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California Laws and Cases Bring New Challenges to Employers in 2007

by Diane M. O'Malley, Renju Jacob, John Adkisson, Molly Lee, Lanay Newsom, Tiffany Gomez

As expected, California employers are facing new laws and cases in the year 2007. Some of the more significant court cases and legislation are discussed in this newsletter. For more information on any of these topics, please speak with the attorneys listed in this newsletter or another Hanson Bridgett attorney with whom you work.

THE IMPORTANT COURT DECISIONS OF 2006

Reasonable employee standard applied to retaliation actions (Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006)

An issue that often arises in retaliation cases is: "what did the employer allegedly do that constituted actionable retaliation?" If the employee has been terminated, demoted, suspended or the employer took some other overt personnel action, the employer can focus its defense on explaining the legitimate business reasons for its personnel action. If, however, the employee alleges he or she was excluded from meetings, not invited to lunch or shunned by managers or co-workers, do these types of allegations constitute retaliation actionable against the employer? The courts have struggled with this issue. Some courts have established a standard that requires the employee to show that the employer took some type of personnel action that materially affected the employee's terms and conditions of employment. This is the standard established by the California court in *L'Oreal.* The federal courts, however, have adopted a different, more nebulous standard.

Following the U. S. Supreme Court's 2006 ruling making it easier for individuals to sue employers for retaliation under Title VII of the Civil Rights Act of 1964, federal courts began using a broad 'reasonable employee' standard in analyzing retaliation claims under other statutes. In *Burlington N. & Santa Fe Ry. Co. v. White,* 126 S. Ct. 2405 (2006), the Supreme Court resolved a split of opinion among the federal circuit courts concerning the legal standard for plaintiffs in such cases, holding that an "ultimate employment decision" or "materially adverse change in the terms and conditions of employment, such as a discharge, demotion, or loss of pay" is not required. Rather, the Court said the standard should be whether a "reasonable employee would have found the challenged action materially adverse," which turns on whether the employer's action "might have dissuaded a reasonable worker from making or supporting a charge or discrimination." This standard obviously will be more difficult to defend against in litigation.

Court finds FEHA permits a separate and independent claim for failure to prevent and investigate retaliation. (Taylor v. City of Los Angeles Department of Water and Power)

The issue of retaliation was also addressed on the state level. A recent Court of Appeal case expands the reach of the FEHA retaliation provisions and holds that, under the Fair Employment and Housing Act., an employee may maintain an action for an employer's failure to prevent and investigate retaliation. As noted above, in August 2006, the United States Supreme Court in *Burlington Northern & Santa Fe. Ry. Co. v. White* already broadened the prima facie case when it established a "deterrence" test, for retaliation cases under Title VII. This more lenient test expanded on the California Supreme Court's August 2005 ruling in *Yanowitz v. L'Oreal USA, Inc.,* which established a "materiality" test for actionable retaliatory employment actions under the Fair Employment and Housing Act. Under the "materiality" test, a retaliatory action must materially affect the terms and conditions of employment in order to be actionable.

In *Taylor,* the plaintiff supported another employee who filed a grievance for wrongful termination, ultimately leading to that employee's reinstatement. Taylor's supervisor, the same person

who terminated Taylor's co-employee: 1) stripped Taylor of his supervisory status; 2) replaced him with another employee in the organization chart; 3) accused him of false time reporting; 4) threatened to modify his 4/10 work schedule; and 5) selected another employee with weaker qualifications for another position. Taylor sued the Department and his supervisor for retaliation. The Court of Appeal made three important findings.

First, it held that Taylor sufficiently plead a cause of action under either the deterrence or materiality test. The conduct satisfied the materiality test because the supervisor's conduct changed the realities of Taylor's working environment and changed the terms and conditions of his employment. Moreover, the deterrence test was also met because the conduct would deter another employee from assisting a coworker who filed a grievance.

