THE HARMONIE GROUP®

Employment Law Changes Around the World

January 2012

International Employment Updates

The Corporate Responsibility To Respect Human Rights
On 16 June 2011, the United Nations Human Rights Council adopted a resolution regarding human rights and transnational corporations and other business enterprises, It endorsed a set of "**Guiding Principles for Business and Human Rights**". This unprecedented move established the Guiding Principles as **the global standard of practice** that is now expected of all governments and businesses with regard to business and human rights.

The Guiding Principles were developed to "operationalize" the UN "Protect, Respect and Remedy Framework. This three-pillar Framework consists of:

- the State Duty to Protect Human Rights
- the Corporate Responsibility to Respect Human Rights
- the need for greater Access to Remedy for victims of business-related abuse.

The Guiding Principles comprise 31 Principles, which:

- outline steps for States to foster business respect for human rights;
- provide a blueprint for companies to manage the risk of adversely impacting human rights;
- and, offer a set of benchmarks for stakeholders to assess business respect for human rights.

Relevance to the Employment Panel?
Many businesses around the world are already looking at how they can implement the Guiding Principles

http://www.thecoca-colacompany.com/citizenship/human_rights_statement.html

Further, the Foreign Secretary has made it a core part of our foreign policy that the Government will do all it can to help UK business achieve greater success overseas, in order to boost Britain's overall prosperity. At the same time he has put respect for human rights as a core value at the heart of and indivisible from foreign policy. With the United Nations' afore-mentioned endorsement of the UN Guiding Principles, the Government has decided to publish a strategy on business and human rights for the middle of 2012.

To note:

Guiding Principle 12
"*The responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, **at a minimum**, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work*".

Guiding principle 13

"*The responsibility to respect human rights requires that business enterprises:*

1. Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

2. *Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts*".

Examples of enterprises being accused of contributing to adverse human rights impacts include:

- providing data about internet service users to a government that uses the data to trace and prosecute political dissidents contrary to human rights;
- performing construction and maintenance on a detention camp where inmates were allegedly subject to inhumane treatment;
- targeting high-sugar foods and drinks at children, with an impact on levels of child obesity;
- changing product requirements for suppliers at the eleventh hour without adjustment to production deadlines and prices, pushing suppliers to breach labour standards in order to deliver.

Examples of adverse impacts that are directly linked to an enterprise's operations, products or services by their business relationships, but where the enterprise itself may not to have contributed to them, include:

- providing financial loans to an enterprise for business activities that, in breach of agreed standards, result in the eviction of communities;
- embroidery on a retail company's clothing products being sub-contracted by the supplier to child labourers in homes, counter to contractual obligations;
- use of MRI machines by medical institutions to screen for female foetuses, facilitating their abortion in favour of male children.

Guiding Principle 14

"The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure".

Guiding Principle 15

"In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

1. A policy commitment to meet their responsibility to respect human rights;

2. A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

3. Processes to enable the remediation of any adverse human rights impacts they cause or contribute to".

Guiding Principle 16

"*As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:*

1. Is approved at the most senior level of the business enterprise;

2. Is informed by relevant internal and/or external expertise;

3. Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services

4. Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;

5. *Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise*".

Guiding Principle 19
"*In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.*

Effective integration requires that:

1. Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;

2. Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts

Appropriate action will vary according to:

1. Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;

2. *The extent of its leverage in addressing the adverse impact*".

Where an enterprise is at risk of causing or contributing to an adverse human rights impact through its own activities, **it should cease or change the activity that is responsible**, in order to prevent or mitigate the chance of the impact occurring or recurring.

Where an impact nevertheless takes place, the enterprise should engage actively in its remediation either directly or in cooperation with others (be it the courts, the government, other enterprises involved or other third parties).

Where an enterprise is at risk of involvement with an adverse impact solely because the impact is linked to its operations, products or services by a business relationship, it does not have responsibility for the impact itself: that responsibility remains with the entity that caused or contribute to it. However, **it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence**. This may involve working with the entity and/or with others who can help.

Guiding Principle 22
"*Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes*".

Canada

Ontario

The *Accessibility for Ontarians with Disabilities Act* (the "AODA") came into force in 2005 with the goal of making Ontario completely accessible for persons with disabilities by January 2025. The AODA mandates the creation of standard development committees in five general areas: Customer Service, Transportation, Employment, Information and Communication and Built Environment.

To date, only the Customer Service Standard has been enacted, with the Accessibility Standards for Customer Service Regulation (the "CSS") coming into force on January 1, 2008. The CSS sets out the requirements for ensuring that providers of goods and services in Ontario have policies in place that accommodate the needs of customers with disabilities.

Starting on **January 1, 2012**, almost all businesses operating in Ontario will be required to comply with the CSS. The CSS applies to:

- Designated public-sector organizations in Ontario; and

- Every person or organization that provides goods or services to the public or other third parties, that have at least one employee in Ontario (including manufacturers, wholesalers, and providers of professional services).

Any organization subject to the CSS must ensure that any third parties that it contracts with for the purposes of provided goods or services are also compliant with the requirements of the CSS.

Generally speaking, individuals and businesses are required to adopt and implement flexible policies, practice and procedures that be adapted to the needs of individuals with a variety of different disabilities, and that further the principles of independence, dignity, integration, and equality of opportunity.

There are also specific policies that individuals and business must implement, including a policy regarding the use of assistive devices to enable individuals with disabilities to access the goods and services provided, and a policy regarding the development of alternative methods of communication with customers that take into account the needs of individuals with various disabilities.

Inspectors under the AODA may enter premises at any time, without a search warrant, to determine whether an organization is complying with the CSS. Administrative penalties and non-compliance orders may be issued if non-compliance with the CSS is determined. Failure to comply with a compliance order is punishable by a fine of up $50,000 for each day of non-compliance.

United States Employment Law Updates (Federal-State)

CALIFORNIA

Statutory Changes

• Notice of Pay Details. (Labor Code §2810.5). California employers are now required to provide hourly employees notice, at the time of hire, setting forth: 1) the employee's pay rate, 2) meal/lodging allowance, if any, 3) the employer's payday, 4) the employer's name and any "doing business as" names used by the company, 5) the employer's full contact information, 6) the employer's worker's compensation insurer's full contact information, and 7) other information the Labor Commissioner deems "material and necessary." These requirements can likely be satisfied with a formal offer letter to a new employee, which sets forth the information required by the new law.

• Employers Required to Continue Health Insurance for Employees on Pregnancy Disability Leave (PDL). California's Government Code §12945 will now require that employers who employ 5 or more employees to maintain and pay for coverage under a group health plan for employees that take PDL. This applies to the full four months of pregnancy disability leave. If the employee chooses not to return from the leave for certain reasons, employers may recover the insurance premiums from the employee.

• Limitation on Employer Ability to Obtain Employee Credit Reports. Beginning January 1, 2012, employers are prohibited from obtaining employee credit reports for certain exempt positions. Previously, employers could obtain credit reports as long as employers followed certain state and federal mandated procedures. The law changes current practices and narrows the pool of employees from which employers can obtain credit reports. Certain financial institutions and employees covered under the managerial exemption are exempt from this prohibition on credit checks.

• "Gender" Redefined. The Fair Employment and Housing Act (FEHA) will be amended to define "gender" to include both gender identity and "gender expression." Employers are required to allow an employee to appear or dress consistent with the way that employee views his or her gender ("gender identity") or gender expression regardless of whether that appearance or behavior is consistent with the employee's sex at birth. Going forward, employers should be careful to ensure that employees who identify or express as female, for example, are treated the same as employees who were born female.

• NLRB Poster Requirements. Beginning April 30, 2012, most private employers will be required to post a notice advising employees of their labor rights. If 20% of an employer's workforce speaks a

language other than English, a notice in that other language must also be posted. Failure to post may be treated as an unfair labor practice. Private employers should visit the NLRB's website to obtain the actual poster. (https://www.nlrb.gov/poster)

• Written Contracts Required for Employees Paid Commissions. California Labor Code §2751 will now require written contracts for all employees paid commissions. Previously, this was only required for businesses located outside California. These contracts must state the method by which the commissions are computed and paid and must be signed by the employer. The employer must also obtain a signed receipt of the contract from each employee. If the contract expires and the employee keeps working, the terms of the contract remain in effect until it is superseded or the employment relationship ends.

• Tougher Penalties for Misclassifying Independent Contractors. Any person who willfully misclassifies an employee as an independent contractor may be fined between $5,000 and $15,000 per violation, with repeat violations penalized at $10,000 to $25,000. Violations may be assessed on a per employee pay period basis. Any organization found to misclassify employees as independent contractors will be required to post a notice on its website that it has committed a serious violation and give workers information about filing claims. The severity of these penalties should not be underestimated and underscores the importance of recognizing an employment relationship when one exists.

• Coverage of California Domestic Partners Under Health Insurance Plans. California law now expressly requires out-of-state companies who employ any employees in California to provide health insurance plans that treat domestic partners the same as spouses.

• Prohibition on Interference with Family and Pregnancy Leave. Amendments to California Government Code sections 12945 and 12945.2 now prohibit interfering with or in any way restraining an employee's right to leave under the California Family Rights Act (CFRA) and Pregnancy Disability Leave (PDL).

• Genetic Discrimination Now Prohibited Under California Law. FEHA will now specifically prohibit discrimination based on genetics, including the manifestation of a disease or disorder in an individual's family. While this amendment mirrors the federal Genetic Information Nondiscrimination Act (GINA), it applies to smaller employers (5 or less employees versus 15 or less employees) and permits recovery of the full range of FEHA damages, versus the more limited recovery available under federal law. California employers with 5-15 employees should be particularly aware of this new avenue for discrimination claims, which was not available in 2011.

• E-verify Use. Employers are still allowed to voluntarily use E-verify but AB 1236 prohibits California state agencies or local governments from passing mandates that require employers to use E-verify.

• Amendments and Clarifications to Bone Marrow & Organ Donation Leave. California's Labor Code §1510 is amended to explain that an employee is entitled to up to 30 days of paid leave to donate an organ, or up to five days to donate bone marrow, annually. The days of leave are business days, not calendar days and the one year period is measured from the date the employee's leave commences. Paid time off, sick leave and vacation will continue to accrue during leave.

• Increased Penalties for Minimum Wage Violations and Liquidated Damages. California's Labor Code sections 98 and 1194.2 are revised to allow the Labor Commissioner to award twice the amount of unpaid minimum wages, along with interest when an employer fails to pay an employee minimum wage. California Labor Code §98 will also be amended to authorize an employee to recover liquidated damages in a labor commissioner hearing for failure to pay minimum wage. This is yet another reason why employers should be particularly careful not to engage in minimum wage violations.

• Employees Now Entitled to Attorney's Fees for Enforcing Court Judgment for Unpaid Wages. California Labor Code §1194.3 now permits employees to recover costs and attorneys fees incurred in enforcing a court judgment for unpaid wages.

• Military Service Member Anti-Harassment. Effective November 21, 2012, HR 674 provides that employers are prohibited from discriminating against current or former service members (including reservists and veterans) in the terms and conditions of their employment. As this amendment clarifies existing law, it applies retroactively.

