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### ADA Amendments Act Signed into Law

On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008, which is intended to broaden the Americans with Disabilities Act by overturning several Supreme Court decisions that limited its applicability to disabled persons. The new law instructs courts that the ADA's definition of disability "shall be construed in favor of broad coverage under the Act, to the maximum extent permitted" by law.

The legislation specifically overturns three Supreme Court cases which held that "mitigating measures"

used to overcome or manage impairments must be considered in determining whether an employee or prospective employee is "disabled" under the federal law. The new legislation states that in determining whether an impairment substantially limits a major life activity, courts should not consider "the ameliorative effects of mitigating measures," including medication, prostheses, use of assisted technology, or auxiliary services.

However, the courts may still consider the effects of "ordinary eye glasses or contact lenses" in

deciding whether someone with imperfect vision is disabled under the ADA.

The legislation also defines "major bodily functions" which may be affected by a disability as including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory and endocrine, and reproductive functions. It also authorizes the Equal Employment Opportunity Commission to issue regulations on what kind of limitations "significantly restrict" such functions as to be covered by the new law.

The ADA Amendments Act takes effect on January 1, 2009. However, its applicability to California employers will realistically be limited only to those with operations in other states, since the California Fair Employment & Housing Act already contains the protections guaranteed by the new statute.

### Court Limits Claims for Violation of the "Interactive Process"

Under California law, separate claims can be asserted for failure to reasonably accommodate a disabled employee or to engage in the "interactive process" to determine whether a reasonable accommodation is possible. In the recent case of *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, a California appellate court concluded that a violation of an employer's duty to engage in the "interactive process" can only be established when a reasonable accommodation is actually possible.

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Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advise of the Firm regarding any specific matter.

This ruling is contrary to previous appellate court decisions which held that a violation of the interactive process could be established irrespective of whether a reasonable accommodation is actually possible.

In *Nadaf-Rahrov*, a clothes fitter who worked in Neiman Marcus' San Francisco store experienced recurring problems with back and joint pain over a period of six years, and was granted various accommodations including time off work and a short work week. However, in December 2002, she informed Neiman Marcus that she had carpal tunnel syndrome in both hands and osteoarthritis in her fingers, and obtained a doctor's note recommending that she be reassigned to a position "that would not involve bending, standing, or kneeling." Although the store had numerous discussions with Nadaf-Rahrov regarding her qualifications, restrictions and available positions with the company, it took the position that she was not qualified for any available jobs at the store until she was released by her doctor to perform work in some capacity. After her family medical leave expired in March 2004, she was informed that the store was no longer able to hold her position open, but her leave was extended an additional four months after she wrote a letter stating that she still needed to be under the care of her doctor "for a little while longer before I can return to work." The store then terminated her in July 2004, after she had exhausted her remaining sick and vacation benefits, on the basis that she had failed to provide any reason to believe that her condition was likely to change in the near future.

When Nadaf-Rahrov sued for disability discrimination under the FEHA, Neiman Marcus contended that it reasonably accommodated her by providing six months of leave beyond the requirements of the FMLA, and was not required to wait indefinitely for her medical condition

to improve to the point where she could perform an available job. Although a trial court agreed with this position and dismissed her claim, the appellate court reversed that determination because Nadaf-Rahrov had produced a list of additional jobs that were available at Neiman Marcus, including clerical and customer service positions, which she contended she could perform even with her limitations. Because the court concluded that it "may have been a reasonable accommodation for Neiman Marcus to extend Nadaf-Rahrov's leave of absence for a limited period of time until a position became available" that she could perform, the store could be held liable for failing to reasonably accommodate her disability – particularly if it could have anticipated future openings and available positions that she was qualified to perform.

