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IMMIGRATION AND LABOR & EMPLOYMENT DEPARTMENTS

2006 EMPLOYERS' LEGAL UPDATE

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CALIFORNIA EMPLOYER'S LEGAL UPDATE 2006

I. LEGISLATIVE UPDATE

A. Workplace Smoking Prohibition: Clarification To Labor Code § 6404.5

Employers may not knowingly permit and no person may engage in smoking in an "enclosed space" at a place of employment, pursuant to Labor Code § 6404.5. Until now, "enclosed space" was not defined.

1. Effective January 1, 2007, "enclosed space" shall include "lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of the building."

2. This addition does not change the existing list of exclusions from "place of employment," found in § 6404.5(d). Most of these exclusions pertain to specific businesses, such as hotels, banquet facilities, tobacco shops and lounges, gaming clubs, and bars, and also to designated smoking break rooms under specific circumstances.

Under existing law, employers are responsible for averting smoking in prohibited areas by nonemployees by posting clear and prominent signage.

What Employers Should Do:

- If the employer already prohibits smoking throughout the entire building, then this change in law should not affect the posting obligation which is a sign that states "No Smoking" at each entrance.

- If smoking is permitted in certain designated areas, a sign at each entrance must state that "Smoking is prohibited except in designated areas."

- Further, while not required, an employer may find it practical to post that smoking is prohibited in certain areas within the new definition of "enclosed space" where otherwise people may believe smoking is permitted.

B. Hand-Free Cell Phone Use While Driving: Vehicle Code § 12810.3

The California Wireless Telephone Automobile Safety Act of 2006 was enacted in order to balance safety benefits associated with mobile communications when assistance is needed against a "growing public concern regarding safety implications of widespread use of hand-held wireless telephones while operating motor vehicles" and the need for a uniform state-wide safety practice.

1. Effective July 1, 2008 cell phone usage while driving must be hands-free for both speaking and listening, except for contacts with law enforcement and public safety agencies and certain commercial vehicles.

2. In general, this new law is not a regulation of employment and does not directly impose duties upon employers. However, given the legislative expressions of concern that hand-held cell phone operation is unsafe, employers should consider being proactive about their employees' cell phone use while conducting the employer's business and operating a vehicle.

What Employers Should Do:

- Evaluate whether to adopt a policy about the use of hand-held cell phones to conduct company business while operating a car.

- If employees are expected to use mobile telephone equipment to conduct company business, including but not limited to while driving, evaluate with counsel what legal duties might arise concerning reimbursement of expenses or provision of equipment.

II. DISABILITY DISCRIMINATION

Disability discrimination law is very technical and counter-intuitive, and California creates broader protection than federal law. A few of the thorny issues in disability law arose in cases in 2006 and a few of those cases have been accepted for review by the California Supreme Court.

A. Background: Three Separate Disability Discrimination Causes Of Action In California (California Fair Employment and Housing Act, Gov't Code §§ 12940 (a), (m), and (n); 12926 (f), (i), (k), (n), (s); and 12926.1).

1. **Discrimination**: Unless based on a bona fide occupational qualification, it is unlawful to refuse to hire, select for training leading to employment, or discriminate in compensation or other terms, conditions, or privileges of employment, because of a physical or mental disability. Cal. Gov't Code § 12940(a) (all cites are to the Cal. Gov't Code).

> **But** an employer is not prohibited from refusing to hire or discharging an employee with a physical or mental disability where the employee, because of his or her physical or mental disability,

a) Is unable to perform his or her "essential duties," *even with reasonable accommodation*, or

b) Cannot perform those duties in a manner that would not endanger the employee or others, *even with reasonable accommodation*. *Id*.

2. **Reasonable Accommodation**: Unlawful to fail to make reasonable accommodation for the *known* physical or mental disability of an applicant or employee.

   But employer need not make an accommodation which it can demonstrate would produce an undue hardship. § 12940(m).

3. **Interactive Process**: Unlawful to fail to engage in a "timely," "good faith," "interactive" process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." § 12940 (n).

B. <u>Background: Person Has Physical Or Mental Disability If The Person:</u>

1. **Has a physical or mental condition** that affects a specific bodily system and limits a major life activity, **OR**

2. **Has a record** of such a condition, which is known to the employer, **OR**

3. **Is "regarded or treated"** as having, or having had, any physical or mental condition that makes achievement of a major life activity difficult now or may become disabling in the future. §§ 12926 (i) and (k).

C. <u>Background: California's Definitions of "Physical" and "Mental Disability" Protect Broader Array Of Circumstances (§ 12926.1) Than Americans With Disabilities Act ("ADA").</u>

1. Protected conditions are not limited to chronic or episodic conditions (such as HIV/AIDS, hepatitis, diabetes, clinical depression, bipolar disorder, multiple sclerosis and heart disease). § 12926.1 (c).

2. The limitation on a major life activity need not be "substantial," as under ADA, but rather meets the test if it makes achievement of the major life activity "difficult." § 12926(k)(1)(B).

3. The limitation on a major life activity is evaluated without considering that mitigation of the condition-- such as eyeglasses, medications, assistive

devices, or reasonable accommodations-- might alleviate the limitation, unless the mitigation itself limits a major life activity (such as side effects of medication). *Id*.

4. "Major life activities" are broadly construed to include physical, social, and mental activities and working. ("Working" is a major life activity regardless of whether the actual or perceived limitation pertains to a class or broad range of employment (the ADA test) or to a "particular" employment.) *Id*.

D. <u>Pitfalls Of Relying On Outdated Medical Information and Workers' Compensation Rating of "Permanent and Stationary," Leading to "Treating As Disabled."</u>

Gelfo v. Lockheed Martin Corp., 140 Cal. App. 4th 34 (2006): As part of a reduction in force, Lockheed laid off an employee who suffered from a workplace back injury. Months later, Lockheed trained the employee for and then offered him a different position. But Lockheed rescinded the offer after discovering that medical restrictions had been imposed six months earlier by the employee's own qualified medical workers' compensation examiner, with which Lockheed's own industrial physician basically concurred. Lockheed believed the restrictions rendered the employee unable to perform the essential functions of the new position. The employee maintained he was not disabled and was able to perform the new job without accommodation, which was supported by more recent medical information which his attorney told him not to provide.

1. <u>Medical Information Outdated And Not Focused On Ability To Do New Job</u>: Lockheed acted at its peril in relying on the employee's own orthopedic surgeon's assessment as part of the workers' compensation claim. The appellate court discounted that assessment as: (a) geared towards avoiding further injury, rather than evaluating the employee's ability to perform the essential functions of the new job with or without reasonable accommodation, (b) based on generalized prognosis rather about an individualized assessment of the employee, and perhaps of greatest importance, (c) outdated by subsequent events which suggested the employee had recovered. Thus, Lockheed was found to have engaged in disability discrimination by relying on the surgeon's medical evaluation and, on that basis, "treated" the employee as if disabled, when in fact he was not.

a) The case alerts employers to the dangers of relying on a "permanent and stationary" finding in Workers' Compensation which *may not* have factual or legal relevance to a FEHA disability analysis.

b) When the employee would not provide Lockheed his more current medical information, Lockheed appears to have assumed the employee was estopped from claiming his condition had improved. The court did not explain the reason the employee was permitted to conceal his own information, but Lockheed also did not require a medical evaluation to establish the employee's current physical ability to perform the new position.

2. Reasonable Accommodation Required: In a case of first impression under FEHA, the court held that Lockheed had a duty to engage in the "interactive" process and offer reasonable accommodation, *even though the employee was not in fact disabled*, declining to follow the Ninth Circuit's *Kaplan v. City of North Las Vegas*, 323 F.3d 1226 (9th Cir. 2003) (no right to reasonable accommodation if employee "regarded" as, but not actually, disabled). Basically, the employee was entitled to a reasonable accommodation of a non-existent impairment.

a) Lockheed might have avoided the problem by engaging in an interactive process in person, instead of limiting the "discussion" to an exchange of letters.

E. The Risk Of Making Assumptions , Prompting to "Treat" as Disabled; New Cause Of Action For Failure to Reinstate:

In an ADA case, ***Josephs v. Pacific Bell***, 443 F.3d 1050 (9th Cir. 2006), Pacific Bell terminated a home service technician about four months after he was hired upon discovery that he had falsified his employment application by failing to disclose his misdemeanor conviction thirteen years earlier for battery on a police officer. Pacific Bell further discovered that the employee also had been found not guilty by reason of insanity of attempted murder 16 years previously and had been committed for two and one-half years to a California state mental facility, six months in a board-and-care mental health facility, and 12 years before becoming employed by Pacific Bell, had been released on parole and changed his name. Prior to working at Pacific Bell, the employee had worked as a home service technician for Cox Communications for ten years.

The stated ground for termination was falsification of application. Prior to a grievance hearing contesting the discharge, the union representative had the misdemeanor conviction expunged and then argued that the employee should be reinstated as had other people who had been similarly terminated but reinstated when their misdemeanor was expunged, but expressed willingness that the reinstatement be to a non-customer service position. O*n advice of counsel*, Lockheed's representative expressed reluctance to return the employee to any job because, given his background, he might "go off" at someone, even if he did not have a customer service job. The jury found that the termination was nondiscriminatory. But it also found that the refusal to

reinstate was discriminatory because, during the grievance proceedings and denial of reinstatement, Pacific Bell "regarded" the employee as mentally disabled.

1. Failure to Reinstate: As a case of its first impression, the Ninth Circuit joined several other federal circuits in recognizing a *failure to reinstate* as a separate actionable claim.

2. Treated As Disabled: Further, the Court affirmed the jury finding that the employer had "treated" the employee as having a mental disability. The legal insanity disposition 16 years earlier might not be analogous with a "mental disability" under the ADA, but the employer's decision not to reinstate was also influenced by discussions in the grievance of newspaper articles that referred to the employee as a "mentally disordered offender," statements made that he spent time in a "mental ward" and "might go off" at a customer, and the employee's own autobiography of mental instability before his hospitalization. Thus, the jury's findings were upheld that the employer had "treated" the employee as if he had a mental disability covered by the ADA and had declined to employ him on that basis.

3. Affirmative Defense of Risk to Health and Safety: The employer's affirmative defense that the employee posed a risk to the health and safety of others in the workplace was held to have been appropriately rejected by the jury based on the evidence that the employee had worked successfully for ten years in a similar job at Cox Communication and for the brief time at Pacific Bell, according to his own supervisor.

What Should Employers Do? Both Gelfo and Josephs Alert Employers to:

- Make disqualifying judgments about perceived disabilities and claims of endangerment only based on current, expert, employee-specific, job-related medical advice.

- Resolve disagreements in employee's and employer's conclusions about ability to perform, based on the foregoing.

- Engage in interactive discussion – not just letter campaign as in *Gelfo*. In *Josephs*, the employee's union representative offered alternative assignments, tantamount to accommodations.

- Disability law demands that employee-specific facts replace assumptions and stereotypes as basis of making employment decisions. The employer in *Josephs* assumed that based on his history, the employee would pose a threat, an assumption that would likely have been made by many other employers.

- Beware of differences between Workers' Compensation goals and FEHA/ADA. Dispositions in Workers' Compensation may not be dispositive under ADA/FEHA, and rehabilitation efforts pursuant to Workers Compensation may cause medical circumstances to change, as is the goal.

- Prepare people who will speak on the employer's behalf to avoid emotionally laden, disparaging language.

- Improper reasons for not reinstating can create separate cause of action. The employer in *Josephs* disclosed during the grievance, that while falsification may have been the stated reason for termination, the perceived mental disability was the reason not to reinstate.

F. Conduct Resulting From Disability Is Part Of Disability

In an ADA case, ***Dark v. Curry County,*** 451 F. 3d 1078 (9th Cir. 2006), a driver of heavy equipment ignored an aura which he knew from years of experience to be a prelude to an epileptic seizure and went to work. He had a seizure while driving a heavy truck. A passenger took control and averted a serious accident. This was the employee's first work incident in 16 years with the employer.

The employer had won summary judgment on its claim that the employee's termination was for his misconduct in not taking proper precautions in light of his disability. The appellate court could have rejected that explanation as inconsistent with the record which established that the employee was told at termination that he was not fit to perform the essential functions because of uncontrolled epilepsy. The employee argued that he had required accommodation for his medications to be regulated, but instead of an interactive process, he was fired.

1. Conduct Arising Out of Disability: In what might be considered dicta, the Ninth Circuit held that a termination based on the employee's failure to take proper precautions amounted to a termination for conduct resulting from a disability, which is not a "legitimate, nondiscriminatory explanation."

2. Distinguishing Actionable Misconduct: The court recognized that:

a) ADA expressly permits employers to discharge on the basis of misconduct associated with alcoholism and illegal drug use, and

b) In some circumstances, an employer may terminate for failure to meet its safety or performance standards when an employee does not control his disability.

c) But the Ninth Circuit declined to follow the Seventh and Eighth Circuits, whose cases it characterized as "unforgiving" by sustaining terminations of employees who neglected to mitigate their disability on a few occasions.

d) The Ninth Circuit treated the failure to mitigate as an aspect of the disability, particularly because the seizure arose out of a drug regime problem which employee was seeking an accommodation to correct.

3. Interactive Process: Until the epilepsy was under control, the employee was *unqualified* for the operation of heavy equipment, which gave rise to the duty on the employer's part to engage in the interactive process to determine if a reasonable accommodation was available.

4. Reasonable Accommodation: If an employer neglects to engage in interactive process, it can only win a failure to accommodate claim if a the fact finder must conclude that *none* would have been available. *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006).

5. Accommodation of Transfer to a Vacant Position**:** A "vacant position" means the position is available when the employee asks for the reasonable accommodation or the employer *knows* it will become available within a *reasonable* amount of time. Ninth Circuit considered vacancies between time employee requested accommodation and the trial date, since the employer refused to engage in accommodation discussions.