On the Horizon

• Meal and Rest Periods. In Brinker Restaurant Corp. v. Superior Court, the California Supreme Court is presently considering whether California law requires employers to simply permit employees to take meal and rest breaks, or if employers must ensure those breaks are actually taken. The Court is expected to hand down its decision in mid-April 2012. We are hopeful the Court adopts the "permit" standard, as the "ensure" standard imposes a much greater burden on California employers.

IDAHO

The Idaho Legislature wrapped up its 2011 session with few changes to employment-related laws. Perhaps more interesting than the changes were the bills that *did not* get passed into law this session, including a proposed amendment to the Idaho Human Rights Act that would have broadened the law to include protection for sexual orientation and gender identity as well as a bill that would have obligated school personnel to intervene in incidents of bullying in schools. Following are highlights of some of the changes to employment and related laws passed this session by the Idaho Legislature:

Labor Relations

Public works contracts cannot contain provisions: (1) specifying the amount of wages and benefits to be paid workers (except when federal law requires prevailing or minimum wages to workers on federally funded projects); or (2) requiring that all work on a specific project be covered by a labor agreement, collective bargaining agreement, pre-hire agreement or any other agreement with workers, their representative or any labor organization as a condition of being awarded work on a project.

Teachers and Inquiries into Performance

Applications for new teaching certificates or renewal of existing certificates will be denied if there are any unsatisfied conditions or a pending investigation of the teacher's license or certificate. However, teachers may be hired on a conditional basis pending the district's review of information and documents received after inquiry of all information relating to job performance, including copies of all documents in personnel, investigative or other files. Beginning September 1, 2011, the law will prohibit school districts from entering into agreements that have the effect of concealing negative information about job performance or misconduct, and further provides that any such provisions will be unenforceable. The school district(s) that currently or previously employed the teacher receive immunity from liability for disclosing such information.

Child Labor

Children under 14 years of age may be employed by the school district in which they are enrolled for a maximum of 10 hours per week, provided employment is voluntary and with the consent of the child's legal guardian.

Limiting Certain Employees' Off-Duty Conduct

Members of the Idaho National Guard are under military jurisdiction regarding the use of illegal drugs even when not in a regular military duty status.

Unemployment Insurance

Corporations may exempt certain officers from unemployment insurance coverage. If corporations do not elect to exempt officers from coverage, those corporate officers are not eligible for unemployment unless the corporation is dissolved or the officer is removed from office pursuant to the corporation's articles or bylaws.

Changes were also made to the unemployment insurance laws that authorized extended unemployment insurance benefits and decreased the number of weeks that seasonal workers or workers with sporadic employment will be eligible for unemployment insurance benefits.

Background Checks for Idaho Employers

The legal landscape regarding employment background checks is in flux. In the last several years, the federal agency with oversight of employment discrimination claims, the Equal Employment Opportunity Commission (EEOC), has again taken a particular interest in criminal, and now credit checks for applicants. The agency has moved from issuing guidance on the topic to a more active role bringing litigation in this arena. This article examines the existing and sometimes conflicting laws that guide background checks as well as the efforts to more carefully define and regulate background checks for Idaho employers.

Background on the Law

Employers routinely use background checks to screen and hopefully hire the best possible candidates for employment. The federal law most frequently raised with respect to background checks is Title VII of the Civil Rights Act, which prohibits discriminatory conduct based on race, color, religion, national origin and sex. In this context, the most frequently claimed charge of discrimination is not that an employer intentionally discriminated against one particular applicant, but that an employer's practice had a disparate impact on a class of minority or protected status applicants. Disparate impact cases may result from a practice with an unintentional effect. That is, an employer may not be aware that its practice of screening groups of applicants based on certain criteria is improper and could result in class action risks and liabilities.

On the other hand, employers are also exposed to liability for failing to complete a comprehensive background check and for hiring an individual who then, for example, harms a fellow employee or third party in the course and scope of employment. Idaho has long recognized this concept, known as negligent hiring. For example, in the case of Doe v. Garcia, a claim of negligent hiring was brought against a hospital when an employee of that hospital harmed a patient. Idaho's Supreme Court found that the hospital did not appropriately inquire about the circumstances of Garcia's termination from his prior employer, where he had been discharged for improprieties with a patient, or that he had been previously convicted of sex crimes.

These conflicting liabilities provide an interesting backdrop to a renewed interest at the federal level in limiting background checks by employers.

EEOC Guidance and Litigation Trends

Over the years the EEOC has published policy guidance and advisory opinions on pre-employment selection procedures, tests, and the use of criminal arrest and conviction records (www.eeoc.gov). The EEOC's guidance provides that excluding applicants who have arrest or conviction records has an adverse impact on certain minorities and therefore an employer must show that selection criteria is job-related and consistent with business necessity. Blanket exclusions are particularly difficult to justify, i.e. no one with a DUI conviction may be hired for any job within an organization.

Conviction and arrest records are treated differently under the guidance. On conviction records, the employer must show that it considered: (1) the nature and gravity of the offense, (2) the time that has passed since the conviction or completion of the sentence, and (3) the nature of the job sought. Generally speaking, the decision not to hire may be justified if the conviction is related to the position applied for and/or if the conduct was particularly egregious. Arrest records are less reliable and, in that regard, an employer must additionally evaluate whether the applicant actually engaged in the misconduct by giving the person an opportunity to explain the events leading to the arrest or offer other evidence of credibility. To date, the EEOC has not issued guidance on the use of credit checks as a part of a background screening process. However, both of these positions may soon change. The EEOC has suggested it may both revisit its policies on criminal background checks and issue new guidance on the use of credit checks.

In addition to these guidance changes, the EEOC has taken an active role in bringing charges and litigation against employers based on use of both credit and criminal reports. In EEOC v. Freeman, the EEOC filed a nationwide class action lawsuit alleging race, national origin, and sex discrimination. The EEOC alleges that the company rejected applicants based on criminal and credit background checks that were not job-related or consistent with the needs of the business and that those practices had an adverse impact on African American, Hispanic, and male applicants. In December 2010, the EEOC filed a lawsuit against Kaplan Higher Education Corporation, also alleging that its practice of excluding candidates based on their credit histories has a disparate impact on minorities. In its press release on that lawsuit, the EEOC noted employers needed to be aware of practices that tend to screen out groups of applicants, even if unintentionally. As this litigation trend continues, and depending on how various courts ultimately rule on these cases, the scope and use of these background checks by employers could narrow significantly.

Idaho Human Rights Commission Guidance

The Idaho Human Rights Commission has published guidance on its website regarding pre-employment inquiries and all Idaho employers should be well versed in those guidelines (http://humanrights.idaho.gov/discrimination/pre_employment.html). For example, the guidance provides that it is appropriate to ask candidates whether they can maintain the company's code of professional conduct. The guidance cautions that obtaining an arrest record requires proof of the business reason for obtaining this information. It approves obtaining information on convictions, including the nature and timing of the crime, unless the "number, nature, and recentness of the conviction(s) make the candidate unsuitable." The guidance also states that "a company is not violating the law if it screens out applicants with a verifiable and pertinent record of dishonesty [but] in fairness to the candidates, the employer should consider the kind of violation and how long ago it occurred before disqualifying a candidate for this reason." A good example provided in the guidance: a reckless driving conviction is not job-related for a bank teller, but is job-related for a school bus driver.

Pam Parks, the Director of the Idaho Human Rights Commission, advises that there are not many reported claims of this type of disparate impact discrimination before the agency and there are no particular trends in this area on the state level. This may be a matter of individuals filing these types of charges only at the federal EEOC level, which is an option, or may be a matter of individuals not fully understanding their rights with respect to pre-employment inquiries.

State Laws Regarding Background Checks

Idaho does not have any state-specific laws limiting the use of criminal or civil background checks. However, for employers who employ individuals in Washington or Oregon, they should be aware that both of these states have laws that restrict the use of credit checks. Washington also has regulations regarding use of criminal arrest and conviction records. While a majority of states provide immunity to employers providing references for former employees (including the state of Washington), the state of Idaho has no such statute on the books, which might make employers more willing to provide accurate references on former employers. It is notable that immunity was built into the legislation on teacher performance this legislative session, which may signal the approval of such a law in Idaho.

A Note About the Fair Credit Reporting Act

While beyond the scope of this article, it is important to note a few of the key areas of compliance under the federal Fair Credit Reporting Act (FCRA). If an employer uses an outside, third-party service provider to conduct its civil or criminal background checks, it must comply with the various notice provisions of this law. The FCRA requires that an employer obtain a release to obtain a report regarding these activities and requires certain notices if a decision not to hire (or to revoke the conditional offer of employment) is made as a result of the information contained in these reports. The FCRA does not regulate the nature of the information contained in the reports in the way that Title VII does. That is, at least under the current state of this law, an employer may make decisions about eliminating applicants based on the criteria that it sets without question or concern regarding adverse impact. However, there is pending federal legislation (the Equal Employment for All Act) that would change this law and require that reports be restricted to criteria that are specifically job related. More information on the FCRA including links to

approved forms may be found on the Federal Trade Commission's website at www.ftc.gov/os/statutues/fcrajump.shtm.

Best Practices Regarding Background Checks
It is important for employers to continue to monitor these changes in the law and risks regarding various practices associated with background checks. This may be a good time to review current policies and procedures to assure that background inquiries meet the test of being job-related and consistent with business necessity. Keep in mind that the trend in these types of cases is that the screening processes may not have a valid relation to the job and may have an adverse impact on minorities. Additionally, all procedures must be consistently applied. For example, while an employer may identify particular positions that will be subject to specific background inquiries consistent with job duties, an employer must then conduct the inquiries consistently so that each applicant is subject to the same background check.
Background checks, particularly when done by a third-party vendor, can be expensive. In addition, information obtained in the process may reveal protected status information, such as age, which is never requested of applicants and may never be used in a hiring decision. As such, best practice would be to conduct background checks after a conditional offer of employment is extended. That is, a conditional offer is made, preferably in writing, which spells out the types of background checks that must be passed in order to be employed. This would also be consistent with the Americans with Disabilities Act requirement that all medical inquiries for applicants, including pre-employment physicals and questionnaires, be completed at the post-offer, pre-employment stage.

If possible, centralize the background check process to better assure consistent practices. When human resource professionals collect this information, it can then be kept separate from the hiring manager, who has no need, at hire or ongoing into employment, to have this knowledge or information. Always obtain a release from the applicant in order to proceed with the background checks, keeping in mind all notices and obligations under FCRA.

Finally, there are no particular limitations on background inquiries in Idaho. However, employers should be aware that state laws can affect and limit background checks, as they do in Washington and Oregon. Employers should also be aware of the changing landscape of background inquiries under federal laws, in particular based on the initiatives and litigation now underway with the EEOC.

INDIANA
Indiana Statutory Updates
Indiana's Right to Work Act
Indiana has become the latest state to pass Right-To-Work legislation, amid a great deal of controversy. The statute is inapplicable to government employees.

