

## But Are You Happy?

# *Happy Anniversary, Mandatory Employment Arbitration!*

Spring 2011 marks two significant anniversaries in the development of the law permitting mandatory arbitration of employment-related claims brought by non-union employees, particularly those under various employee-protective statutes. Twenty years ago, on May 13, 1991, the U.S. Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*, which has been described as one of the most significant employment cases of the last 25 years. Ten years later, on March 21, 2001, the Supreme Court decided *Circuit City Stores, Inc. v. Adams*, which affirmed an interpretation of the Federal Arbitration Act (FAA) that permits — and arguably promotes — having a non-union employee’s claims against his or her employer resolved through arbitration instead of through the courts.

**Some Historical Background.** As most of our readers know, *Gilmer* decided that arbitration agreements or policies that otherwise meet the requirements of the FAA (originally enacted in 1925) and state contract law can be used to mandate arbitration of employee claims asserted under federal and state anti-discrimination statutes. This outcome surprised many observers, who had read the Supreme Court’s 1974 decision in *Alexander v. Gardner-Denver Co.* as holding that arbitrators were generally not authorized to decide such statutory claims. *En route* to its conclusion, the *Gilmer* majority rejected arguments that arbitration was an inferior forum and thus unsuited to protecting employees’ statutory rights.

*Gilmer* had argued that the federal Age Discrimination in Employment Act (ADEA), under which he had brought his claim, did not contemplate arbitration, but the Supreme Court took exactly the opposite approach: Because the ADEA did not explicitly forbid arbitration or other non-judicial resolution of claims, Congress

could not have intended to confine their resolution to the courts. In addition, employees’ reservations about limited discovery in arbitration were swept aside as a necessary part of the arbitration “bargain” that would benefit both sides through expedited resolution. The courts could still, of course, guard against biased arbitrators and skewed arbitrator selection mechanisms. Most importantly, the Court observed that “mere inequality in bargaining power” between employers and employees did not justify a general rule that arbitration agreements were not enforceable in the employment setting.

One key issue that *Gilmer* left open involved the section of the FAA that made the statute inapplicable to “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” Since the great majority of American workers have some connection with interstate commerce in their jobs, could this provision mean that the FAA was not intended to apply to employment contracts?

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It would be another ten years before the Supreme Court put that issue to rest in the *Circuit City* case. In the meantime, most lower courts read the exclusion as limited to workers directly engaged in transporting goods. The Supreme Court agreed, thereby removing the last hurdle to mandatory arbitration in the employment setting.

**Arbitration Catches On.** In the 1990s, many employers rushed through the *Gilmer* door and implemented “pre-dispute” arbitration policies for their non-union employees’ claims. That was a period of heightened alarm about proliferating employment litigation and runaway jury verdicts. Employers felt threatened by the widespread demise of the employment-at-will doctrine in the 1980s and 1990s, and by the enactment of the Civil Rights Act of 1991, which allowed Title VII plaintiffs for the first time to recover compensatory and punitive damages.

Although arbitration cannot occur unless both parties agree, employers obtained agreements to arbitrate all future work-related claims by, for example, having job seekers consent to arbitration in their employment applications and having current employees agree to arbitration as a condition of receiving promotions or raises. Some employers told employees that their continuing employment beyond a certain date would be an expression of consent to a newly adopted arbitration program.

Employers who boarded the arbitration train expected it to take them to expedited resolution of claims, higher success rates, better predictability of risk, and reduced legal costs. Other employers, however, made a policy choice to continue resolving employee claims through the courts.

**What Has Happened In 20 Years?** Today, the arguments against arbitration that the Supreme Court rejected in *Gilmer* seem quaint. The arbitrability analysis the Court applied to the ADEA in 1991 has been applied to an array of other employee-protective statutes, and it is now well established that Title VII, the ADA, and the FMLA, among others, evince no Congressional disapproval of arbitrating such claims. Many state appellate courts have used the same logic to enforce arbitration

agreements as to claims under analogous state laws. In Michigan, the pivotal decision approving of mandatory employment arbitration was *Rembert v. Ryan’s Family Steak Houses*, decided in 1999.

While there is not yet universal consensus, there has been an orderly evolution of case law on how much discovery is essential to make arbitration a meaningful forum, to what extent an employee can be required to pay the costs of the arbitration proceeding, whether statutory remedies can be limited or time periods shortened, and other procedural issues. Recently, the American Arbitration Association and JAMS, the chief providers of neutral administrative services, have made it their policy not to administer any employer-promulgated arbitration policies that require employees to pay any part of the arbitrator’s fee.

Despite judicial evolution favoring arbitration, there seems to be a growing perception today that arbitration has not been the panacea many employers had hoped for. In the Spring 2010 issue of the *Journal of the ABA Section of Labor and Employment Law*, professor and sometime arbitrator Theodore St. Antoine observed that mandatory arbitration had lost its popularity, for basically three reasons: “Employees win too often; it is hard to get summary judgment in arbitration; and full appellate review is not available.” One might add another objection: Some arbitrations come to resemble full-blown lawsuits because the lawyers representing the parties are now often courtroom litigators who are not comfortable foregoing extensive discovery and motion practice, and arbitrators indulge them, earning sizeable fees in the process.