6. Affirmative Defense of Risk to Health and Safety: The court acknowledged the employer's right to defend on the basis of "direct threat" or "business necessity," each associated with the dangers of having a driver of heavy equipment have uncontrolled epilepsy.

But both defenses are subject to the obligation to offer reasonable accommodation to the employee which might have permitted him to meet the employer's safety standards.

What Should Employers Do:

- Make judgments based on totality of circumstances. Need to draw distinctions, for example, between long-term, accident-free employee and repeat offenders of duty to follow regime to mitigate disability.

- Recognize that difficult line-drawing is required between accommodating employee's adjustment to treatment and employee's irresponsibility in mitigating disability, for which legal consultation may be advisable.

- Engage in interactive process.

- Be open to accommodations by assignment to other vacant jobs for which the person is qualified, rather than assuming termination is justified because the employee is no longer qualified for his present position due to a disability. Other accommodations may also be considered, such as a leave while the employee recovers from an injury or adjusts to a disability.

- Evaluate safety concerns after exploring reasonable accommodations.

- State the true reason for a termination at time of discharge; it is too late when the decision is being reviewed.

G. Affirmative And Independent Duty To Engage In Interactive Process Once Employer Knows Of Disability.

1. Notice of employee's disability triggers the employer's burden to take "positive steps" to determine if a reasonable accommodation may be necessary, while the employee retains a duty to cooperate with the employer's efforts. § 12940(m); 29 CFR 1630.2(o)(3).

2. An informal exchange of information is contemplated between the employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions. *Id.; see also, Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006).

3. Interactive process is a continuing duty to engage in discussions while an effective, albeit reasonable, accommodation is found, including consideration for a variety of vacant jobs. *Spitzer v. The Good Guys, Inc.*, 80 Cal. App. 4th 1376 (2000) (store violated FEHA by neglecting employee's requests to be considered for a variety of different jobs and ignored the inadequacy of the restructuring of her current job to resolve the problems she was having); *Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d 1128, 1136 (9th Cir. 2001) (employer's summary judgment reversed for failing to meet continuing duty to evaluate possible accommodations, a duty which is not exhausted by one effort).

H. Reasonable Accommodation

1. Reasonable accommodation can take many forms (*see* Cal. Gov't Code §12926(n) for examples), subject to the employer's right that it not be subjected to an undue hardship. The example of transfer to a vacant position, discussed in *Dark*, and further below, is representative of the type of analysis that may be needed before responding, especially negatively, to requests for accommodation.

2. Transfer To Different Job As Reasonable Accommodation: The EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA provides for reassignment as one option if the employee cannot perform the present job even with an accommodation.

a) An employer is not required to create a new job, to bump another employee from a job, or to make a promotion.

b) If reassignment is done, it should be to a position equivalent to the one previously held in terms of pay and other job status, provided the employee is qualified for and a vacancy exists in the reassigned job.

c) Reassignment may be to a lower graded position if there are no other accommodations and no other vacancies.

d) Reassignment need not be limited to geographical area, branch, department or facility.

e) Reassignment does NOT mean that the employee is "permitted" to compete for a vacant position. It means that the employee gets the vacant position if he or she is qualified for it.

Numerous courts have assumed that the reassignment obligation means something more than treating a disabled employee like any other job applicant. *Jenson v. Wells Fargo Bank*, 85 Cal. App. 4th 245 (2000); *Spitzer v. The Good Guys, Inc.*, 80 Cal. App. 4th 1376 (2000).

(1) An employee may have right to be assigned to a job for which he is overqualified (*Department of Fair Employment and Housing v. County of Riverside*, 2006 Cal. App. Unpublished Lexis 2422 (Mar. 22, 2006), *review granted*, 2006 Cal. Lexis 7282 (June 14, 2006)) or

(2) A right to a job for which he is not the most qualified (*Jenson v. Wells Fargo Bank*, 85 Cal. App. 4th 245 (2000)) (employer must give preference to a disabled employee for vacant positions even if other candidates have better qualifications or more seniority).

f) A "vacant position" means the position is available when the employee asks for the reasonable accommodation or that the employer *knows* will become available within a *reasonable* amount of time. *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006). Under EEOC Enforcement Guidance, a "reasonable" amount of time should be determined based on a variety of factors.

3. Is a California Employer Obligated To Convert A Temporary Accommodating Job Assignment Into A Permanent Assignment?

In ***Raine v. City of Burbank***, 135 Cal. App. 4th 1215 (2006), *review granted,* 2006 Cal. Lexis 7282 (June 14, 2006), a sworn police (patrol) officer who was injured on the job was accommodated during two years of medical leave and four years at a "temporary" light duty desk job while he recovered from his injury. But, when advised after these six years by the officer's physician that he would never recover and be able to perform the essential functions of a patrol officer, the city informed the officer that he could not be *permanently* accommodated at the front desk without reclassifying him to the civilian police technician position which normally runs the front desk, at lower pay and different benefits than sworn officers. The City and officer engaged in the interactive process. The officer wanted to permanently retain the assignment without reclassification to the civilian job, which would jeopardize his police retirement benefits.

a) In a case of first impression, the court held that the duty to reasonably accommodate did not include a requirement that the City transform the accommodated temporary assignment into a permanent position. Since reasonable accommodation does not include a duty to create a new job, the employer has no duty to demonstrate undue hardship.

b) An employer may use certain positions as temporary assignments in which recovering employees are placed without jeopardizing the employer's right not to convert those assignments into permanent jobs. The employer may preserve its system of permanently

assigning a different classification, with lower pay and benefits, to perform the work temporarily performed by others.

c) This case has a very good summary of the duty to accommodate and the law on transfer to vacant positions.

- **What Should Employers Do**: Await the California Supreme Court's decision.

4. In addition to *Raine v. City of Burbank*, watch for two other California Supreme Court decisions. One is ***Williams v. Genentech Inc.***, 139 Cal. App. 4th 357 (2006), *review granted*, 49 Cal. Rptr. 3d 210 (2006). The appellate decision under review was helpful for employers on several aspects of reasonable accommodation, including an employer's right to choose an effective accommodation, although not the one sought by the employee, and to replace the employee during a leave if there is no certainty that she will return.

The review by the California Supreme Court arises out of the appellate court's refusal to apply another case that the Supreme Court is considering, ***Green v. State***, 132 Cal. App. 4th 97, *review granted*, 36 Cal. Rptr. 3d 12 (2005) (employer has burden of showing employee could not perform essential functions of job), by placing the burden on the employee to establish that she could perform the essential duties of the job with or without reasonable accommodation.

III. RECENT DEVELOPMENTS IN SEXUAL HARASSMENT

The California Department of Fair Employment and Housing reports that sexual harassment is one of the most frequently filed complaints with the agency.

A. Hostile Environment Sexual Harassment Requires The Objectionable Conduct Be Discriminatory: *Lyle v. Warner Brothers Television*, 38 Cal. 4th 264 (2006):

Plaintiff Amaani Lyle, hired as a writers' assistant on the show *Friends*, alleged that the use of very explicit sexual jokes, stories, comments and expressive gestures by the show's writers constituted sexual harassment. Lyle had notice at the time of hire that the work environment would be sexually charged.

The California Supreme Court rejected Lyle's claim because she had not established that the conduct engaged in was discriminatory. "[I]t is the disparate treatment of an employee *on the basis of sex*—not the mere discussion of sex or use of vulgar language—that is the essence of

a sexual harassment claim." 38 Cal. 4th at 279-280 (emphasis added). FEHA is not a "civility code" and is not designed to rid the workplace of sexually coarse and vulgar language that merely offends. The objective of FEHA is to prohibit conduct that creates a work environment that is hostile or abusive *on the basis of sex*.

Under the circumstances of a creative workplace dedicated to creating adult, sexually oriented comedy, in which the sexual banter was part of the creative process to which men and women alike were subjected and was *not directed at or about the plaintiff*, the conduct did not violate California law. But questions remain about the applicability of the case to noncreative environments.

The California Supreme Court adopted the federal elements of a hostile work environment sexual harassment claim. The Court also emphasized the factual burdens of establishing that conduct amounts to unlawful harassment, as distinguished from boorish, puerile, or vulgar behavior, by establishing each of the elements summarized below.

Specifically, an employee must show s/he was subjected to sexual advances, conduct, or comments that were:

1. Unwelcome;

2. Because of sex: in *Lyle*, this factor was not satisfied since men and women alike were subjected to the sexual conduct and it was part of the creative process rather than directed at anyone;

3. Sufficiently *severe* or *pervasive* to alter the conditions of employment and create an abusive work environment:

a) To be *pervasive*, there must be a concerted pattern of repeated conduct, not just occasional, isolated or trivial conduct.

b) Whether conduct is *hostile* or *abusive* requires an analysis of the circumstances, including frequency, severity, whether it is physically threatening or humiliating, or a mere utterance, and whether it *unreasonably* interferes with the employee's work performance.

Social context of the behavior must be considered since the impact of the conduct often depends on the circumstances, such as in *Lyle*, where the conduct was part of generating the ideas in order for the writing work to be performed.

c) To be actionable, the sexually objectionable environment must be both:

(1) *Subjectively* offensive -- did the plaintiff perceive the workplace as hostile – and,

(2) *Objectively* hostile from the perspective of the reasonable person in plaintiff's position. Even Lyle admitted some of the conduct was puerile but not offensive.

4. The conduct must be imputable to the employer.

What Should Employers Do:

- Advise applicants in advance if recruitment is for a position in which exposure to sexually oriented conduct or material is part of the business and part of the particular work environment.

- In such environments, train supervisors to draw lines between permissible sexual conduct in order to perform work and impermissible conduct directed at someone.

- Employers will likely continue to emphasize respectful work environments and discourage sexual conduct so that facts do not need to be dissected later in a dispute as to whether conduct was discriminatory and escalated to become pervasive, offensive, and disruptive.

B. Same Sex Sexual Harassment: *Singleton v. U.S. Gypsum Co.*, 140 Cal. App.4th 1547 (2006):

Plaintiff John Singleton claimed that two other male coworkers continuously made comments about performing sexual acts on him and challenged his manliness. The coworkers were harassing the plaintiff because he had previously reported one of them to management.

The Court of Appeals held that Singleton established evidence that he was disparately treated by testifying that his antagonists were attacking his sexual identify as a man which would not be the basis of any attack they would hypothetically make against a woman. The requirement that the conduct complained of be "because of sex" does not require that it be sexually motivated. When sex is used as a weapon to create a hostile work environment, sexual harassment occurs.

What Should Employers Do?

- Stop offensive conduct, whether it is "because of sex" or simply should not be permitted at work.

- A practical approach is to intervene if you would not want it done to you, to your spouse, significant other, or children, or shown on the evening news.

C. Employer Liability For Nonemployee Harassment: *Carter v. Dept. of Veterans Affairs*, 38 Cal. 4th 914 (2006):

The California Supreme Court remanded for trial allegations that arose prior to an amendment to the FEHA that created possible employer liability for third-party harassment because the amendment had merely clarified existing law.

1. The case is a reminder that employers are subject to liability for harassment (on any prohibited basis of discrimination) directed against its employees *by third parties* (clients or customers, vendors, invitees):

a) If the employer knew or should have known about the conduct and,

b) Failed to take immediate and appropriate corrective action,

c) Analysis of which will include consideration of the employer's control and other legal responsibilities with respect to the conduct of the non-employee. Cal. Gov't Code § 12940 (j)(1).

2. The DFEH, in the December 2006 issue of its publication *Fairtimes*, reported a settlement of $145,000 with Macy's on behalf of a long-time store employee who alleged that he was sexually harassed by a customer over a two-month period that culminated in the customer asking for a date, leaving a business card, and attacking the employee when the advances were rebuffed. The employee was terminated for striking the customer, allegedly to extricate himself from the attack.

The DFEH investigation concluded that Macy's did not investigate the salesperson's earlier claims of harassment by the customer, or take steps to ensure its employees were protected from customers' sexual harassment, or train any of its *non-managerial* staff (which is not a legal obligation).

What Employers Should Do:

- Cover protection from third-party harassment in your policy and training.
- In jobs that are more vulnerable to third-party misconduct – such as clubs, bars, and restaurants – or where the clientele is harder to screen because the public is welcome – instruct employees how to handle problems.

- Effectively intervene. An employer with knowledge must take action to protect its employees from third parties whose conduct might constitute prohibited discriminatory harassment. The claim in *Carter,* which has been remanded for trial, is that the VA neglected to effectively intervene when one of its nurses complained about sexually harassing conduct engaged in by a resident.

D. Sexual Harassment Training, Cal. Gov't Code § 12950 Is Amended:

California employers must provide two hours of classroom or other "effective," "interactive" training regarding sexual harassment to all supervisors if the employer has at least 50 employees or contractors in any 20 consecutive weeks in the current or proceeding calendar year. These employees and contractors need not work in the same location or all work or reside in California to satisfy this prerequisite.

1. However, Cal. Gov't Code § 12950.1 has been amended to require that only supervisors who work in California must be trained. The training should have occurred for supervisors who were employed as of July 1, 2005. Thereafter, such training must be provided to each supervisory employee every two years (§ 12950.1). Thus, employers who had satisfied the statute at the time it was enacted on January 1, 2005, may now be due for a new training session (before January 1, 2007). Training for newly hired or appointed supervisors must occur within six months of assuming their role.

2. DFEH has announced that as part of an investigation of any type of violation, regardless of whether the claim is sexual harassment, it will ask any employer subject to this training obligation (Cal. Gov't Code § 12950.1) to confirm compliance.

3. On October 6, 2006 the FEHC issue modified proposed regulations on the training obligations, found at www.fehc.ca.gov. These regulations are very detailed, covering:

a) Types of training which are permissible (classroom, "E-learning," "webinar," audiovisual, or other effective interactive training),

b) Required expertise of trainers,

c) Content, and

d) Record keeping.

IV. RETALIATION

A. California Supreme Court's 2005 *Yanowitz v. L'Oreal*, USA, Inc., 36 Cal. 4th 1028 (2005), Provides Background For This Year's Developments.