The statute declares as "unlawful and void" any requirement that an individual (1) "become or remain a member of a labor organization", (2) pay dues, fees, assessments, or any other charges of any kind of amount to a labor organization", or (3) "pay to a charity or third party an amount that is equivalent to or a pro rata part of dues, fees, assessments, or other charges required of members of a labor organization." A person violating the statute "commits a Class A misdemeanor." A civil remedy is also available if "an individual suffers an injury" as a result of "a threatened violation" or as a result of an "act or practice that violates this chapter". Successful plaintiffs may recover the greater of (1) their actual damages or (2) liquidated damages not to exceed $1,000. Attorney's fees, litigation expenses, and costs are also available. The statute also authorizes declaratory, equitable relief injunctive relief, and, "other relief the court considers proper".

Possession of Firearms or Ammunitions in Locked Vehicles
Most Indiana employers, as a result of a fairly recent statute, may not prevent employees who legally possess firearms or ammunition from keeping the firearms or ammunition locked in the trunk of their car, in the glove box of their locked car, or stored out of plain sight in their locked car. The statute carves out exceptions in certain locations, including school property, child care institutions, group homes, foster homes, penal facilities, domestic violence shelters, public utilities, and certain property subject to federal Homeland Security standards or licensed by the Nuclear Regulatory Commission. Employers also may

prohibit employees who transport individuals with developmental disabilities from possessing firearms or ammunitions in their vehicles. The statute authorizes a civil action, and an award of actual damages, court costs, and attorney's fees "to the prevailing individual."

Finally, the statute stipulates that courts do not have jurisdiction over an action against an employer for any injury or damage resulting from an employer's compliance with the statute. It appears clear that this last provision is intended to protect employers from liability if an employee uses a firearm to injure or kill another individual.

Indiana Case Law Update
Similarly Situated:
The Seventh Circuit continues to seem to relax Plaintiff's burden when seeking to establish that he or she is similarly-situated to another employee who was treated more favorably. Previously, the Seventh Circuit set a very high bar for plaintiffs with respect to their claimed comparators. In Harris v. Warrick County Sheriff's Dept., 666 F.3d 444 (7th Cir. 2012) and Eaton v. Indiana Dept. of Corrections, 657 F3d 551 (7th Cir. 2011), the Court articulated a somewhat more relaxed standard. In Eaton, the Plaintiff, an officer with the Department of Corrections, was fired for refusing an assignment, walking off the job, turned in her badge and belt, and announcing she had quit. She claimed that a male employee who was not fired after he also refused an assignment and walked off the job, was similarly situated to her. The District Court held that the male employee was not similarly-situated to the Plaintiff, because unlike the Plaintiff, he had not turned in his badge or belt, and because he returned to work less than an hour later (Plaintiff returned at the start of her next shift). The Seventh Circuit reversed the district court decision, holding that Plaintiff's conduct was "similar enough" to the male employee's conduct, and that the Plaintiff need not show that the misconduct was "identical". The Seventh Circuit described the standard as one which is "flexible" and a "common-sense standard".

In Harris, the Seventh Circuit affirmed that similarly-situated "does not require near one-to-one mapping between employees, but the employees receiving more lenient disciplinary treatment must at least share a comparable set of failings." Harris, at 449 (citations omitted) In Harris, however, the Seventh Circuit held that the Plaintiff had failed to meet his burden to identify a comparator to whom he was similarly-situated: "None of [the alleged comparators] violated standard operating procedures, disobeyed direct orders, or showed a lack of commitment to the job during their probationary periods." Id. Because there were "material distinctions between [Plaintiff's] misconduct and the performance problems exhibited by the [alleged comparators]", the Seventh Circuit upheld the district court's ruling dismissing the matter on summary judgment.

Age Discrimination
In Barton v. Zimmer, Inc., 662 F.3d 448 (7TH Cir. 2011) the Seventh Circuit dealt with the question of remedies available under the Age Discrimination in Employment Act. Mr. Zimmer was a sales person who alleged that his employer reduced his sales duties because of his age. Both the district court and the Seventh Circuit assumed, without deciding that "this was an adverse employment action for purposes of the ADEA." Id. at 454. The Seventh Circuit outlines a nice review of remedies available to Plaintiffs in ADEA actions. The ADEA allows "reinstatement, back pay, and other legal or equitable relief as may be appropriate, but not compensatory damages for pain and suffering or emotional distress." Id. (citations omitted). Mr. Barton was not eligible for back pay, because he "was not fired and his compensation was not reduced." Id. He could not be reinstated, because he filed for, and was granted, "total-disability benefits with the Social Security Administration." Id. at 453-54. Plaintiff sought front pay, which, the Court held, might be available "in proper circumstances", when, for example, a plaintiff suffers psychological injuries "as a result of the discrimination." Id. at 454. This, however, was not a case for front pay, because the cause of his psychological injury, and thus his inability to work (and be reinstated), was unrelated to any alleged age discrimination. Consequently, "the ADEA provides no remedy." Id. at 455.

Unemployment Compensation
In Chrysler Group, LLC v. Review Board of the Indiana Department of Workforce Development, 960 N.E.2d 118, (Ind. 2012), the Indiana Supreme Court held that employees who voluntarily resigned were

eligible for unemployment benefits. In 2008, Chrysler employees in Kokomo, Indiana had the option to participate in the "Enhanced Voluntary Termination of Employment Program (EVTEP)." Id. at 121. EVTEP included a payout, and continued health care benefits, "in exchange for the employee's voluntary termination of employment." Id. The Workforce Development Board held that, despite the employees' voluntary resignation, they were eligible for unemployment benefits pursuant to an Indiana statute which provides for benefits for employees who "accept an offer of payment or other compensation offered by an employer to avert or lessen the effect of a layoff or plant closure." Id. at 123 (citation omitted). Chrysler argued that this statute did not apply, since there was no explicit finding that the purpose of EVTEP was to avert or lessen the effect of a layoff or plant closure. The Indiana Supreme Court held that an explicit finding was not necessary, and that the employees were eligible for unemployment compensation.

MICHIGAN

Michigan enacted a new law that allows employers to mandate electronic payment of wages. Employers may now require their employees to accept either direct deposit or have their pay on a payroll debit card if certain notices and protections are provided. Employees, however, must not be required to pay any costs that the employer may incur in establishing the electronic payment of wages. In order for an employer to require an employee to receive wages electronically, the employer must provide the employee with a written notice to the employee of the opportunity to elect either direct deposit or debit card.

Minors who are 16 years of age or older, and who are students, cannot work more than 24 hours in a week when school is in session. Previously, such minors were limited to a *combined* school/workweek of not more than 48 hours. Further the Youth Employment Standards Act prohibits minors from working more than six days in a week, working more than an average of eight hours per day during a week , working more than 10 hours in any one day, working more than 48 hours in a week (when school is not in session), working between the hours of 10:30 p.m. and 6 a.m. (except on Fridays and Saturdays, school vacation periods, or when the minor is not regularly enrolled in school, then the minor can work until 11:30 p.m.)

Several bills passed the Michigan legislature will further reduce benefits for Michigan's unemployed, if signed as expected by the Governor. Two of the bills add new limitations to eligibility requirements for unemployment benefits and make changes that aim to help stabilize the unemployment insurance fund. They come after unemployment benefits for Michiganders were previously cut in March of 2011. In addition, the proposed legislation will change the definition of leaving work voluntarily, one cause of benefits ineligibility, to include missing three consecutive work days without proper notice. The definition of "unsuitable" work -- that which is below or outside a worker's skill level -- also will change.

The Sixth Circuit Court of Appeals struck down Michigan's constitutional amendment targeted affirmative action programs in public colleges and universities and added language to the Michigan Constitution which bans "preferential treatment" on the basis of "race, sex, color, ethnicity, or national origin" in public employment, education, and contracting, finding it unconstitutional under the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment. The Sixth Circuit's decision may allow Michigan's public colleges and universities to revive any minority scholarships or other programs that considered race as a criterion, but the full effect of the court's decision will not be known until the time period for challenging the decision has been exhausted.

In *Hamed v. Wayne County,* the Michigan Supreme Court reversed its prior decision and held that an employer **is not** vicariously liable for *quid pro quo* sexual harassment affecting public services under traditional principles of *respondeat superior.*

In *VHC, P.C., v. Elshaarawy,* the Michigan Court of Appeals upheld a trial court's dismissal of an action to enforce a non compete agreement because of the expiration of the underlying agreement. The non compete obligation in an employment contract was for 24 months or until terminated under the provisions of the agreement. There was a $500 thousand dollar liquidated damage provision. The contract expired and was not extended. The employee declined the offer of a new contract and took another job which plaintiff asserted violated the covenant not to compete. The contractual language provided the non compete was triggered by a "separation from employment." A separation had to occur *during* the term of

the agreement. The court of appeals agreed with the trial court that there was no "separation" because the contract ended with its expiration. . The appeals court noted that the non compete provision was found in the termination section of the contract which addressed termination during the term of the contract.

NEW JERSEY

DeRosa v. Accredited Home Lenders, Inc., 420 N.J. Super 438 (App. Div. 2011)

Employees discharged without notice or severance pay filed a class action suit alleging violations of the Millville Dallas Airmotive Plant Job Loss Notification Act (also known as NJ WARN Act) against the parent company of affiliated companies and the parent company's chief executive officer. The issue in this matter is whether the parent company is the employer under the NJ WARN Act.

The NJ WARN Act requires, under certain conditions, that employees receive notice, or alternatively severance pay in the event of a transfer or termination or a mass layoff by an employer. The NJ WARN Act defines "employer" as "an individual or private business entity which employs the workforce at an establishment." This differs from the federal WARN Act which defines "employer" as "any business enterprise that employs 100 or more employees…" Neither the state nor the federal acts contain language allowing for or excluding liability of parents and affiliated corporations.

The Appellate Division held that a parent company may be held liable if the following Department of Labor's five-factor test is satisfied.

> Factor one addresses whether there is common ownership while factor two addresses whether there are common directors or officers. These factors are considered less significant than the other three factors
> Factor three considers whether the parent or affiliated company exercised de facto control over the direct employer.
> Factor four considers whether there exists a unity of personnel policies emanating from a common source.
> Factor five considers the dependency of operations between the relevant companies.

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, 206 N.J. 243 (2011)

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 New Jersey Supreme Court reversed the Appellate Division's decision. The New Jersey Supreme Court held that even in absence of a constructive discharge, employee had right under CEPA to recover damages for lost wages, to the extent that employer, by its retaliatory action, proximately caused employee to suffer a mental injury incapacitating him from his former employment.

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.

Federal Cases

Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011)
This is the first time the United States Supreme Court recognized the so-called "cat's paw" theory of liability. The phrase "cat's paw" is derived from a fable in which a hungry monkey tricks a cat into using its paw to pull roasting chestnuts out of a fire. After the cat gets the nuts, the monkey makes off with them and leaves the cat with nothing except burnt paws. In employment matters, the "cat's paw" typically includes an allegation that an agent of the employer with discriminatory animus (the monkey) influenced an unbiased decision-maker (the cat) to take an adverse employment action against another employee.