Although in some quarters there is still a basic distrust of arbitral adjudication, several empirical studies have shown that mandatory arbitration policies do not discourage employees from bringing claims, and on the whole employees fare as well in arbitration as they do in litigation. There may be fewer “jackpot” recoveries, but there are also fewer summary judgments, with a roughly comparable percentage of employee-favorable outcomes.

**Arbitration Is Here To Stay — But Is It For You?** It is not difficult today to design and set up a mandatory

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employment arbitration policy that will withstand procedural challenges. Each employer must, however, evaluate its own needs and culture in deciding whether mandatory arbitration of such disputes is the right choice.

The clearest advantages of mandatory arbitration continue to be reduced cost per case and greater assurance that an employer will not encounter an aberrant jury or be rocked by a huge verdict. In this sense, there is greater predictability for the employer and less fear of the unknown. For these reasons, some plaintiffs' lawyers avoid cases that must be arbitrated, or seek earlier and cheaper settlements. Furthermore, as a result of the Supreme Court's just-issued decision in *AT&T Mobility v. Concepcion* (a consumer contract case), it would likely be possible to avoid class actions by establishing an arbitration program that precludes them. In that case a California rule invalidating as unconscionable an arbitration provision that banned class-wide proceedings was held preempted by the FAA. Also, it is possible to keep the pendency and results of arbitrations relatively confidential, while court dockets and proceedings are public.

From our perspective, large employers that would expect a substantial number of employment claims in any event and are prepared to accept the occasional loss are the most likely ones to be satisfied with mandatory arbitration policies. Employers that cannot take that long view may see things differently.

Whatever procedural protections may apply, though, there is in every case the risk of being "stuck" with a "bad" arbitrator or one who reacts badly to a given set of facts. (Three-arbitrator panels are unlikely to accomplish anything other than grossly inflating costs.) As noted, arbitrators are inherently reluctant to grant summary judgment, and the likelihood of overturning an arbitrator's award in court is minimal. The FAA permits awards to be vacated for only a few narrow reasons, including corruption, fraud, blatant arbitrator partiality, and procedural irregularities. Courts will not disturb an arbitrator's findings of fact, and errors of law are also insufficient for reversal. Over the years many federal circuits had recognized an arbitrator's "manifest disregard of the law" —

*i.e.*, willfully flouting governing law, not just misunderstanding or misapplying it — as an additional ground for vacating an award, but the Supreme Court's 2008 decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.* may have interred that judge-created doctrine. In all events, a "bad" arbitration award can be far more difficult to overturn than a jury's verdict or trial court's ruling.

So, what should you do? If your organization boarded the arbitration train some years ago, and you have been well served and satisfied, you may want to continue with the *status quo*. The same may be true if you opted against arbitration and feel no regrets. But if you think you would like to try life on the other side, feel free to talk to us.

Noel D. Massie

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## *Is The NLRB Twittering Our Tax Dollars Away?*

It seems from some recent cases that the National Labor Relations Board is trying to become the country's director of social media, setting out parameters governing employers' reactions to their employees' disparaging statements posted for public consumption on Facebook and Twitter. One might ask whether a government agency utilizing \$283+ million in taxpayer funding annually should have better things to do.

Late last year, the NLRB filed a complaint against American Medical Response of Connecticut alleging that the discharge of an employee, who had sometime earlier posted negative comments regarding her supervisor on her Facebook page, violated the National Labor Relations Act. Although the case was quickly settled without a full explication of the facts, the NLRB's apparent theory was that the employee's Facebook page became a forum for critically discussing terms and conditions of her employment; that her negative comments were protected "concerted" activity of interest to other employees; and

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that her discharge was motivated by that protected activity and hence an unfair labor practice.

The NLRB took its social media role even farther in a much-publicized case this spring involving Thomson Reuters, which had allegedly illegally reprimanded one of its news reporters for tweeting this Twitter message: “One way to make this the best place to work is to deal honestly with [Newspaper] Guild members.” When the reporter’s superior called her to say that, under Reuters’ policy, she was “not supposed to say something that would damage [its] reputation,” this seasoned reporter evidently had a severe (perhaps exaggerated?) reaction: “I felt kind of threatened. I thought it was some kind of intimidation.” The NLRB is reportedly taking the position that this simple phone call was coercive and that Reuters’ social media policy went too far by frowning on reputation-damaging tweets.

No doubt, in the not-too-distant future, we will see the now Democrat-dominated NLRB trying to lay down the law of the land regarding what an employer may legally say about Twitter tweets and Facebook postings that affect the employer’s reputation, customer and client relationships, and other legitimate business interests. Not being in the business world, and thus not sensitive to how a single disparaging statement on the internet has the capacity to damage a business, the NLRB cannot be expected to appropriately balance the interests involved. Any rule it tries to lay down will surely face a court challenge.

But these Facebook and Twitter policing efforts are not the only dubious ways the NLRB is spending taxpayer dollars. Three other recent examples illustrate the extremity of the views of the Board’s three sitting Democratic members (there is one sitting Republican member, and, at this writing, one Republican vacancy), as well as its ultra-liberal Acting General Counsel.

