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discrimination receive the same protection against retaliation as the people who formally file charges. Crawford, the plaintiff in the case, testified against her supervisor in an internal investigation of a sexual harassment claim made by another employee. Crawford was not pursuing a claim herself. Rather, she told an investigator when asked that her supervisor had acted in a sexually inappropriate manner with her. She was fired six months later for independent reasons.

Crawford sued for retaliation. Although the lower courts declined to extend federal discrimination laws to participation in an internal harassment probe, the Supreme Court concluded otherwise.

The Supreme Court ruled that Crawford's conduct was covered by the "opposition clause" of Title VII's anti-retaliation provision, which makes it unlawful for an employer to discriminate against an employee for opposing any unlawful practice under Title VII. While the word "oppose" is not defined in the statute, the Court held that it "carries its ordinary meaning" of "resisting, confronting, or being adverse to in opinion."

Vocalized disapproval of an employee's sexually offensive behavior may qualify as resistant and communicating a belief that an employer has engaged in employment discrimination almost always constitutes opposition to the activity. The "opposition" clause, therefore, does not require active opposition, including the initiation of a complaint.

### SAVE THE DATE! June 23, 2009

Hill, Farrer & Burrill, LLP and US Bank will be sponsoring a breakfast to discuss the Employee Free Choice Act, employee privacy law, and other recent developments in Labor & Employment Law on June 23, 2009 at 9:00 a.m. The breakfast will be held at the Newport Beach Radisson, 4545 MacArthur Boulevard, Newport Beach, CA 92660, with registration beginning at 8:00 a.m. James Bowles will address the potential impact of the Employee Free Choice Act on union organizing campaigns, as well as other employment legislation currently pending before Congress. Jonathan Brandler will provide an overview on

the variety of employee privacy issues currently facing employers and recent changes in the law impacting the right to privacy in the workplace. After both talks, there will be an opportunity to address audience questions.

We hope to see you there. If you are interested in attending the breakfast, please contact LaVenia Forte, assistant to James Bowles, at (213) 620-0460, to RSVP.

### Supreme Court Extends Retaliation Claims to Participants in Internal Investigations

In January, the United States Supreme Court held that employees who participate in internal probes of

This occasional newsletter is published by Hill, Farrer & Burrill LLP as a service to clients, friends and colleagues.

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.

## Congress Passes Legislation Overturning High Court's Ledbetter Ruling

On January 27, 2009, Congress passed the Lilly Ledbetter Fair Pay Act, which was promptly signed into law by President Obama. The Act makes it easier to bring pay discrimination claims by providing that a new charge-filing period is triggered each time compensation is paid pursuant to a discriminatory compensation decision or practice.

The Act overturns a recent U.S. Supreme Court decision – *Ledbetter v. Goodyear Tire & Rubber Co.*, and amends Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act. In *Ledbetter*, the Court held that the time limits for filing a discrimination charge with the Equal Employment Opportunity Commission start to run when the employer makes a discriminatory decision about the employee's compensation, not each time the employee receives a paycheck affected by discrimination.

The new law allows people such as Ledbetter - who discovered that she had been receiving less pay than male counterparts doing the same work after working for the company for nearly 20 years - to file claims long after the discriminatory compensation decision was made.

## Court Allows Tip-Pooling With Bartenders Despite Lack of Direct Table Service

A tip-pooling policy that requires servers to share a percentage of their tips with bartenders who do not provide direct table service is not in violation of California law, according to the recent ruling in *Budrow v. Dave & Buster's of California, Inc.* There, the court upheld summary

judgment for Dave & Buster's and rejected the argument that its tip pooling policy was unlawful.

The court held that California law does not distinguish between direct and indirect table service. Rather, the inquiry relates to whom the tip was left for, which is determined by a reasonable assessment of the patrons' intentions. The answer to that question may vary from place to place depending on the nature of the service provided, necessitating flexibility rather than categorical exclusions from a tip pool.

In *Budrow*, it did not matter whether the bartenders brought the drinks to the customers' tables. The fact that they mixed and poured the drinks was sufficient to permit the bartenders to share in the tip pool.

