Wednesday, October 27
11:00am-12:30pm

1005 - Employment Law Update

Dani Gleason
Staff Attorney
BMC Software, Inc.

William Harn
Senior Attorney
Southern California Edison

Kevin Mencke
Senior Counsel - Employment/Labor
International Paper Company

Session 1005

Faculty Biographies

Dani Gleason

Dani Sanchez-Gleason is a labor and employment attorney for BMC Software Inc., headquartered in Houston, Texas. Her responsibilities include providing guidance on employment issues, including disability and religious accommodations, wage and hour matters, FMLA leave, reductions in force, performance management, contingent workers, immigration matters, hiring practices, and OFCCP compliance. Additionally, she is responsible for managing employment and bankruptcy litigation, drafting employment policies and handling administrative agency issues, such as EEOC charges, federal/state wage claims, and employment related agency inquiries.

Prior to joining BMC Software, Ms. Gleason belonged to the Labor & Employment group of Jones Day in Houston. While at Jones Day, she worked solely on labor and employment issues and litigation. She was actively involved in the firm's diversity committee, recruiting committee, and its pro-bono programs.

Ms. Gleason is an active member of the Houston Bar Association, including the Minority Opportunities in the Legal Profession Committee, which provides clerkships to Minority 1L law students from the Houston law schools. She also developed the curriculum for the Jr. JD Program, a semester long class on education law taught to middle school students in low-income schools.

Ms. Gleason received her BA from the University of Michigan-Ann Arbor, her teaching certification from The University of St. Thomas and graduated from the University of Texas, School of Law.

William Harn

William Harn is a senior attorney for Southern California Edison Company, an investor owned electrical utility company. He has specialized in representing SCE and other employers on employment and labor matters, actively litigating cases through jury trial and appeal in both state and federal courts. He has handled over 30 labor arbitrations, appeared in regulatory proceedings before the California Public Utilities Commission, and on a daily basis, provides practical legal advice and solutions to client organizations on a broad panoply of employment, labor and benefits matters.

Mr. Harn is a former chair of ACC's Employment and Labor Law Committee and immediate past -Chair for ACC's Council of Committees. Mr. Harn has been a past ACC and ACCA SoCal presenter or panelist on several employment law subjects including workplace privacy, leave and disability management, wage and hour law, legal intern programs, contingent workers, and the elimination of bias within the legal profession.

Mr. Harn has been actively involved with both SCE and ACCA So-Cal Streetlaw programs. He also provides volunteer service to the Los Angeles County Superior Court as a volunteer mediator and temporary judge. He also is the immediate past president of the Pacific McGeorge Alumni Association.

Mr. Harn received his JD from the University of the Pacific McGeorge School of Law.

Kevin Mencke

Kevin J. Mencke is chief counsel--employment and labor law with International Paper Company located at its Global Headquarters in Memphis, TN. Mr. Mencke is responsible for providing labor and employment law advice and counsel to human resources and management for IP's Printing and Communications, Food Service and Coated Paperboard businesses and related corporate staff.

Before joining International Paper, Mr. Mencke was an attorney in the Atlanta office of the national labor and employment law firm of Ford & Harrison, LLP. At Ford & Harrison, Mr. Mencke was an employment law litigator who concentrated his practice representing and advising company management on all aspects of labor and employment law, including discrimination and harassment under Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act and other Wage-Hour laws, and other related labor employment laws.

Mr. Mencke has been active with the ACC Employment and Labor Law Committee serving as committee secretary and currently as vice chair for the year. Mr. Mencke has been a presenter on employment law matters for several legal and HR related organizations, including the ACC, ABA, and SHRM. He is also a co-editor/author of the Wage and Hour Answer Book by Aspen publishers.

Mr. Mencke earned his undergraduate degree from Emory University and his law degree (with honors) from the University of Georgia School of Law.

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Labor & Employment Law Update 2010

Kevin Mencke
International Paper Company

William Harn
Southern California Edison Company

Dani Sanchez-Gleason
BMC Software, Inc.

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SUPREME COURT Decisions

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Supreme Court - Privacy

- *City of Ontario, CA v. Quon*, No 08-1332 ___S.C.___, (June 17, 2010).
  - Ontario Police Department (OPD) provided pagers to its employees, including Quon
  - SC assumed without deciding that Quon had a reasonable expectation of privacy in the text messages
    - OPD had a policy limiting any expectation of privacy when using the pagers
    - Management told Quon an audit of his text messages would be unnecessary if he paid the overage
  - **Held: Satisfying the 4th Amendment, OPD's warrantless search was reasonable because**
    - Justified at its inception: there are reasonable grounds for suspecting the search was necessary for a non-investigatory work-related purpose or investigation for work-related misconduct— Determine reason for overages
    - Measures adopted are reasonably related to the objectives of the search and not excessively intrusive under the circumstances— Reviewed 2 months and redacted off-dity hours texts
  - SC noted "the search would be regarded as reasonable and normal in the private-employer context"

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Supreme Court - Disparate Impact: SoL