First, in *Southern New England Telephone Co. d/b/a AT&T Connecticut* (March 24, 2011), the Board found that AT&T had violated the Act by prohibiting its service technicians from wearing plain t-shirts that said “Inmate #\_\_\_\_” on the front and “Prisoner of AT&T” on the back while they worked in the field. The Democratic majority reasoned that “the totality of the circumstances would make it clear that the technician was one of [AT&T’s] employees and not a convict,” and that the “prisoner” shirt was “not reasonably likely, under the circumstances, to cause fear or alarm among [AT&T’s] customers.” Wearing the shirts was deemed protected because AT&T and the technicians’ union were bargaining a new contract — though there was no reason customers would know that. The Republican Board member dissented, rhetorically asking his colleagues to imagine someone appearing at their front door wearing a t-shirt that said “Inmate” on the front and “Prisoner” on the back, asking to enter their home.

A second extreme example is *Jury’s Boston Hotel* (March 28, 2011), which clearly reveals the Democratic members’ disfavor for union decertification elections. In 2004, when the hotel opened, the employer recognized the union and included it in orientation sessions for employees. The union received a copy of the hotel’s employee handbook, and raised no objection to three rules (among many promulgated rules) that regulated solicitation/distribution, loitering, and the wearing of emblems and buttons on the job. Two years later, a decertification election petition was filed with the NLRB by a disaffected employee. This prompted the union to file an NLRB charge asserting that these three rules (which it had known about for two years) were overbroad and violated the Act. The hotel immediately responded by issuing a memo clarifying alleged ambigu-



**Is The NLRB Twittering?** *from page 4*

ities in the rules to comply with Board law. The union chose to go forward with the election, but when it lost, it formally objected on the ground that *the mere maintenance of the rules* (notwithstanding the clarifying memo) during the three-month pre-election period had tainted the vote. The Board's Democratic majority agreed and nullified the employees' choice to decertify the union, even though it was undisputed that these rules were not enforced during the pre-election period, and there was no evidence that employees were deterred from exercising their statutory rights. The Republican member once again dissented, pointing out that the majority was attempting unavailingly to "distinguish and diminish" prior Board precedents in order to rationalize a desired outcome.

Third, the NLRB's Acting General Counsel recently issued a formal complaint against The Boeing Company alleging that Boeing's 2009 decision to locate a new manufacturing facility for its 787 Dreamliner in South Carolina, rather than in the Puget Sound area, was an unfair labor practice because the company had acted out of "anti-union animus." The company had discussed with the Machinists union (which represents Boeing's Washington State manufacturing employees) the subject of where this new work would be located, and talks ended when the union made unacceptable demands. The company looked at other locations, and chose South Carolina, bringing billions in investment and thousands of new jobs to that State. The Acting General Counsel's theory appears to be based on the company's understandable desire to avoid the recurring strikes and work disruptions that had plagued its Puget Sound plants, and that the decision to locate the new business in South Carolina allegedly discourages union membership. Not only does this complaint (which is reportedly scheduled to be heard by an NLRB Administrative Law Judge in June) come a bit late, but whatever happened to the entrepreneurial right of an employer to invest new capital where and as it sees fit?

*Thomas G. Kienbaum*

## ***Mandatory NLRB Notice-Posting Proposed For All NLRA-Covered Employers***

Last year the three then-sitting members of the National Labor Relations Board (NLRB), all of them Democrats, approved for publication in the Federal Register a notice of proposed rulemaking that would, for the first time, require that all employers subject to the National Labor Relations Act (NLRA) post a standardized government-prepared notice informing employees of certain of their rights under the NLRA. The three Board members explained that the purpose of the mandatory posting would be "to increase knowledge of the NLRA among employees, to better enable the exercise of rights under the statute, and to promote statutory compliance by employers and unions."

The proposed standardized notice would be essentially the same as the notice the U.S. Department of Labor last year required federal contractors and subcontractors to post for their employees, as a condition of doing business with the U.S. government. The NLRB's notice would have to be at least 11 by 17 inches in size, printed in prescribed colors, translated into other languages if appropriate, posted in conspicuous areas of the workplace, and

### ***KOHP Again Receives "Best of Michigan" Award***

*Kienbaum Opperwall Hardy & Pelton, P.L.C. has again been honored by Corp! Magazine by being selected to receive a "Best of Michigan Business" award in the law firm category. These awards identify Michigan businesses found to be especially responsive and economically sensitive to their clients' needs, have high ethical standards, and demonstrate a commitment to excellence.*

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also distributed electronically (*i.e.*, via email or intranet) “if the employer customarily communicates with its employees by such means.”

The Board’s proposed rule would create three “sanctions” for an employer’s failure or refusal to post the notice: (1) a potential finding that the failure constituted a violation of Section 8(a)(1) of the NLRA by interfering with employees’ Section 7 rights; (2) the possible tolling of the six-month statute of limitations in the event an unfair labor practice charge were filed late; and (3) treating “knowing noncompliance” as evidence of an unlawful motive in an unfair labor practice proceeding.

The public comment period closed on February 22, 2011. The Board received approximately 7,000 responses from the full spectrum of interest groups, some supporting the proposed rule and notice requirement as long overdue, and others pointing out its infirmities. We can, of course, debate whether the Democratic Board members’ assumptions about uninformed employees are correct, or are perhaps paternalistic, in this era of internet data sharing and social media. The other primary arguments identified by the commenters who opposed the proposed rule fell into three general categories.

