed as part of the minimum wage and when the regular pay day is scheduled. Employers must provide employees with this initial and yearly notice in writing in both English and the employee's primary language; this notice must be signed and dated by the employee, and the employer must retain an accurate record of the employees' receipt of this notice for six years. Failure to provide notice as required by New York Labor Law § 195 within ten business days of the employee's first day of employment and with every payment of wages allows either the Labor Commissioner or the employee to bring an action to recover monetary damages. In addition to affording the Commissioner the power to initiate proceedings on behalf of aggrieved employees, the Act amends Section 196 to afford the Commissioner enhanced power to investigate any controversies between employers and employees relating to alleged wage and hour violations.

The Act has also been amended to have an increased deterrent effect on employers imposing greater penalties on those employers found to be in violation of wage and hour laws. Employers must pay the prevailing employee all wages due, costs, attorney's fees, prejudgment interest, and unless the employer proves a good faith basis to believe that the underpayment of wages was lawful, they must also pay liquidated damages equal to 100 percent of the total wages due. New York Labor Law § 198.1-a.

Prior to this amendment, employers were only required to pay, in addition to wages due, 25 percent of the underpayment, but only in some instances. The Act also amends Section 215 of the New York Labor Law to provide employees with increased protection against retaliation. It now prevents any person, not just the employer or his agents, from retaliating against an employee for complaining to anyone, not just the employer or the Commissioner, that the employer has engaged in conduct which the employee reasonably and in good faith believes to be in violation of this chapter or any order issued by the Commissioner related to this chapter. Additionally, the Act makes retaliation a class B criminal misdemeanor. The Act will go into effect April 12, 2011.

Construction Industry Fair Play Act

As a result of frequent employee misclassification in the construction sector, New York State enacted the Construction Industry Fair Play Act which creates a presumption that any person performing services for a construction contractor is an employee, not an independent contractor. New York Labor Law § 861-c.

This presumption can be rebutted only if the individual:

1. Satisfies the requirements to be classified as a separate business entity as defined by the Act; or
2. Meets the criteria under the Act which establish independent contractor status. Id.

The Act imposes civil monetary penalties and criminal penalties on employers who willfully misclassify employees. New York Labor Law § 861-e.

The Act also requires contractors to post in writing, on the site where construction is performed, the rights of employees to workers' compensation, unemployment benefits, minimum wage, overtime and other federal and state workplace protections; the writing must also address the protections against retaliation and the penalties in this article if the contractor fails to properly classify an individual as an employee. New York Labor Law § 861-d. The notice must contain contact information for individuals to file complaints or inquire with the Commissioner about employment classification status. This information must be provided in English, Spanish or other languages required by the Commissioner. Id. Contractors who violate this section shall be subject to civil monetary penalties. New York Labor Law § 861-d.

Employee Privacy and Social Networking

The New York State Supreme Court for Suffolk County determined that non-public portions of a plaintiff's social networking sites are discoverable in personal injury litigation when they may contain information relevant to the plaintiff's claims for damages. Romano v. Steelcase, Inc., 907 N.Y.S.2d 650 (2010). Ms. Kathleen Romano was injured at work when her desk chair collapsed. Although she did not sue her employer, she sued the chair manufacturer and the company that allegedly distributed the chair to her employer; she claimed, among other things, loss of enjoyment of life. On the public portions of Ms. Romano's Facebook and MySpace pages, Steelcase found evidence to the contrary showing that she led an active lifestyle and took vacations to Florida and Pennsylvania during the time period she claimed that her injuries prevented such activities. Thus, they moved for an order granting access to the private and deleted portions of Ms. Romano's Facebook and MySpace pages. Granting this order, the court held, "To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial." Thus, although not addressed in this litigation, since this action arose out of a workplace injury, it is foreseeable that this information will be discoverable in workplace injury actions brought against employers and perhaps even in workers compensation and disability cases.

Note, also the recent case, McCann v. Harleysville Insurance Company, denying access to plaintiff's Facebook account. 910 N.Y.S.2d 614 (2010) and 910 N.Y.S. 2d 398 (2010). In denying access to plaintiff's Facebook account, the Appellate Division, Fourth Department, determined that Harleysville's discovery requests were overbroad and amounted to a fishing expedition. The court granted plaintiff a protective order while also permitting defendant leave to file more tailored

discovery demands. On the second appeal, with more narrow demands, the court again denied access to the Facebook account but left the door open by saying that it may be appropriate to allow access to Facebook at a later date. But, when and on what basis? Unclear.

Limits Placed on Non-Resident Employees' Ability to Sue under New York State and New York City Human Rights Laws

The State's highest court ruled that a non-resident cannot sue his employer under the New York State and City Human Rights Laws unless the employee can demonstrate that the alleged discriminatory conduct had an impact within the State or City of New York. Hoffman v. Parade Publs., 15 NY3d 285 (2010). Howard Hoffman worked for Parade Publications, the publisher of a nationally syndicated Sunday newspaper insert, which is headquartered in New York City. Hoffman worked at the Atlanta, Georgia, office and resided in Georgia. Parade informed him that it was closing its Atlanta office and terminating him. Hoffman then sued Parade claiming age discrimination in violation of New York State and New York City Human Rights Laws. Because Hoffman only traveled to New York a few times a year for meetings at the company's headquarters and otherwise had no contact with New York, the court held these laws did not apply to Hoffman, because the impact of the termination was not felt within the City or State of New York. The court emphasized that the laws' purpose is to protect inhabitants and residents of the State and City. Thus, while these laws protect non-residents who work in the State or the City, this decision acts to prevent employees from forum shopping and taking advantage of the expansive protections of the New York Human Rights Laws.

NORTH CAROLINA

MJM Investigations, Inc. v. Brian Sjostedt and Vetted International Limited, 698 S.E.2d 202, 2010 WL 2814531, (Table Text WESTLAW), Unpublished Disposition, N.C.App. July 20, 2010 (No. Coa. 09-596).

The North Carolina Court of Appeals held that a non-solicitation clause was unenforceable as it failed to define the terms "current client" and "prospect client." The Court considered the term "current client" ambiguous as the agreement did not make clear whether this term referred to clients at the time the agreement was executed, or at the time Defendant's and Plaintiff's employment relationship terminated. The Court discussed the same issue with the term "prospect client", but stated that this term was even more ambiguous as it could include clients not known until a later time. The importance of this particular opinion does not lie with its precedential value, but rather in suggestions made in a concurring opinion by Judge Steelman urging a modification in North Carolina law with regard to restrictive covenants. Presently, North Carolina Courts evaluate non-solicitation covenants and covenants not to compete using a reasonable time and territory standard. Essentially, both the time and territory restrictions must make sense in light of the totality of circumstances and fairness. In his opinion, Judge Steelman suggested that North Carolina Courts, should allow restrictions upon specific individuals for a specific period of time, limited to a narrow type of business with less emphasis on geographic limitations. He cites the growth of a global economy in support of his argument.

Kornegay v. Aspen Asset Group, LLC, 693 S.E.2d 723 (N.C.App. 2010).