- *Lewis v. City of Chicago*, No 08-974 ___S.C.___, (May 24, 2010).
  - Written examination given to applicants for firefighter positions
  - Based on score, applicants were categorized as "not qualified" (below 65), "qualified" (66 to 88) or "well qualified" (89 to 100)
  - Decision to hire "well qualified" applicants with "qualified" applicants put on eligibility list
  - The City stipulated that the cutoff score for well qualified had a "severe disparate impact against African Americans"
  - Title VII prohibits the "use" of an "employment practice" that causes a disparate impact on the basis of race
  - The decision to have cutoff score for "well qualified" applicants who would be hired occurred outside the 300-day SOL for filing an EEOC charge
  - However, the application of that decision (which was applied each time the City hired firefighters for a six year period) occurred within the 300-day SOL and is considered timely
  - **Holding: Plaintiffs may challenge the application of an employment practice with an alleged disparate impact on protected employees even if they have not timely challenged the adoption of that practice.**

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Supreme Court- Collective Bargaining Agreements

- ***Granite Rock Co. v. International Brotherhood of Teamsters* ___*SC*_____(June 24, 2010).**
- Suit under § 301 of the Labor-Management Relations Act (LMRA)
- Supreme Court ruled that courts, not arbitrators, must decide when a collective bargaining agreement was ratified where that issue raises a question of contract formation.
- Court also declined to recognize a cause of action under § 301 for tortious interference with a collective bargaining agreement.

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Supreme Court- NLRB

- ***New Process Steel, L.P. v. National Labor Relations Board* ____*SC*_____(June 17, 2010).**
- Supreme Court resolved circuit split
- Invalidated almost 600 decisions issued by the two member National Labor Relations Board (NLRB) during the 27-month period from December 2007 through March 2010
- Holding in a 5-4 decision that the NLRB is only empowered to decide cases when it has at least three sitting members
- NRLB added to its website (http://www.nlrb.gov) a database of information and documents on all approximately 600 cases

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Supreme Court-Arbitration Agreements

- ***Rent-A-Center, West, Inc. v. Jackson*** **___SC____ (June 21, 2010).**
- In this case, the Supreme Court held that where an employment contract delegates to an arbitrator the authority to decide whether the contract is enforceable, that delegation provision should be enforced unless an employee's challenge is directed specifically at that delegation provision, rather than the contract as a whole.

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Other Arbitration Agreement Cases

- *Ragone v. Atlantic Video at the Manhattan Ctr.,* 595 F.3d 115 (2d Cir. 2010) Holding that an arbitration agreement, as modified by the defendants' waivers of certain provisions, was enforceable. Modifications included a limitations provision mandating that the employee make a demand for arbitration within 90 days after her claim arose; a fee-shifting provision which required that attorneys' fees be awarded to the prevailing party; and a clause which forbade any appeal of the arbitrator's decision.
- *Brady v. Williams Capital Group, LP*, 14 NY 3d 459, 902 NYS 2d 1 (2010) Ruling that the terms of the parties' arbitration agreement – requiring the splitting of the arbitrator's compensation – prevailed over the AAA's 'employer pays' rule, basing this ruling on the principles that arbitration is a creature of contract .

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FEDERAL AGENCIES & REGULATIONS

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DOL & IRS Initiatives

- US DOL – Plan/Prevent/Protect Regulatory & Enforcement Strategy
  - DOL's 2011-2016 Strategic Plan - Shift burden to employer to comply, not with DOL to catch them violating – require employers to self audit and report
  - Aggressive Enforcement
    - Emphasize corporate-wide or enterprise-wide enforcement to stretch DOL limited resources
    - Collaborate with other DOL, Federal, state and local agencies
    - Impose deterrent penalties, including aggressive pursuit of criminal prosecution
  - OFCCP
    - Increased resolution of compensation discrimination, greater emphasis on enforcement
    - Focus on Misclassification as Independent Contractors
      - Will require federal contractors to conduct legal classification analysis and notify workers of their employment status
  - Wage Hour Division & IRS
    - Partner with IRS to prosecute Independent Contractor Misclassification
    - IRS announced plan to audit 6,000 employers – started February 2010
    - Focus on "high risk" industries – agricultural, janitorial, construction, hotel, transportation and warehousing, home health care, child care, meat and poultry processing, etc.

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OFCCP

- Executive Order 13496
  - Posting Obligations effective June 21, 2010
  - Posting informs employees of right to form a union
  - Must physically post and post electronically if you "customarily" post notices electronically
  - Applies to federal contractors who enter contracts after June 21st of > $100K or subcontracts > $10K
- EO Survey likely to be reinstated
  - Either as part of the Paycheck Fairness Act or independently
- *OFCCP v. Frito-Lay, Inc.*, No. 2010-OFC-00002 (July 23, 2010)
  - OFCCP issued Scheduling Letter in 2007; later asked for data from 2008 and 2009
  - ALJ held the regulations do not provide for broad power to extend the desk audit phase to dates beyond the Scheduling Letter
- Moved away from focus on systemic cases to emphasize "full compliance"

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EEOC Initiatives

- New responsibilities– enforcement of:
  - GINA
  - Lilly Ledbetter Act
  - ADAAA (Three cases filed by EEOC in Sept. 2010)
  - Gender Identify for Federal Employees
- FY2010, funding increased by $23 Million
  - Plans to hire 100 additional investigators
- Continuing strategy to focus on race discrimination and cases alleging systemic discrimination