In Staub, two of the plaintiff's supervisors made discriminatory comments about the plaintiff's military obligations, yet he was ultimately fired by a human resources vice president who had not been hostile to him. The Plaintiff argued that the two lower level supervisors caused an unfavorable record to be placed in his employment record, and that the vice president relied on that in part to terminate his employment. The Court held that "if a supervisor performs an act motivated by an anti-military animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA" [the Uniformed Services Employment and Reemployment Rights Act]. Though this holding is about USERRA, it is likely to apply in other contexts — especially Title VII and claims of age, race, and sex discrimination.

Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct.1325 (2011).
The United States Supreme Court determined that oral complaints qualify as protected activity under the anti-retaliation portion of the Fair Labor Standards Act ("FLSA"). The Court of Appeals for the Seventh Circuit determined that oral complaints were not included because the text of the FLSA prohibits discharge of any employee who has "filed any complaint" 29 U.S.C. § 215(a)(3) (emphasis added by the Seventh Circuit). The Supreme Court determined that "filing" need not be limited to writing. The Court noted that the FLSA's purpose is to protect the health, efficiency and well-being of workers — and that the FLSA relies on the complaints of workers to facilitate its enforcement. Further, the Court noted that many workers might only complain orally — especially poor or illiterate workers — and that the anti-retaliation provision should ensure that they can do so without fear of retribution.

AT&T Mobility LLC v. Conception, 131 S. Ct. (1740).
The Supreme Court was divided on this matter (5-4). Justice Scalia authored the opinion that under the Federal Arbitrations Act ("FAA"), contracts requiring plaintiffs to waive their right to form a class in an arbitration proceeding are enforceable because federal law pre-empts California state law disallowing such agreements. Justice Scalia determined that California's rule not permitting waiver of class action rights in adhesion agreements actually disfavored arbitration in a way that was directly contrary to the purpose of the FAA. The Court held that, because California's rule would require arbitration provisions to permit class actions, arbitrations would be more complicated and their use would be discouraged. Notably, Justice Scalia found that the FAA generally preserves other general contract defenses, including unconscionability, when dealing with arbitration agreements.

NEW YORK
The Wage Theft Prevention Act, requiring that employers give written pay notices to employees, becomes effective on April 12, 2012.

Under NY Labor Law § 195, employers are now required to provide notice to new employees and provide an annual notice to existing employees of wage information, including their hourly rate, overtime rate, and

when they are paid, among other things. This notice must be in an employee's primary language and in English, it must be signed and dated by the employee, and a record of the notice must be kept for six years. Many employers have created a form for this and plan to issue it to new employees upon hire and to existing employees when they issue their W-2 statements. It is imperative that you provide two copies of the statement to the employee—one for their records and one to be signed and returned for retention in the corporate records.

The New York Department of Labor has issued its new Hospitality Wage Order which increases the minimum wage for hotel and restaurant employees that receive tips and requires additional circumstance-based payments, such as call-in pay and uniform maintenance pay. 12 NYCRR § 146-1.1 et seq. A new notice must also be posted and is available at http://www.labor.ny.gov/formsdocs/wp/LS209.pdf.

Although the New York legislature declined to enact many new changes to employment and labor law, it nonetheless enacted an amendment to the NY labor law, which extends the length of time for which employment permits for child performers are valid from six months to one year. (2011 NY Assembly Bill No. A07630).

The New York Court of Appeals, the highest state court in New York, broadened self-insured employer liability in cases where employees are injured in company vehicles in Matter of Elrac, Inc. v. Exum, 2011 NY Slip Op 8961 (N.Y. 2011). Self-insured employers can be liable for worker's compensation and uninsured motorist benefits when employees are injured in an accident in a company vehicle. This liability is imposed despite statutory language to the contrary in Workers' Compensation Law § 11, which states:

'The liability of an employer [for workers' compensation benefits] . . . shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributes, or any person otherwise entitled to recover damages, contributory or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom.' (Emphasis added).

The Court stated that there are cases where the "exclusive and in place of" statutory language cannot be taken literally, such as when the basis of the employer's liability is contractual. In Exum, because the corporation essentially wrote an insurance policy to itself for uninsured motorist benefits by self-insuring, it was contractually liable for those benefits and could be made to pay both worker's compensation and uninsured motorist benefits to an employee who files claims under both types of coverage.

The First Department held that an employer does not have to give an employee a second chance or fresh start to satisfy the reasonable accommodation requirement under the Human Rights Law where the disability is offered as an "after-the-fact excuse." Hazen v. Hill Betts & Nash, LLP, 2012 NY Slip Op 47, at *17 (1st Dep't 2012). In Hazen, a former employee-attorney sued his former employer for discrimination when the firm terminated him for charging hotel rooms, limousines, alcohol, adult movies, and escort calls to clients. The former employee alleged his conduct was due to bipolar disorder, but only gave vague indications that he was mentally ill and seeking psychiatric care before his termination. The Court did not buy the argument and overturned a determination by the State Division of Human Rights in favor of the former employee. This First Department's holding is consistent with the general rule that a person who is disabled or alleged to be disabled under the law is still required to adhere to the rules of the workplace.

New York City

The New York City Human Rights Law ("NYCHRL") is part of the New York City administrative code and applies only within New York City. Existing state and federal laws still apply in New York City, but the NYCHRL supplements the protections found in the New York Human Rights Law ("Human Rights Law") and federal law. The NYCHRL is more protective than either the Human Rights Law or federal law. For instance, the NYCHRL provides for attorney fees whereas the Human Rights Law does not. Separate consideration of changes in NYCHRL is important for any employer with employees in the five boroughs of New York City.

Under the NYCHRL, employers are required to make reasonable accommodations not only for persons with disabilities and victims of domestic violence, sex offenses, or stalking, but also for religious observances. The reasonable accommodations requirement for religious observances was amended in 2011.

Existing law requires employers to make "reasonable accommodations" so that employees may observe religious holy days, customs, or usages, including permitting absence from work during the holy day and a reasonable time for transportation. § 8-107. The employer's obligation to make a reasonable accommodation is limited to the extent any accommodation would present an "undue hardship" to the employer. Id.

The amendment to § 8-107 defines undue hardship in the context of reasonable accommodation for religious observances as anything involving significant expense or difficulty, such as interference with safety or efficiency, or "violation of a bona fide seniority system." What may constitute undue hardship will be the burden of the employer to prove; however, factors that will be relevant include the relative cost of the accommodation to the size of the employer, the number of employees who must be accommodated, and the degree to which any geographic separation, administrative relationship, or fiscal relationship between an employer's different facilities makes an accommodation difficult or expensive. The amendment also provides that any accommodation that makes it impossible for employees to perform the essential functions of their position is an undue burden.

Human Rights Law jurisprudence generally parallels Title VII jurisprudence; however, consistent with the more protective scheme under the NYHRL, the New York Court of Appeals held certain affirmative defenses generally available under Title VII are not available under the NYCHRL. The result is that under NYCHRL, employers are strictly liable for sexual harassment. Zakrzewska v. The New School, 14 N.Y.3d 469, 479 (2010).

Regardless of whether an employee bothers to report an incident of sexual harassment or takes advantage of any preventative or corrective opportunities provided by the employer, the employer will still be liable to an employee who is sexually harassed. Id. This means employers must actually succeed at stopping and preventing sexual harassment to avoid liability in New York City.

OHIO

Statutory Changes

Minimum Wage

Ohio's minimum wage increase on January 1, 2012 to $7.70 per hour for non-tipped employees and to $3.85 per hour for tipped employees. Ohio's current minimum wage is $7.40 per hour for non-tipped employees and $3.70 for tipped employees. The increased minimum wage will only apply to employers who gross more than $283,000 per year.1

Ohio State Case law

Mixed Motive in Age Discrimination Cases

In Thomas v. Columbia Sussex Corp., 2011 Ohio 17 (Ohio App. 10 Dist. Jan. 6, 2011), the Ohio Tenth District Court of Appeals held that the United States Supreme Court's decision in Gross v. FBL Financial Services does not apply under Ohio's age discrimination statute. Rather, employees bringing age claims pursuant to Ohio Revised Code 4112 do not have to prove that age was the "but-for" (that is, the only) cause of the adverse employment action. The Supreme Court did not accept this case for review. Therefore, mixed-motive age claims are alive and well under Ohio age discrimination statute, and the effect of Gross is limited to cases brought under the federal ADEA.

Caps on punitive damages

In Luri v. Republic Servs., Inc., 193 Ohio App.3d 682 (Ohio App. 8 Dist. May 19, 2011), the Ohio Eighth District Court of Appeals held that Ohio's tort reform legislation, which caps punitive damage awards to

[1] Note that Senate Bill 5 was passed in March 2011, which would have drastically reduced the collective bargaining rights of Ohio public employees. However, that was overturned by referendum in November 2011.

two times the amount of compensation damages (or two times the amount of compensatory damages or ten percent of the employer's or individual's net worth up to a maximum of $350,000 for small employers of less than 100 employees), applies to employment discrimination and retaliation claims. The tort reform statute also limited noneconomic loss -- damages for pain and suffering, consortium, counsel, mental anguish and all other intangible loss -- to an amount not to exceed the greater of $250,000 or three times the economic loss (tangible loss, including compensation, out-of-pocket expenditures, etc.) up to a maximum of $350,000. In reviewing the statute, the court held that punitive and noneconomic damages awarded in employment discrimination and retaliation claims are limited by the mandates of the tort reform legislation.

Ohio Supreme Court Expands Workers' Compensation Retaliation Protection

In Sutton v. Tomco Machining, Inc., 129 Ohio St.3d 153 (June 9, 2011), the Ohio Supreme Court expanded the scope of workers' compensation retaliation protection to include employees who are injured on the job but have not yet filed an actual workers' compensation claim. On April 14, 2008, DeWayne Sutton injured his back while working at Tomco Machining, Inc. After suffering the injury, he allegedly informed Tomco's president of the injury. Within one hour of reporting the injury to the president, Sutton was fired (obviously before he filed a workers' compensation claim). The employee filed a claim under Ohio's workers' compensation retaliation statute, O.R.C. §4123.90 and a tort claim for wrongful discharge in violation of public policy. The trial court dismissed both claims, and the appellate court affirmed. The Ohio Supreme Court reversed. It noted that R.C. 4123.90 does not expressly prohibit retaliation against injured employees who have not yet filed, instituted, or pursued a workers' compensation claim, but concluded there was a gap in the language of the statute for conduct that occurs between the time immediately following injury and the time in which a claim is filed, instituted, or pursued. In concluding that the General Assembly did not intent to leave a gap in protection, the Ohio Supreme Court held that R.C. 4123.90 expresses a clear public policy prohibiting retaliatory employment action against injured employees before they file a workers' compensation claim or institute or pursue a workers' compensation proceeding. The court rejected a conclusion that "a footrace, the winner being determined by what event occurs first—the firing of the employee or the filing of the claim with the bureau" was intended or proper. As such, Ohio "now recognizes a common-law claim for wrongful discharge in violation of public policy when an injured employee suffers retaliatory employment action after injury on the job but before the employee files a workers' compensation claim or institutes or pursues a workers' compensation proceeding." Even though the majority held that Ohio now recognizes a public policy claim for employees who have not yet filed a claim, the majority held that these employees are limited to the remedies provided by R.C. 4123.90. Thus, an employee pursuing a public policy claim is limited to reinstatement plus back pay and potential attorney fees.