In this case, the North Carolina Court of Appeals dealt with the enforceability of a verbal employment contract and other issues related to the North Carolina Wage and Hour Act. Plaintiff alleged that he entered into an oral contract with Defendant which stated that in addition to a set salary, he would receive bonuses based upon his ability to identify investment properties, and make

them profitable for Defendants. Plaintiff brought suit in 2004 alleging that he was not paid bonuses to which he was entitled. His complaint alleged violations of the North Carolina Wage and Hour Act, quantum meruit and fraud.

Ultimately, the Court held that (1)any notice to terminate bonuses or other provisions of a compensation contract must be clear and unambiguous; (2)the termination of the employment relationship does not terminate a duty to pay bonuses or other compensation earned by an employee;(3) the amount of bonuses or other compensation, even if not quantifiable at the time of the termination of the employment agreement, must still be paid as long as it is reasonably able to be calculated later; and (4) a mixed question of law and fact regarding liquidated damages may be determined by the trial judge and reviewed using an abuse of discretion standard.

OHIO

Ohio's Employer Intentional Tort Statute Upheld as Constitutional

In 2005, the Ohio legislature passed R.C. 2745.01 in an attempt to limit employer intentional tort claims. Pursuant to R.C. 2745.01(A), an employer is liable for an employer intentional tort if "the plaintiff proves that the employer committed the tortuous act with the intent to injure another or with the belief that the injury was substantially certain to occur." The statute, however, proceeds to define substantially certain as an employer acting "with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." R.C. 2745.01(C). Thus, to impose liability upon an employer for an intentional tort as defined by R.C. 2745.01, an employee must establish that the employer actually intended to injure the employee. As defined under the statute, it is no longer sufficient to establish that the employer committed an intentional act with the belief that the injury to the employee was "substantially certain" to occur. In other words, through the passage of R.C. 2745.01, the legislature limited an employer intentional tort claim to situations where the employer possessed an actual intent to injure. Consequently, "substantial certainty" intentional tort claims are no longer legally cognizable given the definition of intent provided by R.C. 2745.01. In *Kaminski v. Metal & Wire Products Co*., 2010-Ohio-1027 (March 23, 2010), the Ohio Supreme Court held that R.C. 2745.01 does not violate the Ohio Constitution. In doing so, the Court analyzed the extensive history of Ohio's workers' compensation laws and the development of the common law employer intentional tort cause of action. The Court recognized that the Ohio Constitution intended the workers' compensation system to be the exclusive remedy for injuries occurring within the course and scope of employment and that an employer intentional tort claim was a judicially created common law exception to that exclusive remedy.

Ohio Supreme Court holds that Insurance Policy can cover Attorney Fees Awarded as a Result of Punitive Damages

Generally, Ohio public policy prohibits insurance companies from covering punitive damage awards. This prohibition presumably included attorney fees awarded solely as a result of a punitive damage award. In *Neal-Pettit v. Lahman*, No. 2009-0325, 2010-Ohio-1829 (May 4, 2010), the Ohio Supreme Court refuted that presumption of non-coverage of attorney fees. The 4-2 majority held that "although an award of attorney fees may stem from an award of punitive damages, the attorney-fee award itself is not an element of the punitive-damages award . . . Attorney fees are distinct from punitive damages, and public policy does not prevent an insurance company from covering attorney fees on behalf of an insured when they are awarded solely as a result of an award for punitive damages." The impact of the Ohio Supreme Court's holding is clear: an insurance policy covers attorneys' fees unless it expressly excludes them, and Ohio public policy permits

coverage of attorneys' fees, it does not require coverage. The decision further reinforces the Ohio Supreme Court's position that punitive damages are uninsurable in the state of Ohio.

Ohio Supreme Court Rejects Ohio Civil Rights Commission's Interpretation on Mandatory Pregnancy/Maternity Leave

In *McFee v. Nursing Care Mgmt. of Am., Inc.*, 2010-Ohio-2744 (June 22, 2010), the Ohio Supreme Court rejected the Ohio Civil Rights Commission's ("OCRC") attempt to require all employers with four or more employees to provide reasonable pregnancy and/or maternity leave regardless of the employee's length of service. The employer denied an employee pregnancy leave because she had not worked the requisite one year to be entitled to leave under the employer's leave policy, and likewise was not eligible for FMLA leave. After the birth of her child, the employee failed to return to work and she subsequently was terminated for taking unauthorized leave. The Ohio Supreme Court held that, "[a]n employment policy that imposes a uniform minimum-length-of-service requirement for leave eligibility with no exception for maternity leave is not direct evidence of sex discrimination under R.C. Chapter 4112." Although the "statutes provide that it is an unlawful discriminatory practice for an employer to terminate an employee because of pregnancy or a related condition without just cause," the Court held that "the statutes do no impose a per se ban on the termination of every employee affected by pregnancy." The Court further held that the anti-discrimination statutes do not provide greater protection to pregnant employees than non-pregnant employees. Rather, the statutory scheme simply ensures that pregnant employees will receive the same consideration as other employees.

Ohio's Military Family Leave Law, Ohio R.C. 5906

Effective July, 2, 2010, a new Ohio law required large employers to provide military family leave. Specifically, employers with 50 or more employees are required to provide ten work days or eighty work hours (whichever is less) of unpaid leave to any employee who is the parent or spouse of a person who is a member of the uniformed services, when the service member is called to active duty or is injured, wounded, or hospitalized while serving in active duty. The statute applies not only to private employers, but also the state or any agency of the state, municipal corporation, county, township, or school district. Pursuant to Ohio's Military Family Leave law, the employee is eligible for unpaid leave, provided that other certain criteria (similar to those in the Family Medical Leave Act) are met. The employee must have been employed for at least twelve consecutive months, must have worked for at least 1,250 hours in the twelve months immediately preceding the leave, and leave is limited to once per calendar year.

Unlike the FMLA, employees are eligible for leave under the Ohio Military Family Leave Act regardless of whether the employee has 50 employees within 75 miles of the worksite, as long as the employer has 50 or more employees in total at all locations. The employee must provide notice to the employer of the need for such leave at least fourteen days prior to taking leave, if the leave is being taken because of a call to active duty. If the employee is taking leave because of an injury, wound, or hospitalization, the employee must provide notice at least two days prior. However, an obvious exception to the notice requirement exists where the leave is taken because the injury, wound, or hospitalization is of a critical or life-threatening nature. Employers are required to continue to provide benefits (including medical insurance, disability insurance, life insurance, pension plans, and retirement plans) to employees during the leave period but are not required to pay the employees' salary or wages during the leave period. When the employee's leave concludes, the employer must restore the employee to the position the employee held prior to taking that leave

or a similar position. This includes the equivalent seniority, pay, benefits, and other terms and conditions of employment.