"Retaliation" against a person for opposing any practices forbidden by the FEHA, or for filing a complaint, testifying or assisting in any proceeding before the FEHC, is an unlawful employment practice. Cal. Gov't Code § 12940 (h). The California Supreme Court in *Yanowitz* established the elements of a FEHA retaliation case:

1. Inference of retaliation is established by:

a) ***Plaintiff engaged in "protected activity."***

- **Opposition Activity** can be based on a reasonable, good-faith belief that the challenged conduct is discriminatory, even if in fact not accurate.

- Yanowitz had been told to terminate a darker skinned female employee in favor of hiring a more attractive blond, "hot" woman. Yanowitz claimed that she had never been required to terminate male employees for insufficient attractiveness, which was enough to support an inference of her good-faith belief of discrimination.

b) ***The employer subjected the employee to an "adverse" employment action.***

(1) ***An adverse employment action*** must "materially" affect the terms, conditions or privileges of employment.

The California Supreme Court rejected the Ninth Circuit test that the treatment would *reasonably deter* an employee from engaging in the protected activity, which is the test adopted by the United States Supreme Court in 2006 (*see* below).

(2) ***Materiality*** should be evaluated under the totality of circumstances, and may be the consequence of a series of events, none of which standing alone suffice, but in combination are reasonably likely to impair a reasonable employee's job performance or prospects for advancement.

- "Materiality" is to distinguished from mere offensive utterances or even a pattern of social slights.

- Yanowitz claimed retaliation in the forms of heightened scrutiny of her performance, increasing hostile evaluations that were inconsistent with the prior reviews, public criticism of her work, and a requirement that she provide a plan to become effective in managing business changes. She quit after she was denied an opportunity to respond to the last critical memo.

(3) ***The continuing violation doctrine*** applies to *both* evaluating materiality and determining when the statue of limitations begins to run. Thus, an *adverse employment action* may be a series of employment events only some of which are within the statute of limitations.

c) ***A causal link existed between the protected activity and the employer's action***.

- ***Casual link:*** An employer may be held to have "known" that an employee is engaging in "opposition" conduct based on circumstantial evidence.

- Yanowitz never told anyone in management that she believed that she was being asked to discriminatorily terminate someone. Instead, each time she was instructed to replace the incumbent saleswoman with a sexy blond, Yanowitz asked for the justification for the termination.

- The California Supreme Court reversed the summary judgment in favor of L'Oreal, holding that a jury could infer by Yanowitz's question about the justification that the employer "knew" her noncompliance arose out of concern about the lawfulness of the order.

2. Employer has duty to establish a legitimate, nonretaliatory reason for the adverse employment action,

3. This duty obligates the employee to prove intentional retaliation by establishing the proffered reason is a pretext for the discrimination. *Yanowitz*, 36 Cal. 4th at 1042 (2005).

B. United States Supreme Court Adopted Different Standard Of "Materiality": *Burlington Northern & Santa Fe Railway Company v. White*, 126 S. Ct. 2405 (2006):

In *Burlington,* a forklift operator and the only female working in the maintenance department, contended that after she complained that her supervisor made inappropriate remarks and contended that she did not belong in that department – for which her supervisor was disciplined – she was reassigned to a track laborer job which was less skilled. She filed a gender claim with the EEOC, followed by a second EEOC charge, alleging that she was placed under surveillance in retaliation for her first charge. Soon after the filing of the second EEOC charge, she was placed on indefinite suspension, which lasted 37 days, as discipline for insubordination. Burlington rescinded the suspension when it was determined during the grievance procedure that she had not been insubordinate.

1. The U.S. Supreme Court interpreted the statutory scheme of Title VII in arriving at a different, and more pro-employee standard of *adverse employment action* than was adopted in *Yanowitz.*

a) Accordingly, the test of an adverse action that may give rise to a claim of retaliation under Title VII is whether the employment actions would *deter a reasonable person in the plaintiff's circumstances* from making a charge of discrimination,

b) Whereas under the FEHA, the more difficult standard must be met that the employment actions *materially affect terms, conditions, or privileges of employment.*

2. Adversity also must be "material" under Title VII to eliminate trivial claims. But materiality under Title VII is a measure of whether the events experienced by the plaintiff would deter opposition conduct in others, rather than the FEHA test of a sufficient affect on employment terms.

3. ***Materiality*** under Title VII should be evaluated within the context of the conduct.

a) For example, a change in schedule may be nonmaterial to many workers, but not to those whose child care responsibilities are dependent on the schedule.

b) Similarly, a supervisor's exclusion of a plaintiff at lunch may be trivial, but would not if training occurred at the lunches.

c) The transfer of plaintiff to different duties within the same job title could be a material "adverse" employment action that would

dissuade a reasonable employee from bringing a discrimination claim because the general laborer duties were dirtier and more arduous and considered by male employees to be a less desirous job, whereas the forklift operator position was considered by males to be a better job.

d) Additionally, even though Burlington remedied the suspension with back pay, the Court held that the experience of an indefinite suspension and more than a month without pay would cause many reasonable employees to experience serious hardship, which plaintiff claimed caused her medical and emotional distress.

C. Detailed Factual Analysis To Determine If Alleged Continuous Pattern Is Attributable To Retaliation Under *Yanowitz*: *McRae v. Dept. of Corrections*, 142 Cal. App.4th 377 (2006):

In *McRae*, an African-American surgeon filed a FEHA charge alleging that the denial of an appointment to a different prison facility was racially motivated, which she later claimed unleashed an extensive list of retaliatory actions. In a post-*Yanowitz* decision, the appellate court in *McRae* reversed the plaintiff's jury victory by separately evaluating each alleged adverse action for both causation and whether the particular action was *detrimental and substantial enough to contribute to a continuous pattern of conduct that in totality amounted to adverse employment action*.

This case is significant for its interpretation of how high *Yanowitz* set the bar in evaluating whether specific claimed adverse treatments can be considered part of a continuous pattern which in the aggregate is "adverse." It is too soon in the development of post-*Yanowitz* law to know how this particular court's analysis will fare. This case may also provide a window into the difference between *Yanowitz* and *Burlington,* especially since the appellate court disagreed with the jury about the significance of many specific adverse actions that the plaintiff experienced to conclude that in the aggregate adverse action had not occurred.

1. Materiality of Adverse Employment Acts:

a) The appellate court interpreted the materiality standard in *Yanowitz* to require that the employment actions complained about have a *"detrimental and substantial"* effect on employment, to be contrasted with an employer's "intermediate action that may be retaliatory, but lacks the substantial and material adverse effect on the terms and conditions of the employee's employment to support a claim of actionable retaliation. This approach is beneficial for employers since it makes the challenges greater for a plaintiff to connect individual acts of adverse treatment into an actionable pattern.

b) The court claimed that this standard strikes a balance between the needs of employers to engage in routine employment actions without fear of retaliation claims while protecting employees against *substantial* adverse consequences.

c) Analysis of Each Claimed Act of Adverse Treatment: The appellate court analyzed the trial record concerning each of the many acts that plaintiff contended established a continuous pattern of adverse actions to determine: (i) if the particular people involved knew of her protected activity (filing DFEH charges) and; (ii) whether each specific employment act affected her terms of employment or instead was an appropriate response to her own conduct problems (leaving the emergency room without physician coverage; disobeying direct orders about contacting a family and failing to facilitate hospice; giving a medication order by phone without examining the patient; arguing with two nurses over a procedural matter).

2. The Court Disregarded as Not Affecting Her Terms of Employment:

a) A corrective letter, since it was private and could not be the basis of future adverse action;

b) A transfer to a comparable job at another facility without loss of pay and thus without substantial and tangible harm, even though plaintiff contended that it was reputed to be the worst facility in the corrections system;

c) Numerous differences in working conditions at the new facility, which item by item by item the appellate court disregarded.

3. Causal Link: The court also held the plaintiff failed to meet her burden of establishing a causal link. The court appeared to recognize that the plaintiff was so disgruntled about her former work environment and the enmity between her and co-workers was so extreme that transferring her to a different facility was a reasonable management decision, whether or not she had filed discrimination charges.

D. New Cause of Action For Failure To Prevent Retaliation And Individual Liability For Retaliation: *Taylor v. City of Los Angeles Department of Water and Power*, 144 Cal. App. 4th 1216 (2006):

Taylor sets the example of what an employer *should not do*. This case is a review of a successful demurrer, and thus based solely on the allegations in the complaint.

Taylor had been a city engineer for 16 years, with ambitions to be promoted beyond his supervisory responsibilities for six people. His employment circumstances deteriorated after he opposed the termination by Taylor's own boss of one of Taylor's subordinates, an African-American. Taylor's opposition included providing information to the DWP's EEO office when the terminated subordinate complained, participating in several internal investigative interviews, and testifying pursuant to a subpoena at the terminated employee's personnel hearing. Although the terminated employee was reinstated with full back pay ten months later, Taylor fared worse.

Taylor' boss, Mr. Hamer, pounded on Taylor each time Taylor took any action to oppose the termination in a succession of over 20 acts, including threatening to end his 4/10 schedule; stripping him of supervisory and other duties; disparaging him to his former subordinates; denying supervisory training; denying an interim promotion in favor of a less qualified candidate who Taylor was required to train; undermining his performance by withholding essential information and removing important contract assignments; labeling him as a troublemaker to prospective supervisors; and disclosing confidential information to his co-workers —to name a few. Taylor futilely sought intervention by DWP's EEO office seven times, by reporting the claimed retaliation, seeking a transfer away from Hamer, and ultimately filing a "formal" charge of retaliation and a grievance. Taylor won the grievance 17 months after Hamer's campaign had begun. But then he competed unsuccessfully against 29 candidates for a civil service promotion. Taylor believed his lackluster competition for the promotion was attributable to Hamer's stripping his supervisory duties, denying supervisory training, and denying the interim supervisory appointment.

The trial court sustained a demurrer without leave to amend, relying on *Yanowitz* to find that Taylor had not experienced an "adverse employment action" because the succession of events was not sufficiently material in affecting terms and conditions of employment. The reversal on appeal evaluated the case under both *Yanowitz* and *Burlington*:

1. ***Adverse Action***:

a) ***Yanowitz Materiality Test***: This appellate court distinguished the conduct to which Taylor was subjected from the *McRae* facts, because all of the allegedly wrong acts against Taylor were engaged in by one person, his boss, and proximate in time to Taylor's opposition behavior. Additionally, the succession of actions by the boss allegedly contributed to Taylor's low rank in the civil service competition for a promotion.

b) ***Burlington Deterrence Test***: While unclear why the appellate court reviewed the facts under the federal test, it concluded that the course of action that Taylor alleged to experience would also lead a reasonable city engineer of his tenure and promotional objectives to be deterred from supporting a claim of discrimination.

2. ***Causation:*** Although Taylor did *not* contend that his boss actually knew of his opposition conduct, the appellate court imputed the knowledge of DWP's EEO office to Taylor's boss. Further, the appellate court inferred that the boss "knew" since each of his adverse acts came on the heels of some type of opposition conduct by Taylor and he branded Taylor as a "troublemaker." Since the appellate court was reviewing dismissal of a case at the introductory pleading stage, before any evidence had been adduced, it is unclear whether knowledge of the EEO office would be imputed to the supervisor in a later litigated stage.

3. ***Personal Liability for Retaliation by the Boss*:** The appellate court held that a claim for retaliation can be brought *against a supervisor*, since Gov't Code § 12940(h) regulates the conduct not just of employers but also of "persons." This is distinguished from a claim brought under §12940(a) for discrimination, which prohibits "employers," but not also "persons," from discriminating.

4. ***Separate Cause of Action For Failure to Prevent Retaliation Under § 12940(k):*** This section expressly prohibits failure to take reasonable steps to prevent discrimination and harassment, without reference to also preventing retaliation. However, the court relied on *Yanowitz* for the proposition that §12940 read as a whole evinces a statutory intention to protect employees as much from retaliation as from discrimination. *See also Giovannetti v. Trs. of Cal. State Univ.*, 2006 U.S. Dist. Lexis 41750 (N.D. Cal. June 12, 2006) (recognizes cause of action under FEHA for failure to prevent retaliation on similar analysis).

E. What Should Employers Do? Be As Attentive To Preventing Retaliation As To Preventing Discrimination And Harassment Since Retaliation Claims Are Not Likely to Be Discouraged By Current Legal Developments

1. Effective policy: nonlegal terms; with headings; clear about how and to whom to report claims; separately explain retaliation and the prohibition against it.

2. Nonlegalistic, effective training on preventing discrimination, harassment *and retaliation* that anticipates the types of issues your particular workplace is likely to have and is practical about how to deal with them.

3. Investigations are conducted by people who are viewed as objective, professional and discreet, and are trained in the law and to be effective fact-finders. Prejudgment does not occur; due process does.

4. Factually evaluate claims of retaliation. Goal should be to prevent the aggregation of events that may create the jury issue and perhaps liability.

5. Prevent Retaliation:

    - Emphasize importance of protection from retaliation (including, as appropriate, telling co-workers as well as complainant and alleged wrong doer);

    - Anticipate and manage practical difficulties of maintaining working relationships after a claim has been made;

    - Monitor consequences of the claim, including adverse actions against the claimant and checking with claimant on scheduled basis;

6. Prompt, effective action is taken *to prevent* recurrences of discrimination, harassment, and conduct that appears to be retaliatory, consistent with the nature and severity of the misconduct.

7. Prompt remedial action is taken *to remedy* any harm to a victim, whether the misconduct was discrimination, harassment *or retaliation*.

V. DIFFERENCE BETWEEN FEDERAL AND CALIFORNIA DISPARATE IMPACT AGE CASES

A. Background:

Both the disparate treatment and disparate impact theories have been available to establish prohibited discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII") for years. Under disparate *treatment*, the claimant must prove that s/he was intentionally treated differently or subjected to adverse action based on a characteristic protected by Title VII, such as race, gender, or national origin.