It is within this context that the court held that a claim for violation of the "duty to engage in the interactive process" could only be established if a reasonable accommodation is possible. The court stated a violation of that duty can be established "where the employee who is unable to identify a specific available reasonable accommodation" might have been able to do so if the employer consulted with her as required by law. The court specifically held that a reasonable jury could find that Neiman Marcus caused a breakdown in the interactive process by refusing to provide information about available positions that might have assisted her in finding other work at the company, even outside of the geographical area she was employed in. This failure, in turn, prevented Nadaf-Rahrov from obtaining information about specific jobs that could help her obtain a limited medical release from her doctor that could enable her to return to work with only certain limitations. The court also noted that although an employer need not provide repeated leaves of absence

when an employee who has a poor prognosis of recovery, the mere fact that a medical leave has been repeatedly extended does not necessarily establish that it will continue indefinitely, and that in some circumstances the employer may need to consult directly with the employees' physician to determine the employee's medical restrictions and prognosis for improvement or recovery. In this instance, the court held that it was unreasonable for Neiman Marcus to determine unilaterally that Nadaf-Rahrov could not perform any available vacant position and would not be available to do so in the foreseeable future.

## Congress Passes Mental Health Parity Bills

on September 23, 2008, the House and Senate approved legislation that would require health plans which provide medical coverage to provide the same benefits for mental illness as they do for other medical conditions. The bills would amend federal laws to prohibit employee group health plans from adopting mental health treatment limitations, financial requirements, or out-of-network coverage for the patients unless comparable limitations requirements were adopted for medical and surgical benefits. Employers with fewer than 50 workers would be exempt from the parity requirements. The legislation approved by the House (HR 6049) still needs to be harmonized with the Senate bill, since it does not provide the same kind of funding vehicle.

## Court Invalidates Non-Compete Agreements

In *Edwards v. Arthur Andersen LLP*, the California Supreme Court confirmed that non-competition agreements are generally void as against public policy under California law.

The Court found that Arthur Andersen's non-competition

agreement with its employee, Edwards, restricted his ability to practice his accounting profession and did not meet any statutory exceptions to the general public policy against such agreements. The agreement prohibited Edwards from performing any services equivalent to those performed for his clients at Arthur Andersen for 18 months upon leaving the company, and imposed a 12 month bar on solicitation of clients to which he was assigned during the 18 months preceding his departure. The Court's opinion thus establishes that, as a general rule, non-competition agreements are invalid in California, even if they are deemed "reasonable," if they do not fall under a statutorily-carved out exception – such as those imposed as a condition to the preservation of goodwill upon the sale of a business. The Court noted that there is no "narrow restraint" exception under California law – i.e., no exception for agreements that narrowly limit a portion of a person's profession.

The Court did not address the applicability of the trade secrets exception to the law, because Edwards did not dispute that portion of his agreement. As such, that exception remains viable in California, at least for the time being. The Court also held that a release of "any and all" claims against an employer was enforceable, but does not waive statutory rights like the right to indemnification under Labor Code section 2802.

This decision makes clear that enforceable non-compete agreements are very narrowly limited in California. Any employer currently utilizing non-compete agreements or considering the use of one is urged to consult their attorney at Hill, Farrer & Burrill LLP. Also clear is that employers may rely on releases of "any and all" claims, with the understanding that such releases will not waive rights guaranteed to employees under law.

## Challenge to Living Wage Ordinance Rejected

In a landmark ruling involving the enforceability of Living Wage Ordinances in California, a California appellate court in *Amaral v. Cintas Corporation* recently held that an employer was liable for approximately \$800,000 in unpaid hourly wages for failing to pay its employees in accordance with the wages and benefits required by the Hayward Living Wage Ordinance. The employer in that case made contentions that the Living Wage Ordinance was unconstitutional because it applied outside the boundaries of the City, and that it did not apply to all hours of work performed by employees in its operations. However, the court rejected these challenges and required that the employer pay all employees who could have worked on the City contract the wages and benefits required by the Living Wage Ordinance (LWO) because the employer did not segregate the work or otherwise account for how many hours it took to process the City's garments.

The case serves as an important reminder that companies should only enter into government contracts in this day and age with an understanding of whether such requirements as a Living Wage Ordinance can apply, and to ensure that those employees who work on city business covered by an LWO will receive the wage and benefits required by the Ordinance.