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EEOC – High Profile Settlements

In the past year, at least fourteen settlements or judgments >$1M:

- Lawry's Restaurants, Inc.– $1M settlement for sex bias against men in hiring (Nov. 2009)
- Albertsons, LLC– $8.9M settlement of 3 cases alleging race, color and national origin discrimination/retaliation, 2 alleging a pattern & practice (Dec. 2009)
- Allstate Ins. Co.– $4.5M settlement for failure to hire ADEA disparate impact case (Dec. 2009)
- Outback Steakhouse– $19M for "glass ceiling" for women case (Dec. 2009)
- Sears, Roebuck & Co.– $6.2M for ADA failure to accommodate based on inflexible leave policy (Feb. 2010)
- Walmart– $11.7M for failure to hire sex discrimination suit, as well as placing 50 class members into the first 50 warehouse positions that become available (March 2010)
- Kentucky Fried Chicken, Inc.– $1M for sexual harassment ,against 19 female employees, including 3 teenage victims (April 2010)
- ABM Indust. – $5.8M for sexual harassment against 21 female employees (Sept. 2010)

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EEOC – Total Charge Statistics

	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Total Charges	75,428	75,768	82,792	95,402	93,277
	26,740	27,238	30,510	33,937	33,579
Race	35.5%	35.9%	37.0%	35.6%	36.0%
	23,094	23,247	24,826	28,372	28,028
Sex	30.6%	30.7%	30.1%	29.7%	30.0%
	8,035	8,327	9,396	10,601	11,134
National Origin	10.7%	11.0%	11.4%	11.1%	11.9%
	2,340	2,541	2,880	3,273	3,386
Religion	3.1%	3.4%	3.5%	3.4%	3.6%
	22,278	22,555	26,663	32,690	33,613
Retaliation - All Statutes	29.5%	29.8%	32.3%	34.3%	36.0%
	19,429	19,560	23,371	28,698	28,948
Retaliation - Title VII only	25.8%	25.8%	28.3%	30.1%	31.0%
	16,585	16,548	19,103	24,582	22,778
Age	22.0%	21.8%	23.2%	25.8%	24.4%
	14,893	15,575	17,734	19,453	21,451
Disability	19.7%	20.6%	21.4%	20.4%	23.0%
	970	861	818	954	942
Equal Pay Act	1.3%	1.1%	1.0%	1.0%	1.0%

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EEOC – Suits Filed Statistics

	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
All Suits Filed	416	403	362	325	314
Merits Suits	381	371	336	290	281
Suits with Title VII Claims	295	294	268	224	188
Suits with ADA Claims	49	42	46	37	76
Suits with ADEA Claims	44	50	32	38	24
Suits with EPA Claims	13	10	7	0	2
Suits filed under multiple statutes	17	22	16	9	9
Subpoena and Preliminary Relief Actions	35	32	26	35	33

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USCIS -- Immigration Issues

- July 22, 2010 – new ICE rules re electronic storage and maintenance of I-9 data
  - Electronic tracking systems must be auditable and must be able to issue receipt to EE upon request
  - Don't commingle with regular employment records as they are auditable – privacy risks
  - Complete no later than three business days *after* employee first begins to work for pay to process I-9 and E-Verify
  - Longer limits are applicable to federal contractors
- Sept. 15, 2010 – Notice of Inspections served to 500+ businesses nationwide

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Genetic Information Nondiscrimination Act

- Key Issue --Employee Wellness Programs At Risk?
  - Whether employers can offer incentives for "voluntary" health risk assessments
  - Still awaiting EEOC Final GINA Regs for Title II
- GINA – signed into law May 21, 2008
  - Title I – prohibits health insurance genetic discrimination – effective May 2009
    - Cannot increase premiums based solely on genetic information
    - Cannot require genetic testing of participants
    - Cannot request, require, or purchase genetic info for underwriting
  - Title II – prohibits genetic discrimination in employment – effective Nov 2009
- GINA Title I Joint Interim Final Regs – Effective Dec 7, 2009
  - DOL – EBSA, IRS, and DHS – Centers for Medicare and Medicaid Services
- GINA Title II EEOC Proposed Regs – Issued March 2009
  - Still pending – recent full EEOC Commission appointed – reviewing – this year?

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Executive Compensation

- DOD-GSA interim rule requires disclosure of compensation of five most highly compensated employees where 80% of revenue is from federal awards which in the aggregate exceed $25MM.
  - Must report and publicly disclose contract awards in excess of $550k as of Oct. 2010 and in excess of $25k as of March 2011

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PENDING LEGISLATION

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Pending Legislation

- Paycheck Fairness Act– would require employers to demonstrate a "bona fide factor" other than gender, such as education or experience that justifies a difference in pay between men and women who perform the same job
- Employee Misclassification Prevention Act– aims to prevent misclassification of non-employees, requires employers to maintain documentation on all non-employees who perform services for payment; provides significant penalties for employers
- Healthy Families Act & Paid Vacation Act– would require employers to provide employees with minimum paid sick time and vacation leave
- Automatic IRA Act of 2010– employers who are >2yrs old with 10+ employees must establish automatic IRA for employees >18yrs old with 3+months of service; default 3% of pay contribution; affirmative opt out
- Direct Care Workforce Empowerment Act– would require minimum wage and OT for all in-home care workers who work more than 20 hrs/week
- Protecting Older Workers Against Discrimination Act – adopts "motivating factor" as the standard of proof for any federal discrimination/retaliation law