Disparate impact cases claim that a employment practice or job requirement that appears neutral – such as restrictions based on arrest record, minimal education, or height – has a disproportionately adverse *effect* on persons within a protected group. Plaintiffs must isolate and identify the particular employment practice that is responsible for a statistically relevant adverse impact on a protected group. That adverse impact is unlawful unless the employer can establish that the practice or requirement is justified by *business necessity*. Ultimately, the plaintiff must prove that another practice would accomplish the employer's business necessity with equal effectiveness, and with less discriminatory effect.

B. ADEA Standard For Disparate Impact:

Until 2005, uncertainty existed about whether the disparate *impact* theory could be used in claims of age discrimination brought under the *federal* Age Discrimination in Employment Act ("ADEA"), which the U.S. Supreme Court resolved last year in *Smith v. City of Jackson*, 544 U.S. 228 (2005). The Court held that the theory is available in federal age claims, but, importantly, that differences between the statutory language of the ADEA and Title VII require a modification that lightens the burden employers bear in defending *age* disparate impact cases and places a greater burden on the plaintiff to prove his case.

Instead of establishing that a practice is justified by a *business necessity,* an employer can avoid liability under the ADEA by merely establishing that the neutral practice is based on a *reasonable factor other than age ("RFOA"),* whereas the plaintiff must prove that practice to be unreasonable, rather than establishing that another practice would be effective and less discriminatory.

C. Federal Age Cases In 2006 Demonstrate Difference Between ADEA And Title VII Impact Analysis:

The Second Circuit had originally sustained a verdict in favor of 22 age-protected employees who had convinced a jury in an ADEA case, applying a Title VII-type impact analysis, that the performance criteria used for their selection for layoffs could have been modified to have less of an adverse effect while also meeting the employer's legitimate objectives. But, that decision was remanded to the Second Circuit in light of *Smith v. City of Jackson* and reversed, since the selection criteria were *reasonable* and not based on age, and the plaintiffs had not proven them to be *unreasonable*. *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134 (2nd Cir. 2006); *see Pippin v. Burlington Resources Oil and Gas Co*, 440 F.3d 1186 (10th Cir. 2006) (as a "matter of law" the employer's practices of choosing candidates for layoff based on performance reviews and skill sets and honoring job offers made to recent school graduates are "reasonable" and unrebutted by plaintiff.)

D. California Law Uses More Stringent Title VII-Type Impact Analysis For Age Impact (and Other) Cases:

California Gov't Code § 12941, enacted in 1999, establishes that (1) the disparate impact theory is available to prove age discrimination, and (2) that the Legislature intends courts to "interpret the state's statutes prohibiting age discrimination …broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination," (3) while preserving the affirmative defenses established in the applicable regulations, Title 2, Cal. Code of Regulations § 7286.7.

Those regulations create a business necessity defense to disparate impact cases, including California age cases, which arguably places a heavier burden on employers than Title VII. California's business necessity defense requires proof that the business purpose being served is

not only "legitimate," but also "overriding," by being "necessary" to the "safe and efficient operation of the business" and that the practice effectively fulfills the business purpose. Even then, the practice may still be impermissible if it is shown that an alternative practice exists which would accomplish the objective "equally well," with less of a discriminatory impact.

What Should California Employers Do:

- Avoid the false comfort of evolving federal cases applying *Smith v. City of Jackson*. When reading reports of new disparate impact age cases, note if the law applied is the federal ADEA or the California FEHA, since the burden under the FEHA of defending a practice that adversely impacts age-protected employees is more onerous than federal law.

- Carefully analyze whether practices that appear to be neutral, such as layoff selection criteria, pre-employment and promotion criteria, and job requirements, have an adverse impact on any protected group, including those over age 40.

- If such an adverse impact appears, carefully evaluate whether the objective that the practice intends to promote is both necessary for safe and efficient operation (or, under ADEA is "reasonable") and might be achieved a different way that might have less of an adverse impact on a protected group.

VI. FAMILY AND MEDICAL LEAVE ACT ("FMLA")

A. Department of Labor Requests Public Information on FMLA in First Major Examination of Regulations

In what could be a significant first step to an overhaul of FMLA regulations, the Department of Labor ("DOL") is requesting information from the public on possible changes to the FMLA. In particular, the DOL will be focusing on the use of intermittent leave as an accommodation when the leave is unscheduled or requested with little advanced warning. The DOL also will be reviewing concerns about the proper flow of accurate medical information that allows employers to determine whether an employee has a serious medical condition or is fit to return to work. As for employee concerns, the DOL will be considering the language barriers that may prevent many workers from fully understanding their entitlement to FMLA leave, as well as the definition of "serious health condition."

Comments to the DOL's request for information are due by 5 p.m. (EST) on February 2, 2007. Written comments should be submitted to:
Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C., 20210. Electronic comments may be submitted by email to

whdcomments@dol.gov. Comments of 20 pages or less may be submitted by fax to (202) 693-1432.

What Employers Should Do:

- MSK will be happy to discuss any specific issues you may have which your company would like MSK to present to the Department of Labor.

B. Hour-Based Bonus Plans Are "Production" Bonuses and May Be Prorated for Those Who Take FMLA Leave

In ***Sommer v. Vanguard Group***, 461 F.3d 397 (3rd Cir. 2006), the Third Circuit found that Vanguard did not violate the FMLA when it reduced the annual bonus payment of an employee who missed two months of work while on FMLA leave due to illness. This is the first case in the Circuit Courts of Appeal to address this issue. Among the requirements for the bonus at issue was an annual 1950 hours worked requirement. If the employee did not meet the annual goal for hours worked, his or her bonus was prorated based on the deficiency in hours. The bonus however was not prorated for those on paid sick leave or vacation. The plaintiff argued that the district court incorrectly classified the bonus plan as one that rewards for production and not for the absence of an occurrence, which may not be prorated under FMLA (such as perfect attendance bonuses). He also argued that prorating a production bonus interfered with the rights guaranteed under FMLA because FMLA leave was treated differently than paid vacation or sick leave in violation of the FMLA.

The Third Circuit disagreed with the plaintiff. First, the court held that the bonus plan was a "production" bonus plan because, in addition to employment requirements, the plan provided an incentive for employees to contribute to Vanguard's performance and production by meeting a predetermined hours goal. Second, the court held that prorating the production bonus did not interfere with FMLA rights because the FMLA does not require the equal treatment of those who take unpaid forms of leave and those who take paid leave. Third, equating paid and unpaid leave would violate the FMLA which provides that employees are not entitled to "the accrual of any seniority or employment benefits during any period of leave or … any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken leave." Congress did not intend to force employers to chose between paying full production bonuses to those who potentially miss up to 12 weeks of work, or prorating the production bonuses of all employees who take vacation or sick leave.

What Employers Should Do:

- Review FMLA policies to ensure that any production bonuses are being prorated properly for employees who take paid or unpaid leave.

C. Employee Properly Terminated for Inappropriate Behavior, Not for Requesting FMLA Leave

In ***Denny v. Union Pacific Railroad Co.***, 173 Fed. Appx. 549 (9th Cir. 2006), the Ninth Circuit found that an employee who had become insubordinate immediately after the denial of his FMLA request had been fired for the insubordination, not the request. In that case, the employee had requested FMLA leave as a result of severe back pain due to an existing work-related injury. The supervisor denied the request and the employee went to work to discuss the issue with him. A heated argument broke out between the two wherein the employee asked the supervisor to "take it outside." The Ninth Circuit affirmed judgment in the employer's favor and held that "the question is not what Plaintiff actually said, but only whether Defendant fired him because of what Defendant believed he said, rather than for a reason prohibited by the FMLA." However, according to the dissent, because the plaintiff's actions stemmed directly from his legitimate request for leave, the actions themselves were protected.

D. Employee Properly Terminated for Legitimate, Non-Discriminatory Reasons, Not for Taking CFRA Leave

In ***Neisendorf v. Levi Strauss & Co.***, 143 Cal. App. 4th 509 (2006), the Court of Appeal affirmed judgment for the employer and found that the employee's termination was proper even though it occurred the day she returned from a 14-week leave. The plaintiff was a Vice President who previously had received written and verbal negative reviews about her performance. The plaintiff refused to accept the criticisms and blamed others. The plaintiff shortly thereafter offered to resign and requested a separation package worth $1.7 million. When her request was rejected, the plaintiff went on a 14-week leave pursuant to the California Family Rights Act ("CFRA"). About eight weeks into her leave, the plaintiff was medically cleared to return to work if she received needed accommodations (such as changing the reporting relationship to her supervisor). The employer worked with the plaintiff to achieve the requested accommodations. However, the plaintiffs' return to work was contingent on her willingness to accept and address the performance deficiencies set forth in her reviews. The plaintiff refused and she was terminated the day she returned to work. At trial, a jury found that an adverse employment action had not been taken because of the plaintiff's exercise of her right to CFRA leave.

The Court of Appeal upheld the jury's verdict. As the Court of Appeal made clear, although there is an accommodation requirement under the Fair Employment and Housing Act (a requirement which the jury found did not apply because the plaintiff was not "disabled"), there is no obligation under the CFRA that an employer provide accommodations to an employee in order to allow the employee to return to work within the 12-week leave period. In addition, the plaintiff was terminated for reasons having nothing to do with taking a CFRA leave.

What Employers Should Do:

- It is important to remember that an employer may have an obligation to accommodate an employee or engage in the interactive process (under FEHA or ADA) after the employee returns to work.

- Even if the company believes that there is no such accommodation requirement (because the employee is not considered to be "disabled"), it may be prudent to nevertheless engage in the interactive process. The court in *Neisendorf* was impressed by the employer's willingness to engage in the interactive process even though it did not have to do so.

VII. WAGE & HOUR UPDATE

A. Legislative Update

1. Minimum Wage Increase

Effective January 1, 2007, the minimum wage shall be increased to $7.50 per hour and shall be increased to $8.00 per hour, effective on and after January 1, 2008. This increase also will affect exempt administrative, executive, and professional employees because their minimum salary requirements are tied to the state minimum wage. These employees must be paid a monthly salary that is at least equivalent to two times the state minimum wage or $31,200 per year starting on January 1, 2007, and $33,280 per year starting on January 1, 2008.

What Employers Should Do:

- Ensure employees, especially exempt employees, are being paid correctly in light of the wage increase.

- Post new minimum wage posters which reflect the increase in order to remain in compliance with California law.

2. Section 201.5 of the Labor Code (applying to the motion picture industry)

Effective January 1, 2007, current Section 201.5 of the Labor Code is repealed and a new Section 201.5 is added which provides that an employee engaged in the production or broadcasting of motion pictures whose employment terminates (regardless of how it ends) is entitled to receive payment of the wages earned and unpaid at the time of the termination by the next regular payday. The "production or broadcasting of motion pictures" means the

development, creation, presentation or broadcasting of theatrical or televised motion pictures, television programs, commercial advertisements, music videos or any other moving images. An employee covered by this Section is one whose duties relate to or support the production or broadcasting of motion pictures or the facilities or equipment used in the production or broadcasting of motion pictures regardless of the duration of the assignment. Payment pursuant to Section 201.5 shall be deemed to have been made on the date that the employee's wages are mailed or made available to the employee at the location specified by the employer, whichever is earlier.

What Employers Should Do:

- Because late payment of final wages pursuant to Labor Code Section 201.5 subjects employers to waiting time penalties under Labor Code Section 203, it is important that payroll departments and production accountants understand that final wages must be paid by the next regular payday.

3. NEW Section 201.9 of the Labor Code (applying to employers in live theatrical or concert industry)

Effective January 1, 2007, Labor Code Section 201.9 (added by Senate Bill 1719) will create an exception for employers in the live theatrical and concert industry to the payment requirements of Labor Code Section 201 (which generally provides that the earned and unpaid wages of a discharged employee are due and payable upon discharge). Under newly-enacted Section 201.9, if employees are employed at a venue that hosts live theatrical or concert events and are enrolled in and routinely dispatched to employment through a hiring hall or other system of regular short-term employment established through a bona fide collective bargaining agreement, these employees and their employers may establish the time limits for payment of wages to a discharged or laid off employee in their collective bargaining agreement.

What Employers Should Do:

- MSK will be happy to discuss whether Section 201.9 applies to your company and the appropriate language that may be negotiated in any applicable collective bargaining agreements.

4. Amendment to Section 204 of the Labor Code (regarding itemizing the payment of overtime in paystubs)

Effective January 1, 2007, Labor Code Section 204 shall be amended to provide that the payroll information requirements of Labor Code Section 226 relating to total hours worked will

be satisfied if the overtime hours worked in the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently issued paystub shall identify the dates of the pay period for which the employer is correcting its initial report of hours worked.

What Employers Should Do:

- Ensure that your company's paystubs correctly reflect the overtime hours worked by employees as required by Labor Code Sections 204 and 226.

B. Payment of Wages Upon Termination

In ***Smith v. Superior Court (L'Oreal)***, 39 Cal. 4th 77 (2006), the California Supreme Court held that the discharge element of Labor Code Sections 201 and 203 is satisfied when an employee is released after the completion of a specific job assignment or duration for which the employee was hired. In that case, L'Oreal hired a hair model for a one-day fashion show. The hair model was paid two months after the show. The model filed suit asserting claims under Labor Code Sections 201 and 203. Section 201 provides that an employee who is "discharged" must be paid immediately upon discharge. Under Section 203, an employer's willful failure to pay wages timely to a "discharged" employee subjects the employer to waiting time penalties in the amount of a day's wages up to 30 days. L'Oreal contended, and the trial court agreed, that the model could not recover penalties under Labor Code Section 203 because she had not been "discharged" from an ongoing employment relationship. Instead, she simply completed her one-day assignment for which she was hired. The Court of Appeal upheld the trial court's decision.