Reasonable accommodations

A recent Sixth Circuit ruling places the burden on disabled employees to propose a reasonable accommodation. In *Jakubowski v. The Christ Hosp., Inc.*, 2010 U.S. App. LEXIS 24997 (12/8/10), the plaintiff was a family medicine resident at Christ Hospital, which noted a number of deficiencies in his performance. Specifically, Jakubowski was having difficulty communicating his thoughts to people and processing what people communicated to him. Jakubowski's cognitive issues were later diagnosed as Asperger's. Upon receiving the Asperger's diagnosis, Jakubowski contacted the hospital with a proposed accommodation for his disability of "knowledge and understanding" of the hospital physicians and staff. He did not explain how that accommodation would have improved his communication and interaction with patients. The hospital participated in the interactive accommodation process in good faith. Specifically, the hospital considered plaintiff's proposed accommodations, informed him why they were unreasonable, offered assistance in finding a new position in pathology that involved little to no patient contact, and never hindered the process along the way. When the parties could not agree on an accommodation, Jakubowski was terminated and later filed a lawsuit. The trial court granted the hospital's motion for summary judgment, holding that Jakubowski was not "an otherwise qualified individual" entitled to the protections of the ADA and Ohio disability discrimination laws because the ability to clearly communicate with hospital staff and patients was an essential function of Jakubowski's job. The Sixth Circuit's analysis focused on the interactive process. First, the Sixth Circuit held that "if a disabled employee requires an accommodation, the employee is saddled with the burden of proposing an accommodation and proving that it is reasonable." Moreover, the Court found that the hospital's actions in giving consideration to Jakubowski's proposed accommodation and in offering a reasonable alternative demonstrated that it engaged in the interactive process.

Minimum Wage Increased

As part of a Constitutional Amendment approved by voters in 2006, Ohio's minimum wage will increase by ten cents in January 2011. The Amendment provides for an indefinite increase every January 1st tied to the rate of inflation. After a stagnant year in 2009, inflation rose 1.4 percent in the 12 months ending August 31, 2010. This rise in inflation will increase the minimum wage by 10 cents in January. Thus, Minimum wage will be $7.40 per hour for non-tipped employees and $3.70 per hour for tipped employees (plus tips).

PENNSYLVANIA

New Pennsylvania Law Imposes Penalties for Misclassification for Independent Contractors in the Construction Industry

On October 13, 2010, the Construction Workplace Misclassification Act (the "Act") was signed into law. The Act provides criteria for classifying independent contractors within the construction industry and imposes a variety of penalties for misclassifying employees as independent contractors. The Act specifies that, in order to be properly classified as an independent contractor under the Act, and also for purposes of Workers' Compensation and Unemployment Compensation, an individual must:

1. Have a written contract to perform services in the construction industry for remuneration;
2. Be free from control or direction over the performance of such services – both under the contract and in fact; and

3. Be engaged in an independently established trade, occupation, profession or business with respect to such services.

Further, in order to meet the third part of the requirement, above, the individual must:

- Possess the essential tools, equipment and other assets necessary to perform the services;
- Be able to sustain a profit or a loss as a result of performing the services;
- Perform the services through a business in which he or she has a proprietary interest;
- Maintain a business location separate from the location of the person for whom he or she performs the services;
- Previously have performed the services for another while free from direction or control and under a contract of service and in fact; or hold him or herself out as an independent contractor; and
- Maintain liability insurance during the term of the contract of at least $50,000.

The failure to withhold income taxes or to pay unemployment contributions or workers' compensation premiums may not be considered as a factor in the independent contractor analysis. An employer – or an officer or agent of an employer – may be subject to a variety of penalties under the Act if he or she fails to properly classify an individual as an employee for purposes of the Unemployment Compensation Law or the Workers' Compensation Act and fails to provide coverage required under those laws. Penalties may include both civil and criminal sanctions, as well as the possibility of a stop work order.

Civil penalties can range from $1,000 per violation to $2,500 per violation for first-time and repeat violations, respectively. In addition, a stop-work order may issue as a result of violations of the Act. Such an order requires misclassified individuals to cease work within 24 hours of the order, which may result in the cessation of all of the employer's business operations at each site where a violation occurred. Employers will be subject to an added $1,000-per-day penalty for each day that they conduct business operations in violation of an order. The order will continue until a subsequent court order releases it.

The Act also provides for criminal penalties. Under the Act, each violation of independent contractor classification requirements will be graded as a second or third degree misdemeanor or a summary offense, depending upon whether the violation is found to be intentional or negligent. A summary offense conviction will require payment of $1,000 or less.

Importantly, these penalties apply for violations separately – meaning each individual instance of independent contractor misclassification will be considered a separate violation under the Act. In addition, a non-employer third party who intentionally contracts with an employer knowing that the employer intends to misclassify employees also will be subject to the Act's penalty provisions.

The Act went into effect on February 10, 2011. In the interim, construction industry employers should carefully review their independent contractor arrangements for compliance with the Act's criteria and take the necessary steps to ensure compliance on February 10, 2011 – and moving forward.

TEXAS

Texas Workers' Compensation Act

In *Leordeanu v. American Prot. Ins. Co.*, 54 Tex. Sup. J. 291 (Tex. 2010), the Texas Supreme Court addressed the issue of whether an injury suffered while an employee is travelling from one workplace to another while on the way home is considered an injury in the "course and scope of employment" such that the employee is afforded protection under the Texas Workers' Compensation Act. Claimant was injured in an automobile accident when she left a work-sponsored dinner and intended to stop by a company storage unit that was also right next to her house before heading home. Texas Labor Code § 401.011(12) defines "course and scope of employment" as excluding "transportation to and from the place of employment" under subsection (A) and "travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs by the employee" under subsection (B), subject to a few exceptions. The court of appeals determined that Claimant was not injured in the course and scope of employment because she did not satisfy subsection (B). However, the Texas Supreme Court reversed the court of appeals and held that subsection (A) only applies to travel to and from the place of employment while subsection (B) applies to other dual-purpose travel. Because Claimant was injured while traveling from one place of employment to another (dinner and the storage unit), subsection (B) did not apply. Therefore, the court held that Claimant was injured in the course and scope of employment.

In *American Intl. Specialty Lines Ins. Co. v. Rentech Steel LLC*, 620 F.3d 558 (5th Cir. 2010), the 5th Circuit evaluated Texas law to determine whether an employee's negligence action against an employer that does not subscribe to the Texas Workers' Compensation system is an "obligation" under the Texas Workers' Compensation Act such that it would be excluded under an insurance company policy's "various laws" exclusion. The Texas Supreme Court has never ruled on whether the Texas Workers' Compensation Act obligates a non-subscribing employer to compensate an employee for injuries sustained due to employer negligence. The 5th Circuit examined Texas legislation and previous opinions from the Texas Supreme Court and Texas appellate courts to make an "Eerie guess" that the Texas Supreme Court would hold that a negligence claim against a nonsubscriber to the Texas Workers' Compensation Act is not an "obligation' imposed by the Texas Workers' Compensation Act.

In *Espinoza v. Cargill Meat Solutions Corp.*, 622 F.3d 432 (5th Cir. 2010), the 5th Circuit determined whether an employee's waiver of both her right to sue in tort and her right to elect coverage under the Texas Workers' Compensation Act was void and unenforceable under Texas Labor Code § 406.033(e) when the employee opted instead to participate in an insurance plan offered by her employer. Texas Labor Code § 406.033(e) provides that "any agreement by an employee to waive a cause of action or any right described in Subsection (a) before the employee's injury or death is void and unenforceable." Employer provided three options to its employees: (1) receive protection under its Texas Workers' Compensation Act policy; (2) waive Texas Workers' Compensation Act protection and retain the right to sue in tort; or (3) waive both Texas Workers' Compensation Act protection and the right to sue in tort and instead participate in the company's occupational temporary disability plan. The court reasoned that because Texas Labor Code § 406.033(a) refers only whether an employer has Workers' Compensation insurance coverage, and not whether an individual employee has been covered by the employer's policy, the operation of § 406.033(e)'s bar does not apply to an employer who has Workers' Compensation coverage, irrespective of Claimant's decision to opt-out of that coverage. Furthermore, the court found that § 406.033 also allows an employee to waive her right to sue in tort so long as the employer has Workers' Compensation

coverage. Therefore, the court held that § 406.033 did not preclude a claimant from waiving both her right to sue in tort and her right to receive Worker's Compensation coverage.