Public Policy

In Dohme v. Eurand Am. Inc., 130 Ohio St.3d 168 (Sept. 15, 2011), the Ohio Supreme Court held that a plaintiff alleging that he was wrongfully discharged in violation of the state's public policy favoring workplace safety must be able to point to a the state constitution or a state statute, regulation, or common law as the specific source of that policy.

Workers' Compensation and No Fault Attendance Policies

In Scalia v. Aldi, 2011 Ohio 6596 (Ohio App. 9 Dist. Dec. 21, 2011), the plaintiff injured her elbow while employed at Aldi and she received workers' compensation benefits while her restrictions impaired her ability to perform her job. A year later, Aldi ordered an independent medical examination which found the plaintiff had reached maximum medical improvement, and her workers' compensation benefits were terminated. Shortly thereafter, Aldi terminated her employment under its (facially neutral) "no fault" attendance policy that required termination of any employee who had performed no work in the past 12 months. The plaintiff claimed retaliation for participation in the workers' compensation system, wrongful discharge in violation of public policy, and violation of Ohio disability discrimination law because Aldi perceived her as having a disability and fired her for that reason. The Ohio Ninth District Court of Appeals held that application of a facially neutral attendance policy does not constitute retaliation per se under R.C. 4123.90. However, the court did not foreclose that Scalia could otherwise support a retaliation claim, saying that their conclusion of no retaliation per se "should not be interpreted to say that an employee can never allege a statutory retaliation claim based on action taken under an attendance

policy, or that an employer's use of a facially neutral attendance policy can never be a pretext for retaliation."

Sixth Circuit Caselaw

Supervisors Claims Preempted by the NLRA

In Lewis v. Whirlpool Corporation, 630 F.3d 484 (6th Cir. Jan. 12, 2011), the Sixth Circuit held that a former employees' wrongful termination claim alleging that he was terminated in violation of Ohio public policy for his refusal to discharge employees for unionizing activities was pre-empted by the National Labor Relations Act ("NLRA"). The plaintiff argued that because he had been employed as a supervisor, he was not an employee covered by the NLRA. However, the Sixth Circuit held that a supervisor has a viable claim under the NLRA when he is terminated or otherwise disciplined for refusing to commit unfair labor practices.

Employees Returning from Sick Leave Required to Provide Doctor's Note

In Lee v. City of Columbus, 636 F.3d 245 (6th Cir. Feb. 23, 2011), The city issued a Directive, which required that employees returning from more than three days of sick leave submit a note to their immediate supervisor from their doctor stating the "nature of the illness" and whether the employee is capable of returning to regular duty. Current and former employees asserted class claims challenging the City's Directive, alleging that the Directive violated the Rehabilitation Act, as well as the privacy provisions of the First, Fifth and Fourteenth Amendments of the United States Constitution. The District Court granted summary judgment in favor of the plaintiffs and entered a permanent injunction prohibiting the City from enforcing the Directive. On appeal, the Sixth Circuit Court vacated the injunction and found in favor of the City. The Court emphasized that the Rehabilitation Act expressly prohibits discrimination solely by reason of disability. It concluded that "the mere fact that the employer, pursuant to a sick leave policy, requests a general diagnosis that may tend to lead to information about disabilities falls far short of the requisite proof that the employer is discriminating solely on the basis of disability." The Court concluded that the City's Directive is a universally applied request for information justifying the use of sick leave, and concluded that it does not violate the Rehabilitation Act. The Sixth Circuit also rejected the plaintiffs' privacy rights under the First, Fifth and Fourteenth Amendments, as it does not raise an informational-privacy concern of a constitutional dimension.

Sixth Circuit Applies "Primary Benefit" Test To Uphold Unpaid Internship Program

In Solis, Secretary of Labor v. Laurelbrook Sanitarium and School Inc., 642 F.3d 518 (6th Cir. Apr. 28, 2011), the U.S. Department of Labor brought a lawsuit against Laurelbrook school, a boarding school which operated a nursing home partially staffed by students to further the students' practical training. The DoL alleged that the students were "employees" and had to be paid under the FLSA. The Sixth Circuit ultimately held the district court's finding that the school's students were not "employees." The Court noted that there is no bright-line test for determining whether a student worker is an employee for purposes of the FLSA, and affirmed the district court's analysis pursuant to the "primary benefit" test, which ascertains which party derives the primary benefit from the relationship. Under this test, if a student receives the primary benefit of the work performed for a purported employer, and the student's presence does more harm to the purported employer's operations than good (or no good at all), the student will not be considered to be an employee under the FLSA. Notably, in doing so, the Court expressly rejected the DoL's six-factor test for determining "employee" status and rejected the DoL's longstanding position that all six criteria must apply before the agency will consider that a youth engaged in a career education program is not an employee for purposes of the FLSA.

Plan Administrator Need Not Independently Investigate Whether the Employer Violated FMLA When Denying ERISA-Based Income Protection Benefits

Farhner v. United Transportation Union Discipline Income Protection Program, 645 F.3d 338 (6th Cir. May 3, 2011), the plaintiff advised his supervisor about 'some personal things going on" and sought a medical leave of absence. The supervisor advised him that he had to supply a note from his medical doctor so the employer could evaluate whether the leave for request was under the FMLA. His treating physician submitted a letter that the plaintiff needed a leave of absence for at least three months "for medical reasons." HR determined that did not provide sufficient information to evaluate his medical request, so his supervisor told hm to contact HR to determine what information he needed to provide. His supervisor

also placed him on vacation leave at that time. HR informed the plaintiff that he needed to provide a note that details: (1) the date he first saw the doctor; (2) a diagnosis; (3) the nature of any treatment; (4) a prognosis, and (5) a potential return date. Two weeks later, the plaintiff exhausted his medical leave, and his supervisor informed him that he needed to provide the requested documentation or return to work within 48 hours. Rather than doing either, the plaintiff faxed a request for FMLA leave. After conducting an investigation and holding a hearing, KCSR terminated the plaintiff for insubordination. The plaintiff filed an application for income-replacement benefits under the United Transportation Union Discipline Income Protection Program ("DIPP"), an ERISA-based plan that permitted members to purchase coverage for any suspension or discharge, subject to certain restrictions. One of those restrictions was that the plan did not cover suspensions or discharges for insubordination. After reviewing the transcript of the plaintiff's hearing, the plan administrator denied benefits because the plaintiff had been discharged for insubordination. The plan based its decision only on the evidence that was obtained during the employer's formal investigation. The plaintiff challenged the denial of benefits, claiming that his discharge was really in retaliation for seeking FMLA leave. The district court held that because the administrative record demonstrated that the plaintiff had been terminated for insubordination, (a stated exclusion under the plan), the plan's denial of benefits was not arbitrary and capricious. On appeal, the plaintiff argued that KCSR improperly terminated his employment in violation of the FMLA, that the plan administrator should have looked beyond the plain meaning of the DIPP to determine whether his termination was proper, that it failed to do so, and that its determination was therefore arbitrary and capricious. The Sixth Circuit rejected this claim and held that the plan had no obligation to make an accurate determination of whether KCSR complied with its FMLA obligations. In addition, the court found that the plan administrator was not required to look beyond the language of the plan where that language was unambiguous and the plan did not require any inquiry beyond the evidence that was already available to it. Thus, the plan administrator could rely on the employer's stated reason for termination of an employee, rather than conducting an independent review of the facts regarding the termination.

"Associational" Disability Discrimination Claim

In Stansberry v. Air Wisconsin Airlines Corp., 2011 U.S. App. LEXIS 13659 (6th Cir. July 6, 2011), the Sixth Circuit addressed the standard for a claim under the "associational" provisions of the ADA. The plaintiff's wife suffered from various conditions, including a rare and debilitating auto immune disorder that required expensive treatment. Plaintiff was terminated for poor performance based on failure to stay within budget, failure to report security violations, and improper supervision of employees, which led to security violations. He sued, alleging that his termination was due to his wife's disability, under the "distraction" theory based on the employer's unfounded fears that he would be distracted at work. The Sixth Circuit rejected that claim, nothing that "the record is replete with evidence that [plaintiff] was not performing his job to Air Wisconsin's satisfaction and devoid of evidence to suggest that his discharge was based on any unfounded fears that his wife's illness might cause him to be inattentive or distracted in the future." Further, the court noted that the Company had been aware of his wife's illness for many years and had never taken any adverse action, undercutting the inference that plaintiff's termination was based on unfounded fears that his wife's disability might cause him to be inattentive at work. Alternatively, the court also found that plaintiff's poor performance was a legitimate non-discriminatory reason for Air Wisconsin to terminate him in any event. In response to an argument that his supervisor had "lied about the reason for terminating" him, that still "does not show that Air Wisconsin terminated [him] on account of his wife's disability." And finally also, the court stated that "while Stansberry's poor performance at work was likely due to his wife's illness, that is irrelevant under this provision of the Act. Stansberry was not entitled to a reasonable accommodation on account of his wife's disability [since there is no such requirement under the Act]."

FMLA Interference Claims

In Donald v. Sybra, Inc., Case No. 10-2153 (6th Cir. January 17, 2012) the Sixth Circuit held that the McDonnell Douglas burden-shifting framework applies to FMLA interference cases. Arby's terminated Gwendolyn Donald the day she returned from an FMLA absence after it determined that she had been improperly discounting drive-in window orders and pocketing the difference. The plaintiff alleged that she was terminated to interfere with her FMLA rights. The Sixth Circuit began its analysis by laying out the elements for an FMLA interference case: (1) the plaintiff must be an "eligible employee" under the FMLA; (2) the defendant be an "employer" under the FMLA; (3) the plaintiff must be "entitled" for leave under the

FMLA; (4) the plaintiff must give her employer notice of the intent to take leave; and (5) the employer must deny the employee FMLA benefits. The court concluded that it had "effectively adopted the McDonnell Douglas tripartite test without saying as much" in Grace v. USCAR, 521 F.3d 655, 670 (6th Cir. 2008).

Upcoming
Ohio Supreme Court to Address Assignability of Noncompetes During Mergers and Acquisitions: On November 15, 2011, the Supreme Court heard oral arguments in Acordia of Ohio LLC v. Fishel et al., In Accordia of Ohio, the trial court refused to enforce the four non-competes in question because the non-competes were with specifically named employers. The named employers disappeared following mergers, and the employees did not sign new agreements with the surviving company. The trial court concluded that this terminated employment under the non-compete. So when the employees decided to join a competitor, the non-competes had expired. The First Appellate District in Hamilton County affirmed the ruling and concluded that "the absorbed company ceases to exist as a separate business entity" and that "[b]ecause the predecessor companies ceased to exist following the respective mergers, the Fishel team's employment ceased to exist following the respective mergers, the Fishel team's employment with those companies was necessarily terminated at the time of the applicable merger."