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Medical Marijuana – A Growing Issue

- State by State Issue: (But no need to accommodate use or allow under influence at work)
  - -13 states + DC have laws that legalize medical marijuana – "compassionate use"
    - – (AK, CA, CO, DC, HI, ME, MI, MT, NV, NJ, NM, OR, RI, VT)
  - -2 states (AZ, MD) have laws favorable towards medical marijuana
  - -8 states with pending legislation to legalize marijuana (AZ, IL, MA, NY, NC, OH, PA, SD)
- US Supreme Court 2005 – State med marijuana laws not trump federal law, but--
- Obama AG Memo 10/2009 "Hands Off"- not use resources to prosecute med marij distribution
- *Casias v. Wal-Mart* – Pending challenge to termination under Nov 2008 Michigan Law
- All state court decisions so far rule for employers:
  - Ross v. Ragingwire (CA S.Ct. 2008) – employer has no legal obligation to accommodate use of marijuana in violation of drug free workplace policy.
  - *Roe v. Teletech Customer Care Management* (Wash App. Ct.) – state's compassionate use law contains no employment protections.
  - *Emerald Steel Fabricators v. Bureau of Labor and Industry (*OR S. Ct. 2010) – Even though state law permits med marijuana use, drug is still illegal under fed law; therefore, employees who use med marijuana still excluded by "illegal drug use" exceptions to state and fed disability discrimination laws.
  - *Washburn v. Columbia Forest Products, Inc.* (OR S. Ct. 2006) – Plt. was not disabled under OR disability discrimination law, therefore not entitled to accommodation

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FEDERAL DISCRMINATION LAWS

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Americans with Disabilities Act (ADA)

- Reassignment as Reasonable Accommodation: *Duvall v. Georgia-Pacific Consumer Products, L.P.*, (10th Cir. July 2010)
  - Held: Employer not obligated to reassign a disabled employee to a position currently filled by a temporary worker as a reasonable accommodation because such positions are not considered vacant for purposes of the ADA.
  - A position is considered vacant under ADA only "if it would be available for a similarly-situated non-disabled employee to apply for and obtain."
- Fitness For Duty: *Brownfield v. City of Yakima* (9th Cir. July 27, 2010)
  - Held: Employer can order a "preemptive" fitness for duty examination when faced with "significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job."
  - Court also warned against overuse of such examinations:
    - "an employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can perform job-related functions."

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ADA--Neutral Absence Policies

- Automatically terminate employment following a specified number of absences (i.e. 180 days) regardless of the reason for such absence
- EEOC's ADA Enforcement Guidance says modifying workplace policies, including these policies, is a reasonable accommodation.
- EEOC has challenged such policies across industries
  - $6.2M settlement against Sears Roebuck & Co. (see slide 13)
  - JP Morgan Chase & Co.– $2.2M settlement re: 6 month maximum leave policy
  - UPS– maximum 12 month medical leave policy
  - Supervalu, Inc./Jewel-Osco– one year leave maximum
  - IPC Print Services– maximum hours leave policy
- FMLA regulations also address neutral absence policies 29 C.F.R. §825.220(c)

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Age Discrimination

- *Schoonmaker v. Spectrum Graphics Leasing, LLC*, 2010 US App. Lexis 2288 (6th Cir. 2010)
  - EE claimed she and another EE over 50 RIF'd in favor of 29 yr. old
  - Summary Judgment Affirmed: Mere age difference between retained and released employees, without more, is not sufficient evidence of age discrimination in a RIF case; EE must show additional evidence that s/he was singled out due to age, (e.g. discriminatory comments, evidence of superior qualifications beyond subjective belief of EE)

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Age Discrimination

- *EEOC Proposed Regs:*
  - may make it easier to bring disparate impact age claims
  - may require employers to conduct statistical analysis before RIFs are carried out.

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Age Discrimination-Stray Remarks

- *Jackson v. Cal-Western Packaging Co.*, ___ F.3d____, 2010 WL 1135735 (5th Cir. 2010).
  - A manager's alleged statement "he was going to be in charge of all the plants when that old, gray haired ____ [plaintiff] retires" was a stray remark
  - Failed to create an issue whether discrimination caused the plaintiff's discharge for alleged sexual harassment
  - The comment was made a year before the plaintiff's discharge and appeared to be unrelated to the disciplinary action against the plaintiff.

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Race Discrimination

- *Chaney v. Plainfield Healthcare Center*, ___ F. 3d ___ (7th Cir. 2010)
  - Employee complained of racially hostile work environment where she was prevented from treating certain patients due to their racial preferences and racial epithets/harassment from coworkers, fired after only 3 mos. on job.
  - Employer claimed its policy of considering racial preferences of patients in assigning health care workers was supported by state law entitling patients to receive treatment from a provider of choice; EE was termed for cause.
  - Summary judgment for employer reversed: Assignment of employee work based on race creates a racially hostile work environment per se; employer may not rely on state law patient health provider choice rights as a BFOQ defense; Employer's reason for termination (Plaintiff's use of a profanity to describe a patient's bodily function) appeared pretextual and not supported by evidence known to Employer.