First, while most federal labor statutes contain explicit notice-posting requirements, the NLRA conspicuously does not, and hence the Board lacks statutory authority to require such a posting through the rulemaking process. This view was articulated by the single Republican Board member (who had not yet been confirmed by the Senate when his three Democratic colleagues moved forward) in a dissent published in the Federal Register with the notice of proposed rulemaking. Some commenters noted that this objection may be especially applicable to the electronic posting requirement, as no other federal agency has gone that far. Unlike many agencies, the NLRB does not have roving authority to act on its own *vis-à-vis* employers – *i.e.*, it is empowered to act only when an unfair labor

practice charge is filed against a particular employer. So this jurisdictional argument is not an insignificant one.

Second, commenters pointed out that the NLRA is very specific regarding conduct declared to constitute an unfair labor practice, and the failure or refusal to post a standardized notice is not included. Creating a new unfair labor practice providing for potential sanctions, these commenters posited, is a policy judgment for Congress to make — not for the Board to declare through a rulemaking process.

Third, the language of the standardized notice itself was challenged by many commenters as unbalanced and favoring unionization. For example, they pointed out, while the proposed notice informs employees of their

right to form a union, it does not mention the right to decertify a union, and it only lightly touches on an employee’s right not to engage in the identified protected activities. Nor does the notice provide any explanation of an employee’s right to abstain from union membership or from paying union dues (*e.g.*, “Beck” rights), or the materially different rights of employees who work in the 22 “right to work” States. Especially troubling to some commenters was the

notice’s statement of employees’ right to “[s]trike and picket, depending on the purpose or means of the strike or the picketing” – without explaining that many employees do not have such rights or what the limitations are — creating potential for confusion, work disruptions, firings, and negative impacts on the economy.

At this writing, it is unknown whether or when the Board will take further action. Needless to say, if adopted, the rule would undoubtedly face an immediate court challenge. If ultimately found enforceable, millions of employers would suddenly discover that they are subject to a new posting requirement and potential sanctions for noncompliance.

*Theodore R. Opperwall*



## *Federal And State Wage And Hour Developments*

**Oral Complaints Are Protected.** On March 22, 2011, the U.S. Supreme Court issued its much-anticipated opinion in *Kasten v. Saint-Gobain Performance Plastics Corp.*, a case addressing the anti-retaliation provision of the Fair Labor Standards Act (FLSA). That provision prohibits employers from discharging or otherwise discriminating against an employee because the employee “has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the FLSA], or has testified or is about to testify in such proceeding.” The federal appellate courts had been divided on whether the key phrase “filed any complaint” required that the complaint be *in writing* to be protected. In *Kasten* the Supreme Court said “no.”

Kasten made an *oral* complaint to his employer, asserting that the location of time clocks was illegal because it prevented employees from being paid for time spent donning and doffing their required protective gear. His employment was later terminated. He sued, claiming that his discharge was retaliatory in violation of the FLSA. The trial court dismissed the case, holding that oral complaints are not a protected activity under FLSA, and the U.S. Court of Appeals for the Seventh Circuit agreed.

The Supreme Court disagreed, concluding that this key phrase should be interpreted to include oral complaints – which would be consistent with how the U.S. Department of Labor had interpreted it. The Court held that a “complaint” is “filed” when “a reasonable, objective person would have understood the employee to have put the employer on notice that the employee is asserting statutory rights under the Act.” The complaint “must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both the content and context, as an assertion of rights protected by the statute and a call for their protection.”

Employers should accordingly treat oral complaints regarding FLSA issues just as seriously as written complaints, if they have not already been doing so, and should ensure that their anti-retaliation policies are broad enough to cover both written and oral complaints. Although the result in *Kasten* is not surprising, given the

Supreme Court’s recent expansive interpretation of anti-retaliation statutes, the definition of protected activity in the FLSA is narrower than those in other employment statutes, such as Title VII. Under the FLSA, protected activity requires something fairly specific – a “complaint,” institution of “proceedings,” or testifying or being about to testify. In contrast, under Title VII, protected activity can include other actions that constitute “opposition” to unlawful employment practices, even if the employee does not file a complaint, institute a proceeding, or testify.

**No More Paper Paychecks.** In a development affecting employers in Michigan, the Legislature has amended the Michigan Payment of Wages and Fringe Benefits Act to allow employers to mandate, for the first time, that employees receive their pay either through direct deposit or through a payroll debit card, provided certain procedures are followed. Previously, Michigan employers had to obtain employees’ freely given written consent to use direct deposit — and virtually all employers had some paper paycheck holdouts (who may have distrusted electronic banking).

The new rules are as follows: The employer must provide the employee with (1) a written form that allows the employee the choice of receiving wages either by direct deposit or through a payroll debit card; (2) a statement indicating that (with some exceptions) the employee’s failure to return the form within 30 days with the account information necessary to implement direct deposit will be presumed to indicate consent to receiving wages through a payroll debit card (however, if an employee is currently paid by direct deposit, the method of payment may not be changed to a payroll debit card without the written consent of the employee); and (3) a written disclosure of certain information concerning the payroll debit card. The employee must be permitted to select payment by direct deposit freely, without intimidation, coercion, or fear of discharge or reprisal.

The new law also outlines several conditions for the use of a payroll debit card, including that the card must (1) entitle the employee to make at least one withdrawal

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or transfer without charge each pay period; (2) allow no changes in fees or terms of service without 21 days' written notice; (3) permit the employee to make an unlimited number of balance inquiries without charge; and (4) not be linked to any form of credit.