This opinion, in effect, requires employers to guess whose tips should be pooled, but allows some flexibility in developing a tip pooling policy that is suitable for the needs of the particular business. So long as managerial employees or other agents of the employer are not included in the pool, the *Budrow* case suggests that the courts will not adjust the tip pool in favor of employees who seek a larger share to the detriment of other wait staff. Assistance of counsel in developing a tip-pooling policy is suggested.

## Supreme Court Validates Requirement to Arbitrate Bias Claims in Collective Bargaining Agreement

The U.S. Supreme Court recently resolved a long-standing question regarding the ability to arbitrate the employment discrimination claims of union-represented employees, holding that a collective bargaining agreement that "clearly and unmistakably" requires employees to arbitrate claims under the Age Discrimination in Employment Act is enforceable.

At issue in the case, *14 Penn Plaza LLC v. Pyett*, was a collective bargaining agreement that prohibited discrimination against employees, citing numerous federal and state laws including the ADEA. The agreement provided that all discrimination claims were "solely and exclusively" subject to arbitration and that such arbitrators will apply the "appropriate law" in rendering decisions.

The Court concluded that the "broad sweep" of the National Labor Relations Act makes arbitration provisions in collective bargaining agreements (CBAs) enforceable. It also stated that nothing in the text of the ADEA prohibits arbitration of such claims: "The decision to fashion a CBA to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery." A negotiated arbitration provision, like other contractual terms and conditions of employment, "must be honored unless the ADEA itself removes this particular class of grievances from the NLRA's broad sweep."

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court previously held that the ADEA did not preclude compelling an individual asserting ADEA claims against an employer to proceed through an arbitration procedure the employee accepted. The Court explained that there was nothing in the law that suggested a distinction between collective and individual agreements to arbitrate.

The Court further noted that in order to enforce an agreement to arbitrate a statutory claim, there must be clear language explicitly assigning the claim to arbitration. It also held that subjecting a claim to arbitration does not waive an employee's substantive rights under the ADEA.

While not explicitly overruling its prior decision in *Alexander v. Gardner-Denver Co.*, it found that the case

was a “strong candidate for overruling.” *Gardner-Denver* involved a collective bargaining agreement that gave an arbitrator authority to resolve only questions of contractual rights. The Gardner-Denver court concluded that an employee did not waive the right to file a lawsuit under Title VII by participating in an arbitration because the federal policy favoring arbitration did not make an arbitrator’s resolution of a contractual claim dispositive of a statutory claim under Title VII. The Court stated that claims under statutes such as the ADEA may be subjected to arbitration without contravening statutory protections against discrimination.

The Court’s decision makes clear that whether an agreement to arbitrate discrimination claims contained in a CBA will be enforceable depends entirely on the clarity of the provision. Where the language clearly assigns all such claims to arbitration, the language of the CBA will control as to all covered employees. Employers subject to existing CBAs or in the process of negotiating a CBA should review the language of their agreements to ensure coverage.

## California Legislature Relaxes Alternative Workweek Rules

On February 20, 2009, the California legislature voted to amend California Labor Code section 511 to provide some additional flexibility to alternative workweek schedules. Under California law, an employee may work according to an alternative workweek schedule with shifts of up to 10 hours per day without the necessity of paying daily overtime. However, the alternative workweek laws have been criticized as inflexible, causing many employers to reject alternative workweek scheduling. In response, the California Legislature passed AB 5, which allows employers to offer a regular 8 hour per day/5 day per

week work schedule among a “menu of options” for alternative workweeks.

Under prior law, a regular 8 hour per day/ 5 day per week schedule could not exist among the alternative workweek “menu of options.”

Allowing employees to choose the regular workweek among other non-traditional options will likely increase the number of employees interested in adopting an alternative workweek schedule (AWS). However, like prior law, employers must accommodate any employee who cannot work an AWS.

The new law provides that employees can switch from one AWS to another from week to week with the employer’s consent. The DLSE has previously taken the position that switching schedules from week to week invalidates the AWS. Now, employees can choose to work a normal workweek schedule one week and a non-traditional workweek schedule (such as a 10 hour day, 4 day week schedule) another week. All that is required is that both schedules be among the “menu of options” adopted by the employees under the employer’s proposal and that the employer consents to the change in schedule.