Texas Commission on Human Rights Act ("TCHRA")
In *Waffle House, Inc. v. Williams*, 313 S.W.3d 796 (Tex. 2010), the Texas Supreme Court addressed a question of first impression: may a plaintiff recover negligence damages for harassment covered by the TCHRA. The TCHRA provides a cause of action for a sexual harassment claim. The plaintiff sued her former employer for sexual harassment and for the torts of negligent supervision and retention. The jury awarded damages on both claims, and the plaintiff elected to recover under the state tort claims. The Texas Supreme Court determined that plaintiff's common-law claim and statutory claim were based on the same course of conduct. Therefore, the court held that the plaintiff's remedy was limited to the TCHRA, which is subject to statutory damage caps.

Wrongful Termination
In *Physio GP, Inc. v. Naifeh*, the Fourteenth Court of Appeals in Houston held, in a case of first impression, that an individual cannot be held personally liable for a *Sabine Pilot* cause of action. 306 S.W.3d 886 (Tex. App. Houston [14th] Dist. 2010). Texas is an at-will employment state. However, the *Sabine Pilot* claim is a narrow exception to the general rule that arises when an employee is terminated by his employer solely for refusing to perform an illegal act. In *Physio*, the plaintiff claimed her employment was terminated for her refusal to sign altered patient medical treatment records showing medical services that were never provided and that would have led to higher insurance payments for the employer. The plaintiff filed suit against both her employer and her supervisors. The Court of Appeals, in a split decision, held that individual supervisors (absent a finding that the supervisor was the alter ego of the employer) cannot be held personally liable for a *Sabine Pilot* cause of action.

WASHINGTON
The Washington State Legislature took a respite from the many employment law issues that were at its forefront in 2009. Consequently, there were no significant employment law changes that impacted private sector employers this year. The following, however, are notable employment law issues to address:

RCW 49.46 – Washington State Minimum Wage Act
Washington is just one of 10 states that adjusts its minimum wage based on inflation. In 1998, a voter initiative passed which requires the state minimum wage to be adjusted for inflation each year according to the change in the federal Consumer Price Index for Urban Wage Earners and Clerical Works during the twelve month period ending August 31. The index decreased during the twelve months between September 2008 through August 2009. As a result, Washington State's minimum wage remained at $8.55 per hour. This was the first time since the initiative passed twelve years previously that there was no increase in the state's minimum wage.

Amended WAC 296-126 – Employment Standards (Standards of labor for the protection of the safety, health and welfare of employees for all occupations subject to RCW 49.12).

The purpose of this rulemaking was to update the current industrial welfare rules, which were adopted in 1974. The adopted rules repeal and delete outdated requirements, remove duplicative provisions, establish rules consistent with current statutory requirements, specify the information for

certain requirements, create cross references, and update definitions and terms for consistency and clarity. The changes were adopted on 2/2/2010 and became effective on 3/15/2010.

New WAC 296-135 – Leave for Victims of Domestic Violence, Sexual Assault, or Stalking
This rulemaking was a result of Substitute House Bill 2602 (Chapter 286, Laws of 2008), which became effective on April 1, 2008. This bill required employers to provide employees with reasonable or intermittent leave from work upon advance notice, except in emergencies, for specified activities if the employee or family member is a victim of domestic violence, sexual assault, or stalking. Leave can be used for seeking or obtaining legal or law enforcement assistance, medical treatment, social services, counseling, or for safety planning or relocation. Employers are prohibited from discriminating against employees who exercise rights protected by this bill. Administrative and civil causes of action for violation of the provisions of the bill are created. Rules are needed to administer and enforce SHB 2602. The legislature directed the adoption of rules through the passage of this bill. The rules were adopted on 7/6/2010 and became effective on 9/1/2010.

WISCONSIN
2009 WI ACT 287
Claimants who have been laid off without expectation of recall may enter a program of vocational training. While in training, such claimants are not disqualified from receiving weekly unemployment benefits even though they are not available for work at that time. These claimants are also not required to search for work or accept job offers while in training. 2009 Act 287 adds to the types of training that the Department may approve. In addition, Act 287 amended Act 11 to allow claimants in approved training to receive up to 26 weeks of benefits after exhausting all other entitlement to state and federal unemployment benefits. All benefits funded by state taxes and paid while a claimant is in approved training will be charged to the Reserve Fund's balancing account. Formerly, these benefits were charged to and affected the tax rates of all employers that had laid off the claimant during the period used to determine the claimant's eligibility for unemployment insurance.

Also, in most cases the Department finds that a bonus is earned in the week it is paid. Act 287 clarified and simplified the treatment of bonus payments by explicitly stating that a bonus will be considered earned in the week it is paid.

Moreover, Act 287 replaced the words "at least 35 hours" per week with "full time." "Full time" is defined by administrative rule as 32 or more hours of work per week. As such, full time is reduced by three hours. The change is effective in July 2011.

2009 WI ACT 290
The new law makes it an act of employment discrimination under the Wisconsin Fair Employment Act (WFEA) to take adverse employment action against an employee who refuses to attend a meeting at which "religious or political" matters are discussed. Wisconsin Act 290 defines "political matters" to include "the decision to join or not to join, to support or not to support…any constituent group". "Constituent group" is defined to include labor organizations. Therefore, as a result of Act 290, it is employment discrimination under WFEA for any employer to take adverse action against an employee for refusing to attend any meeting at which the employer seeks to discuss the pros and cons of joining a labor union.

2009 WI ACT 292
Effective January 1, 2011, the Wisconsin Department of Workforce Development (DWD) will have increased authority to investigate and enforce worker misclassification (employee v. independent contractor) in the construction industry. 2009 Wisconsin Act 292 allows the DWD to issue an order requiring the employer to stop work at the particular locations prior to a hearing or determination, thereby halting any construction

Canada

British Columbia
The Supreme Court of British Columbia handed down a decision in February 20091 concerning the dismissal of a 46-year-old director of sales and marketing of a well-known hotel in Vancouver because of his behavior during … the employer's holiday party. This behaviour included excessive consumption of alcohol, sexual suggestive dancing and inappropriate sexual touching with a female subordinate during an after-party that he organized. With the holiday season approaching, this case is instructive to employers to be vigilant of possible employee behaviour at company events which could expose employers to liability in potential human rights claims for allowing a poisonous work environment or sexual harassment to occur at such events or thereafter.

Nova Scotia
2009 was the year where the concept of mandatory retirement continued to fade in Canada. On July 1, 2009, Nova Scotia became the latest province to enact legislation to amend its provincial human rights code to eliminate mandatory retirement. However, this does not mean that all Canadian employers cannot have retirement programs based on a certain age. For example, legislation in New Brunswick has provisions to allow mandatory retirement for employees whose job duties demand a certain amount of physical ability.