Second, the court additionally found that Government Code section 820.2 (discretionary immunity) did not apply because employment decisions such as promotions, training and providing job assignments are not the type of policy decision making that is entitled to immunity and that retaliation was a similar type of action.

Finally, analyzing the legislative history of FEHA, the court found retaliation to be a form of discrimination. As a result, the court finds that a cause of action for failure to prevent retaliation is available under Section 12940(k) of the Government Code.

Terminating employee after return from FMLA/CFRA leave (Neisendorf v. Levi Strauss & Co., No A109826 (Cal. Ct. App. Sept. 28, 2006)

A California court of appeal has confirmed that, with proper documentation, an employer may terminate an employee who has just returned from a protected leave. In *Neisendorf v. Levi Strauss & Co.* an employee with significant performance problems took medical leave under the California Family Rights Act ("CFRA"). After eight weeks of leave, her doctor approved her return to work, with a myriad of restrictions. After the employee refused to address her previous performance issues, however, she was terminated.

The employee sued for age, gender and disability discrimination, for retaliation for exercising her rights under CFRA, for violation of CFRA and for an unpaid bonus. The trial court dismissed her CFRA and unpaid bonus claims.

The employee appealed the Court's rulings on her CFRA claim and bonus claim contending that her employer Levi Strauss violated CFRA by refusing to return her to work and violated the Labor Code by failing to pay her bonus.

With respect to the CFRA claim, the appellate court found that Levi Strauss had a legitimate business reason for her termination—her major performance problems and her refusal to address them.

With respect to her wage claim for the unpaid bonus, the Court found that the employee was not entitled to the bonus because the bonus plan explicitly conditioned the payment of the bonus on continued employment.

Neisendorf demonstrates that, when an employer has thoroughly documented an employee's performance issues, it is not foreclosed from terminating that employee after the employee exercises his or her rights under CFRA. It also confirms that employees are not entitled to bonuses as a matter of right, and that employers may follow reasonable bonus plans, even if that results in forfeiture of a bonus on termination.

Court confirms employer ability to charge back commissions (Koehl v. Verio, Inc., No. A108972 (Cal. Ct. App. Sept. 13, 2006)

In another recent decision, a California appellate court confirmed that under a well-drafted plan, an employer may provide employees with an advance on commissions and may recover the advanced money if the deal ultimately fails and actual payment is not received from or refunded to the customer.

In Koehl, former sales associates at Verio, Inc. were paid a base salary plus commissions. Verio's compensation plan provided that commissions are paid when orders are booked, but that Verio can recover, or "charge back" commission advances, if certain conditions are not met. The commissioned employees sued, alleging that the commissions were wages, thus making the chargebacks unlawful under California Labor Code Section 221. Verio contended that the commissions were not wages, but advances on wages.

The Court agreed with Verio. When the employees book a sale and issue a service order, they receive an advance payment of

the anticipated commissions. They do not "earn" their commissions, however, until after the product is delivered to the customer, and the customer pays the employer several months later. Since Verio paid its employees the commissions before they were earned, it reserved the right to deduct the previously-paid amount if the customer decided to cancel the order at a later date. All of the commissioned employees had signed acknowledgments stating that they understood the plan. They all admitted that under the plan, they did not earn their commissions until the employer was paid by the customer.

The Court found that the compensation plan agreement was enforceable. Under California law, an employer can recover advances when there is an express agreement providing for charge backs. Commission plans and the determination of when commissions are "earned" are determined by reference to the commission agreement or contract. The Court found that Verio's commission plan was such a contract and the employees knew of its terms. Accordingly, the Court found that the plan was not unconscionable because there was no unfair surprise or oppression and that it properly established when commissions were earned.

Koehl confirms that under a well-drafted plan, an employer can provide employees with an advance on commissions, while retaining the right to recover the money if the deal ultimately fails.