PENNSYLVANIA
Recent amendments to Pennsylvania's Unemployment Compensation (UC) Law will bring changes to the way benefits are calculated and paid to future unemployment compensation claimants. Act 6 of 2011 was signed into law on June 17, 2011 by then Governor Rendell. It amended the Pennsylvania Unemployment Compensation Law in a number of ways. Most significantly, for the first time in Pennsylvania, severance pay may serve as an offset against unemployment compensation benefits.

Some questions still exist regarding how exactly the offset will be calculated and implemented. For example, it is unclear how the Pennsylvania Department of Labor and Industry will treat payments made by an employer directly to a former employee's attorney as part of a separation or settlement agreement. We expect that some of these questions will be answered in the near future through implementation, the issuance of additional guidance from the Department of Labor and Industry, or litigation. In the meantime, employers and employees alike should be aware of the new rules regarding severance and unemployment compensation benefits when making post-employment plans that include severance.

One significant change under the UC Law amendments is a new provision which will allow offsets against unemployment benefits for certain severance payments made to a claimant in connection with his or her separation from employment. The offset is calculated by subtracting 40 percent of the "average annual wage" under the Unemployment Compensation Law from the total severance amount. Currently, this "40% of the average annual wage" calculation equals $17,853. This means that claimants can receive up to a gross amount of $17,853 in total severance pay before their unemployment compensation benefits are affected. The effective date of the Act's severance pay provision is January 1, 2012. Severance agreements reached between an employer and employee in 2011 should not impact the employee's unemployment compensation benefits, even if the severance pay continues into 2012. Act 6 states that its severance pay provisions apply to benefit years that begin on or after the effective date, but will not "apply to severance pay agreements that were agreed to by an employer and employee prior to the effective date."

What does this mean for Pennsylvania employers? The cost of severance agreements may go up as plaintiffs' lawyers include into any settlement the offset. The Commonwealth's gain may be at the employer's expense.

Employers should be aware that the eligibility requirements under the UC law will be changing over the next several years as a result of the recent amendments. In addition, employers who currently use or who are considering using severance arrangements should consider the impact that the new offset provisions may have on such arrangements.

TEXAS

Covenants Not to Compete

In *Marsh USA Inc. et al. v. Cook*, 2011 WL 6378834, 2011 Tex. LEXIS 930 (Tex. Dec. 16, 2011)(substituting the court's opinion at 2011 WL 2517019, 2011 Tex. LEXIS 465 (June 24, 2011)) the Texas Supreme Court overruled long-standing law that only confidential information or specialized training may be sufficient consideration for a covenant not to compete. In *Marsh*, a managing director of Marsh USA Inc. was granted the option to purchase 500 shares of stock in Marsh's parent company. Upon exercising the stock options, the director was required to sign a non-competition agreement in which he agreed not to solicit certain company clients or employees for two years after leaving the company if he left within three years of exercising the stock options. After the director left, Marsh USA, Inc. attempted to enforce the non-compete agreement, arguing that the agreement was reasonable in time, scope and geography, and was ancillary to an enforceable agreement. *See* TEX. BUS. & COMM. CODE § 15.50. By a 6-3 majority, the Texas Supreme Court agreed with Marsh USA, Inc. that the non-compete covenant in this case was ancillary to an otherwise enforceable agreement. Specifically, the protection business interest – i.e., goodwill – was reasonably related to the consideration given – i.e., stock options. The case was remanded to the trial court for a determination as to whether the agreement was reasonable.

Texas Worker's Compensation Act

In *Insurance Company of the State of Pennsylvania v. Muro*, 347 S.W. 3d 268 (Tex. 2011), the Texas Supreme Court considered whether the Texas Worker's Compensation Act ("TWCA") limits the award of lifetime income benefits only to the specific injuries and body parts enumerated in the statute. Section 408.161 of the TWCA authorizes the award of lifetime income benefits to employees who lose certain body parts or suffer certain injuries. In *Muro*, an employee injured both her hips, an injury not specifically enumerated in Section 408.161. However, the hip injuries affected the employee's use of her feet, an injury enumerated in Section 408.161, and it was determined that these injuries would permanently prevent the employee from returning to work. The court of appeals determined that the employee was entitled to lifetime income benefits because the loss of use of both feet is covered by the statute, even though there was no direct injury to the covered body parts. However, the Supreme Court disagreed and held that "an employee does not lose the use of a body part, within the statute's meaning, without some evidence of an injury to that body part."

Retaliation/Wrongful Termination

The Texas Supreme Court held in *Travis Central Appraisal District v. Norman*, 342 S.W.3d 54 (Tex. 2011) that political subdivisions of the State of Texas may claim immunity from worker's compensation retaliation suits. Prior to the *Norman* decision, the Court held in *City of LaPorte v. Barfield*, 898 S.W.2d 288 (Tex. 1995) that retaliatory discharge claims may be brought against political subdivisions as governmental immunity from such suits was waived by the Political Subdivisions Law, TEX. LAB. CODE CH. 504. In reversing *Barfield*, the court noted that numerous statutory changes to the Texas Labor Code undermined the basis for the court's prior decision.

In *Emeritus Corp. v. Blanco*, 2011 WL 2637474, 2011 Tex. App. LEXIS 5073 (Tex. Ct. App.—El Paso July 6, 2011), the El Paso Court of Appeals, in a case of first impression, held that the Assisted Living Facility Licensing Act ("ALFLA"), TEX. HEALTH & SAFETY CODE §247.068, creates a private cause of action. In *Emeritus Corp.*, the Interim Executive Director for an assisted living center complained to her superiors about inadequate staffing, inadequate training, and other issues related to patient care. After she resigned from the assisted living center, the employee filed suit against her former employer, alleging that she had been constructively discharged as a result of her complaints. At the trial court, the jury found in the employee's favor and awarded her damages in the amount of $128,500. The employer appealed, arguing that the ALFLA provides no private cause of action for retaliation. However, the Court of Appeals disagreed with the employer, and recognized an implied private cause of action under the ALFLA for an employee believing he or she has been retaliated against. The Court concluded that the ALFLA's anti-retaliation provisions would be meaningless without a remedy for retaliation. A petition for review has been accepted by the Texas Supreme Court.

Legislative Update

In 2011, the Texas State Legislature passed S.B. 321, which was later codified in Chapter 52 of the Texas Labor Code and Section 411.203 of the Texas Government Code. Under the new law, public and private employers cannot prohibit an employee who lawfully possesses firearms or ammunition from transporting or storing such items in an employee's privately-owned, locked vehicle on the employer's premises. The new law does not apply to an employer owned or leased car. Further, certain employers are exempt from the law such as school districts (including private charter schools) and oil and gas operations in which the lease restricts the possession of firearms. However, the employers that are bound by the law are granted immunity from civil liability for damages arising out of an incident involving a firearm brought onto the employer's property, unless the employer acted with gross negligence.

UTAH

No major cases impacted the employment law landscape in Utah this past year. A bill passed last year amends a number of sections of the Labor Code. Limited changes will affect only a discrete group of employers.

> The amendments apply to any unincorporated entity that must be licensed under the Utah Construction Trades Licensing Act. There is a rebuttable presumption that anyone working for one of these companies is an employee, not an owner. The presumption is rebutted by the company showing that the work of the person is not supervised and that the person owns at least 8 percent of the company. Individuals working for the company and owning less would be considered employees and the company would have to pay taxes, unemployment insurance, etc. The foregoing changes were effectuated by amendment to the following sections of the Utah Code: Utah Code Ann. §§ 34-28-2, 34A-2-103, 34A-2-110, 34A-5-102, 34A-6-103, 58-55-102, 58-55-302, 58-55-306, 58-55-401, 58-55-501, 58-55-502, 58-55-503, 63G-2-302, 63G-11-104.

VIRGINIA

Virginia Code § 8.01-216.8

The Virginia legislature expressly waived sovereign immunity under the Virginia Fraud Against Taxpayers Act and created a cause of action for an employee of the Commonwealth, its agencies, or any political subdivision against that entity if an adverse employment action is taken against the employee because the employee has opposed any practice by his employer prohibited by the Act or because the employee has participated in an investigation, action, or hearing under the Act.

The Supreme Court of Virginia has continued its trend of requiring employers to draft and tailor their non-compete agreements narrowly. In Home Paramount Pest Control Companies v. Shaffer, 282 Va. 412, 718 S.E.2d 762 (2011), an employee of a pest control company signed an employment agreement containing the following provision ("the Provision"):

The Employee will not engage directly or indirectly or concern himself/herself in any manner whatsoever in the carrying on or conducting the business of exterminating, pest control, termite control and/or fumigation services as an owner, agent, servant, representative, or employee, and/or as a member of a partnership and/or as an officer, director or stockholder of any corporation, or in any manner whatsoever, in any city, cities, county or counties in the state(s) in which the Employee works and/or in which the Employee was assigned during the two (2) years next preceding the termination of the Employment Agreement and for a period of two (2) years from and after the date upon which he/she shall cease for any reason whatsoever to be an employee of [Home Paramount].

In analyzing this provision, the Court stated "we have consistently assessed the function element of provisions that restrict competition by determining whether the prohibited activity is of the same type as that actually engaged in by the former employer." In focusing on this function element, the Court found that "on its face, it prohibits Shaffer from working for Connor's or any other business in the pest control industry in any capacity. It bars him from engaging even indirectly, or concerning himself in any manner whatsoever, in the pest control business, even as a passive stockholder of a publicly traded international conglomerate with a pest control subsidiary." (emphasis added). Home Paramount Pest Control Companies, 718 S.E.2d at 765. Based upon this finding, the Court held that the "clear overbreadth of the function" could not be saved by narrow tailoring of geographic scope and duration, and therefore, the provision was overbroad and unenforceable. Id.

The interesting part of this opinion is that the non-compete agreement at issue in this case was identical to the non-compete provision that was upheld in Paramount Termite Control Co. v. Rector, 238 Va. 171, 380 S.E.2d 922 (1989), and involved the very same company and business interests. The Court explained its ruling by stating that it has "incrementally clarified the law since that case was decided in 1989", justifying the result reached here.

WASHINGTON

Washington addressed a number of employment law issues in 2011 and early 2012. A summary of these new developments is discussed below.

Washington's Marriage Equality Act

On February 8, 2012, the Washington Legislature passed SB 6239 to legalize same-sex marriage in Washington State. Under the Marriage Equality Act, a valid same-sex marriage from another state would be recognized as a marriage in Washington. Individuals married in other states who move to Washington would need do nothing more to have the marriage recognized. Similarly, a couple in a validly formed domestic partnership from another state would be treated as having the same rights and responsibilities in Washington as married spouses. To retain that status, the couple would have to marry within one year after becoming permanent residents of Washington State, unless at least one of the partners was at least 62 years of age.