The California Supreme Court reversed the judgment and relied on California's public policy requiring the prompt payment of wages in doing so. According to the Supreme Court, the very nature of an employer-employee relationship supports a more inclusive construction of "discharge" because it is the employer who directs how the assignment is to be executed and when it has been completed. In addition, that other Labor Code Sections, such as Section 201.5 (applying to the motion picture industry), provide for exceptions to Section 201's immediate payment requirement implies that Section 201 is not limited to dismissals from ongoing employment. According to the Court, its broader interpretation of Section 201 ensures that discharged employees do not suffer deprivation of the necessities of life or become charges upon the public. Otherwise, employees like the plaintiff who fulfill their employment obligations by completing the specific assignment or duration of time for which they were hired would be exposed to economic vulnerability from delayed wage payment, while at the same time employees who are fired for good cause would be entitled to immediate payment of their earned wages.

What Employers Should Do:

- Ensure that your company's payroll departments are aware of the timely payment provisions of Sections 201 to 203 of the California Labor Code, especially if your company hires temporary workers.

C. Conflicting Holdings Regarding Statute of Limitations for Meal & Rest Penalties

In ***National Steel and Shipbuilding Co. v. Superior Court***, 135 Cal. App. 4th 1072 (2006), *review granted*, 42 Cal. Rptr. 3d 415 (Cal. 2006), the Court of Appeal for the Fourth Appellate District found that meal and rest penalties are wages and require a three-year statute of limitations (instead of the one-year statute of limitations for penalties). Noting that the "one additional hour of pay" is a deterrent against violations in the form of a compensatory remedy, the court held that Section 226.7 is ultimately compensatory because it requires employers to compensate employees for time worked during meal and rest periods and it is tied to the rate of the employee's pay. According to the court, the self-executing nature of the payment also suggests it is not a penalty because the right to a penalty does not accrue until it has been enforced. The one hour of pay required by Section 226.7, however, is owed when it is incurred and, therefore, it is similar to earned wages. The court noted that because statutes governing conditions of employment are to be construed broadly in favor of protecting employees, the three-year statute of limitations should apply. The court also held that because the payments under Section 226.7 are for unpaid hours of work, they are restitutionary and recoverable under California Business & Professions Code Section 17200.

By contrast, in ***Mills v. Superior Court***, 135 Cal. App 4th 1547 (2006), *review granted*, 42 Cal. Rptr. 3d 415 (Cal. 2006), the Court of Appeal for the Second Appellate District found that an action pursuant to Section 226.7 is for a penalty or forfeiture and thus is limited to a one-year statute of limitations under Section 340(a) of the California Code of Civil Procedure. The Second District reasoned that the payment was a penalty because an employer is required to compensate the employee with a fixed sum (one additional hour of pay) "without regard to the actual amount of break time missed." The court read the legislative history as intending the payments to be a penalty because the Assembly continued to describe it as a penalty. Additionally, the court found that payment required under Section 226.7 is at odds with the definition of wages provided elsewhere in the Labor Code.

The California Supreme Court has granted review of these cases. 42 Cal. Rptr. 3d 415 (Cal. 2006).

D. Employers Need Not Seek the Approval of the Department of Labor Standards Enforcement to Implement Electronic Itemized Wage Statements As Long As Certain Requirements Are Met

In an Opinion Letter issued on July 6, 2006 (found at http://www.dir.ca.gov/dlse/opinions/2006-07-06.pdf), the Department of Labor Standards Enforcement ("DLSE") advised that itemized wage statements may comply with Section 226 of the Labor Code if certain requirements are met and that employers need not seek the approval of the DLSE to implement an electronic itemized wage statement program. Previous Opinion Letters (1999.07.19 and 2002.12.04) had implied that, although electronic itemized wage statements might comply with Section 226, employers would need to obtain the approval of the DLSE to implement such a program. However, the DLSE's recent Opinion Letter advises that those previous Opinion Letters are superseded and withdrawn and that DLSE approval is no longer needed.

To comply with the DLSE's guidelines, any electronic itemized wage statement program must incorporate the following: (1) an employee must be able to elect to receive paper wage statements at any time; (2) the wage statements must contain all information required under Section 226(a) and must be available on a secure website no later than pay day; (3) access to the website must be controlled by unique employment identification numbers (not social security numbers) and confidential personal identification numbers. The website must be protected by a firewall and is expected to be available at all times with the exception of downtime caused by system errors or maintenance requirements; (4) employees must be able to access their records through their own personal computers or by company-provided computers. Computer terminals must be available to employees for accessing these records at work; (5) employees must be able to print copies of their electronic wage statements, at no charge, at work on printers that are in close proximity to their computer or computer terminal. Employees must be able to access their records over the Internet and save them electronically and/or print them out on their own printer; and (6) wage statements must be maintained electronically for at least three years and must be available to active employees for that entire time. Former employees should be provided paper copies at no charge upon request.

The DLSE made clear that its interpretation of Section 226 as allowing electronic itemized wage statements may be subject to different interpretations by the courts and that compliance with the DLSE's guidelines does not provide any "safe harbor" from private wage and hour actions.

What Employers Should Do:

- If your company is interested in implementing an electronic itemized wage statement program, MSK will be happy to discuss the DLSE's guidelines with you to ensure your company's program is in compliance with those guidelines.

E. Employees Not Required to Arbitrate Alleged Violations of Labor Code

In ***Zavala v. Scott Brothers Diary***, 143 Cal. App. 4th 585, the Court of Appeal held that a union cannot waive an employee's right to bring claims of statutory labor rights in court. In *Zavala*, union employees sued their employer alleging claims for rest break penalties (Section 226.7) and penalties for failing to provide accurate itemized wage statements (Section 226). The employer filed a petition to compel arbitration because the claims "arose under the collective bargaining agreement" and, hence, were subject to arbitration. The Court of Appeal rejected this argument and found that: (i) the union could not waive the employees' statutory rights to rest breaks and wage-stub itemization; and (ii) there was no provision in the collective bargaining agreement under which the employees agreed to arbitrate violations of statutory rights. Mere recital of the statutory rest break and wage statement requirements in the collective bargaining agreement did not require arbitration of alleged violations of those statutory rights.

What Employers Should Do:

- Review any collective bargaining agreements and consider negotiating for a provision wherein the employees agree to arbitrate violations of statutory rights.

F. Travel Time Not Hours Worked

In ***Overton v. Walt Disney Co.***, 136 Cal. App. 4th 263 (2006), the court held that Disney was not required to pay employees for time spent on a free shuttle bus from the employee parking lot to the park entrance because Disney did not require employees to park in the lot or to take the shuttle bus. In a case four years earlier, *Morillon v. Royal Packing Co.*, 22 Cal. 4th 575 (2002), the California Supreme Court held that "employees must be compensated for travel time when their employer requires them to travel to a work site on employer-provided buses." In that case, the employer required employees to meet at a designated parking lot, take the shuttle, and prohibited the use of individual transportation to the worksite at the threat of losing a day's work. Thus, in *Morillon*, time spent waiting for and riding on the shuttle was considered time worked because the employees were subject to the employer's control during that time. The court in *Overton* held that such was not the case for Disney because Disney did not require that employees park in the assigned lots, provided alternative methods to avoid parking in the lot that was one mile from the park entrance, and ten percent of employees used alternate means of transportation, thus avoiding the lots and use of the free shuttle altogether. Furthermore, the court noted that the Supreme Court specifically stated in *Morillon* that employers were not required to compensate employees for time spent riding optional employer-provided transportation.

G. Commissions Update

1. Payments Received by Telemarketers Based on Points Accrued Are Not Commissions

In ***Harris v. Investor's Business Daily, Inc.*,** 138 Cal. App. 4th 28 (2006), the Court of Appeal rejected the defendants' argument that they did not have to pay overtime because its telemarketing employees were paid by commission and therefore exempt. In that case, five telemarketers who sold newspaper subscriptions filed a class action lawsuit alleging claims under the California Labor Code for overtime pay, unlawful commission deductions, waiting time penalties, and unfair competition pursuant to California Business and Professions Code Section 17200 for violations of the Fair Labor Standards Act ("FLSA"). These employees were paid on a point system based on the number of points earned. Employees received a certain number of points for each type of subscription sold and the value of the points increased as employees earned more points. Defendants argued that the telemarketers were exempt from overtime because their earnings were more than one and one-half times the minimum wage and more than half of their compensation represented commissions (as required to qualify for the exemption). The trial court granted summary adjudication in defendants' favor.

The Court of Appeal reversed finding that, under the holding in *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785 (1999), a compensation scheme involves commissions if the amount of the compensation "is a percent of the price of the product or service." Because the point values in the defendants' compensation scheme were not tied to the price of the subscriptions sold, the payments received by the employees did not constitute commissions.

The Court of Appeal also found that the goals of an FLSA opt-in collective action were not undermined by allowing a state law opt-out class action that was based on the FLSA claims. Therefore, the plaintiffs' Section 17200 claim for violations of the FLSA was proper.

2. Chargebacks Against Advanced Commissions Permissible Even If the Policy Does Not Specify that the Deductions Are Being Taken From "Advances"

In ***Koehl v. Verio, Inc.***, 142 Cal. App. 4th 1313 (2006), the Court of Appeal held that chargebacks of advanced commissions did not violate Labor Code prohibitions against recoupment of paid wages. In *Koehl*, the plaintiffs worked for an Internet service provider and sold Internet access and web hosting services. In addition to their base pay (between $40,000 and $70,000 per year), the plaintiffs were paid commissions when an order was booked but which the employer could recover, or chargeback, if the account was cancelled prior to receiving three months of payment from the customer. The plaintiffs also had significant ongoing responsibilities after the order was booked such as significant customer service to the account. The plaintiffs all acknowledged signing compensation plans which explained all of these terms and all admitted that the company paid them in advance of when commissions were earned. Nevertheless, they filed a class action alleging violations of the Labor Code as a result of the

chargebacks claiming, among other things, that the compensation plans did not specify that the plaintiffs were "advanced" commissions and, as such, the chargebacks were improper deductions from already earned wages.

Relying heavily on *Steinhebel v. Los Angeles Times Communications*, 126 Cal. App. 4th 696 (2005), the Court of Appeal rejected the plaintiffs' arguments because the plaintiffs had expressly agreed and understood that they were being paid advances on commissions and that commissions were not earned until the customer paid for three months of service. The chargebacks also were not improper because they were authorized in writing (in the compensation plans which the plaintiffs signed) and did not reduce the plaintiffs' standard wages.

What Employers Should Do:

- Audit how commissioned salespeople are being paid. If they are classified as exempt, ensure that their earnings are more than one and one-half times the minimum wage and more than half of their compensation represents commissions (*i.e.*, a percent of the price of the product or service).

- Ensure any compensation plans are in writing and signed by the employees. Ensure these written agreements state when commissions are earned and the precise events that cause the commissions to vest.

- Ensure that the written agreements clarify that chargebacks are being taken on the already advanced commissions.

H. Extending the Ruling in *Reynolds*, Corporate Officers Who Hold Operation Control of an Enterprise Are Not Personally Liable for Labor Code Violations

In ***Jones v. Gregory***, 137 Cal. App. 4th 798 (2006), the Court of Appeal extended its ruling in *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005) which held that corporate officers are not personally liable for violations of Labor Code Section 1194 (nonpayment of minimum wages and overtime). In *Jones*, the Department of Labor Standards Enforcement ("DLSE") filed an action on behalf of 45 former employees. In addition to filing the action against the corporate employer (which was filing for bankruptcy), the DLSE also filed the action against its chief executive officer claiming that he had operational control of the corporation. The DLSE brought claims for waiting time penalties (pursuant to Sections 201 to 203), failure to pay vacation time (Section 227.3), and failure to indemnify business expenses (Section 2802). The matter went to trial and the trial court entered judgment in the DLSE's favor and against the corporate employer and the individual, jointly and severally, for over $100,000.

The Court of Appeal reversed the judgment against the individual and held that the ruling in *Reynolds* also applied to the Labor Code sections sued upon by the DLSE. Specifically, because none of those Labor Code provisions define "employer," the presumption is that the common law definition of an employer applies, precluding personal liability for corporate agents. The Court of Appeal left open the possibility, however, that an individual may be liable for Labor Code violations on an alter ego theory of liability.

I. Exemptions

1. Computer Professional Exemption

a) DOL Finds Help Desk Support Personnel Non-Exempt

In an Opinion Letter issued on October 26, 2006 (FLSA2006-42 found on http://www.dol.gov/esa/whd/opinion/flsa.htm), the Department of Labor advised that the position of "IT Support Specialist" (renamed from Help Desk Support Specialist) does not qualify for the administrative or computer professional exemptions under the FLSA. According to the employer who sought the DOL's opinion, the position would require the employee to spend 55% of his or her time being on-call to diagnose computer problems, conduct problem analysis and research, troubleshoot, and resolve complex problems with business applications, networking, and hardware, either in person or by using remote control software. Twenty percent of the time the employee would be installing, configuring, and testing upgraded and new business computers and applications based upon user-defined requirements. The employee also would be responsible for the timely closeout of trouble tickets. The position would require a high school diploma or GED, although an associate degree would be preferred.

The DOL found that the exercise of discretion and independent judgment required for an exemption to apply must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources. The duties described by the employer would not involve, with respect to matters of significance, the comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered as required by the FLSA regulations.

The position described also would not meet the requirements for the computer professional exemption in that it would neither involve the application of systems analysis techniques and procedures nor the design, development of computer systems or programs or of computer programs related to machine operating systems.

b) Increase in Amount Paid to California Computer Professionals

Effective January 1, 2007, salaried computer professionals who otherwise meet the specified requirements will be exempt from overtime requirements under California law, as long as their salary is not less than an amount equal to $49.77 for every hour worked. Because employees may work more than 40 hours per week, an employer may not simply multiply

$49.77 by 40 hours per week on an annualized basis (which equals to $103,521.60) to arrive at a salary sufficient to satisfy the exemption. Employers who wish to utilize this exemption must make sure that they set a salary high enough to ensure employees are paid $49.77 for *all hours worked*.

What Employers Should Do:

- Audit, audit, audit. Audit the classifications of exempt employees in the technology field and ensure that such employee are being paid properly.