*Sonja Lengnick*

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## *High Court Rules That "Third Party Victims" Can Claim Retaliation*

In *Thompson v. North American Stainless LP*, decided January 28, 2011, the U.S. Supreme Court significantly broadened the reach of Title VII's anti-retaliation provision. North American Stainless (NAS) fired Thompson three weeks after his fiancé (and co-worker) had filed a charge of sex discrimination with the EEOC. Thompson then filed a lawsuit claiming that his termination was "payback" for his fiancé's EEOC filing. The trial and appellate courts held that Title VII's anti-retaliation provision did not permit Thompson's claim, because he had not engaged in any "protected activity" himself. In fact, it is undisputed that he had not.

The Supreme Court unanimously reversed, finding not only that such a theory of retaliation was actionable, but also that Thompson – the victim of the alleged retaliation – could bring a lawsuit in his own right. The Court's prior precedent had broadly interpreted Title VII's anti-retaliation provision as prohibiting any employer action that might dissuade a reasonable employee from making or supporting a charge of discrimination. Under this precedent, the Court found, it was "obvious" that an employee would be dissuaded from engaging in "protected activity" if she knew her fiancé would be fired. Moreover, Thompson was a person "aggrieved" within the meaning of

Title VII because he fell within the "zone of interests" it was intended to protect.

The outer reach of this new type of retaliation theory remains to be seen. The Court's opinion does not clearly set boundaries, stating that if a "close family member" is terminated, this would "almost always" dissuade an employee from making or supporting a claim of discrimination, but terminating a "mere acquaintance" would "almost never" have such an effect. Nor is it clear what actions less than termination would rise to an "adverse job action." The trial courts will be called upon to judge each case by its own circumstances. The bottom line for employers is to be cautious when terminating employees who have close relationships with co-workers who have made or supported claims of discrimination.

*Ryan D. Bohannon*

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## *When Does A Non-Compete Go Too Far?*

Like most States, Michigan allows an employer to enter into non-compete agreements with its employees so long as the terms are "reasonable." Reasonableness is a function of the employee's duties and responsibilities, the nature of the restraint, the geographic scope and temporal duration of the restraint, and the strength and legitimacy of the employer's "competitive interest" in keeping the employee (at least for a time) from bolting to a competitor or poaching former co-workers on behalf of a competitor.

The rationale for allowing such agreements is that some measure of protection of an employer's legitimate competitive business interest is warranted, in order to promote a stronger business environment and investment, even though such restraints inhibit the free movement of employees (often highly skilled workers or key managers) in their own competitive marketplace. Years ago, many States (including Michigan) had broadly prohibited non-

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compete agreements as violative of the public policy favoring free competition — unless the agreement was associated with the sale of a business. Most States have now repealed those laws.

It goes without saying that, because of the legal technicalities governing non-compete agreements, and the way their enforceability will inevitably hinge on individualized circumstances, special attention is warranted when drafting such agreements and presenting them to new or existing employees for signature. Moreover, explicit inquiry should be made of a prospective employee who has worked for a competitor to determine whether he or she had previously signed such an agreement with that employer.

But exceptional caution is warranted if an agreement of this general character is being (or has been) proposed or entered into *with a competitor* – for instance, to establish ground rules affecting the way each competitor’s employees may (or may not) be contacted, solicited, or recruited by another firm. Agreements *between competitors* can certainly stabilize workforces, but at the same time they impinge on skilled workers’ or key managers’ mobility in the labor market and drive down their potential compensation. Agreements *between competitors* also implicate Section 1 of the federal Sherman Antitrust Act, which prohibits “contracts,” “combinations,” and “conspiracies” in restraint of trade or commerce.

A recent flurry of activity by the U.S. Department of Justice’s (DOJ’s) Antitrust Division illustrates how such an effort among several competitors can go too far. Late last year, the DOJ filed civil injunction suits against Adobe Systems, Apple, Google, Intel, Intuit, Lucasfilm Ltd., and Pixar – all familiar names in the high-tech field – seeking to enjoin agreements among them to limit their recruiters’ abilities to contact each others’ key employees and offer employment to them.

The agreements made between these competing businesses were, according to the DOJ’s complaints and associated filings, negotiated and carried out rather openly through the companies’ management, human resources personnel, and recruiters. They obviously inhibited the

marketability of these highly skilled employees. According to the DOJ, the agreements had no reasonable connection to any legitimate competitive interest, and were classic “naked” restraints on competition. It appears that all of the companies are entering into settlements with the DOJ, or have already done so, in which they agree to discontinue these practices and allow the DOJ to monitor their recruiting activities.

The lessons for employers entering into non-compete agreements are clear: For traditional non-compete agreements *with your key employees*, be wary of the legal technicalities and enforceability issues. But for non-traditional agreements *with your competitors*, stay away.

*William B. Forrest III*

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## *OFCCP Pursues Health Care Providers, Sharpens Compensation Analysis*

In the late 1990s, the Office of Federal Contract Compliance Programs (OFCCP) sought to expand its reach to include hospitals and other health care providers. This early effort did not succeed, primarily because federal financial assistance through Medicare or funneling federal program dollars through an insurance conglomerate is not a contract for supplies or services. But OFCCP’s jurisdictional limits did not stop the agency from continuing to try, and now there are signs that this persistence may be paying off.