For Washington State employers, the Marriage Equality Act will create only limited changes as Washington was the first state in the country to adopt "everything but marriage" domestic partner rights in 2009. Under the "everything but marriage" law, the terms "spouse, marriage, marital, husband, wife, widow, widower, next of kin and family" apply equally to married couples and state-registered domestic partnerships under all aspects of Washington law, apart from the definition of marriage. Thus, the registration provides the same benefits and obligations that apply to spouses under Washington law, including the right to use sick leave to care for each other, the right to workers' compensation benefits, and the right to unemployment and disability insurance benefits. The Marriage Equality Act would be somewhat more expansive in its coverage, however, as it would not require that those who marry must share a home, which currently is a requirement to register as Washington domestic partners.

In terms of health benefits, the Act is unlikely to have any impact, apart from a change in terminology from domestic partner to spouse. Employers should check with their insurance brokers, however, to see if there are any changes to plans, policies, enrollment forms or other issues related to purchased insurance benefits. Employers should also take this opportunity to review their non-insured employee benefits that provide spousal coverage (including self-insured health benefits) to determine whether any terminology or substantive changes are appropriate or required.

Washington's Meal and Rest Period Law

In *Pellino v. Brink's Inc.,* 164 Wn. App. 668, 2011 Wn. App. LEXIS 2541 (Nov. 7, 2011), *recons. denied* (Dec. 22, 2011), Washington Court of Appeals recently affirmed a $2.1 million judgment against an employer for failing to comply with Washington's meal and rest period law. The Court of Appeals also determined that the company engaged in a class-wide pattern or practice of failing to provide sufficient meal and rest period time also in violation of Washington state law.

The case arose when a class of 182 armored car employees who worked for Brink from April 26, 2004, through October 31, 2007, alleged they did not receive meal and rest breaks as required by Washington law. The employees claimed that any breaks they received were not legally sufficient because they were required to remain on active duty and on guard during their breaks. The trial and the appellate courts agreed, concluding that the employees did not receive any "'break from mental and physical exertion'" nor did they have any "'opportunity for personal relaxation, activities or choice.'"

Both courts also agreed that the vigilance required by Brink amounted to "'active observation and mental exertion at all times,'" and so was compensable. On appeal, Brink relied on a federal case brought by border agents, to support its argument that vigilance is not work and not compensable. The Court of

Appeals distinguished the border agents case because those workers were merely being passively "'vigilant'" during their commuting time, which just "meant turning on the border patrol radio and keeping a lookout for immigration infractions."

Washington's break regulation (WAC 296-126-092) states that employees "shall be allowed" specific amounts of meal and rest period time. Arguing on appeal that the trial court misinterpreted the regulation, Brink contended it complied by "allowing" employees to take self-directed meal and rest breaks. The Court of Appeals disagreed and concluded that the regulation requires employers to "'make sure'" meal and rest periods were both provided and taken. In so holding, the Court of Appeals relied on the state's "administrative policy" informally discussing the break regulation.

The moral of the story is that employees are entitled to meal and rest breaks under Washington law. Therefore, employers should also review their meal and rest period practices to confirm they meet the state regulation's detailed requirements.

Washington's Public Policy Against Discrimination

In *Int'l Union of Operating Eng'rs, Local 286 v. Port of Seattle, No. 65037-8* (Oct. 17, 2011), the Washington Court of Appeals vacated an arbitrator's award reinstating an employee who was terminated for hanging a noose in his workplace because it violated Washington's public policy against discrimination. The Washington Court of Appeals panel vacated the award and remanded the case back to the trial court for further proceedings because the trial court had exceeded its authority in making its own decision about the appropriate employee discipline.

In December 2007, the Port of Seattle terminated one of its employees, Mark Cann, for violating the Port's zero-tolerance anti-harassment policy when he tied a noose in a length of rope and hung it on a rail within 30 feet of an African-American employee who had a falling out with Cann. The employee's union, Local 286 of the International Union of Operating Engineers, filed a grievance under its collective bargaining agreement (CBA) disputing the termination. The grievance proceeded to arbitration under the CBA.

During the arbitration, Cann admitted that he received a copy of the Port's rules, underwent harassment prevention training and understood the Port's zero-tolerance policy. He also testified that he hung the noose as a joke directed at another employee and claimed that he was unaware of the noose's discriminatory symbolism. He further claimed that he apologized to the employee who was offended.

The arbitrator found that, by hanging the noose, Cann violated the Port's anti-harassment policy. The arbitrator "doubted the sincerity of Cann's apology" and concluded that his conduct warranted substantial discipline. However, the arbitrator found the Port did not have just cause to terminate Cann and ordered the Port to reinstate Cann with most of his lost pay and benefits, reducing his discipline from termination to a retroactive 20-day suspension.

The Port asked the trial court to vacate the arbitration award, arguing it was contrary to public policy. The trial court agreed that the arbitration award violated Washington's public policy against workplace discrimination because the award was "excessively lenient." It vacated the arbitration award, but ordered the Port to reinstate Cann with his 20-day suspension lengthened to six months. The trial court also ordered that Cann "write a sincere letter of apology," attend diversity and anti-harassment training, and serve a four-year probationary period during which he would be subject to termination for any additional policy violations. The union appealed.

The Court of Appeals stated that Washington has an "applicable explicit, well-defined, and dominant public policy" against workplace harassment and discrimination. The Washington Law against Discrimination ("WLAD") declares that "discrimination . . . threatens not only the rights and proper privileges of [Washington's] inhabitants but menaces the institutions and foundation of a free democratic state." The Court of Appeals quoted Washington Supreme Court opinions referring to the WLAD as embodying a public policy "of the highest priority" with the "overarching purpose" of deterring and eradicating discrimination in Washington as the WLAD "clearly condemns employment discrimination as a

matter of public policy." Thus, employers who fail to take adequate remedial measures in response to harassment or discrimination may be subject to liability.

The Court of Appeals then determined that the arbitration award violated Washington public policy by "improperly limiting the Port's ability to comply with the WLAD." Since this was a case of first impression in Washington, the Court of Appeals examined the arbitrator's decision about Cann's discipline in light of decisions in other jurisdictions and Washington's public policy.

The Court of Appeals ultimately held that the arbitrator's lenient sanction for Cann "minimized society's overriding interest in preventing this conduct from occurring and interfered with the Port's ability to discharge its duty under the WLAD to prevent future acts of discrimination." As a result, it vacated Cann's arbitration award, concluding that the award failed to provide an adequate sanction for his conduct, did not discourage repeat behavior, and did not allow the Port to fulfill its duty to provide a discrimination-free workplace. The Court of Appeals also found the trial court exceeded its authority in imposing an alternate sanction and remanded the case back to the trial court for further proceedings consistent with its opinion.

This case is noteworthy for employers because it illustrates that an employer's discipline for a discriminatory workplace must be substantial enough to discourage repeat behavior – even when an arbitrator disagrees – in order to comport with Washington's public policy against discrimination.

Washington Claims for Wrongful Discharge in Violation of Public Policy

In *Cudney v. ALSCO, Inc*., Wash. LEXIS 665 (Sept. 1, 2011), the Washington Supreme Court reaffirmed that employee tort claims alleging wrongful discharge in violation of public policy may be brought only in limited circumstances, where the public policy at issue is not adequately promoted through alternative mechanisms, such as statutory remedies or criminal sanctions.

Cudney sued his former employer in state court, asserting a claim for wrongful discharge in violation of public policy on the theory that the Washington Industrial Safety and Health Act (WISHA) and the Washington laws against driving under the influence of alcohol (DUI laws) prohibited his discharge. Specifically, Cudney thought was terminated after he had reported to the assistant general manager that one of the other general manager's appeared to be intoxicated while driving a company vehicle.

ALSCO, Cudney's employer, removed the case to federal court and brought a motion for partial summary judgment based on Cudney's asserted failure to satisfy the jeopardy element, which is one of the four required elements to establish a claim for wrongful discharge in violation of public policy. The U.S. District Court for the Eastern District of Washington concluded that the Washington Supreme Court had not clearly decided whether WISHA or the DUI laws adequately promoted their underlying public policies so as to preclude Cudney's wrongful discharge claim. As a result, the federal court certified these two questions to the Washington Supreme Court.

The Washington Supreme Court accepted review and determined that WISHA and the DUI laws offered remedies that adequately protected the public policy mandates they embodied. The majority emphasized, "[T]his court has repeatedly applied [a] strict adequacy standard, holding that a tort of wrongful discharge in violation of public policy should be precluded unless the public policy is inadequately promoted through other means and thereby maintaining only a narrow exception to the underlying doctrine of at-will employment."

The Washington Supreme Court concluded that the "robust statutory remedies available in WISHA" were not inadequate to protect the underlying public policies of protecting worker safety and preventing retaliation for safety complaints. "[T]he point of the jeopardy prong…is to consider whether the statutory protections are *adequate to protect the public policy*, not whether the claimant could recover more through a tort claim," the Court stated (emphasis in original). In reaching this conclusion, the Court rejected Cudney's argument that the 30-day deadline for filing an L&I complaint rendered WISHA inadequate to protect its public policy. The Court reasoned that employees will almost always receive immediate notice of their terminations, and they also will know that they recently raised a safety concern, so they should be able to file an L&I complaint within 30 days. During the L&I investigation, the employee

will have "significant additional time" to prepare a case if L&I decides not to pursue the matter. Further, under WISHA regulations, the employee's 30-day deadline for filing an L&I complaint might be subject to equitable tolling if there were "strongly extenuating circumstances" (e.g., the employer concealing or misleading the employee about the grounds for the discharge). In this case, Cudney gave no reason why he could not have filed a claim within 30 days.

The Washington Supreme Court also evaluated the adequacy of the DUI laws to safeguard their public policy of protecting the public against drunk drivers, and cited to a series of state laws that criminalize driving under the influence of alcohol. The criminal penalties available include mandatory jail time, a $5,000 fine, suspension or revocation of the offender's driver's license, and limiting driving privileges through an ignition interlock device. The Court observed, "Social penalties can also adhere, such as the loss of status in the community and possible suspension or termination at work." Once again the Court applied a strict adequacy standard, quoting Washington case law requiring Cudney to prove "that telling his manager about [the general manager's] drunk driving is the '*only available adequate means'* to promote the public policy of protecting the public from drunk driving." (Emphasis in original.) The Court reasoned that this would not be true unless the criminal laws and their enforcement mechanisms and penalties all were inadequate public policy protections. In so reasoning, the Court found it "very hard to believe that the 'only available adequate means' to protect the public from drunk driving was for Cudney to tell his manager about [the] drunk driving." However, the Court noted that a different result might have been reached if Cudney had been terminated for reporting the drunk driving incident to law enforcement.

Washington's Minimum Wage Act

In *Washington State Nurses' Assn. v. Sacred Heart Med. Ctr*., No. 29366-1-III (Aug. 25, 2011), the Washington Court of Appeals held that employees who miss state-mandated rest breaks during their regular 40-hour workweek assignments are not entitled to overtime compensation for the missed rest breaks. The Court of Appeals determined that the plaintiff-nurses were entitled only to straight-time compensation under the Washington Minimum Wage Act because they did not work in excess of 40 hours during the week they missed a rest break. The break periods were included in, and a part of, their 40-hour week.