Also, in August 18, 2009, two trials had to be adjourned in Ontario after a Toronto lawyer questioned the propriety of having a 77-year-old deputy judge presiding as the provisions of the federal Constitution Act, require all superior court judges to retire at 75. No doubt that the Federal Court's decision, which could have serious repercussions for many decided cases, will be closely examined; especially as six of the seven deputy judges in Federal Court are over the age of 75.

Ontario Developments
The most anticipated potential provincial legislation in 2009, for those practicing in the area of employment law in Ontario, is Bill 168. This bill is entitled "An Act to Amend the Occupational Health and Safety Act with respect to Violence and Harassment in the Workplace and Other Matters". Significant provisions to this proposed legislation will possibly require more onerous duties to be borne by employers. These proposed provisions will require employers to create policies with respect to workplace violence and workplace harassment, to develop programs to implement the workplace violence policy, to assess the risk of workplace violence and to report the results of the assessment to their joint health and safety committee or to a health and safety representative. Further, an employer will be obligated to develop a program to implement a workplace harassment

[1] *Van Woerkens v. Marriott Hotels of Canada Ltd.*, 2009 BCSC 73

policy which will include specific measures. Moreover, Bill 168 will also amend provisions in the current legislation dealing with a worker's right to refuse work in various circumstances where his or her health and safety is in danger, to include the right to refuse work if workplace violence is likely to endanger the worker.

United Kingdom

Equality Act 2010

The Equality Act 2010 came into force on the 1 October 2010, and was perhaps the key legislative change of 2010. It was hailed as the most significant piece of equality legislation in the last 40 years, with the aim of unifying and simplifying discrimination law.

Some of the key changes were the extension of the concepts of associative and perceptive discrimination to cover all protected characteristics, the introduction of the concept of third party harassment and the prohibition on pre-employment medical questionnaires. The Act also provides specifically for direct discrimination because of a combination of no more than two protected characteristics. However, this provision will not be in force until April 2011 at the earliest.

Atypical working

Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2010

These Regulations came into force on 1 October 2010 and amended the Conduct of Employment Agencies and Employment Businesses Regulations 2003. They introduced a 30-day cooling-off period applicable to performers, such as actors, dancers, singers and models, during which the work-seeker will have a right to cancel or withdraw from the contract with immediate effect. The Regulations also re-structured the existing regulations on obtaining work-seekers' consent to terms before providing services and modified the suitability checks that employment businesses and employment agencies must carry out on work-seekers. Advertisements for jobs no longer have to state whether the advertiser is an employment agency or an employment business, but now need to state whether the position advertised is permanent or temporary.

Apprenticeships, Skills, Children and Learning Act 2009

The right for employees to request time off to undertake training or study came into force on 6 April 2010 for employers with 250 or more employees; and will apply to all businesses by April 2011. The apprenticeship provisions are not due to come into force until September 2013. This part of the Act will introduce a new apprenticeship structure to facilitate the creation of apprenticeship agreements and the provision of apprenticeship certificates. Apprenticeship agreements will also be in a prescribed form. The relationship will be a contract of service not apprenticeship.

Cross-border and immigration

Limits to non-EU economic migration

On 28 June 2010 the government launched a consultation on the mechanism to be used to limit the number of non-EU economic migrants entering the UK and on the additional measures that should be taken to find alternatives to migrant labour.

In November 2010 the UKBA published refining criteria which will apply to all employers seeking additional certificates of sponsorship in the Tier 2 (general) category; the Prime Minister confirmed

that the cap would not apply to intra-company transfers and the government announced new measures to control the number of migrants that can come to the UK from outside Europe that include an annual limit of 20,700 on those coming to the UK under Tier 2 (general), the tightening the intra-company transfer route and abolishing the existing Tier 1 (general) category and replacing it with a new Tier 1 (exceptional talent) category which will be limited to 1,000 people. These provisions are due to come into force in April 2011.

Statement of changes in Immigration Rule, October 2010
The changes enable further use of online application forms and introduce an English language requirement for migrants applying for leave to enter or remain as the partner of a British citizen or person settled in the UK.

UK Border Agency - New rules for Tier 1 and Tier 2 and other changes to the Immigration Rules
The key changes relate to Tier 1 and Tier 2 of the points-based system, and include a new points criteria for both tiers, a simplified process for Tier 1 applicants without a Master's degree, greater flexibility for short-term transfers by multinational companies and more protection against the use of such transfers to fill long-term vacancies that should go to resident workers.

Directors
UK Corporate Governance Code
On 28 May 2010, the Financial Reporting Council published the revised UK Corporate Governance Code. The Code introduces new principles on the roles of the chairman and non-executive directors, composition of the board, time commitment expected of directors and board's responsibility for risk.

Discrimination
Equality Act 2010
The Act replaced previous discrimination legislation with one single Act in order to harmonise and strengthen the existing law. On 17 November 2010, the government confirmed that it will not be bringing the section 1 public authority socio-economic duty into force. On 2 December 2010, the government confirmed that the positive action in recruitment and promotion provisions will come into force in April 2011.

New equality question and answer forms (discrimination questionnaires)
In October 2010, the final statutory question and answer forms were published by the Government Equalities Office. It introduces a new streamlined procedure for obtaining information about potential discrimination and equality of term cases. They are based on the statutory questions and answers contained in the Equality Act 2010 (Obtaining Information) Order 2010 (SI 2010/2194). There are two new forms: one for discrimination and one for equal pay.

Consolidating disability regulations
Equality Act 2010 (Disability) Regulations 2010 Replicate and consolidate the numerous regulations previously supporting the Disability Discrimination Act 1995, including the Disability Discrimination (Meaning of Disability) Regulations 1996 (SI 1996/1455) and the Disability (Blind and Partially Sighted Persons) Regulations 2003 (SI 2003/712), which were repealed on 1 October 2010.

The only changes are the new categories of persons with a visual impairment deemed to have a disability under the new regulations.

EHRC draft Codes of Practice
Three draft statutory codes of practice providing guidance on the Equality Act 2010. The consultation on the draft codes closed on 2 April 2010 and the final versions of the employment and equal pay codes were laid before Parliament on 12 October 2010.

Stirring up hatred on grounds of sexual orientation
The Criminal Justice and Immigration Act 2008 (Commencement No.14) Order 2010 No. 712 (C. 47) introduced a new criminal offence of intentionally stirring up hatred against a person on the grounds of their sexual orientation and came into force on 23 March 2010.

Coalition agreement proposals
Section 12 of the coalition's Programme for Government set out the government's proposals on equality, including promoting gender equality on the boards of listed companies and promoting equal pay by undertaking a pay review in the public sector and implementing the principle that the highest paid person in an organisation is not paid more than 20 times the lowest paid (the "20 times" pay multiple).

Employee Data and Monitoring
Coroners and Justice Act 2009
The Act amended the Data Protection Act 1998 to provide broader enforcement powers to the Information Commissioner; the changes came into force on 1 February 2010.