- Consider requiring all computer professional employees (regardless if salaried) to keep track of their hours worked.

2. Newspaper Reporters Not Exempt as Creative Professionals

In ***Wang v. Chinese Daily News, Inc.*,** 435 F. Supp. 2d 1042 (C.D. Cal. 2006), the district court found that the employer's reporters were not exempt as creative professionals because they depended upon their "intelligence, diligence, and accuracy rather than invention, imagination, and talent." Specifically, these reporters spent most of their time rewriting press releases and community events announcements. The district court also found that meal and rest penalties are wages and require a four year statute of limitations (because of the plaintiffs' Section 17200 claim).

3. The Ninth Circuit Overturns $52.5 Million Verdict and Finds Claims Adjusters Exempt Under FLSA

In ***In Re: Farmers Ins. Exch. Claims Reps Overtime Pay Litig.***, 466 F.3d 853 (9th Cir. 2006), the Ninth Circuit reversed a $52.5 million overtime verdict in favor of claims adjusters in seven states, finding that all the adjusters are exempt from the FLSA regardless of the type or value of the claims they handle. The Ninth Circuit found that, even with small claims, the claims adjusters are not merely pursuing a standardized format for resolving claims but rather use their own judgment about what the facts show, who is liable, what a claim is worth, *etc.* In addition, because the employer could be subject to state fines if reserves are set too low and because an adjuster advises the management, represents the company and negotiates on its behalf, an adjuster's coverage decisions and duties are directly related to management policies and general business operations.

4. "Registered Representatives" in the Financial Services Industry May Qualify for the Administrative Exemption Under the FLSA

In an Opinion Letter issued on November 27, 2006 (not yet posted on the Department of Labor's website), the Department of Labor advised that "registered representatives" in the

financial securities industry (such as stockbrokers and financial consultants) may qualify for the administrative exemption if certain requirements are met. Specifically, registered representatives who collect the clients' financial information, analyze the information, compare and evaluate possible investment options, advise clients about the risks and the advantages and disadvantages of various investment opportunities, and identify investment strategies and potential investments based on their knowledge of market conditions and the clients' particular circumstances, satisfy the requirements for the administrative exemption, as long as they are paid the minimum salary amount ($455 a week pursuant to federal law) and such minimum salary amount is not subject to reduction due to the quality or quantity of work performed and the employee is never required to repay any portion of that salary even if the employee fails to earn sufficient commissions or fees.

Such work is considered "office or non-manual work directly related to the management or general business operations of the employer" (as required for the exemption) because the registered representatives service their employer's financial services business by engaging in promotion and business development activities, including the marketing, servicing, and promoting of the employing firm's financial services and products, and by making themselves visible to the appropriate segments of the public in order to meet and retain potential new clients for their employing firm. Such work also satisfies the discretion and independent judgment requirement (even if the registered representative uses computer software and other tools) as long as the representative, and not the computer software, is the one who selects and evaluates the particular investment alternatives for the client.

The DOL made clear, however, that registered representatives will not qualify for the administrative exemption if their primary duties consist of selling investments to clients (as opposed to analyzing and evaluating investment options).

5. Deductions Made to Reimburse Employer for Lost or Damaged Equipment Violates the FLSA's Salary Basis Rule

In an Opinion Letter issued on March 10, 2006 (FLSA 2006-7 found on http://www.dol.gov/esa/whd/opinion/flsa.htm), the Department of Labor advised that an employer's policy which allows for the taking of fines or deductions from the salaries of exempt employees who damage equipment while performing their jobs (such as cellular telephones and laptop computers) violates the salary basis rule and, therefore, employees who have such fines or deductions taken from their salaries lose their exempt classification. Such impermissible deductions violate the prohibition against reductions in exempt employees' compensation due to the quality of the work performed by the employee. It does not matter whether the employer implements such a policy by making periodic deductions from employee salaries or by requiring employees to make out-of-pocket reimbursements from compensation already received.

What Employers Should Do:

- Check whether any practices or policies allow deductions of exempt employees' wages for lost or damaged equipment and, if so, consider revising such policies and/or practices.

J. Class Action / Representative Action Updates

1. Denial of Class Certification of Grocery Store Managers

In ***Dunbar v. Albertson's Inc.***, 141 Cal. App. 4th 1422 (2006), the court denied certification of a class of grocery store managers ("the second person in charge of the store") in an action alleging unpaid overtime. The plaintiff asserted that common issues of fact predominated because each class member had the same job title, same job description, performed the same duties, and was required to follow the same policies and procedures. Defendants argued that the court was required to make an individualized factual inquiry into how each class member actually spent his or her time. Such analysis depended on a variety of factors such as store size, number and type of peripheral departments, demographic makeup of the local community, and the personal management style of a store's director.

The court affirmed the trial court's ruling that common issues did not predominate and that a class action was not the superior means for resolving the litigation. Specifically, the court held that resolving the case required an individual inquiry into each of the 900 putative class members' work duties. It was not the mere presence of individual issues that made certification untenable, but rather the significant variation in the managers' duties on both a store-to-store and week-to-week basis.

2. Denial of Class Certification of Assistant Store Managers

In ***Chand v. Target Corp.***, (Cal. Sup. Ct. No. BC315688), Judge Victor H. Person denied certification of a class of assistant managers in an action alleging unpaid overtime under California wage laws. The court found that, because the putative class members performed both managerial and nonmanagerial tasks in varying amounts, the question of how much time a manager spent on exempt versus nonexempt tasks is an individualized one and these individual questions predominate.

In ***Sepulveda v. Wal-Mart***, 237 F.R.D. 229 (C.D. Cal. 2006), a federal judge refused to certify a class of assistant managers at Wal-Mart in an action alleging violations of California's meal break and overtime laws. The court found that the questions of fact common to the members of the putative class did not predominate over any questions affecting only individual members because, among other things, the court would need to determine how much of each

employee's work was exempt and then whether that employee's work was consistent with the employer's realistic expectations.

3. Offer of Judgment Renders FLSA Collective Action Representation Moot

In ***Briggs v. Arthur T. Mott Real Estate LLC***, 2006 WL 3314624 (E.D.N.Y. 2006), a federal judge found that the employer's offer of judgment to the representative plaintiff in a FLSA collective action rendered the plaintiff's FLSA claims moot. Plaintiff Briggs had filed an FLSA collective action and class action pursuant to New York law in federal court claiming unpaid overtime wages. The defendant employer then made an offer of judgment to Briggs in an amount that exceeded what he was entitled to under the FLSA (along with reasonable attorneys' fees and costs and reasonable expert fees actually incurred). Although Briggs did not accept the offer, the federal court found that Briggs' claims were no longer "live" because he lacked a "legally cognizable interest in the outcome." Briggs' FLSA claims therefore were moot. Because no collective plaintiffs had opted into the action and because the court declined to exercise supplemental jurisdiction over the state law claims, the court dismissed all of Briggs' claims for lack of subject matter jurisdiction.

4. An Employer Does Not Have a Right to Jury Trial of Equitable Section 17200 Action

In ***Hodge v. Superior Court***, -- Cal. Rptr. 3d --, 2006 WL 3423486 (Nov. 29, 2006), the Court of Appeal held that no jury trial was warranted for the plaintiffs' Section 17200 action even though the employer was seeking a jury trial and even though the Section 17200 action would require proof of the underlying Labor Code violations. In that case, the plaintiffs filed a class action lawsuit seeking to represent 800 current and former workers' compensation adjusters and alleging overtime pay. The plaintiffs also asserted a Section 17200 claim based on the same failure to pay overtime wages. The case was tried to a jury, but a mistrial was declared after the jury was unable to reach a verdict on the question of whether the class members qualified for the administrative exemption. After the jury trial, the plaintiffs amended their complaint to state only a cause of action for violation of Section 17200. In a reversal of roles, it was the defendant employer who sought a jury trial for the Section 17200 claim and the trial court granted that request.

The Court of Appeal reversed and held that because the remedies under Section 17200 (restitution and injunctive relief) are equitable in nature, there was no right to a jury trial. This was true even though the defendant had raised affirmative defenses that otherwise would be entitled to a jury trial and even though the "borrowed statute" underlying the Section 17200 were Labor Code violations.

VIII. SETTLEMENT AGREEMENTS AND RELEASES

A. Waivers Of The Right To Bring Administrative Charges May Invalidate A Settlement Agreement

EEOC v. Lockheed Martin Corporation, 444 F. Supp. 2d 414 (D. Md. 2006), dealt with the issue of whether an employer can require an employee to dismiss an EEOC charge, and to promise not to file any future charges, as a condition of receiving severance benefits. Past cases have held that a waiver of the employee's right to file a charge with the EEOC as a condition of receiving severance benefits is facially retaliatory and void as a matter of public policy. However, an employer **may** condition payment of benefits on the employee waiving the right to recover damages in his or her own lawsuit, as well as in a lawsuit brought by the EEOC on the employee's behalf. *See Rogers v. General Electric Co*., 781 F.2d 452, 454 (9th Cir. 1986); *Wastak v. Lehigh Valley Health Network*, 333 F.3d 120, 128-29 (3d Cir. 2003); *EEOC v. Cosmair, Inc*., 821 F.2d 1085, 1091 (5th Cir. 1987).

In the *Lockheed* case, the employee was informed that she was going to be laid off, and would receive severance benefits in exchange for signing a "Release of Claims" form, which included a covenant not to sue. The employee was also advised that she could not participate in the severance program unless she dismissed a charge pending with the EEOC, alleging that her layoff was discriminatory on the basis of race, gender and age. The EEOC filed a lawsuit on the employee's behalf arguing that: (1) conditioning receipt of severance benefits on the withdrawal of her EEOC charge, whether or not she was otherwise entitled to the benefits before she filed the charge, constituted retaliation; and (2) the release was facially retaliatory because it prohibited the employee from filing any future EEOC charge. The Court agreed with the EEOC on both points, stating that waivers of the right to file administrative charges would impede the EEOC's ability to enforce employment discrimination laws (since the main purpose of filing a charge with the EEOC was to inform that agency of possible unlawful discrimination).

What Employers Should Do:

- At a minimum, any covenant not to sue contained in a release should be expressly limited to circumstances where such a covenant is legally permissible. Language such as "To the fullest extent permitted by law, [Employee] agrees and covenants that he will not file any claims with any federal, state or local court or agency …" may be sufficient.

- Another option is to avoid making any reference of any waiver of the right to file an administrative charge with any federal, state or local agency. Instead, any waiver would be limited to the right to bring a lawsuit in court, or to recover personal remedies or damages. This approach avoids giving an employee any encouragement to file an administrative charge. Care must be taken, however, to

ensure that the waiver language is both precise and narrow enough that it will not be interpreted as a waiver of the employee's right to bring administrative charges.

- Another way an employer can draft a severance benefits/release agreement is to state expressly that the agreement does not prohibit an employee from filing an administrative charge. For example, an employer could include the following very explicit language:

> This Agreement recognizes the appropriate authority of certain administrative agencies, including but not limited to the U.S. National Labor Relations Board, the U.S. Equal Employment Opportunity Commission, and the California Department of Fair Employment and Housing, to investigate allegations of discrimination, retaliation and harassment within the appropriate jurisdiction of such agencies. While [Employee] by signing this Agreement is waiving and releasing any and all rights to damages and any and all rights to file or participate as a plaintiff in any lawsuit against the Company or any of the Releasees, nothing in this Agreement prohibits [Employee] from filing a charge or administrative complaint with such agency.

This approach has the advantage of explicitly disclaiming any improper waiver of the right to bring administrative charges, but of course carries the disadvantage of alerting the employee of their right to do so. Employers should weigh the advantages and disadvantages of different approaches to suit their individual needs.

B. Releases Must Be Knowing And Voluntary

In *Syverson v. IBM Corp*., 461 F.3d 1147 (9th Cir. 2006), the Court held that waivers of claims under the Age Discrimination in Employment Act must be "knowing and voluntary," and therefore must be "written in a manner calculated to be understood" by the average employee receiving the document. In that case, confusion arose because of differences in the language of the release of claims (which applied to all claims) and the covenant not to sue (which expressly excluded ADEA claims).

What Employers Should Do:

- Avoid ambiguous or contradictory provisions in settlement agreements. Avoid excessive "legalese" without, of course, becoming so colloquial that the agreement is subject to misinterpretation. The IBM agreement in the *Syverson* case is a good example of how employers can get into trouble. It is unclear just

what IBM was trying to accomplish with its unusual settlement agreement, but it does seem clear that IBM was somehow trying to get "cute" about the scope of its release, and paid a price.

- Include a short and plain statement of the effect of the release, in bold type and where the employee will not miss it. For example:

> "**THIS AGREEMENT CONTAINS A RELEASE OF ALL CLAIMS, KNOWN AND UNKNOWN, WHICH YOU HAVE AGAINST THE RELEASEES LISTED HEREIN. READ IT CAREFULLY. IF YOU HAVE ANY QUESTIONS ABOUT THE EFFECT OF THIS RELEASE OR THE MEANING OF THIS AGREEMENT YOU SHOULD CONSULT LEGAL COUNSEL OF YOUR CHOICE.**"

C. Ambiguous Language About The Scope Of A Release Can Undermine Its Usefulness.

Butler v. Vons Companies, Inc., 140 Cal. App. 4th 943 (2006), is a useful reminder of the fact that a poorly drafted settlement agreement and release may not be enforced. In that case, the plaintiff employee initially filed a grievance over a suspension he received over an altercation with his manager. The employee's union representative settled the grievance, and the company, the employee, and the union representative all signed a document entitled "Compromise and Release Settlement Agreement." It is unclear from the Court's opinion whether this Agreement contained a "general release," but it did contain a provision waiving Section 1542 of the California Civil Code. Section 1542 provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

The employee later filed a FEHA action, based on alleged harassment, and the employer asserted the release as a defense to that action. The employer, relying on the Section 1542 waiver, asserted that the release was intended to cover all claims, and the trial court granted summary judgment to the employer on that basis. However, the Court of Appeal reversed, holding that there was an issue of fact as to whether the parties intended the release to cover claims not involved in the union grievance proceeding.