Washington's Medical Use of Marijuana Act

In *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, No. 83768-6 (June 9, 2011), the Washington Supreme Court rejected an employee's claims for wrongful termination, holding that the state Medical Use of Marijuana Act ("MUMA") does not provide a civil cause of action for wrongful termination based on the employee's authorized medical marijuana use. The Court further held that MUMA does not create a clear public policy supporting a tort claim for public policy wrongful discharge.

This is victory for employers in the medical marijuana battle. With this ruling, employers do not need to accommodate an employee's use of medical marijuana, and employees terminated for medical marijuana use have no basis to sue their employers.

Seattle Paid Sick Time and Paid Safe Time Ordinance

On September 23, 2011, Seattle Mayor Mike McGinn signed into law the Seattle Paid Sick Time and Paid Safe Time Ordinance. Effective on September 1, 2012, nearly all private sector employers must provide to employees who work in Seattle specified amounts of accrued, job-protected paid time off for personal illness, family care and other purposes. Seattle joins San Francisco, Washington D.C., Connecticut, and potentially Denver, in mandating that employers provide a paid time off benefit.

Employment Law Posters

On February 15, 2011, the Washington State Unemployment Insurance poster was updated to reflect a new web address to use when applying for unemployment benefits at www.esd.wa.gov/uibenefits. On March 18, 2011, the Washington State Workers' Compensation poster for Employers was updated to reflect that a registered domestic partner may also receive a pension as a death benefit if a worker dies.

WYOMING
There were no significant changes to Wyoming's employment statutes in 2011. Below is a summary of notable Wyoming employment cases:

Pre-termination Due Process
The *Evansville Police Dept. v. Porter*, 256 P.3d 476 (Wyo. 2011) case indicates that while administrative agencies must strictly comply with their pre-termination procedures, the Wyoming Supreme Court will not require terminated employees to strictly follow a requirement that the employee serve a specific person with notice of an appeal of his termination.

In *Porter*, the Wyoming Supreme Court addressed pre-termination procedural due process requirements. Several provisions of the relevant employee handbook were at issue. First, the handbook specified the required pre-termination procedure applicable when the Evansville Police Department ("Department") was considering terminating an employee for cause. It stated that an employee's employment could be terminated "for an infraction of a severe nature or a repeated infraction following earlier disciplinary action." *Id.* at 477. It also stated:

> Notice of termination shall be in writing, stating the specific details of the infraction(s), earlier disciplinary action taken for other, similar infractions(s) (if appropriate), reasons for the termination action, the effective date, and notice of the right to request an informal hearing before the appointing authority prior to the effective date of termination. Prior to termination (except in an emergency when immediate action is required), the employee may request an informal hearing before the appointing authority, which the employee and department head shall attend, for purposes of determining whether there is reasonable cause for termination. A tape recorded record of the informal hearing shall be maintained….

Id. at 477-478 (emphasis added). The handbook also addressed the required post-termination procedure when an employee appeals his termination, stating, "Notice of the appeal must be submitted to the appointing authority within ten (10) calendar days of the effective date of the…dismissal action." *Id.* at 478.

Lonnie Porter ("Porter") was a Sergeant with the Department. *Porter,* 256 P.3d at 477. On February 7, 2008, Police Chief Gentile called Porter into his office and questioned him about allegations made against Porter by two rookie officers. The allegations were that Porter slept for an entire shift on December 25, 2007 and that he allowed a training officer to conduct solo traffic stops. *Id.* at 480. A lieutenant with the Department and Porter's attorney also attended this meeting. *Id.* at 478. At the meeting, Porter denied wrongdoing, but admitted to sleeping during lunch, which he claimed is permissible, and allowing a training officer to perform traffic stops that Porter claimed the officer was fully trained and qualified to perform. *Id.* at 480. The Chief did not mention terminating Porter's employment. *Id.*

On February 12, 2008, the Chief again called Porter into his office. He handed Porter a letter of termination that stated, *inter alia*, that Porter's termination was effective that day. *Porter,* 256 P.3d at 478. The letter indicated that Porter was being terminated "based on recent violations of Departmental Policies and Procedures" in addition to "prior past discipline and performance." *Id.* at 480.

In a February 20, 2008 letter, Porter's attorney and the Town of Evansville's ("Town") attorney agreed to give Porter a ten-day extension to file a notice of appeal. By letter dated February 27, 2008 and addressed to the Town's mayor and copied to the Town's attorney, Porter's attorney gave notice of Porter's appeal. *Id.* at 478. Sometime in the summer of 2008, the attorneys engaged a hearing examiner who set hearing dates, and to whom Porter submitted a dispositive motion. The Department did not respond to Porter's motion. *Id.* at 478.

Instead, in an August 20, 2008 letter, the Town's attorney indicated that he had concluded that the Mayor and Council did not have jurisdiction to consider Porter's appeal. *Porter,* 256 P.3d 478. The Town's

attorney claimed the employee handbook required Porter to serve his notice of appeal on Police Chief Gentile as "the appointing authority," not on the Mayor or Town Council. *Id.* He claimed that the notice of appeal was improperly served, so no appeal existed, and that the time to appeal had expired. *Id.* at 478-479. Neither the Town's governing body nor the Mayor notified Porter that they did not have jurisdiction, and they issued no formal decision on the matter. *Id.* at 479. Porter filed a petition for review with the district court on September 11, 2008.

The district court issued an "Order of Reversal for Agency Inaction," finding that it had jurisdiction pursuant to Wyo. Stat. § 16-3-114(a) and Wyo. R. App. P. 12.01, which expressly authorize judicial review of agency inaction. *Porter,* 256 P.3d at 481, *citing Painter v. Spurrier*, 969 P.2d 548, 549 (Wyo. 1998). The district court reasoned that the Department is an administrative agency, and that an administrative agency is without authority to deviate from its adopted personnel rules. *Id.* "When a procedural rule bears on an individual right, 'the rule is binding on the agency and may not be violated or ignored because the rule is not a mere internal housekeeping arrangement.'" *Porter,* 256 P.3d at 482. Pursuant to these rules of Wyoming law, the district court determined that the pre-termination meeting between Chief Gentile and Porter was not the informal hearing required by the Handbook.

Regarding Porter's appeal, the district court noted, "The appeal process in an administrative review is not as rigidly construed as appeals from a court; as long as all necessary parties are notified of the appellant's desire for an appeal, service is effective. *Porter,* 256 P.3d at 483. Thus, despite untimely notice, albeit per the attorneys' agreement, and notice to the wrong person, service of Porter's notice of appeal was deemed effective. The Department appealed.

The Wyoming Supreme Court discounted the Department's argument that Porter's failure to submit his notice of appeal deprived the Town's governing body of jurisdiction and, in turn, deprived the district court of subject matter jurisdiction. Without any reasoning or other discussion, the Supreme Court simply stated, "We reject the Department's argument," and moved on to the issue of pre-termination due process.

The Court agreed that that the Department's termination violated Porter's pre-termination procedural due process rights. It reasoned that "[a]dministrative rules and regulations have the force and effect of law, and agencies are, therefore, required to comply with their administrative rules. *Porter,* 256 P.3d at 486. In proceedings of this nature, "scrupulous observance of departmental procedural safeguards is clearly of particular importance. The guiding principle of procedural due process is that the requisite pre-termination hearing be granted 'at a meaningful time and in a meaningful manner.'" *Id.* "Absent suitable written notice, as required by the departmental procedural safeguards in place here, the opportunity for Porter to marshal his case and be meaningfully heard before termination was a charade." *Id.* Moreover, the Court noted that the "February 12 termination letter expanded considerably the breadth of reasons" for the termination.

The Wyoming Supreme Court also noted that "the post-termination grievance procedures….could not compensate for a lack of pre-termination process…." *Id.*, *citing Cotnoir v. Univ. of Maine Sys.*, 35 F.3d 6, 12 (1st Cir. 1994). "If an employee is fired without these pre-termination protections, normally the constitutional deprivation is then complete." The Court remanded to the District Court with directions to issue its order requiring the Department to reinstate Porter effective February 12, 2008.

Public Records Act

In *Laramie County Sch. Dist. No. One v. Cheyenne Newspapers, Inc.*, 250 P.3d 522 (Wyo. 2011), the Wyoming Supreme Court indicated that a party will be hard pressed to prove that disclosure under the Wyoming Public Records Act ("WPRA") is exempted because it would violate another Wyoming statute. The Court indicated that it must be very clear that the Legislature intended an exception to the WPRA before an exception will apply.

In *Cheyenne Newspapers,* the Wyoming Supreme Court dealt with the issue of whether the newspaper was entitled to the salaries of individual employees of the Laramie County School District (the "District"). Cheyenne Newspapers, Inc. (the "Newspaper") requested all records "depicting employee names in

conjunction with their salaries or a listing of employee names with salaries" pursuant to the WPRA. *Id.* at 523. The District refused to produce the requested information. It argued that Wyo. Stat. §21-3-110(a)(ii)(A) of the Wyoming Education Code (WEC) required it to publish the salaries of its employees by category, without reference to individual employees' names. *Id.* at 523. The District noted that the WPRA "contains an exception to the general rule of disclosure if the disclosure 'would be contrary to any state statute.'" The District reasoned that disclosure of the requested information would violate the WEC, thus falling within this exception to the WPRA.

The Wyoming Public Records Act (WPRA) "mandates that all public records 'shall be open for inspection by any person at reasonable times.'" *Id.* at 524, *citing* Wyo. Stat. § 16-4-202(a). "The state, its agencies, and local government entities are therefore required to operate in a 'fishbowl' with only a few necessary exceptions." *Id.* While the WPRA allows a custodian to deny inspection of personnel files (with certain exceptions), it specifically states that "documents setting forth the term sand [sic] conditions of [employment of public officials and] employees are not considered part of a personnel file and shall be available for public inspection." *Id.* (brackets in original). The Court determined that "the amount an employee is paid is a term of any employment contract." It reasoned that while

> no governmental entity would be required to disclose personal information such as address, age, date of birth, social security number…, since these do not relate to the terms and conditions of employment, and would impact privacy rights of employees….[t]he majority of courts presented with the issue of whether the public is entitled to documents indicating the names, positions, and salaries of individual employees have held that these documents must be made available for inspection.

Cheyenne Newspapers, 250 P.3d at 525.

The Court concluded "that while the legislature intended that school districts would offer general salary information which was not specific to any employee to the public through annual publication [via the WEC], it did not intend to make specific salary information confidential as to those employees if a member of the public or the press wishes to expend the time and effort to obtain that information by making a proper request." *Id.* at 527. "Exceptions to the disclosure required by the WPRA must be clearly set out in legislation, and [] they should not generally be applied against entire classes of documents." *Id.*

The Court found that when the provisions of the WPRA and the WEC were read in conjunction, "the provisions of the education code are not clear enough to exempt the records sought in light of the specific language of the WPRA concerning the right of access to documents relating to terms and conditions of public employment." *Id.* The Court limited its holding by noting that the School District did not need to produce a list of employees and their salaries if one did not already exist, but was free to do so in lieu of producing the documents identified by Wyo. Stat. 16-4-203(d)(iii). *Cheyenne Newspapers*, 250 P.3d at 527.