In *OFCCP v. Florida Hospital of Orlando*, an Administrative Law Judge (ALJ) of the U.S. Department of Labor held that the hospital’s agreement with an insurance organization to accept managed care referrals for military veterans and family members subjected the hospital to OFCCP jurisdiction. Unlike the earlier situation, in which a hospital had treated federal employees and had

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received federal funds through the Blue Cross-Blue Shield insurance network, Florida Hospital of Orlando contracted with an insurer that had itself contracted with the Department of Defense Tricare program to provide managed care and other medical services in addition to insurance. Under these circumstances, the ALJ reasoned, the insurer's contract with the Department of Defense was a prime supply and service contract subject to OFCCP jurisdiction, making the hospital a covered subcontractor.

The *Florida Hospital* decision closely tracks a 2009 Administrative Review Board (ARB) opinion that held that the federal government's contract with a Health Maintenance Organization to provide medical services to federal employees qualified as a supply and service contract, with the consequence that hospitals that contracted with the HMO were covered subcontractors. That decision, *OFCCP v. UPMC Braddock*, foreshadowed the result in the *Florida Hospital* case, which may in turn foreshadow a willingness to try to further expand jurisdiction to include Medicare Part C and possibly Part D providers. Both the *Florida Hospital* and the *UPMC Braddock* decisions are presently being appealed.

OFCCP is also changing its approach to compensation analysis. One major change is the agency's withdrawal of the so-called 5:10:3 trigger test to identify "indicators" that would justify a regression analysis requiring the production of further compensation data. Contractors that received notice of such indicators had to submit individualized information concerning eleven factors, including all forms of compensation, hire date, birth date, gender, race, and the like, which OFCCP would then array and manipulate in its version of a multiple regression analysis.

In place of the 5:10:3 test, OFCCP is now subjecting routinely requested compensation data to a computer program designed to identify either a 2% or \$2,000 difference in annual pay among what OFCCP categorizes as similarly situated employees. And, pursuant to an internal directive, a single such discrepancy in only one similarly situated group will "provide the basis to request employee level data for the entire workforce to conduct a

more in-depth analysis." OFCCP also has expanded its former eleven factor "in-depth" request to include 13, 15, or, in some cases, 16 factors.

In essence, OFCCP is instructing its compliance officers that a single anomaly in a small isolated segment of a workforce will justify a multiple regression analysis of the entire establishment's workforce. This new trigger test is so sensitive that at least one disparity will be found in virtually every audit. The net impact will be a regression analysis compensation data request — and justification for an on-site audit — in almost every desk audit.

*Julia Turner Baumhart*

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## *WARN Act Generates New Appellate Decisions*

Now well into its third decade, the federal Worker Adjustment and Retraining Notification (WARN) Act of 1989 has seen most of its seemingly simple — yet often troublesome — provisions definitively interpreted by the courts, leaving few major issues other than the required crystal-ball-gazing about *exactly when* and *exactly how many employees* will be laid off in connection with a "plant closing" or "mass layoff." It is relatively unusual now to see significant new federal appellate court decisions interpreting the WARN Act, or applying it in new factual circumstances, but the past few months have brought three decisions of significance — from the Sixth Circuit, the Seventh Circuit, and the Ninth Circuit. The unanimous three-judge Sixth and Seventh Circuit panel decisions correctly apply the statute; the two-to-one Ninth Circuit panel decision is highly questionable, and, if left unreviewed, portends genuine difficulty applying the statute for employers on the West Coast.

The Sixth Circuit decision is *Bledsoe v. Emery Worldwide Airlines and CNF Corporation* (February 16, 2011). A preliminary issue in the case (for which there is a dearth

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of authority) was whether the WARN Act confers a right to jury trial. Utilizing the familiar Seventh Amendment framework for determining whether a new statutory action resembles a suit at common law (to which the right to jury trial attaches) as opposed to an equitable claim (no right to jury trial), the court held that the rights and remedies under the WARN Act were largely equitable in nature and hence conveyed no right to a jury trial.

As to the merits, the Sixth Circuit held that the plaintiffs had not been entitled to WARN notice. The plaintiffs were initially laid off following the FAA's intervention in the certification of their airline employer that caused the employer to ground its planes. *At that time*, it was presumed that the layoffs would be temporary and that no WARN notice would be required. As time went by, however, it became increasingly apparent that the airline might be required to shut down. When the airline did cease operations four months later, the employees were determined not to be "affected employees" entitled to WARN notice because a "reasonable employee" would not have expected to be recalled *at that point*.

The analysis in *Bledsoe* is somewhat confusing and at first blush appears to be inconsistent with the statute. But it is consistent if viewed in two timeframes and under two statutory definitions. The employees were not entitled to WARN notice initially because the layoffs were not expected to exceed six months and, as a result, there would not be an "employment loss" triggering a notice obligation. Yet, when the shut down occurred four months later, they were not "affected employees" entitled to notice because they did not, by then, have a reasonable expectation of recall.

The court emphasized the facts that (1) it became increasingly apparent to the airline that complying with the FAA's new operating requirements was not feasible, something the airline was communicating to the

employees, and (2) due to the "hurdles that had developed and the uncertainty as to whether, when, and at what cost [the airline] would secure the approval of the FAA to resume operations, a reasonable employee under the same circumstances would not have expected to be recalled when [the airline] decided to close." The facts in *Bledsoe* can be contrasted with those in *Kildea v. Electro-Wire Products* (decided by the Sixth Circuit in 1998), which reached the opposite result. In the circumstances of that case, employees on indefinite or temporary layoff were found to be "affected employees" because they did in fact have a reasonable expectation of recall.