Disability Discrimination and Workers Compensation:

1. Court confirms that employers can use light duty assignments without fear of those positions becoming permanent and confirms that employers are not required to create positions for disabled employees *(Raine v. City of Burbank)*

Raine v. City of Burbank is a welcomed case for employers. It involved a police officer who sustained a knee injury and, as a result, was assigned to a temporary position as light duty at the front desk. This position was a civilian position or one that was staffed by injured officers recovering from injury. After Raine was declared permanently disabled in the Worker's Compensation proceeding, he asked to keep the civilian position. However, he also asked that he retain the privileges, pay and benefits to which he was entitled as a sworn officer. The City of Burbank refused, although it did offer him the position as a civilian. The City argued that to allow Raine to continue to enjoy sworn officer benefits would result in a reclassification of the front desk position and thus—the creation of a new position which it was not required to do under the law. The court agreed.

It held that the duty to provide reasonable accommodation for a disabled employee does not obligate the employer to convert a temporary light-duty position into a permanent one, especially when doing so would have the effect of creating a new position.

The implied holding in this case is a good one for employers. The City of Burbank Police Department allowed Raine to remain in that position for six years. Ordinarily, employers would be concerned that such a long period of time would render it impossible to argue later that they could not accommodate the individual. However, the court appears not to hold the time period against the City.

2. Court confirms that employers must engage in interactive process with employees when they claim they can perform the job and cannot rely merely on workers compensation reports to deny employment (*Gelfo v. Lockheed Martin*)

The *Gelfo* case demonstrates how California disability discrimination law interacts, and perhaps, trump, the Workers Compensation process. *Gelfo* involved a metal fitter who had a back injury, filed a Worker's Compensation claim and was ultimately given a permanent disability rating for which he received benefits. His rating resulted in a work restriction of no repetitive lifting over 50 pounds. Lockheed laid off Gelfo but rehired him and trained him as a fabricator. It offered, but revoked a fabricator job offer, based on the medical restriction imposed by the qualified medical examiner in his Workers' Compensation case. Gelfo claimed that he could do the fabricator job. The Court made a number of troubling findings. It found that Gelfo was not disabled but that Lockheed regarded him as disabled. Lockheed regarded Gelfo as disabled when it denied him the fabricator position. It found that Lockheed should have tried to reasonably accommodate Gelfo in that position or engage in the interactive process even though he wasn't disabled.

In ruling so, the Court departed from the 9th Circuit decision in *Kaplan v. City of North Las Vegas,* and held that individual who is regarded as disabled is entitled to reasonable accommodation under the law and thus the employer must engage

in an interactive process with that employee. The court faulted Lockheed for relying upon, what the court viewed as, an outdated medical opinion in the workers compensation case. It states that an employer must conduct an independent evaluation of the individual's ability to perform. What is the scope of that evaluation remains questionable. The court made it quite clear that employers rely upon workers compensation reports at their own risk.

❑❑ THE 2006 CALIFORNIA LEGISLATIVE ACTIVITY

New Employer Costs of Doing Business in San Francisco

1. Health Care

On July 20, 2006 the San Francisco Board of Supervisors passed the San Francisco Health Care Security Ordinance. This historic legislation creates a Health Access Program and offers comprehensive healthcare services.

Under the Ordinance, which becomes effective on July 1, 2007 for employers with over 50 employees and on March 31, 2008 for employers with 20 to 49 employees, businesses that are required to obtain a San Francisco business registration certificate from the San Francisco Tax Collector's office, must spend a minimum amount per employee per hour on health care for their employees. Large companies (defined as 100 or more workers) will initially be required to spend a minimum of $1.60 per hour per employee on health care services. Medium-sized companies (defined as 20 to 99 employees) will be required to spend a minimum of $1.06 per hour per employee on health care services. These amounts will increase each year.