## Pest Eliminators Held Exempt, But Not in California

In the recent case of *English v. EcoLab, Inc.*, a federal district court in New York dismissed the overtime pay claim of pest eliminators employed by Ecolab, a nationwide cleaning company, on the ground that the eliminators were exempt from the overtime requirements of

federal law by virtue of the "retail sales" exemption. To qualify for that exemption, an employee must earn 150% of the federal minimum wage, earn at least half their salaries in commissions, and work for a retail or service establishment. The federal judge in the *Ecolab* case ruled that because the eliminators were "readily available for a direct, two-way communication with the public through a wide-range of communication devices," they were employed by a retail establishment within the meaning of the exemption, and were not eligible for overtime pay.

However, the result would have been different under California law, in which the retail sales exemption is only available under Wage Order 4 (applying to the Professional, Technical and Clerical industry), and Wage Order 7 (governing the Mercantile industry). Pest control operations in California are governed by the Public Housekeeping Industry Wage Order (Wage Order 5), in which the retail sales exemption is not recognized.

## Female Electrician Permitted to Proceed with Sex Discrimination Claim

In the recent case of *Davis v. Team Electric Company*, the U.S. Ninth Circuit Court of Appeals ruled that a female journeyman electrician could proceed with her claim for sex discrimination against her employer based on how she was treated by foremen and supervisors. The treatment included excluding her from meetings, refusing to give her a radio, and assigning her a disproportionate number of jobs that entailed work with hazardous material that is sprayed over metal and wood (Monokote). When the female electrician complained about the physical effects of her exposure to Monokote, she was told that she would lose her job for being paranoid and that "We don't mind females working as long as they don't complain." In one discussion

with the female electrician about a requested transfer to another job because she was experiencing neck pain from doing ceiling work for two weeks, the project foreman said he would transfer her to another foreman because that foreman “needs a girl friend,” and referred to his wife repeatedly as an “Astro-bitch.”

After filing a formal complaint with the Oregon anti-discrimination agency, the female employee found lipstick on her car that said “Lady Killer,” and found her car with its lights turned on and the battery dead. She also complained about a sexually charged work environment in which demeaning comments about women’s bodies were repeatedly made. Although a lower court initially dismissed her sex discrimination claims, the appellate court had no trouble concluding that she had raised sufficient grounds to proceed to trial on her claim that she was treated differently because she was a woman, and that she could also proceed with her hostile work environment claim.

## **New Wage Law Affects Temporary Service Employers**

Temporary service employers need to update their payroll system to comply with newly approved wage laws. Senate Bill 940, approved by the Governor on July 22, 2008, will amend the requirements under the Labor Code for payment of wages to temporary service employees. Existing law generally requires that wages to all employees be paid twice during each calendar month, within 72 hours if an employee quits, and immediately upon discharge. The new law mandates that employees of temporary services employers be paid on a weekly basis, or daily if an employee is assigned to a client on a day-to-day basis or to a client engaged in a trade dispute.

Note, however, that the new law does not apply to employees who are assigned to a client for over 90 consecutive calendar days unless the employer chooses to pay the employee weekly in compliance with the new law. In line with existing law, a violation of these new wage payment requirements will subject the employer to civil and criminal penalties. If these new requirements apply to your company, make sure that payroll is in compliance.

## **Payment of Wages Via Debit Card Is Permissible**

The Division of Labor Standards Enforcement has recently issued an opinion letter approving the use of payroll debit cards as an alternative method for paying employees. A payroll debit card is defined as a type of prepaid card which contains or represents an amount of pre-loaded value. The value on the card can be accessed by the employee at various locations, such as through ATM withdrawals. Withdrawal of wages by the employee through the use of the payroll debit card is then debited from a designated bank account. Wages paid to employees via the payroll debit card satisfy the requirements under the Labor Code so long the following procedures are implemented:

1. The payroll debit card program must be presented to the employee as an alternative to traditional wage payment methods. The employee’s participation in the payroll debit card program must be optional and the employee must voluntarily and specifically authorize the deposit of his or her wages into a specified account.
2. The value of the wages electronically transferred to the card on each pay day must be immediately available to the employee as cash accessible through financial institutions and ATMs throughout California.