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Race Discrimination

- Ash v. Tyson Foods, Inc., ___ F. 3d ___ (11th Cir. 2010)
  - Divided 11th Cir., in 4th look at this case, reverses jury verdict for plaintiff and enters judgment for employer on insufficient evidence.
  - African American Supervisor not selected for promotion based on not being as qualified as selected candidate.
  - Presented of pretext evidence of pretext (he was interviewed after the selection decision had been made) and evidence of racial bias (manager's use of the word "boy" in conversations directed at African Americans).
  - Court held that the evidence supported the employers decision
  - Strange case in that jury verdicts s/b presumed correct absent prejudicial error, good case that should have been settled, a pyrrhic victory in light of attorney fees and time expended. Case may yet not be over.

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Gender Discrimination-Ledbetter Fair Pay Act

- Lilly Ledbetter Fair Pay Act (Jan 2009) extends the time for filing a discriminatory pay claim by providing that each pay check is a separate act of discrimination.
- *Lohn v. Morgan Stanley*, 652 F. Supp. 2d 812 (S.D. Tex. 2009)
  - Held: Ledbetter Fair Pay Act applies to claims under the Texas employment discrimination statute, even though the state legislature has not yet passed conforming legislation expressly to include the same rule in Texas law.
- *Schuler v. Price Waterhouse Coopers, LLP, (DC Cir. Feb 16, 2010)*
  - Held: Age-based failure to promote claim is outside the scope of the Ledbetter Fair Pay Act.

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Class Actions

- *Dukes v. Wal-Mart Stores, Inc.*, 2010 U.S. App. LEXIS 8576 (9th Cir. April 26, 2010).
  - A 6 to 5 *en banc* ruling, affirming in part and reversing and remanding in part, class certification order in gender based pay and promotions action.
  - 1. Affirmed the district court's certification of a class of female employees who were employed by Wal-Mart when the lawsuit was filed in 2001 with respect to their claims for injunctive relief, declaratory relief, and back pay for gender based discrimination in pay under Rule 23(b)(2);
  - 2. Reversed and remanded the district court's class certification of these employees' claims for punitive damages, instructing the district court to consider whether to certify the class under newly elucidated standards of Rule 23(b)(2) or (b)(3);

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Class Actions (cont.)

- *Dukes v. Wal-Mart Stores, Inc.*, (Cont.)
  - 3. Reversed and remanded the claims of putative class members who no longer worked for Wal-Mart when the complaint was filed in 2001, instructing the district court to consider whether to certify an additional class or classes under Rule 23(b)(3); and,
  - 4. Affirmed the district court's decision not to certify promotion claims brought by class members who lacked objective evidence of their interest in promotion.

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Class Actions

- *Velez v Novartis Pharms Corp*, SDNY, No 04 Civ 9194 (May 2010).
  - Gender discrimination class action.
  - Jury verdict for Plaintiffs—and class of approximately 5,600 women in sales-related job positions with Novartis in U.S. since 2002.
  - Awarded approximately $3.3 million in compensatory damages to the named Plaintiffs, and $250 million in punitive damages to the entire class.
  - Largest punitive damages award in history in any class action employment discrimination case.
  - Settled for $175 million in monetary and non-monetary relief.
  - A fairness hearing is scheduled for November 2010.
-
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Fair Labor Standards Act

- 29 USC 207(r)(1)- Break time for Nursing Mothers
  - Newly enacted section which requires employers to provide 1) "reasonable" breaks for mothers to express milk for their infants who are up to one year old and 2) a private space, other than a restroom, for mothers to express milk.
  - Does not require such breaks be paid, nor does it apply to exempt employees
- ATT faces $1 billion misclassification suit
  - Class consists of 5,000 first-level managers in a 7-tier management hierarchy
- *In re Novartis Wage & Hour Lit.*, No. 09-0437-cv (2d Cir. July 6, 2010)
  - Pharmaceutical sales-reps non-exempt under FLSA, not qualify for administrative or outside sales exemption
  - Damages estimated at $100M+
- *Urnikis-Negro v. Am. Family Prop. Servs.* No. 08-3117, 2010 U.S. App. Lexis 16126 (7th Cir. Aug. 4, 2010)
  - Provides guidance on calculating damages for misclassified employees (discussing fluctuating workweek method)

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Fair Labor Standards Act- DOL

- DOL abandons Opinion Letters; adopts Administrator Interpretations
  - AI 2010-1: Reversed course on Mortgage Loan Officers, found them to be non-exempt
- Intends to issue regulations
  - For employees exempt from OT, contemplated regulations would require employers to perform an exemption analysis identifying the applicable exemption
  - The exemption analysis would have to be:
    - Disclosed to the worker
    - Retained by the employer (record keeping requirement), and
    - Provided to any enforcement agency (Wage and Hour Division)

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FMLA

- DOL Clarifies FMLA Definition of "Son" and "Daughter" through expansive interpretation of "*in loco parentis*".