The new law also defines the term “work unit,” which was previously undefined in the Labor Code. In order to adopt an alternative workweek, two-thirds of the affected employees in a “readily identifiable work unit” must vote to adopt the proposed schedule. A “work unit” is a division, department, job classification, shift, separate physical location, or recognized subdivision, which may consist of one or more individual employees.

While the new provisions increase flexibility in adopting an AWS, California workweek law remains fairly complicated. If you wish to review your company’s policy, please contact Ron Novotny at

novotny@hillfarrer.com or James Bowles at jbowles@hillfarrer.com.

## New FMLA Regs Stress the Importance of Reviewing Leave Policies

On January 19, 2009, new Family and Medical Leave regulations went into effect. The new regulations track changes made to the Family and Medical Leave Act (FMLA) last year, including the addition of two types of military leave. Given the changes to the FMLA, there is less overlap than before with the California Family Rights Act (CFRA).

Recently, the California Legislature issued a guidance to assist employers with compliance. The guidance notes that there are several forms of leave that are covered under one law and not the other, including some forms of military leave, leave related to pregnancy, and leave taken to care for an ill domestic partner. While most leave policies coordinate CFRA and FMLA leave, an employee may still be eligible for more than the total 12 workweeks of leave allowed under either statute because only one leave will be used up at a time.

Though it is anticipated that more will be done by the California government to coordinate CFRA with the FMLA, in the interim it is recommended that all California employers review their family and medical leave policies to ensure that they are compliant with both state and federal law. If you would like assistance reviewing your company’s policy, please contact your employment counsel at Hill, Farrer and Burrill, LLP for more information.

## The Stimulus Bill and Changes to COBRA: What Employers Need to Know

The recently enacted stimulus bill (the American Recovery and Reinvestment Act of 2009), that

President Obama signed into law February 17, 2009 creates a temporary, partial subsidy of the COBRA premiums payable by certain terminated employees for continuation coverage provided under employer-sponsored group health plans. The premium subsidy and new notification requirements under COBRA that apply to employers and plan administrators as a result of this legislation are summarized below.

### **The COBRA Premium Subsidy**

The subsidy covers 65% of the COBRA premiums that would otherwise be payable by "assistance eligible individuals," as defined below, which is paid by the employer and then generally recouped from the federal government via a credit against the employer's federal payroll taxes, or, alternatively, through a direct payment from the government. The COBRA premium subsidy is available to assistance-eligible individuals for up to nine months and will generally apply to premiums paid for periods of coverage beginning on and after March 1, 2009. The subsidy is based on the premium actually charged to the assistance-eligible individual, and thus, does not include amounts that an employer has agreed to pay on behalf of the individual (e.g in a severance agreement). The COBRA premium subsidy is no longer available once an assistance-eligible individual becomes eligible for coverage under another group health plan or Medicare or is otherwise no longer eligible for COBRA continuation coverage. The subsidy applies to group health plans but does not apply to plans that provide only dental, vision, counseling or referral services or health care flexible spending arrangements (typically offered under cafeteria plans).

An "assistance-eligible individual" means any qualified beneficiary (within the meaning of COBRA) who: (1) experiences an involuntary termination of employment (but not

for reasons of gross misconduct) at any time during the period from September 1, 2008 through December 31, 2009; and (2) elects COBRA continuation coverage. A special election period is available for those individuals who do not have a COBRA election in effect on the date of the law's enactment but who would be assistance-eligible individuals if such election were in effect. The special election period for these individuals begins on February 17, 2009 and ends sixty (60) days after the plan administrator sends out the newly required notice of the new special election period. This means that employees fired or laid off between September 1, 2008 and February 17, 2009 who did not elect COBRA continuation coverage will have a new 60-day window in which to elect COBRA continuation coverage that will be effective with the first period of coverage beginning on or after February 17, 2009. Thus, for plans that provide and charge for COBRA continuation coverage on a monthly basis, such coverage potentially commenced for them on March 1, 2009.