- *Is every San Francisco Employer covered?*

No. Small companies (fewer than 20 employees) are exempt. Non-profit organizations with fewer than 50 employees are also exempt, as are non-profit job training programs. Public agencies are also not covered.

- *For what are San Francisco Employers required to spend money?*

The Ordinance requires that an employer make a health care expenditure to its covered employees or to a third party on behalf of its covered employees for the purpose of providing health care services or reimbursing the cost of such services. The Ordinance provides examples such as 1) contributions by the employer to a health savings account, 2) reimbursement for expenses incurred in the purchase of health care services, 3) payments to a third party for the purposes of providing health care services, or 4) payments to the City to fund the Health Access Program for uninsured San Francisco residents.

The Ordinance requires that a covered employer make the required health care expenditure to or on behalf of their covered employees each quarter, maintain records and proof of minimum quarterly health care expenditure payments and permit inspection of and access of information regarding covered employers' health care expenditures. If an employer does not maintain adequate records documenting the health expenditures made, it is presumed the employer did not make the required health care expenditures for the quarter which the records are lacking.

- *Which employees does it cover?*

San Francisco employers will have to meet the spending requirements for all workers, except for managerial, supervisor, and confidential employees who earn over $72,450 per year. Employees who are eligible for Medicare and/or veterans' benefits are not covered.

To be covered, an employee must have performed work for compensation for his/her employer for ninety days and performed a minimum number of hours of work each week. The minimum hours' requirement is phased in: during 2007 a worker must work 12 hours per week; during 2008, a worker must work 10 hours a week; and from 2009 on, a worker must work 8 hours. While many employers offer health care benefits to full-time employees, under the Ordinance, employers may now have to make health care expenditures on behalf of part-time, seasonal, and temporary employees.

- *Legal Challenges to the Ordinance*

The Golden Gate Restaurant Association has filed a lawsuit questioning the enforceability of the required employer health care expenditures and the additional administrative requirements, including maintaining records regarding the payments made. The basis of the complaint is that required health care expenditures and record requirements conflict with federal law and are therefore unenforceable. The

complaint seeks declaratory judgment and a permanent injunction. If the case is not resolved by March 2008, the Golden Gate Restaurant Association plans to seek a temporary restraining order preventing the implementation of the Ordinance.

In other states, challenges to similar laws have been successful. In February 2007, the Fourth Circuit in *Retail Industry Association v. Fielder* struck down Maryland's attempt to require employers with 10,000 or more employees to provides health coverage that equaled 8% of its payroll costs. The fourth circuit held that that the law violated ERISA's preemption clause by effectively mandating the structure of health benefits to meet the ERISA's minimum spending threshold. The Fourth Circuit also noted that other states and local governments have adopted or are considering similar laws, so the Maryland law would require the large employers to tailor health plans to each state—a result that ERISA specifically is designed to avoid.

- *What does this mean for a San Francisco Employer?*

While the outcome of the litigation is pending, San Francisco employers should review their health care benefits and assess whether their offered health care benefits will satisfy the Ordinance requirements for full-time, part-time, seasonal, and temporary employees.

Employers using temporary staffing agency workers in San Francisco should require the agency to comply with the ordinance as to workers dispatched to the employer, and review the terms of the agency contract to minimize risk. In addition, such employers should analyze their usage patterns to determine whether risk could be reduced in other ways.

More information on the San Francisco Health Care Security Ordinance is available at www.sfhp.org.

2. San Francisco "Sick Leave Ordinance": Covered employers without a paid sick leave policy will need to develop one and employers with sick leave polices will need to review them to assure compliance.

On November 7, 2006 San Francisco voters passed Proposition F, which mandates paid sick leave entitlements for employees working in San Francisco.

- *When does the law become effective?*

The law became effective on February 5, 2007. What does this mean? For employees hired on or before February 5, 2007, they begin to accrue sick leave immediately. Newly hired employees starting after February 5, 2007 do not begin to accrue paid sick leave until after an initial 90-day waiting period of employment. The advantage of this initial 90-day waiting period is that it allows employers to withhold paid sick leave from short-term temporary employees, including those retained through a temporary personnel agency.