The Seventh Circuit decision, *Ellis v. DHL Express, Inc.* (January 11, 2011), addressed an interesting legal issue that, surprisingly, had not been previously decided: Whether employees who accept a severance package and resign their employment on the eve of a plant closing or mass layoff are included in the headcount for determining whether the WARN Act's numerical thresholds are satisfied. DHL Express and its parent, Deutsche Post AG, announced on November 10, 2008 that its U.S. domestic shipping would end on

January 30, 2009, signaling to certain of DHL's facilities in the Chicago area that they would be closed. The employees' union negotiated special severance packages under which employees who waived their seniority and recall rights, and their rights to sue, were paid a specified number of weeks of salary and benefits. The employees who took the severance packages argued that they should not be deemed to have "voluntar[ily] depart[ed]" within the meaning of the WARN Act's exclusion because they did so under extreme economic uncertainty and pressure after it was clear that their jobs were doomed.

The Seventh Circuit determined that, while these employees had found themselves in "unenviable positions," they had nonetheless voluntarily elected to leave



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and hence were not counted as affected employees who had experienced job losses. Emphasizing that the severance agreements had been negotiated by their union with the employees' interests in mind, that they were unambiguously written, and that the employees had been given adequate time to consider their options, the court concluded: "In offering its workers the olive branch of severance pay, DHL was hedging its bets against WARN Act liability. Employers are permitted to 'gamble' that enough workers accept their proffered incentive packages to absolve them from potential WARN Act liability... and DHL successfully tossed the dice here."

The Ninth Circuit appears to have reached the opposite conclusion in *Collins v. Gee West Seattle LLC* (January 21, 2011). The facts are somewhat similar, though no severance package was involved. The employer was a Seattle car dealership that had approximately 150 employees in the summer of 2007, when it was attempting to find new capital or a purchaser to allow it to continue operating (thus, in the background was WARN's "faltering business" exception that allows delayed notice to employees). The rescue effort unfortunately failed at the last moment, and the employer distributed a memo on September 26, 2007 advising the workforce that the business would have to close on October 7 unless a suitable buyer could be located by then. Between September 26 and October 5, approximately 120 of the 150 employees stopped reporting for work (apparently there were plenty of other job opportunities in that industry in Seattle in 2007). In part because of the sudden departure of 80 percent of the workforce, no last-minute purchaser was located and the dealership closed.

When one of the affected employees sued under the WARN Act, the employer responded that less than 50 employees had experienced an employment loss because 120 of the 150 employees had "voluntar[ily] depart[ed]" and were therefore excluded from the headcount. The trial court agreed, but a Ninth Circuit panel reversed by a 2-1 vote, holding in extremely broad terms that "where an employee's reason for departing is because the business is closing, such a departure cannot be termed 'voluntary'

under the Act." What is more, the majority opined, "[d]etermining an employee's reason for departing is a factual inquiry" — presumably turning on the subjective mindset of every employee who departs.

One member of the two-judge majority concurred in the result, relying entirely on the fact that, in post-litigation interrogatory answers, an official of the closed dealership had stated that its relationship with the employees had ended because the "business closed." In that judge's view, that statement shifted the burden to the dealership to establish otherwise. That cryptic (and perhaps ill-advised) generic phrase hardly disposes of the more complex question of statutory interpretation.

In his dissent, the third judge on the panel argued that the burden of proof should be on the employee who leaves after the announcement of a likely closing. That judge observed that the plaintiff had neither argued nor presented evidence establishing that any of the 120 departing employees had been constructively discharged or had actually left involuntarily. He also noted that the interrogatory answer was not probative of employees' mindsets, and that the majority's supposed bright-line rule created "new law" that was not consistent with the language or structure of the WARN Act. That seems rather apparent, though it may take the panel's reconsideration or *en banc* review, or a U.S. Supreme Court decision, to correct this deviation.

*Eric J. Pelton*

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## FMLA Developments

Here are some of the more interesting federal court decisions interpreting the Family and Medical Leave Act (FMLA) since our last issue of *Insight*.

**Faith Healing Trip Not Covered By FMLA.** In *Tayag v. Lahey Clinic Hospital*, the U.S. Court of Appeals for the First Circuit affirmed summary judgment in favor of the employer where the employee was discharged while

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taking a seven-week leave to the Philippines to accompany her husband on a spiritual healing trip. The leave included a series of healing pilgrimages (including a visit to a Catholic church known for its healing abilities) along with incidental socializing. The case turned on whether the healing pilgrimages were comprised of medical care within the meaning of the FMLA. The court found they were not. The court concluded that the FMLA regulations' faith-healing exception for Christian Scientists who reject ordinary medical care and seek treatment through their faith did not apply because the plaintiff and her husband were Catholics who accepted both traditional medicine and faith healing. The court also found that the employee's claim failed because she did not comply with FMLA certification procedures.