Safeguarding Vulnerable Groups Act 2006
On 15 June 2010 the government announced an immediate halt to the requirement for individuals working with children or vulnerable adults to register with the Independent Safeguarding Authority. Registration was due to become compulsory in November 2010.

In October 2010, the government set out the scope of its review of the vetting and barring scheme. It will consider the fundamental principles and objectives behind the scheme and evaluate the scope of the scheme's coverage, the most appropriate function, role and structures of safeguarding bodies and governance arrangements, and make any arrangements as to what, if any, new scheme is needed. A review of the criminal records regime will also take place. The government's recommendations are expected in early 2011.

Employment Tribunals
PIDA "whistleblowing" claims to regulators
The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2010/131 came into force on 6 April 2010 and gives employment tribunals the power to send details of whistle-blowing claims direct to a prescribed regulator where the claimant has given express consent.

Damages Based Agreements
Coroners and Justice Act 2009 and The Damages-Based Agreements Regulations 2010/1206 introduced minimum requirements for enforceable "contingency fee agreements" and a new cap on

the percentage of a client's compensation a firm may take as their "fee" at 35% inclusive of VAT. The legislation came into force on 8 April 2010.

Unfair dismissal compensatory award
The Employment Rights (Revision of Limits) Order 2009 provides that the maximum compensatory award for unfair dismissals with an effective date of termination on or after 1 February 2010, went down to £65,300 due to a drop in RPI.

Equal Pay
Equality Act 2010
The Act introduced explicit provisions on indirect discrimination in equal pay cases, reflecting current case law. It also provides for the possibility of direct sex discrimination claims in respect of pay based on hypothetical comparators and limits the enforceability of contractual "pay secrecy" clauses.

On 17 November 2010, the government confirmed that it will not be bringing the section 1 public authority socio-economic duty into force and on 2 December 2010, the government announced that it will not be introducing mandatory gender pay reporting requirements, but intends to work with employers to develop a voluntary gender pay reporting scheme in the private and voluntary sector.

Families and Pregnancy
Additional paternity leave and pay
The Additional Paternity Leave Regulations 2010/1055 came into force on 6 April 2010. It applies to parents of babies born (and adoptive parents notified of a match) on or after 3 April 2011. It enables eligible employees (usually fathers) the right to take up to 26 weeks paternity leave, if the mother (or primary adopter) returns to work early. Part of the leave is paid if taken during the mother's (or primary adopter's) paid leave period.

Revised Parental Leave Directive
The new Parental Leave Directive (2010/18/EU) was adopted on 8 March 2010 and implements the revised Framework Directive on Parental Leave, and repeals Directive 96/34/EC. The Directive increased parental leave from 3 to 4 months and gives member states two years to implement.

Equal treatment of self-employed workers Directive
The Directive came into force on 4 August 2010 and introduced a new entitlement for self-employed women, and female spouses and life partners of self-employed workers, to maternity benefits, including at least 14 weeks maternity allowance. Member states can decide whether to provide these benefits on a mandatory or voluntary basis.

Member states have two years to implement the Directive into national law. After this time, Directive 86/613/EEC will be repealed. Is likely to have little or no practical effect for UK self-employed workers who are currently eligible for up to 39 weeks maternity allowance.

Coalition agreement proposals: extension of flexible working
Section 12 of the coalition's Programme for Government set out the government's plan to extend the right to request flexible working to all employees. On 30 September 2010, the government announced that the right to request flexible working will be extended to parents with children under

18 from April 2011. A consultation on how to extend this right to all employees and create a new system of flexible parental leave will be launched later this year.

Pay and Benefits

Financial Services Act 2010

The Act received Royal Assent in 8 April 2010 and will amongst other things strengthen the powers of the FSA to regulate remuneration in the financial sector, promote effective risk management, introduce compliance with international standards and provide for a greater link between risk and reward.

It will also give the FSA power to prohibit specified types of remuneration, make contractual terms void if they breach such a prohibition and provide for the clawback of payments made under void terms.

The Executives' Remuneration Reports Regulations 2010 - proposals include obliging large banks and building societies to disclose the remuneration packages of executives earning £500,000 or more.

Revision of FSA Remuneration Code

FSA proposals on revising the Remuneration Code.

The main proposed changes include significantly increasing the scope of the Remuneration Code (from approximately 26 to over 2,500 financial firms) and new requirements concerning bonus deferral, a limit on the proportion of bonuses that can be paid in cash, restrictions on guaranteed bonuses and severance pay.

Financial sector remuneration policy

Remuneration in the financial sector will be subject to new EU requirements from 1 January 2011, under an amending directive known as CRD 3.

In October 2010, the Committee of European Banking Supervisors (CEBS) published a consultation paper addressing important issues about the implementation of the CRD 3 remuneration requirements and clarifies some of them. The consultation closed on 8 November 2010.

In November 2010, the FSA published a further consultation paper on remuneration disclosure (CP10/27) which outlines its proposals to implement CRD 3. Among other things the FSA is consulting on items to be disclosed, the form and frequency of disclosures and proportionality. The consultation closes on 8 December 2010.

Pensions Act 2008

Employers are required under the Act to automatically enroll "jobholders: into a pension scheme and will be required to make minimum contributions to jobholders' pension schemes. Jobholders will be free to opt out of membership once they have been enrolled. The stakeholder pension requirements will also be abolished. These provisions have been in force since 1 October 2010.

Coalition agreement proposals

Section 1 of the coalition's Programme for Government set out the government's plans to limit remuneration in the financial sector, including bringing forward detailed proposals for robust action to tackle unacceptable bonuses in the financial services sector.

Recruitment

The Safeguarding Vulnerable Groups Act 2006

On 15 June 2010, the government announced an immediate halt to the requirement for individuals working with children or vulnerable adults to register with the Independent Safeguarding Authority. Registration was due to become compulsory on November 2010. The scheme is to also be remodeled.

In October 2010, the government set out the scope of its review of the vetting and barring scheme. It will consider the fundamental principles and objectives behind the scheme and evaluate the scope of the scheme's coverage, the most appropriate function, role and structures of safeguarding bodies and governance arrangements and make any arrangements as to what, if any, new scheme is needed.

A review of the criminal records regime will also take place. The government's recommendations are expected in early 2011.

Sickness and Incapacity

New GP medical certificates: "Fit notes"

The Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 introduced the new "fit note" for use by GPs. The Regulations came into force on 6 April 2010 and their intention was to focus minds on what can be done to assist a return to work and prompt useful discussions between patient and GP and employer and employee to this aim.

GPs are required to complete a tick-box section to confirm whether they consider a phased return to work, altered hours, amended duties and/or workplace adaptations would enable the employee to return to work. A new computerised rather than handwritten statements were also introduced by the Regulations.

Trade Unions

Blacklisting of trade unionists

The Employment Relations Act 1999 (Blacklist) Regulations 2010, which came into force on 2 March 2010, made it unlawful to compile, use, sell or supply "prohibited lists," subject to certain exemptions. There are also new rights for workers not to be subjected to detriment or dismissal for a reason connected to a prohibited list.

Whistle-Blowing

Coalition agreement proposals

Section 16 of the coalition's Programme for Government stated that the government intended to introduce new protections for whistleblowers in the public sector.