What Employers Should Do:

- Releases should be carefully reviewed to ensure that they unambiguously cover all possible claims. It is common, although not necessarily mandatory, to expressly list the more typical claims which might be brought, such as claims

under FEHA, Title VII, the ADA, the ADEA and other common statutory provisions conferring rights on employees.

- It is often advisable to include an arbitration provision in any settlement agreement, so that in the event of a dispute over the scope of the release an arbitrator, rather than a jury, would decide any issues of fact.

- In situations where there is a third party to the release, such as the union in the *Vons* case here, the employer may want to consider a separate release directly with the employee. This would also apply in cases where an administrative agency, such as the DFEH or DLSE is involved in the claim.

- If the claim being settled arises out of a forum with limited scope, such the grievance proceeding in the *Vons* case or, to take another example, a workers' compensation claim, the release should contain express language explicitly stating that it is not limited to claims where were or could have been brought in that forum.

IX. ARBITRATION AGREEMENTS

A. Enforceability

California Courts continue to apply their two-prong test to determine the enforceability of arbitration agreements, and continue to apply it in an inconsistent and unpredictable manner. Under the two-prong test, an agreement to arbitrate disputes will be enforced unless it is both procedurally and substantively unconscionable. Basically, a procedurally unconscionable agreement to arbitrate is one that is forced upon the employee by virtue of the employer's greater bargaining power, without giving the employee any meaningful opportunity to bargain about its terms. A substantively unconscionable arbitration agreement is one which is slanted or one-sided in favor of the employer to such an extent that it would be unfair to enforce it against the employee. If an agreement is both procedurally and substantively unconscionable, the courts will not enforce it.

In *Higgins v. Superior Court*, 140 Cal. App.4th 1238 (2006), the Court found an arbitration clause contained in a contract for a family to appear on the reality television show Extreme Makeover Home Edition to be procedurally unconscionable because it was buried in the "Miscellaneous" section of a 24-page single-spaced contract, with nothing to call attention to it. The Court found the provision to be substantively unconscionable because it gave the producers of the show greater rights than the family to avoid arbitration or to obtain judicial review of the arbitration.

B. Application Arbitration To Class Action Claims – Class Action Waivers

An issue of potentially enormous importance to California employers is currently pending before the Supreme Court in *Gentry v. Superior Court* (Circuit City Stores, Inc.), Supreme Court Case No. S141502 (2006). That case deals with the application of arbitration agreements to class action claims. Given the rapid growth of wage and hour class actions in recent years, employers should be giving consideration to whether they can or should compel these cases to be submitted to arbitration.

Although arbitration of employment claims is generally a good idea for employers, due to the expense and uncertainty of jury trials, there are reasons to hesitate before agreeing to submit a class action case to arbitration. There is a widely held belief that arbitrators are more likely than judges to certify class actions, if for no other reason than that the arbitrator who refuses to certify a class is thereby denying him or herself the opportunity to hear the underlying claims.

If an employer does wish to limit the arbitrability of class action claims, the most obvious approaches would be to state, in the arbitration agreement, either (1) that employees waive the right to pursue claims as class actions, and are required to pursue all claims arbitrable under the Policy as individual claims (in effect, a class action waiver); or (2) that class action claims are simply excluded from the agreement, and that employees wishing to bring class action claims are free to do so in court. The former approach is certainly preferable. The issue in the *Gentry* case is whether such class action waivers are enforceable under California law.

In 2002 Gentry filed a class action lawsuit, alleging that he and other class members were misclassified as "exempt" employees. Gentry had signed Circuit City's arbitration agreement, which contained a class action waiver clause providing that the arbitrator could not consolidate employee claims or hear such claims as a class action. The trial court granted Circuit City's petition to compel arbitration under that agreement. The Court of Appeal agreed, but the California Supreme Court granted review, and then remanded the case for reconsideration in view of its holding in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), in which it had invalidated a class action waiver contained in mass mailing sent to customers by a bank, on the grounds that it was a "consumer contract of adhesion."

On remand, the Court of Appeal again ruled for Circuit City, holding that the class action waiver was neither procedurally nor substantively unconscionable. Among other things, the Court of Appeal found that the provision was not procedurally unconscionable because it was not a condition of employment – employees were given thirty days to "opt out" of the arbitration agreement. The Court distinguished the *Discover Bank* case on the grounds that the claims at issue in *Gentry* were for substantial amounts of money, unlike the customers of the defendant bank in *Discover Bank* who were likely to have small claims not worth litigating as separate actions.

The Supreme Court has now again granted review of the Gentry case, and is expected to decide the issue sometime next year.

What Employers Should Do:

- Obviously, one thing for employers to do is wait with some anticipation for the Supreme Court to decide this issue. If and when the Court holds that class action waivers contained in employer-employee arbitration agreements are enforceable under California law, these would be a useful protection for most, if not all, California employers.

- If the class action waivers are not enforceable, then employers should consider whether they would want to have class action cases heard by arbitrators. The obvious downside to expressly excluding class action claims from an arbitration agreement is that it gives an incentive to any employee who wants to avoid arbitration simply to style his or her claim as a class action – obviously an undesirable result.

- A middle ground which employers may wish to consider is to provide that the arbitrator will not have authority or jurisdiction to decide class certification issues and that class certification must be decided by a court. However, if the court certifies a class, then the arbitrator will hear the underlying claims.

C. Other Arbitration Developments

In *Berglund v. Arthroscopic and Laser Surgery Center*, 43 Cal. Rptr. 3d 456 (2006), the Court held that third parties from whom discovery is sought through a subpoena issued in arbitration proceedings are entitled to judicial review of the arbitrator's discovery order. The Court reasoned that although judicial review is not normally available, or is very limited, from such orders, that rule should apply only to the parties who have voluntarily agreed to submit themselves to the authority of the arbitrator, and should not bind third parties who did not consent to waive their rights to judicial review. The practical effect of this ruling, however, is to give the third party "two bites at the apple" – first by seeking relief from the arbitrator, and second by challenging the arbitrator's ruling before the Court.

Rodriguez v. American Technologies, Inc., 136 Cal. App. 4th 1110 (2006), dealt with inconsistencies between the California and Federal Arbitration Acts. California law gives judges greater flexibility to coordinate overlapping arbitration proceedings and judicial proceedings involving third parties not subject to the arbitration agreement. Federal law is more specific in requiring the arbitration proceeding to take precedence, and proceed in advance of the court proceedings. The *American Technologies* Court ruled that if the parties' arbitration agreement expressly states that the procedures of the Federal Act will govern, then the Court must resolve the conflicting provisions of the two Arbitration Acts in accordance with the Federal rule. This case also upheld and enforced a provision requiring that any dispute as to the scope of the arbitration agreement would be submitted to the arbitrator to decide.

In *Zavala v. Scott Bros. Dairy*, 143 Cal. App. 4th 585 (2006), the Court held that an arbitration clause in a **collective bargaining agreement** did not bar an employee's right to bring an individual lawsuit in court alleging violations of California wage and hour laws. This ruling is consistent with past cases, and was not surprising.

In *U-Haul of California*, 346 N.L.R.B. No. 34 (2006), the National Labor Relations Board held that an arbitration provision violated the National Labor Relations Act because it was open to the interpretation that it precluded employees from filing charges with the NLRB. This 2-1 decision seems to rest on shaky ground, as Chairman Battista pointed out in his dissenting opinion, since the arbitration agreement in question neither expressly stated that it covered claims over which the NLRB had jurisdiction, nor had it been applied to such claims in practice. However, the two Board members who upheld the ALJ's ruling on this point reasoned that lay employees might not understand the legal fine points of the arbitration agreement, and conclude that it covered claims which could be the subject of unfair labor practice charges.

X. NON-COMPETITION PROVISIONS AND TRADE SECRET PRESERVATION

The most significant case in this area is, again, pending before the California Supreme Court. That case is *Edwards v. Arthur Andersen LLP*, 2006 Cal. LEXIS 14181, on review from the Second District Court of Appeal's decision in *Edwards v. Arthur Andersen LLP*, 142 Cal. App. 4th 603 (2006).

Edwards raises the question of whether the "narrow restraint" exception to California's prohibition on covenants not to compete will continue to be recognized. The narrow restraint exception holds that a restriction on competition which is so narrow that it does not place any significant obstacle on a person's ability to ply their trade in the marketplace can be enforceable. This exception had been repeatedly recognized in Ninth Circuit cases such as *Campbell v. Stanford Univ.*. 817 F.2d 499 (9th Cir. 1987) (holding it was an issue of fact whether contract under which psychologist was hired to revise a vocational interest test and also was prohibited from preparing any similar competing test, was enforceable); *General Commercial Packaging v. TPS Package*, 126 F.3d 1131 (9th Cir. 1997) (contract between general contractor and subcontractor which prohibited subcontractor from soliciting the customer to hire subcontractor directly, thereby bypassing the general contractor, did not violate California prohibition on covenants not to compete).

The Court of Appeal in *Edwards* had ruled that these cases and the entire narrow restraint exception were erroneous interpretations of California law, and that all restrictions on trade, no matter how narrow, were invalid (unless covered by one of the express statutory exceptions). The Supreme Court should address this issue sometime next year. When the Court rules, it will be an appropriate time for California employers to review and/or revise any non-competition agreements they may have in place.

Another issue which continues to get attention in litigation is the "race to the courthouse." Because California law is far more restrictive than the law of most other states

when it comes to enforcing covenants not to compete, there are often conflicting lawsuits filed in different states, seeking to enforce or challenge such agreements. In *Biosense Webster, Inc. v. Superior Court (Deana Dowell)*, 135 Cal. App. 4th 827 (2006), the trial court had issued a temporary restraining order, precluding the former employer, *Biosense*, from seeking to enforce its non-competition agreement with former employer Dowell in the courts of any state other than California. The Court of Appeal rejected this ruling, based on the California Supreme Court's 2002 decision in *Advanced Bionics Corp. v. Medtronic, Inc.,* 29 Cal. 4th 697 (2002), where the Supreme Court had observed: ""enjoining proceedings in another state requires an exceptional circumstance that outweighs the threat to judicial restraint and comity principles." The *Biosense* Court also held that principles of federalism preclude a California court from enjoining a federal court action of this type, because the right to file suit in federal court is granted by federal law which is binding on state court judges.

Strategix, Ltd. v. Infocrossing West, Inc., 142 Cal. App. 4th 1068 (2006), dealt with the limited exception to California's ban on non-competition agreements which applies in connection with the purchase of a business including its goodwill. In that case, Strategix, with the consent of its parent company ePassage, had sold the assets and good will of its business to Infocrossing. In exchange, Infocrossing received a non-competition agreement which prohibited ePassage from soliciting Infocrossing's employees or customers for one year after the termination of the consulting relationship. The Court held this agreement to be overbroad and unenforceable, because it applied to **all** of Infocrossing's employees and customers, not just the former employees and customers who had formerly been with Strategix. Further, the Court declined to "blue pencil" the agreement to limit it to the scope of what could lawfully have been agreed upon. Instead, the Court voided the agreement entirely.

What Employers Should Do:

- California law continues to be highly hostile to covenants not to compete. Although the California Supreme Court's upcoming decision in *Edwards* could mark a turning point, the smart money is not betting on that possibility. As a general rule, employers need to recognize that California law is very aggressive in striking down any restrictions on any person's ability to ply his or her occupation in the marketplace.

- California law does recognize, and will enforce, contractual provisions protecting a company's proprietary rights in trade secret information. The most common mistake made by employers in this arena, however, is trying to use a trade secret agreement as a thinly veiled disguise for an unlawful covenant not to compete. To be enforceable, trade secret agreements must be narrowly drawn and clearly designed to protect information which is truly proprietary.

XI. AT WILL AGREEMENTS

The enforceability of at will agreements is now pretty firmly established in California law, and most of the plaintiffs bar has stopped pursuing pure "breach of implied employment contract" claims; instead, they favor of discrimination, retaliation, and statutory rights causes of action. However, in a decision which seemed to be a bit of a throwback to the 1980's, one California Court of Appeal held that there was an issue of fact whether the following language created an at will employment relationship:

> "Brook, please know that as with all of our company employees, your employment with Arnold Communications, Inc. is at will. This simply means that Arnold Communications has the right to terminate your employment at any time just as you have the right to terminate your employment with Arnold Communications, Inc. at any time."

Remarkably, the Court of Appeal held that this language did necessarily create an at will relationship, because it did not expressly state that plaintiff Brook Dore could be terminated "without cause." Therefore, according to the Court of Appeal, there was an issue of fact as to the meaning of the language in question.

Happily, the California Supreme Court rejected (indeed, it positively ridiculed) the Court of Appeal's reasoning. In *Dore v. Arnold Worldwide, Inc.* 39 Cal. 4th 384 (2006), the Supreme Court observed:

> The language of the parties' written agreement is unambiguous. AWI's letter plainly states that Dore's employment with AWI was at will. Indeed, as the trial court observed, Dore admitted as much and further admitted that he "read, signed, understood and did not disagree with the terms of the letter." Even the Court of Appeal acknowledged that the term "at will" when used in an employment contract normally conveys an intent employment may be ended by either party "at any time without cause." Although AWI's letter also states that AWI would provide Dore a "90 day assessment" and "annual review," these provisions, in describing AWI's employee evaluation schedule, neither expressly nor impliedly conferred on Dore the right to be terminated only for cause. …
>
> We conclude, in sum, that AWI's letter contained no ambiguity, patent or latent, in its termination provisions.

What Employers Should Do:

- Although the *Dore* case had a positive outcome, it is still a cautionary tale that in this day and age a California Court of Appeal could still find such a clear and express "at will" agreement to be ambiguous, and subject to reinterpretation by a jury. California employers should be sure that they have very, very clear and unambiguous at will statements applicable to all at will employees.