- *Narodelsky v. Cardone Industries, Inc.*, No. 09-4734 (E.D. Pa. Feb. 24, 2010).
  - The district court refused to dismiss plaintiff's FMLA and ERISA claims against five individual defendants who allegedly orchestrated his termination shortly after learning he needed time off for surgery.
  - The complaint supported an inference that each of the individual defendants played some role in a forensic search of plaintiff's computer with the goal of finding a reason to justify his termination and exercised control over the plaintiff in the decision to terminate him.
  - The company President was properly a named defendant as a corporate officer with operational control over the company. Court rejected federal district court cases from Utah, Minnesota and Kansas to the extent they limited individual liability to corporate officers.

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USERRA – Release of Claim

- *Wysocki v. International Business Machine Corporation d/b/a IBM, Inc.*, ___ F.3d ___, No. 09-5161 (6th Cir.).
  - In a case of first impression, the court held that Section 4302 of USERRA did not automatically prohibit a service member from releasing a USERRA claim.
  - The critical inquiry was whether the rights provided to the Service Member under the release were more beneficial than the rights he waived.
  - Under this test, that court concluded that because the release was clear and expressly referred to claims based on "veteran status," and because there was no evidence of duress, the plaintiff must have believed that the $6,000 he received for the release was more beneficial than the right he had to proceed with a claim alleging a violation of USERRA.

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Veterans Issues

- *Kirk v. Schindler Elevator Corp*; __ F. 3d ___ (2nd Cir. 2010)
  - Failure to file accurate VETS-100 can result in liability under False Claims Act. Employer failed to have a mechanism in place to identify veterans employed and covered by Vietnam Era Veterans Readjustment Assistance Act (VEVRAA).

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Retaliation

- *Alvarez v. Royal Atlantic Developers, Inc.*, No. 08-15358 (11th Cir. July 2010) Recognizing that in certain circumstances, a legitimate and reasonable fear that an irate employee will use his/her position in the company to sabotage operations will justify termination, even following protected activity.
- *Crawford v. Met. Gov't of Nashville*, (Feb. 2010) –SC Case that held an individual need not bring formal claim to be protected from retaliation, on remand, jury awarded Crawford $420,000 in compensatory damages, more than $408,000 in back pay, and more than $727,000 in reimbursement for future pay
- *Alvarado v. Cajun Operating* Co., 588 F.3d 1261 (9th Cir. 2009) Holding that the ADA does not provide for punitive damages, compensatory damages or a jury trial in ADA retaliation cases

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Sarbanes Oxley Whistleblower

- *Gale v. DOL*, 11th Cir, 6/25/2010 – In per curiam ruling, held that SOX whistleblower protection provision requires that an employee claiming the act's protection must actually believe that a covered employer engaged in illegal or fraudulent activity. Joining 1st, 4th, 7th, and 9th circuits.

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Independent Contractor Issues

- *Fleming v. Yuma Regional Medical Center*, No. 07-16427 (9th Cir. Nov. 19, 2009)
  - Agreeing with the Tenth Circuit, the Court held the Rehabilitation Act would cover disability claims by an independent contractor notwithstanding the lack of an employee-employer relationship
  - The 6th and 8th Circuits require an employer/employee relationship
- *Halpert v. Manhattan Apartments, Inc.,* No. 07-4074 (2d Cir. Sept. 10, 2009)
  - ADEA liability for employment decisions made by independent contractors of an employer
  - The Court said general principles of agency law should be considered to determine whether the independent contractor had been given actual or apparent authority to hire on behalf of the company

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ERISA

- *Conkright v. Frommert,* _____ U.S. ____ (April 21, 2010).
  - A defined benefit plan Administrator made an unreasonable interpretation of the Plan provision in accounting for previously paid benefits to rehired participants. It then adopted a more reasonable discretionary interpretation/approach which was rejected by the District Court and Court of Appeals and subjected to de novo review.
  - Held: ERISA Plan administrator's interpretation of Plan terms is entitled to deference under an abuse of discretion standard consistent with principles of trust law and *Firestone v. Bruch* even after reversal for violating ERISA.

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ERISA

- *Hardt v. Reliance Standard Life Ins. Co.*, ___ U.S. ____ (May 24, 2010).
  - Affirming a district court award of attorney fees to EE who was found disabled and obtained benefits on remand for further consideration and proof even though she did not obtain an enforceable judgment in her favor.
  - Held: ERISA claimant can get attorney fees if claimant obtains "some degree of success on the merits."
- *1515 Golden Gate Restaurant Assoc. v. San Francisco, 546 F. 3d 639 (9th Clr. 2009) (cert. denied)*
  - Employers challenged city ordinance mandating that employers contribute certain amounts toward employee benefit coverage.
  - No ERISA preemption of local laws mandating employer contributions to certain health care benefit programs.