On 12 October 2010 the government opened a consultation on its proposals to amend the NHS constitution to: insert an expectation that NHS staff will raise concerns about safety, malpractice or wrong doing at work which may affect patients, the public, other staff or the organisation itself as early as possible; insert a NHS pledge to support all staff in raising concerns about safety,

malpractice or wrong doing at work, responding to and where necessary investigating the concerns raised; and highlight the existing legal right for NHS workers to raise concerns about safety, malpractice or other wrongdoing without suffering any detriment. The consultation closes on 11 January 2011.

Working Time and Time Off

Right to request time off for training

Employees who have been employed for at least 26 weeks by employers with 250 or more employees now have the right to request unpaid time off work to undertake study or training to improve their effectiveness at work and the performance of their employer's business.

On 11 August 2010, BIS launched a consultation on the future of the right to request time off to train, with a view to reducing burdens on businesses.

On 11 November 2010 the Business Minister, Mark Prisk, stated that the right to request would not apply to employers with less than 50 employees. However, on 17 November he said that his earlier statement was "premature" and that the policy was "still under active consideration until final decisions can be made."

Acas Code of practice on time off for trade union duties and activities

New Code replacing the 2003 guidance.

Review of the Working Time Directive (2003/88/EC)

"First phase" consultation with the EU social partners over European Commission proposals to comprehensively review the Working Time Directive (2003/88/EC).

The Commission has reportedly confirmed that there will be a second consultation in Autumn 2010, although the outcome of the "first-phase" consultation has not yet been revealed.

Main Legislative Developments for 2011

Bribery Act 2010

The Bribery Act will come into force in April 2011. The Act will have a significant impact on employers, above all because it introduces a new criminal offence for commercial organisations of failure to prevent bribery. This offence can attract unlimited fines. The only defence available is for organisations to demonstrate that they have 'adequate procedures' in place to prevent bribery occurring and that these procedures are adhered to.

Phasing out Default Retirement Age

The Default Retirement Age (DRA) will be abolished by October 2011; although it will still be possible for individual employers to operate a compulsory retirement age, provided they can objectively justify it. At present the interim provisions effectively mean that employers only have until 1 April 2011 to issue notification of retirement to employees who are about to reach 65 years of age.

Agency Workers Regulations 2010

The regulations implement the Temporary Agency Workers Directive (2008/104/EC) and are due to come into force on 1 October 2011. The main provisions include agency workers entitlement to basic working and employment conditions after 12 weeks in the same role, that are no less favourable than employees recruited direct by the hirer. From the start of an assignment, agency workers will be entitled to equal access to on-site facilities and information on permanent employment vacancies. The Regulations also give increased rights to pregnant and breast-feeding mothers.

Other Developments for 2011

Apprenticeships and Skills (Public Procurement Contracts) Bill 2010-11

The Bill proposes that certain public procurement contracts led by public authorities include a commitment to provide apprenticeships and skills training.

National identity cards

The Identity Documents Bill makes provision for the cancellation of the UK National Identity Card, the cancellation of the Identification Card for EU nationals, the destruction of the National Identity Register and the retention of the identity card for foreign nationals (biometric residence permit).

Draft Immigration Simplification Bill

The draft bill is intended to replace the five current categories of leave to enter the UK with the concept of one "immigration permission," with permission either being temporary or permanent. Temporary permission will be given for a particular purpose to visit, work or study and will be subject to conditions such as access to work or public funds and new restrictions on migrants' ability to vary the purpose or duration of their leave.

Financial Services Regulation Bill

The Financial Services Regulation Bill was announced in the Queens Speech on 25 May 2010 and will move responsibility for the regulation of financial services from the FSA to the Bank of England. According to HM Treasury's business plan (published November 2010) the government will present more detailed proposals, including draft legislation, for consultation in February 2011. It intends to bring forward the FS Regulation Bill in June 2011, with the aim of completing the passage of primary legislation by December 2012.

Proposal to amend Pregnant Workers Directive

In October 2010 the European Parliament voted to increase minimum maternity leave across the EU to 20 weeks on full pay and to extend compulsory maternity leave period to six weeks.

On 6 December 2010, EU ministers expressed concerns about the proposals to amend the Directive. Eight members of the Council tabled a statement expressing their opposition, in particular to the plan for women to be paid in full for 20 weeks' maternity leave. Until the Council adopts a "first reading position" (as required under the ordinary legislative procedure), the proposals to amend the Directive will not progress further.

Superannuation Bill

The civil service compensation scheme is a statutory scheme under the Superannuation Act 1972 which provides a range of benefits to civil servants who leave the service early.

The Superannuation Bill 2010-11 would impose a cap on payments under the scheme of 12 months' pensionable earnings for dismissals and 15 months for voluntary terminations. On 7 December 2010, the Bill had its third reading in the House of Lords and has now been returned to the Commons with amendments.

Lawful Industrial Action (Minor Errors) Bill
Private members' Bill sponsored by John McDonnell MP.
Aims to amend section 232B of the Trade Union and labour Relations (Consolidation) Act 1992 to extend the circumstances in which industrial action is not to be treated as excluded from the protection of section 219.

Health and Safety (Company Director Liability) Bill 2009-10
Private members' bill introduced by Frank Doran MP which seeks to impose health and safety duties on directors.

Legal aid reform
Ministry of Justice proposals for what it describes as a "radical, wide-ranging and ambitious programme of reform" of legal aid in England and Wales, aiming to save £350 million per year in taxpayers' money. The consultation paper proposes withdrawing all funding for employment cases, with the exception of discrimination matters, for which the current arrangements would remain in place.

Sweden

Annual Leave Act
A new version of the Swedish Annual Leave Act (SFS 1977:480) became effective on April 15, 2010. The primary purpose for the new additions is to simplify the rules regarding vacation and to adjust the Swedish Annual Leave Act so that it is more aligned with EU law and international conventions.

One important aspect to the new version of the Act relates to the calculation of vacation pay. The Act now provides two different models for the calculation of vacation pay; the former method known as the "Percentage Rule" (*Sw* Procentregeln) and the new method known as the "Equal Pay Rule" (*Sw* Sammalöneregeln). As anticipated, the Equal Pay Rule is based on the same principles for the calculation of vacation pay that already exist in many collective bargaining agreements in Sweden.

In circumstances where the employee's monthly or weekly salary is fixed, the Act recommends that holiday pay be calculated according to the Equal Pay Rule. In such instances, the holiday pay amounts to the employee's current monthly or weekly salary (any fixed premiums included) together with an added fixed holiday supplement. The fixed holiday supplement for every paid vacation day is 0,43 % of the employee's monthly salary. For those employees with weekly salaries, the fixed holiday supplement is 1.82 % of the total weekly salary. If the employee's salary also consists of any variable parts (such as bonuses or commissions), then the holiday pay is 12 % of the employee's total amount of the earned variable parts during the vacation year.

An employer can choose to use the Percentage Rule even when the Equal Pay Rule is applicable. However, the Percentage Rule must always be applied when (i) an employee's salary does not consist

of a fixed monthly or weekly salary; (ii) the employee has had a level of occupation that has varied during the qualifying year; (iii) an employee has changed leaves of occupation between the qualifying year and the time of the annual leave; (iv) an employee has been absent during the qualifying year for reasons that do not afford an entitlement to holiday pay; or (v) the employee's salary regularly consists of one fixed part and one variable part and the variable part amounts to more than 10 % of the total salary during the vacation year.