- It is always best if the at will nature of an employee's employment is reflected in one or more documents which are signed by the employee. Those documents should not be limited to pre-employment documents, such as an employment application, since there may be some question whether such documents rise to contractual status. Nor should the at will language be contained solely in a policy or employee handbook – especially if the employer also states that the employee handbook or policy manual do not create contractual rights and are subject to unilateral modification by the employer at any time.

XII. NEW DEVELOPMENTS IN IMMIGRATION LAW: 2006

A. H-1B Visa Issues

1. H-1B Visas: An Introduction

The H-1B visa is the most common visa used to employ skilled foreign workers. If a foreign national holds a university degree which may be deemed to be a prerequisite to entry to a profession, he may qualify under the H-1B work visa category as a "member of the professions" (e.g., accountant, computer scientists, engineers, MBA's, etc.).

In addition to the foreign national's education and work experience requirements, the H-1B visa is premised on the requirement that there is a job available by a U.S. employer which requires the services of a "professional." The H-1B visa also requires that the foreign national be paid the prevailing wage as determined by the U.S. Department of Labor for the specific professional position in the specific metropolitan location where the foreign worker will render services.

Contrary to a common misconception, there is no requirement to demonstrate the absence of qualified U.S. workers before filing an H-1B visa petition. H-1B visa status can be granted for an initial period of up to three years, and extensions of status may be granted for up to a maximum total period of six years, unless steps are taken towards securing permanent residents status before the beginning of the sixth year.

The H-1B visa process does contain hidden risks and potential liabilities that a U.S. employer must be prepared for, including:

1. The failure to pay an H-1B foreign worker at least the "prevailing wage" or the "actual wage" paid to similarly employed workers at the jobsite may lead to fines, back pay awards, and possible temporary disqualification from filing additional H-1B visa petitions for future workers;

2. The visa petition process contains specific posting, documentation gathering and record keeping requirements which must be complied with to avoid possible fines. These documentary requirements include:

a. The posting of a notice for ten (10) days in two (2) places in the workplace, stating that an H-1B petition is being filed and stating the salary to be offered to the foreign worker or workers;

b. The establishment of a special file, which is open to public inspection, containing a copy of a Department of Labor form called a Labor Condition Application, which is an integral part of the H-1B visa petition process;

2. The Frantic Filing Window

Congress has set an annual cap of new temporary professional worker "H-1B" visas at 65,000. Despite continual political efforts to increase in the cap (as was temporarily done during the "dotcom" boom years of the late 1990's), we have seen little change in this annual quota. Exempt from this cap are certain not-for-profit organization petitioners, individuals seeking an extension of H-1B status or change of employer. There are also separate caps for employees with U.S. Masters or Ph.D. degrees, Chileans and Singaporeans.

Current Cap Count for Non-Immigrant Worker Visas for Fiscal Year 2007

What is a "Cap"

The word "Cap" refers to annual numerical limitations set by Congress on the numbers of workers authorized to be admitted on different types of visas or authorized to change status if already in the United States.

H-1B

Established by the Immigration Act of 1990 (IMMACT 90), the H-1B nonimmigrant visa category allows U.S. employers to augment the existing labor force with highly skilled temporary workers. H-1B workers are admitted to the United States for an initial period of three years, which may be extended for an additional three years. The H-1B visa program is utilized by some U.S. employers to employ foreign workers in specialty occupations that require theoretical

or technical expertise in a specialized field. Typical H-1B occupations include architects, engineers, computer programmers, accountants, doctors and college professors. The H-1B visa program also includes fashion models. The current annual cap on the H-1B category is 65,000.

H-1B Advanced Degree Exemption

The H-1B Visa Reform Act of 2004, which took effect on May 5, 2005, changed the H-1B filing procedures for FY 2005 and for future fiscal years. The H-1B Visa Reform Act of 2004 also makes available 20,000 new H-1B visas for foreign workers with a Master's or higher level degree from a U.S. academic institution.

	Cap	Beneficiaries Approved	Beneficiaries Pending	Beneficiary Target 1	Total	Date of Last Count
H-1B (FY 07)	58,200 2	------	------	------	Cap Reached	5/26/2006
H-1B Advanced Degree Exemption (FY 07)	20,000	------	------	------	Cap Reached	7/26/2006
H-1B (FY 06)	58,200	------	------	------	Cap Reached	8/10/2005
H-1B Advanced Degree Exemption (FY 06)	20,000	------	------	------	Cap Reached	1/17/2006

Refers to the estimated number on April 1, 2006, of beneficiary applications needed to reach the cap, with an allowance for denials and revocations. This target is subject to revision later in the cap cycle as more petitions are processed.

6,800 visas are set aside during the fiscal year for the H-1B1 program under the terms of the legislation implementing the U.S.-Chile and U.S.-Singapore Free Trade Agreements. Unused numbers in this pool can be made available for H-1B use with start dates beginning on October 1, 2006, the start of FY 2007. USCIS has added the projected number of unused H-1B1

Chile/Singapore visas to the FY 2007 H-1B cap as announced in the H-1B Press Release, dated June 1, 2006.

H-1B1

An H-1B1 is a national of Chile or Singapore coming to the Unites States to work temporarily in a specialty occupation. The law defines specialty occupation as a job that requires a bachelor's degree or higher. The beneficiary must have a bachelor's degree relating to the job offer. The combined statutory limit is 6,800 per year. The projected number of 6,100 unused H-1B1 visas for FY 2006 was incorporated and applied to the FY 2007 H-1B cap. **(Chart Taken from U.S. Citizenship and Immigration Services website).**

The new allotment of H-1B visas takes effect at the beginning of each government fiscal year, which begins on October 1st of each year. Since the U.S. Citizenship and Immigration Services allows an employer to file for H-1B visas no sooner than six months before the employment start date, the filing window for H-1B visas opens on April 1st. This year FY 2007 numbers ran out on May 26, 2006, making for a much shorter filing window than 2005, where the FY 2006 numbers ran out in August. This essentially means that employers must be ready to file H-1B petitions on April 1st, as the numbers will disappear quickly.

3. H-1B Alternatives

Employers should also consider the following alternatives to the H-1B Visa.

a) TN's for Canadians and Mexicans

The North American Free Trade Agreement ("NAFTA") provides for the temporary entry into the United States of "professional workers" who are Canadian or Mexican citizens, under the TN category. NAFTA contains a list of specific professions and their requirements. An individual can qualify for TN work authorization if he or she (1) has a job offer from a U.S. employer in one of the listed professions, and (2) can demonstrate the prerequisite educational or employment background. TN status is granted in one-year increments. While there is no specified maximum period of time after which the foreign worker must depart from the U.S. or become a permanent resident, TN remains a temporary employment category, and a foreign worker may be denied an extension of his or her TN status if the USCIS believes that the worker's position has become permanent in nature.

b) L-1's for Intracompany Transferees

The L-1 visa category was designed for multinational corporate groups, to facilitate the transfer of executive and managerial personnel and personnel with "specialized knowledge." The specific requirements for the L-1 visa are as follows:

1. The individual seeking transfer to the United States must have been continuously employed abroad by a branch, subsidiary, parent or corporate affiliate of the U.S. employer for at least one year in the preceding 3 years before the L-1 is filed. Temporary visits to the United States for business are permitted during the year preceding application for the L-1 visa and will not break the individuals' continuous employment abroad. However, any period of time spent in the United States cannot be counted towards compliance with the minimum requirement of at least twelve months employment abroad;

2. The foreign enterprise and the U.S. organization to which the individual will be transferred are linked by common ownership and control to establish the requisite parent/subsidiary or affiliate relationship;

3. The U.S. organization has established office facilities;

4. During the period that the intracompany transferee is in the United States, the foreign affiliate or another foreign office of the corporate group must continue to do business abroad; and

5. The U.S. enterprise is in need of the services of an executive, managerial or specialized knowledge employee by virtue of the volume of its business operations and number of employees.

A manager or executive may remain in the United States for up to seven (7) years under L-1 status. A "specialized knowledge" employee may remain in the United States for up to five (5) years under L-1 status.

c) E's for Investors, Traders and Australians

The United States has signed Treaties of Trade or Commerce which enable nationals from numerous countries to apply for E-1 Treaty Trader or an E-2 Treaty Investor visas to work temporarily in the United States for a foreign owned company, corporation or branch office.

The applicant must document a job offer in the United States as a manager, executive or person with essential skills who is not replacing an otherwise available U.S. worker. The State Department has issued guidelines to be followed by officers adjudicating E-Treaty visa applications which set forth the requirements for executive, managerial and essential employees, with the latter category as the most restrictive.

An "essential employee" must be a specialist who:

1. Is familiar with the company's mode of operations;

2. Can document experience and training with the company; and

3. Is essential to the U.S. enterprise or will train U.S. workers.

The E-3 is a new visa for Australian nationals. Its requirements are more like those for an H-1B visa than for an E visa, in that, these visas are targeted at professional workers. This new visa enables employers to hire Australians whom they previously would have hired under the H-1B category. There is an annual quota for this category of 10,500.

d) O's for Extraordinary Ability

These visas, used primarily for artists, athletes and scientists may be used by employers in very limited circumstances, such as when the employee has won numerous awards, published books and/or articles in distinguished publications, and/or receives a very high salary.

e) H-3 and J-1 Trainees

These visas are for those whose employment has training as its primary purpose. Such visas are not good long-term solutions, but rather, they are appropriate for the worker whose qualifications are marginal based upon lack of experience and who would not normally qualify for visas in other categories. There is occasionally a requirement that such visa holders return to their home countries after the completion of such employment.

What the Employer Should Do

- Plan professional recruitment activities far enough in advance to allow for time to meet USCIS filing deadlines.
- Consider alternatives to the H-1B, at least as a temporary measure.
- Lobby Congress for increased H-1B visa numbers and/or flexibility in the filing deadlines the quotas produce.

B. New Issues In Labor Certification/Permanent Resident Cases

On March 28, 2005, the Department of Labor's computerized PERM labor certification program was released. Initially, the program was beset by numerous administrative and technical problems, resulting in mass denials of cases without any human oversight. Since then, the program has gradually begun to function better, and has evolved to a point where case processing is fast and often accurate. However, as nice as it is to receive PERM approvals two weeks or two months from the filing date, it really does not matter much when the entire process is spread over several years.

This is because the permanent residency application process for most employees is essentially three parts: (1) the labor certification, now done according to the computerized PERM system; (2) the I-140 filing with USCIS, which now can be expedited; and (3) the filing of the adjustment of status application (I-485) or the application for an immigrant visa interview abroad.

When an employer files a PERM petition online for an employee, the date the PERM is filed becomes the employee's "priority date". Example: If the PERM is filed on January 1, 2006, then that date becomes the "priority date" which lasts during the pendency of the whole case. Supposing the PERM is approved on February 1, 2006, then the employer can move to the next step, the I-140. If the I-140 is approved on March 1, 2006, can the employer move to the third and final step, which is either the filing of the adjustment of status, or the preparation of documents in advance of scheduling an interview at a U.S. consulate abroad?

The answer: In some cases yes and in some cases no.

This is because of something known as the State Department backlog. According to the State Department, an alien may not apply for an adjustment of status nor be scheduled for an immigrant visa interview unless his visa category is either "current" (no backlog), or the backlog date is later than the alien's priority date. Each alien is assigned a category on the chart. For most professional workers for whom a green card through labor certification is sought, the relevant categories are "EB-2" and "EB-3". "EB-2's" are those workers whose jobs require them to have either a Master's or higher degree (or foreign equivalent), or at least a Bachelor's degree (or foreign equivalent) plus at least five (5) years of progressive professional experience before the current employment. "EB-3's" are those with at least two (2) years of training, but who commonly (but not always) have Bachelor's degrees (or foreign equivalent). Of the persons in these categories, separate categories have been created for persons born in India, China, the Philippines and Mexico, because of the high numbers of immigrants from these countries. Persons born in such countries are backlogged further than those born in the rest of the world.

To show how this works, here is the chart for December 2006:

	All Charge-ability Areas Except Those Listed	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
Employment - Based					
1st	C	C	C	C	C
2nd	C	22APR05	08JAN03	C	C
3rd	01AUG02	01AUG02	22APR01	08MAY01	01AUG02
Schedule A Workers	U	U	U	U	U
Other Workers	01OCT01	01OCT01	01OCT01	01OCT01	01OCT01
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
Iraqi & Afghani Translators	18SEP06	18SEP06	18SEP06	18SEP06	18SEP06
5th	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C

As you can see, our hypothetical professional employee whose PERM was filed on January 1, 2006, would be able to proceed to the third step, filing of adjustment of status, if her or she had a job which required a master's or Ph.D. degree and if he or she was not born in China or India. Otherwise, some backlog does apply, and the backlog can be very severe. For example, if the candidate was in a job that required a Bachelor of Science degree and two years of experience, and the candidate was from India, he or she would be backlogged back to April 22, 2001 – even with an approved I-140!!

These long delays create frustration in even the most patient employees, and are a constant source of stress to the human resources professional. Accordingly, there are a few things an employer can do to keep such employees reasonably happy.

Things an Employer Can Do

- When considering a green card for an employee, review his or her qualifications carefully, and the job's qualifications carefully, as a faster EB-2 case may be possible.

- Carefully manage expectations. This process takes a long time no matter what, and stories about "my friend who got his green card in two months, start to finish", while prevalent, are too hard to believe.

- For those whose pre-PERM standard (no prior recruitment) labor certification applications have been pending for years and are now part of the backlog at the Department of Labor's Backlog Reduction Centers, consider the preparation of an "RIR conversion" request, which can expedite labor certification approval and avoid you having to undertake recruitment activities supervised by DOL officers.

C. A Final Note: Western Hemisphere Travel Initiative

Please note that as of January 23, 2007, all travelers, ***including U.S. citizens*****,** arriving by air to the United States, from anywhere, including Canada, Mexico and the Caribbean, must have, in all but some unusual exceptions, a valid passport. Sometime before January 1, 2008, all arrivals by land and sea will also be required to carry valid passports.