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LABOR LAW

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Labor for Non-Labor Companies

- Employee Free Choice Act still a priority for President Obama
- Federal Contractors required posting under EO 13496 (slide 11)
- NLRB announced $900,000 settlement with non-union employer
  - Two employees were terminated for circulating a petition complaining of poor management and unfair treatment by their employer
  - Management conducted a forensic study of office computers to determine who participated in drafting the petition
  - One employee was fired after a fragment of the petition was found on his computer; the other employee, a supervisor, was fired after refusing to provide names of the 11 individuals who signed the petition (they had used aliases)
  - NLRB Judge ruled the employer committed an unfair labor practice because the termination was in retaliation for, and interfered with, the employees' rights to engage in "concerted activity" (§7)
  - $900K represents back pay for the 2 employees, settled while pending before the 5th Circuit

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National Labor Relations Act (NLRA)

- *Hacienda Hotel*, 355 NLRB No. 154 (Aug 27, 2010) (Employer Victory)
  - In right to work states, employer may stop dues check-off post collective bargaining agreement expiration as exception to unilateral change doctrine
  - Decision after 10 years and 2d remand from 9th Circuit, a divided NLRB (2-2, Becker recused), unwilling to overturn precedent, dismissed complaint.
- *Machinists Local Lodge 2777 (*L-3 Communications), 355 NLRB No. 174 (Aug 27, 2010)
  - Unions violated their duty of fair representation by requiring Charging Party, the nonmember objecting to supporting activities of the Unions unrelated to collective bargaining and contract administration (under *Beck),* to make his objection annually even though he had informed the Unions in writing that he wished to object on a continuing basis.
  - *See Communications Workers of America v. Beck*, 487 U.S. 435 (1988)

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National Labor Relations Act (NLRA)

- *United Bhd. Of Carpenters*, 355 NLRB No. 159 (Aug 27, 2010)
  - Upheld a union's right to display "large stationary banners" with messages attacking secondary employers that purchase products or services from the "primary employers" with whom the union has a labor dispute
  - Banners are more like permitted handbilling than prohibited secondary picketing.
- Pending-NLRB Poised to Advance EFCA by reversal of 2 Bd. Decisions
  - ***Dana Corp***., 351 NLRB 434 (2007) – NLRB modified the "**recognition bar doctrine**" (which prevented decert or rival union petition for *reasonable time* after voluntary recognition of union based on signed cards) to allow decert petition within 45 days of a company's voluntary recognition of union, and to post a notice explaining this 45 day right to employees.
  - ***MV Transportation***, 337 NLRB 770 (2002) – overturned "**successor bar doctrine"** & re-established that when a company buys another employer's unionized work force, the previously recognized union is only entitled to rebuttable presumption of majority support among workforce, which can be rebutted by decert petition, employer petition, or rival union petition.

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Railway Labor Act (RLA)

- National Mediation Board (NMB) Changed 75-year rule for elections
- Old rule: Required a *majority of employees* to cast a vote for union representation under RLA
  - meant that a union would not be certified if fewer than half the workers cast ballots.
- New rule: Union representation election determined based on *majority of votes cast*, even if less than a majority of employees in a craft or class participate in an election.
  - Effective June 30, 2010
  - DC Court upheld-- new rule lawful under the RLA (did not exceed NMB authority) and Administrative Procedure Act (not arbitrary and capricious). *Air Transport Ass'n v. NMB*, D.D.C., No. 10-cv-00804 (6/28/2010).

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STATE LAW ISSUES

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Non-Competes

- *PharMethod Inc. v Caserta*, No. 10-1388 (3d Cir. June 2, 2010).
  - Provides a checklist for drafting a non-compete.
  - Some Pennsylvania courts, similar to other states, have shown a reluctance to enforce non-competes against an employee who leaves employment involuntarily
  - Requires the lower court to consider the specific circumstances of the individual's termination
- *Silguero v. Creteguard, Inc.*, B215179, 2010 WL 2978222 ___ Cal. Rptr. 3d ___, (2d App. Ct. July 30, 2010).
  - Individual signed non-compete with former employer; subsequent employer terminates the person based on the non-compete with the former employer
  - Court found this to be a wrongful termination because generally, non-competes are void in California
- Several states considering statutes to govern non-competes, including Illinois, Georgia & Massachusetts

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Noteworthy State Law Issues

- *Zakrzewska v The New School*, 2010 NY Slip Op 03796 (NY Ct. App. 5/6/2010).
  - Held: *Faragher-Ellerth* affirmative defense not available under the New York City Human Rights Law ("NYCHRL"):
  - Farragerh-Ellerth affirmative defense allows employer to defeat harassment claims if it shows:
    - (a) there was no adverse employment action,
    - (b) it took reasonable care to prevent or promptly correct harassing conduct, and
    - (c) the employee unreasonably failed to take advantage of the employer's preventive or corrective procedures

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California Issues

- *Reid v. Google, Inc.*. ___ Cal. 4th ___ (2010)
  - Affirmed reversal of summary judgment for employer. Managers' ageist innuendos and work place comments are admissible even though not directly connected with any employment decision; stray remarks doctrine not applicable in CA as such evidence is admissible to show pretext or bias; however, where only a weak inference is raised, summary judgment should still be granted.
- *Ralph's Grocery v. UFCW, Local 8*, __ Cal. App. 4th __ (2010)
  - Court finds statute limiting judicial intervention in labor dispute an unconstitutional restraint on property owner rights and as selectively favoring one type of speech over another; enjoins certain picketing at private grocery store property .