A transition period for the Ordinance has been proposed. The Board of Supervisors voted to adopt the transition period legislation at its meeting on February 13. The transition period would delay the implementation and imposition of administrative penalties ninety (90) days to give employers an opportunity to put procedures in place. Employers would not have to pay out sick leave until the delayed implementation date. The ordinance would still require businesses to track and account for the amount of sick leave accrued by their workers. The matter will go before the Board again and then to the mayor. It is expected that the mayor will sign the transition legislation.

- *Who does it cover?*

On its face, the ordinance apples to employees, defined as "any person who is employed within the geographic boundaries of the City by an employer." An "employer" in turn is defined in accordance with Labor Code Section 18, which is the Labor Code's definition of a "person" and includes "any person, association, organization, partnership, business trust, limited liability company, or corporation." Local government does not appear to fall within this definition and thus the New Ordinance does not apply to public agencies. The employer does not have to be located in San Francisco.

- *What is the Sick Leave Benefit?*

An employee accrues one hour of paid sick leave for every 30 hours worked, with accrual occurring only in full-hour increments. An employee may accrue sick leave up to a cap of 72 hours, at which point accrual stops until the employee uses some sick leave. Employees of a "small business" can accrue up to 40 hours of unused sick leave. Small businesses are defined

as an employer "for which fewer than ten persons work for compensation during a given week," including part-time and temporary employees and persons hired through a temporary services or staffing agency.

Accrued unused paid leave carries over from year to year up to the maximum leave limits. This is a change for many employers. However, employers are not required to pay out accrued unused paid sick leave to a terminating employee.

The "Sick Leave Ordinance," also expands existing state law "kin care" requirements so that covered employees must be permitted to use paid sick leave to care for siblings, grandparents, grandchildren and a "designated person" of the employee's choice. Employees must be permitted to use any or all accrued paid sick leave for such kin care, while state law requires that only half of an employee's accrued sick leave could be used for that purpose.

The "designated person" category is undefined and can include anyone. Thus, for example, employees can now take sick leave to care for a neighbor. Once an employee has completed the first 30-hour accrual period (i.e., 30 hours of work after the 90-day waiting period has elapsed) the employee has 10 work days to identify the "designated person" for whom the employee will use the paid sick leave benefit. Thereafter, the employer must annually provide another 10-work day window of opportunity to make such a designation or to change a previous designation.

In preparation for the new law's effective date, employers should review sick leave and paid time off policies. Employers who currently have a paid sick leave policy will need to ensure that adequate paid leave is provided and that it is not lost each year.

- *Should an employer adopt a paid time off policy?*

Under California law, if an employer combines vacation and sick leave into one Paid Time Off policy, the employer would have to cash out any accrued, but unused, paid time off when an employee terminates his or he employment. Currently, sick leave does not have to be paid out upon terminating employment. This additional financial burden should be kept in mind before employers adopt such a policy.

The new San Francisco health care and the sick leave laws add to an already financially burdensome environment for employers with employees based in San Francisco. Many questions remain to be answered for the sick leave ordinance, such as—how should an employer calculate sick leave for exempt employees? How does a small employer determine if it is covered—what week does it use? As one would expect, the ordinance prohibits an absence control policy that counts paid sick leave taken as an absence that may lead to discipline. What impact, then, does this have on an attendance control policy? Given the other protected absences, are attendance policies a thing of the past?

Special AB 1825 Training Alert!