3. The employee must have the option of withdrawing the full amount of wages due and payable without a transaction fee at least once per pay period.
4. The funds deposited into an employee’s payroll debit card account must be held for at least 30 days.
5. An itemized wage statement (pay stub) must be distributed to the employee on the scheduled pay day.

If the above steps are followed, implementation of a payroll debit card program can be a simple and new wage payment option offered to employees.

## **Free Speech Rights Infringed By Shopping Malls That Prohibited Union Picketing and Handbilling**

According to the Ninth Circuit Court of Appeals, two California shopping malls infringed on free speech rights under the California Constitution, and violated federal labor law, by prohibiting the Carpenters and Joiners of America from picketing and handbilling in protest of the use of nonunion contractors.

A unanimous court held that a rule banning activities that identify by name the mall owner, manager, or tenants and a rule banning signs and written materials that interfere with the mall’s commercial purpose constitute content-based restrictions on free speech in violation of the California Constitution. Moreover, a third rule requiring an application process was impermissible when used to enforce the first two rules.

One rule did not just ban speech communicated in dangerous or intrusive ways, but “virtually all speech communicated visually through images and text.” Another rule went beyond limiting activity at

mall entrances or in areas that must be kept clear under the fire code, and included areas where traffic flow restrictions would not have been a concern. Yet another rule banned expressive activity during the “peak traffic periods” from Thanksgiving through the end of December, foreclosing “any chance of effectively reaching a large percentage of the target audience.”

Both of the shopping centers involved in the case were privately owned, and enclosed. In ruling against the centers, the Ninth Circuit held that the free speech provision of the California constitution “protects expressive activities—including petitioning and picketing—conducted in privately-owned shopping centers.” The court’s findings as to each of the rules relied heavily on the tests established by the recent California Supreme Court decision in *Fashion Valley Mall LLC v. NLRB*.

### **Painter with Lapsed Contractor’s License Deemed Independent Contractor**

On September 11, 2008, the California Court of Appeal held that Kyong T. Chin, a worker who was injured while performing painting services at the Ontario shopping center Hollywood 28, was an independent contractor and not an employee of either the limited liability company that owned the shopping center or the company that managed the center. Although Chin had previously been licensed as a painting contractor, his license lapsed in 2000, and he was not licensed at the time of the injury.

The appellate court stated that under Labor Code section 2750.5, the presumption of employee status can be rebutted only as to persons who hold a valid contractor’s license. It cannot be rebutted as to

persons who do not hold a valid contractor’s license. Moreover, if a worker misrepresents himself as a licensed contractor, he is barred from asserting that his unlicensed status makes him an employee under the statute.

In Chin’s case, the situation was augmented by the fact that he initially accurately informed Hollywood 28 that he was licensed, but over time his license expired. Chin never told Hollywood 28 that his license had expired, and it never made a second inquiry. In such situations, the court articulated the factors that should be considered: 1) the nature of Chin’s initial disclosure and respondent’s initial inquiry; 2) the length of time the license was valid and how long since it had lapsed; 3) the parties’ expectations; 4) the nature and length of the relationship between Chin and respondents; and, 5) custom and practice in the industry. The burden of proving any mitigating factors rests with the hiring party.

Here, it was reasonable for the lower court to have found that Chin had waived any claims he was an employee under the Labor Code, because he was a licensed painting contractor when he began working for respondents in 1996, and the existence of his license was discussed at that time. Over the years that followed, Chin provided painting services to respondents on a number of projects, and it was respondents’ belief that Chin would have advised them if his license had been revoked. Respondents further argued that Chin was among several bidders for the contract to paint the shopping center, and they never would have awarded him the contract had they known he was no longer licensed. Moreover, there was evidence that Chin was operating his own business, as he brought his own ladder, scaffolding and tools to the site, had the right to control the

manner of his performance, and had held himself out as a licensed contractor in bargaining for the contract.