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California Issues

- *Pearson Dental Supp., Inc. v. Sup. Ct.,* _ Cal. 4th __ (2010)
  - Where an arbitration award denies an employee a hearing on a FEHA claim, a trial court may vacate the award on the basis of legal error.
- *Roby v. McKesson, Inc.,* ___ Cal. 4th ___ (2010)
  - Managerial acts may be considered as part of totality of circumstances test for determining whether harassing conduct constituted a hostile work environment.

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California Issues

- Kin Care: *McCarthur v. Pac. Teliesis Group*, ___Cal. 3d___, No. S164962 2010 WL 547321 (Cal. Feb. 18, 2010).
  - California's "Kin Care" requires employers that provide sick leave to permit employees to use a portion of that leave to care for sick family members
  - Unanimous Cal Sup. Ct Held:
    - California's "Kin Care" rules do not apply to sick leave policies providing an unlimited number of paid sick days.
    - Kin Care rules apply only to paid sick leave policies that provide a "measurable, banked amount of sick leave."

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California – Pending Cases

- *Brinker Restaurant Corp. v. Sup. Ct.*, 80 Cal. Rptr. 3d 781 (2008) (rev. granted).
  - Are employers required to ensure an employee takes a statutory meal break lest they be subject to a missed meal period penalty or must they merely provide the employee the opportunity to take a statutory meal period which the employee is free to waive or forego without causing employer liability.
- *Harris v. City of Santa Monica*, 181 Cal. App. 4th 1094 (2010) (rev. granted)
  - Does a mixed motive analysis apply in a FEHA discrimination case?

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Same Sex Marriage and Domestic Partner Benefits

- Executive Memorandums re extension of benefits to same sex domestic partners of federal employees
  - Federal benefit plans
- DOMA still intact but HR2517 may change for federal benefits
- *Perry et al. v. Schwarzenegger*, 2010 US Dist. Lexis ___ (ND Cal 2010)
  - Strikes down Prop 8 defining marriage as between man & woman as violative of 14th Amendment; re-opens door for same sex marriage in CA and possible full faith & credit issues affecting DOMA and other states
  - On appeal to 9th Cir.
- DOL regulatory definition of "*in loco parentis*" essentially creates potentially broader rights for unmarried couples under FMLA; marital exception does not apply.

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SUPREME COURT 2011 DOCKET

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Cases on the SC's 2011 Docket

- *National Aeronautics and Space Administration v. Nelson*
  - Appellants are contract employees, including scientists, engineers and administrative personnel
  - Caltech, initially opposed background investigations by NASA, but their contract required compliance
  - Ninth Circuit held informational privacy rights implicated based on "open ended" questions
  - Question Presented: Did NASA's background investigations violate federal contract employee's constitutional right to informational privacy?
- *Kasten v. Saint-Gobain Performance Plastics Corp.*
  - Kasten made verbal complaints to management regarding legality of time clock's location and alleges subsequent termination was in retaliation for such verbal complaints
  - Seventh Circuit held purely verbal complaints are not protected activity
  - Circuit split: 6th, 8th & 11th Circuits found verbal complaints protected; 2d& 4th Circuits do not
  - Question Presented: Whether an oral complaint is protected conduct under FLSA's anti-retaliation provision?

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Cases on the SC's 2011 Docket

- *Thompson v. North American Stainless, LP*
  - Thompson and his wife both worked for North American Stainless; Thompson was terminated three weeks after North American Stainless learned of his then-fiancée's EEOC charge
  - Thompson concedes that he did not engage in any protected activity either on his own behalf or on his then-fiancée's behalf
  - No Circuit recognizes third-party retaliation claims; 3d, 5th & 8th Circuits have rejected 3d party retaliation claims
  - Question Presented: Does Title VII create a cause of action for third-party retaliation for persons who did not themselves engage in protected activity?

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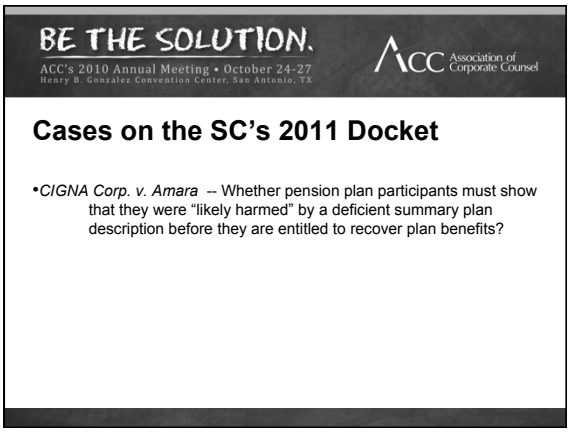
Cases on the SC's 2011 Docket

- *Staub v. Proctor Hospital*– Cat's Paw -- In what circumstances may an employer be held liable based on the unlawful intent of officials who cause or influenced but did not make the ultimate employment decision?
- *AT&T Mobility v. Concepcion*-- Whether Federal Arbitration Act preempts state unconscionability law?
- *Chamber of Commerce of the U.S. of Am. V. Candelaria* – Whether the Legal Arizona Workers Act is preempted by federal immigration law? (9th Circuit upheld Arizona law that revokes the business l icenses of employers who knowingly hire illegal immigrants and requires employers in the state to use E-Verify) 6-29 bna



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