Two very important changes to California's mandatory harassment training law occurred this year. First, AB 2095 clarified that out of state supervisors are exempt from mandatory training. Second, the new training regulations adopted by the Fair Employment and Housing Commission were "disapproved" by the State Office of Administrative Law (OAL) on January 30, 2007. The OAL found that the regulations were so "ambiguous" that the meaning of so-called "qualified trainers" **could** include trainers unable to teach the subjects or answer questions about the statute's required. The ruling will narrow the types of "experts" that can be used, and will challenge the entire notion of "on-line training, since no expert teachers are involved in widely used on-line seminars. Watch our website for more to come on this late development.

Minimum Wage Increases (AB 1835)

State

Assembly Bill 1835 raises the existing minimum wage rate over a two-year period from the current $6.75 per hour is now $7.50 per hour as of January 1, 2007. On January 1, 2008, the rate will be increased to $8.00 per hour.

Employers should keep in mind that any increases in the State minimum wage increases the minimum "salary basis" requirement for some classifications of employees exempt from overtime, such as the administrative and executive exemptions, in California's Labor Code.

San Francisco

Not to be outdone by the state, starting January 1, 2007, San Francisco's minimum wage increased by 3.6%. The minimum wage of $8.82 per hour was adjusted to $9.14 effective

January 1, 2007. San Francisco's Minimum Wage Ordinance mandates an annual rate adjustments based on the previous year's Consumer Price Index for urban wage earners in the San Francisco-Oakland-San Jose metropolitan area.

❑ ❑ 2006 FEDERAL LEGISLATION

New E-Discovery Rules Reshape Employer Responsibilities for Documentation

Effective on December 1, 2006 revisions to the Federal Rules of Civil Procedure (FRCP) broadly changed the parties' responsibilities to preserve, collect, and produce electronically stored information during discovery. "ESI" (the new "buzz word" for "electronically stored information")

Although these rules do not expressly apply to state courts, it is expected that over time state courts will also use these rules to guide their procedures. Employers involved in litigation have had to act quickly to understand the revised rules and to structure their electronic data storage systems so that they can comply and avoid sanctions.

Preservation of ESI

While the rules apply to parties once they have filed, or been served with, a federal court complaint, if a party waits until then to comply with the revised FRCP requirements, it may be too late. Although a duty to preserve discoverable information has long been established in case law, this is the first time the FRCP expressly requires "preserving discoverable information," and the first time that the obligation is extended to ESI (Revised FRCP 26(f)). If the party has not already established procedures for preserving potentially discoverable ESI by the time it is involved in a federal court action, it may be too difficult to put such procedures into place on short notice.

The obligation to preserve documents is fairly straight forward when it comes to paper documents (e.g., the parties set aside the file folders that include correspondence and memos regarding the subject of the lawsuit), but preserving ESI is much more complicated. To help clients preserve their ESI, outside counsel must coordinate with not only the legal department, but also now with the information technology (IT) department. Unfortunately, the IT department's goals—to prevent systems from crashing due to excess data—may not mesh with and, in some cases will be inconsistent with, the legal department's goals of preserving ESI.

If a court determines that there was a failure to preserve or produce relevant ESI, sanctions could be imposed, including fines, evidence exclusion, striking claims or defenses, shifting the burden of proof, adverse jury instructions, etc. These consequences could be serious. For example, if evidence excluded related to a key issue, such as the date of a company's first use of its mark, the judge's sanction could have a critical impact on the party's ability to prove it has prior use of the mark.

"Safe Harbor"

Fortunately, the revised FRCP rules include a "safe harbor" provision. FRCP 37(f) states that "[a]bsent exceptional circumstances a court may not impose sanctions under these rules on a party" where a party has lost ESI "as a result of routine, good-faith operation of any electronic information system." Companies should make sure they have "routine and good faith electronic system operations" before they become involved in a federal court action. It will still be some time, however, before the courts will determine exactly what is meant by the terms "routine" and "good faith operation." Also, while the court might not impose sanctions "under these rules," it can still use its inherent powers to impose sanctions (See Committee Note to Revised FRCP 37).