### **Court Upholds Independent Contract Status for Construction Inspector**

In the recent case of *Varisco v. Gateway Science & Engineering, Inc.*, a California appellate Court concluded that a construction inspector was an independent contractor for a firm providing construction management services, because that firm did not retain the right to direct how the inspection work was to be accomplished. The inspector’s work hours were established by the project architect and not the construction management firm, which he visited only twice a month to pick up his paycheck. The court noted that the inspector was paid an hourly rate and that his services were part of the construction firm’s regular business activities. The firm also required him to fill out an employment application, and could discharge him at-will.

However, the court found that these factors were overridden by the fact that the inspector was a professional who exercised his skills and discretion without oversight, reported directly to a client, and was not subject to control by the construction firm in the manner or means by which he performed his work.

### **Court Holds That Strike Replacements Can Be Considered “Permanent” Despite At-Will Clause**

When employees stage an economic strike against an employer, the employer is permitted by federal law to hire “permanent replacements” to take the strikers’ jobs, which strikers may only be able to re-obtain after abandoning the

strike and being placed on a "preferential hiring list." Such "permanent replacements" are to be distinguished with "temporary replacements," who are subject to termination immediately once the strikers abandon the strike and seek to return to work.

In the recent case of *Steelworkers v. NLRB*, the U.S. Seventh Circuit Court of Appeals in Chicago held that strike replacements could be considered "permanent" even though they were employed in an at-will basis. The court concluded that an offer of employment may be considered "permanent" for purposes of federal labor law without necessarily being an enforceable contract for continued employment under state law. The court noted, however, that permanent replacements could still be replaced by former strikers pursuant to a strike settlement agreement.

## **DOL Issues Opinion Letters On On-Call Time, Administrative Exemption**

The U.S. Department of Labor has recently issued several Opinion Letters on what constitutes compensable "on-call" time, as well as the application of the administrative exemption to several kinds of positions.

In an Opinion Letter dated May 23, 2008, the Department considered whether the on-call time spent by rescue employees employed by an ambulance service was compensable, when they were required to respond to rescue calls two hours before and two hours after their regular eight-hour shifts. The rescue workers were required to stay within a specific area and to respond to pages within eight minutes. They typically responded to call-ins once every four hours, and were not permitted to swap on-call responsibilities with other employees.

Although the Department concluded that the time spent waiting under such circumstances was "sufficiently restricted to make it compensable under the FLSA," its opinion could be different if the frequency of calls was only once or twice a week or the workers were able to turn down call-ins by having another employee cover them.

The Department also concluded, in a separate Opinion Letter, that a Product Technology Application and Marketing Analyst and was exempt based on administrative exemption. The analyst worked with an engineering design group to develop tests that measure the performance of new products for a soil erosion prevention firm, and assess the uses of current products in strengthening retaining walls and foundations for that company. He also worked with the engineering group in developing a test to measure a product's performance under varying conditions, and spent significant time liaising the company sales professionals to discuss specific features and uses of the company's products and how to respond to customer inquiries regarding competitors' products. The analyst's primary functions of quality control and research were found to be directly related to the general business operations of their employer and its customers, and that he was exempt from overtime under the administrative exemption.

In another Opinion Letter, the Department found that a purchasing agent employed by a motor home manufacturer also qualified for the administrative exemption when he negotiated prices with vendors, placed orders, and ensured that materials and supplies were timely delivered so that the manufacturing process functioned smoothly. The Purchasing Assistants were authorized to make purchases up to 25,000 without managerial review or authorization, and played a primary role in the research and selection of vendors. The Department found that

the purchasing agents were exempt because they had the authority to commit the employer in matters that had significant financial impact, given the high threshold amount requiring authorization.

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If you have any questions about these issues or any other labor matters, please contact any member of the Labor & Employment Department at Hill, Farrer & Burrill LLP.

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