It is important to note that these new provisions regarding the calculation of vacation pay may be set aside by a central collective bargaining agreement.

Age discrimination

Since January 1, 2009 the Swedish Discrimination Act (2008:567) has contained protection against discrimination on grounds of age. The Equality Ombudsman (DO) is the government agency that seeks to combat discrimination in Sweden, and in 2010 the DO, for the first time, successfully pursued compensation for an individual based upon a claim of age discrimination.

The case involved 62 year old women ("AH") who applied for one of two vacant positions as a job coach with the Swedish Public Employment Service (*Sw* Arbetsförmedlingen). Of the ten applicants who were called for interviews, six were women, four were men and all but one was younger than AH. One man was 60 years old while the other applicants were between 23 to 50 years old. AH was not called for an interview, and she did not become employed by Arbetsförmedlingen. The two women who did receive employment were 27 and 36 years old. DO brought an action against the State based upon allegations of both age and sex discrimination.

The Labour Court determined that AH was disadvantaged by not being called for an interview or being offered employment. Further, the Court found that AH was in a comparable if not better situation, especially with respect to her work experience and education, to those who did receive interviews and to at least one of the two women who were actually offered the positions.

In its defense, the State argued that AH was not provided an interview because she had "personal shortcomings" that would prevent her from doing the job properly, and it contended that AH's age and sex were not an issue. The State explained that the Arbetsförmedlingen had obtained information about AH's personal shortcomings after speaking with two employment advisers who had previously met AH. It was the advisers' opinion that AH was not suitable for the work as a job coach since she was arrogant and lacked empathy.

The Labour Court rendered a verdict in favor of the DO, holding that the State was in breach of Chapter 2, section 1 of the Discrimination Act, because the State failed to show that the decision not to call AH for an interview, or to hire her, lacked connection with her sex or age. The Court reasoned that an employer's assessment of personal suitability must be executed objectively and that an employer must possess hard evidence regarding an applicant's alleged personal shortcomings. Furthermore, the Court expressed that the conventional way of collecting information regarding an applicant is to contact previous employers and others with relevant personal knowledge about the applicant. The Labour Court found that it was not sufficient to base an assessment on two brief and "internal" conversations that had no real relevance to the recruitment at issue.

Whistleblowing
It is becoming increasingly more common for Swedish Companies to have a policy regarding whistleblowing so employees can appropriately report serious improprieties within the company or group of companies. This raises interesting scenarios because Section 21 of the Swedish Personal Data Act (SFS 1998:204) prohibits anyone, other than public authorities, to "process" personal data concerning an individual's offences involving crime, judgments in criminal cases, coercive penal procedural measures or administrative deprivation of liberty (the very conduct that is often the subject of "whistleblowing") without first applying for a special exemption. This prohibition of "processing" such information applies regardless of whether consent to "process" the data has been obtained from the data subject.

Interestingly, a new regulation issued by the Data Inspection Board (DIFS 2010:1) amends regulation DIFS 1998:3 and now provides (effective November 1, 2010) that it is possible, under certain conditions, to process information on legal offences in whistleblowing systems without having to apply for a special exemption. The amendment does not change in substance the requirements when handling information in whistleblowing systems, and all provisions in the Personal Data Act must still be observed when creating a whistleblowing policy.

Hiring of labor when there are employees with a right to priority
In Sweden, employees' right to priority of re-employment is regulated in the Employment Protection Act. The legal situation is unclear as regards hiring of labor when there are employees with a right to priority. This contributed to make the issue of hiring of labor, when there are employees with a right to priority, to one of the deal-breakers during the 2010 bargaining round between the parties at the labor market in Sweden.

LO, which is a central employee's organization for 14 affiliates with approximately 1.700.000 members, demanded new rules that would strengthen the trade union's influence when it comes to hiring labor and would limit the employer's ability to use hired labor when there existed former employees with rights of priority for re-employment. The employer's central federation demanded that this issue should not be regulated in collective bargaining agreements. In the end the issue was regulated in some of the collective bargaining agreements.

Remuneration regulations within the financial sector
In 2010, and again in 2011, the Swedish Financial Supervisory Authority issued regulations and guidelines regarding remuneration systems within the financial sector. These regulations and guidelines are based on recommendations from the EU commission and are designed to reduce the remuneration systems' affect on a company's risk level.

According to the regulations, the company's remuneration policy must be consistent with, and even promote, sound and effective risk management. In fact, the policy must discourage excessive risk-taking and establish a balance between base salary and variable salary aspects to an individual's overall compensation. Further, for certain categories of employees, such as management and employees whose actions can have a material impact on the risk exposure of the company, a part of the variable remuneration must be deferred, generally for at least three years. The deferred variable remuneration may be cancelled in part or in whole under certain circumstances (such as when the company's position is significantly weakened). For certain larger companies, there is a requirement that part of the variable remuneration for the executive management must be paid in shares or share-linked instruments.

Swedish Foreign Posting Act

Posting of workers is regulated by the Directive 96/71/EC of the European Parliament (the "Posting Directive"). The Posting Directive is implemented in Sweden's national legislation by the Posting of Workers Act (SFS 1999:678). The purpose of this legislation is to guarantee that the rights and working conditions of posted workers are protected and to avoid "social dumping". In order to achieve this purpose the legislation provides that a Member State's minimum terms and conditions of employment must be applied to workers posted to that State.

After a verdict in the EU Court of Law (C-341/05), the so-called "Laval verdict", a number of changes have been made to Sweden's Posting of Workers Act. The changes entered into force April, 15 2010 now provide that a Swedish employees' organization can use industrial actions against employers who post workers in Sweden in order to achieve a regulation of the employment terms and conditions for the posted employees by means of a collective bargaining agreement. However, the terms and conditions demanded by the employees' organization must provide:

(i) Minimum terms or conditions in a Swedish central branch agreement, which means an agreement that is valid generally in the whole country for a particular branch;
(ii) Terms or conditions within the 'hard core` of protective rules for posted employees stated in section 5 of the Swedish Foreign Posting Act, inter alias terms or conditions valid for leave, working hours, pay and similar;
(iii) terms or conditions in a central branch agreement that are better than those already in force according to Swedish law.

The Swedish central branch agreement serves as a "reference-agreement" with respect to the terms and conditions a Swedish labor organization can "force" upon employers who post workers in Sweden by taking industrial actions. However, a Swedish employees' organization may not use industrial action to achieve a Swedish collective agreement if an employer can show that the employees are already included in terms and conditions that are at least as good as those in a Swedish central branch agreement.

The employee's organizations must submit to the Swedish Work Environment Authority any employment terms and conditions which they are to demand through the use of industrial actions. So far, the Work Environment Authority has received such employment terms and conditions from IF Metall (a merger between the Swedish Industrial Union (Industrifacket) and the Swedish Metalworkers' Union (Metall) and SEKO (The Union for Service and Communications Employees). It shall be noted that there is no sanction for the employee's organization if no such submission has been made. Hence, it does not affect the admissibility of an industrial action or lead to a liability to pay damages for the employee's organization if no such submission has been made.

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