Because of the comprehensive nature of these new ESI requirements and the potential risk for non-compliance, all employers should review their data systems to make sure that compliance will be possible.

❑ ❑ WHAT'S IN STORE FOR 2008?

California's ban on cell phone use in vehicles

For employers who have a significant workforce of employees who use employer issued cars and who frequently use cell phones, beginning in July 2008 it will be illegal to drive and use a cellular telephone unless that phone is hands free. Some exceptions of course apply—for example emergency situations—and some classifications of employees are exempt—for example emergency service personnel. Employers should review their cell phone polices as they may need updating to

reflect this new law. Property maintenance problems must also be addressed for vehicles that an employer wants to maintain in its current fleet but which will not be in compliance with the law.

We will be following up to give the specifics of this law in the near future. In the meantime, the Office of Labor Standards Enforcement (OLSE) posted a list of frequently asked questions about the Ordinance. The website is http://www.sfgov.org/site/olse

U.S. Supreme Court takes on public sector union dues case: Davenport v. Washington Education Assn.

On September 26, 2006, the U.S. Supreme Court accepted review in *Davenport, et al. v. Washington Education Association* (No. 05-1589) and *Washington v. Washington Education Association* (No. 05-1657) cases wherein the Supreme Court will decide whether public sector unions can use agency fees deducted from nonmember paychecks for political activity; and whether a law that would require the union to obtain the nonmembers' consent before using that money is constitutional. The Supreme Court's answer to the first question could affect the way unions fund political campaigns and other activities.

Davenport and *Washington* stem from a Washington law enacted in 1992 (RCW 42.17.768) that requires unions to obtain each employee's authorization in order to use union fees for political purposes. In essence, Washington has adopted an option mechanism by which agency employees must affirmatively consent to the union's use of their fees for political purposes.

Here, the WEA provides a process established by *Chicago Teachers Union v. Hudson,* 425 U.S. 292 (1986) by which the union rebates to dissenting non-members' amounts for non-chargeable activities. Twice a year the WEA sends a "Hudson packet" to each nonmember. The Hudson packet includes a letter notifying the employee of his or her right to object to paying fees for non-chargeable expenses. The packet gives the nonmember three choices: (1) pay agency shop fees equivalent to 100% of dues; (2) object to paying 100% and receive a rebate of non-chargeable expenditures, by calculated to WEA; or (3) object to paying 100% and challenge WEA calculations of non-chargeable expenditures.

The state filed suit contending that the plain language of the statute made clear that each individual nonmember must provide actual consent and that failure to respond to the Hudson packet did not constitute consent. WEA argued, however, that the Hudson process satisfied the requirement of affirmative authorization because it provided each individual nonmember the opportunity to object, to obtain a refund, and to prevent fees from being used by the WEA for political purposes.

Upholding the decisions of the Court of Appeals in each case, the Supreme Court of *Washington* held that the statute's opt-in procedure was not narrowly tailored and therefore unconstitutional. Specifically, the court found that the statute imposed an "extremely costly" administrative burden on the union and specifically burdened the union's right of expressive association. The court also noted that if protection of dissenters' rights was a compelling state interest, the opt-out procedure was a less restrictive constitutionally permissible alternative.

It is unclear how the United States Supreme Court will decide this issue. However, there are concerns that a ruling upholding the decision could open the door for unions to attempt to roll back established limits on the use of union dues. On the other hand, if the Court overturns the *Washington* Supreme Court's decision, there is no doubt that unions across the country will suffer a major financial blow. It is likely true that no matter which way the Supreme Court rules there will certainly be changes in the designated used for union fees.

We will be watching for a decision in this case.

HANSON BRIDGETT MARCUS VLAHOS RUDY·LLP

More Information

If you would like to pursue the subject of this newsletter or other labor and employment matters, please contact Diane O'Malley (415-995-5045, domalley@hansonbridgett.com) or any Hanson Bridgett attorney with whom you have an existing relationship.