The subsidy begins to phase out for individuals and couples with annual adjusted gross income in the amounts of \$125,000 and \$250,000, respectively. The subsidy is completely phased out for individuals with an annual adjusted gross income of more than \$145,000 and couples with an adjusted gross income of more than \$290,000. Any individual receiving the subsidy during the year whose income exceeds these limits is required to repay the subsidy to the government.

### **New Notice Requirement**

Employers must provide notice of the availability of the COBRA premium subsidy to employees and former employees who experience or have experienced a qualifying event during the period from September 1, 2008 through December 31, 2009. This notice must include the following information:

- A description of the qualified beneficiary's right to the premium subsidy and any conditions on the entitlement to the subsidy.
- The forms necessary for establishing eligibility for the premium subsidy.
- The name, address and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with the premium subsidy.
- A description of the special election period that is available for those individuals who do not have a COBRA election in effect as of February 17, 2009, but who would be assistance-eligible individuals if such election were in effect.
- A description of the qualified beneficiary's responsibility to notify the plan if he or she becomes eligible for coverage under another group health plan or for Medicare, and the penalties imposed under Section 6720C of the Internal Revenue Code for failure to do so (i.e., payment of 110 percent of the premium reduction provided after termination of eligibility).
- A description of alternative COBRA coverage options if the employer elects to provide them. *(Employers have the option to permit assistance-eligible individuals to elect a different COBRA health coverage option from the one they had been enrolled at the time of their termination of employment. This other group health plan coverage must be an option offered by the employer to active employees at the time the election is made, and the premium for such coverage cannot be more*

expensive than the premium for coverage in which the individual was enrolled at the time of his or her qualifying event.)

Under the new law, the Department of Labor was required to publish a model notice by March 19, 2009. The model notice is available at: <http://www.dol.gov/ebsa/COBRAmodelnotice.html>. We recommend following the language of the model notice to ensure compliance with the stimulus bill's provisions.

### **Action Items For Employers and Plan Administrators**

The following is a list of action items that you may find helpful in preparing for the new obligations under COBRA as recently amended:

1. Identify employees and former employees (including their eligible spouses and dependents) that are eligible to elect COBRA continuation coverage who experienced involuntary terminations on or after September 1, 2008.
2. Review and update existing COBRA communications and notices. In particular, employers and plan administrators should focus on preparing a new notice meeting the requirements described above.
3. Review and revise existing payroll systems and procedures to track and facilitate the COBRA premium subsidy payments.
4. Establish payroll and accounting processes and procedures that will gather the information needed to accompany the employer's claim for the tax credit.
5. Determine the impact the COBRA premium subsidy will have on existing arrangements.
6. Coordinate with any third-party COBRA administrators to clearly

define the roles of each party with respect to the new responsibilities under COBRA.

## **Pending Federal Legislation Threatens Validity of Arbitration Clauses in Employment Agreements Under FAA**

### **The Arbitration Fairness Act of 2009**

Legislation was introduced in the U.S. House of Representatives on February 12, 2009 that would invalidate pre-dispute arbitration clauses in employment agreements under the Federal Arbitration Act (FAA). Among other things, the Arbitration Fairness Act of 2009 would make any agreement to arbitrate in an employment agreement unenforceable by limiting the scope of the Federal Arbitration Act to exclude employment disputes arising out of the employee-employer relationship. If enacted, the law would invalidate any agreement to arbitrate that is made prior to the time of a dispute under the FAA. The law would also specifically invalidate predispute agreements to arbitrate any claims arising under any federal statute intended to protect civil rights.

Under the proposed law, a court rather than an arbitrator would be required to determine the validity or enforceability of an agreement to arbitrate a claim under federal law, irrespective of whether the party resisting arbitration challenges the agreement itself or in conjunction with other terms of the contract containing the arbitration provision.

One question arising out of this legislation is its effect, if any, on state arbitration law. Even if the agreement to arbitrate were unenforceable under the FAA and federal law, it is possible that the agreement would still be enforceable under California law if so designated in the agreement. However, the language of the

proposed law does not distinguish federal civil rights claims from claims based on state law. Therefore, one effect of the law may be to prohibit the enforcement of any predispute arbitration agreement in the context of a civil rights claim.

We will keep a close eye on developments regarding this legislation and its impact on employers.

## **Employer Did Not Prove Validity of Electronic Signature on Arbitration Pact**

The recent federal court ruling in *Kerr v. Dillard Store Services, Inc.* should put all employers on notice of the importance of verifying and safeguarding electronic documents, most particularly electronic agreements. In *Kerr*, the District Court of Kansas held that the employer failed to satisfy its burden of showing that an employee's electronic "signature" on an online arbitration agreement was valid. Because the employer could not prove the validity of the signature, the court refused to compel the employee to arbitrate her race discrimination claim.

It was the practice of the store to require employees to consent to arbitration by executing an electronic arbitration agreement through the company's intranet system. There, the employee had refused to sign the agreement for months and had been vocal about her disagreement with the policy. Because the existence of a valid agreement to arbitrate was in dispute, the employer was required to demonstrate that the employee knowingly executed the agreement with the intent to arbitrate any disputes. Because the employer could not prove that the electronic "signature" belonged to Kerr, it failed to meet its burden of showing knowing intent to arbitrate on her part.

The court noted that the employer failed to create adequate procedures for maintaining the security of intranet passwords, restricting access to the screen permitting electronic execution of the agreement, determining whether the electronic signatures were genuine, or determining who opened individual emails.

Employers who accept e-signatures on their employment agreements should revisit the features of their intranet and password protection systems to ensure that such agreements are secure from tampering and are electronically linked to the employee signing the agreement.

## Outside Sales Exemption Does Not Apply to Drug Representatives, Court Holds

A federal district court in Connecticut recently ruled that the outside sales exemption to the overtime pay requirements in the Fair Labor Standards Act (FLSA) does not apply to pharmaceutical sales representatives whose primary job mainly consisted of educating physicians about a company's drugs. The court in *Kuzinski v. Schering Corp.* stated that because the company's pharmaceutical sales representatives "do not make sales or obtain orders or contracts, the outside sales exemption is inapplicable to them." The court explained that an employee does not "consummate a 'sale' for purposes of the FLSA merely by 'laying the groundwork' for another employee to obtain a customer's commitment."

Four former pharmaceutical sales representatives of Schering Corp. sued the drug manufacturer, alleging that it had violated the FLSA by misclassifying them as exempt employees. Their core job responsibility was to meet with medical professionals and provide

them with Schering-approved materials and scripted information about the company's products in hope that the physicians would prescribe the product to their patients.

The sales representatives worked mostly outside company offices and attended after-hours training sessions. The company selected the physicians for its sales representatives to target and tracked trends in the use of its products. The sales representatives were primarily responsible for developing relationships with physicians and deliver a "core message" about the products. The sales representatives did not enter into contracts "over the price or quantity of Schering's products, obtain their orders for Schering's products, or get binding commitments from the physicians to purchase or prescribe Schering's products." Each was paid a base salary plus incentive payments loosely based on the number of prescriptions for company products in their geographic area.

Under the law, employees must "consummate sales or obtain contracts or orders" before the outside sales exemption exempts them from receiving overtime pay. Here, the visits to physicians did not culminate in contracts requiring physicians to write a particular number of prescriptions, and the products were not sold directly to patients.

The ruling disapproved federal case law from the Southern District of New York, which applied the outside sales exemption to pharmaceutical sales representatives on the basis that they "make sales in the sense that sales are made in the pharmaceutical industry" even if they do not sell drugs to the doctors they visit, because the FLSA regulations clearly define "sale" and "sell" to include sales, exchanges, contracts to sell, consignments for sale, shipments for sale, or other dispositions – none of which occurs when the pharmaceutical sales reps

visit the physicians. The court added that the representatives and physicians "do not even have the capacity to consummate sales" because they "are barred both by law and by their employer from entering into contracts or binding commitments with physicians for the prescription of their employer's products."

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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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