**Employee's Remarks Failed To Put His Employer On Notice.** In *Wilson v. Noble Drilling Service, Inc.*, the U.S. Court of Appeals for the Fifth Circuit dismissed an FMLA retaliation lawsuit where the employee failed to make his employer aware of his need for FMLA leave. Wilson told his supervisor that he "might" need to take leave to care for his soon-to-be born child if his alternative child care arrangements fell through. A month later, he was discharged when he upset his supervisor by complaining to upper management about his pay. The court noted that the close proximity in timing between the alleged protected activity (his mention of a possible need for leave) and his discharge might provide the requisite "causal connection" needed to establish a FMLA retaliation claim. However, the FMLA claim failed because Wilson had not given sufficient notice to make the employer aware of his need for FMLA leave. Instead, he had merely commented that he "might" need to take unspecified leave and there was a "possibility" he would need to do so. The court noted that Wilson had never informed his management that he actually intended to

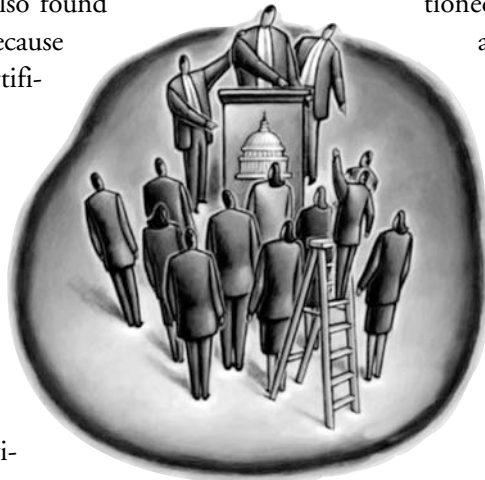
take leave or the anticipated timing and duration. Consequently, his FMLA retaliation claim failed.

**Employee Failed To Respond To His Employer's Inquiries.** In *Righi v. SMC Corporation*, the U.S. Court of Appeals for the Seventh Circuit upheld the dismissal of an employee's FMLA claim where the employee was absent for several days attending to his ill mother, but had failed to specify how much leave he would need and did not respond to his supervisor's repeated phone calls to inquire about the duration. Righi had sent an email to his employer stating that he was going to be absent for "a couple of days" to care for his mother. He mentioned that he had vacation time available

and that he did not want to apply for family leave "at this time." He was then absent for six work days, during which he failed to respond to 15 phone calls asking for more information. He was discharged upon his return. The court held that, while his email to his employer stating he did not want to take family leave was not an unequivocal waiver of his FMLA rights, and that it could be sufficient to trigger the employer's duty to make further inquiry,

the employer undisputedly had done so by placing numerous calls to Righi, and that Righi's complete failure to respond doomed his FMLA claim.

**Too Many Return-To-Work Inquiries Support FMLA Interference Claim.** Employers must carefully approach employees who are on FMLA leave to inquire about return-to-work status — lest it be viewed as pressuring the employee to return before he or she is ready. In *Terwilliger v. Howard Memorial Hospital*, the employee took an approved FMLA leave for back surgery. While she was out on leave, her employer called her every week to ask when she planned to return to work and to suggest she return as soon as possible. Shortly after returning to work, Terwilliger was discharged for stealing, an accusation she denied and claimed was a pretext. In allowing



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her FMLA interference claim to proceed to trial, a U.S. District Court in Arkansas held that the employer may have improperly discouraged or chilled Terwilliger's exercise of her FMLA rights. The court dismissed her FMLA retaliation claim, however, because the evidence established that the decision-maker who fired Terwilliger honestly believed she was guilty of an attempted theft, which was a termination offense under the hospital's policy.

**Absences For Substance Abuse Versus Treatment Of Abuse.** In *Picarazzi v. John Crane, Inc.*, a U.S. District Court in Texas held that an employee fired for absenteeism due to substance abuse-related absences could proceed to trial on his FMLA retaliation claim. On April 1, Picarazzi began an FMLA leave to enter an alcoholism treatment program. His leave was set to expire on June 23, and he was to give his employer a status update every 30 days. Picarazzi was released from the treatment facility on April 23, and his doctor released him to return to work on April 30. Due to relapses, however, he returned to the treatment facility from April 30 to May 8 and again from June 9-15. On several days between and after these periods, though, Picarazzi was absent from work. His employer considered the time when he was in actual treatment as approved FMLA leave, but not the days when he had relapsed and was not undergoing treatment at the facility. For the latter, he was assessed attendance points, and this ultimately resulted in his termination. Relying on the FMLA regulation providing that absence because of the use of a substance, rather than for treatment, does not qualify for FMLA leave, the employer argued that it had properly assessed the points. The court disagreed and held that the regulation does not require the employee to be enrolled in the treatment facility *on each day* of his leave for it to qualify as FMLA leave. The court also found that Picarazzi could show that his absences were FMLA-covered based on his employer's representations that that he was eligible and approved for leave through June 23. Accordingly, Picarazzi was allowed to present his case to a jury.

*Shannon V. Loverich*

## *Sixth Circuit Addresses Important ADA Issues*

The Americans with Disabilities Act (ADA) continues to be a hot topic in federal courts across the country. The U.S. Court of Appeals for the Sixth Circuit (with jurisdiction over Michigan, Ohio, Kentucky, and Tennessee) has been particularly active lately.

**Proper Bounds Of Medical Inquiries And Testing.** In *Lee, et al. v. City of Columbus, Ohio*, a class of current and former police officers challenged a departmental directive that all employees returning from medical leave submit a doctor's note to their immediate supervisor containing a statement of the nature of their illness and that he or she is capable of returning to regular duty. The plaintiffs sued under the Rehabilitation Act (the ADA's counterpart applicable to federal contractors), claiming the directive was overly intrusive. The trial court agreed and enjoined its enforcement.

On appeal, the Sixth Circuit rejected the trial court's conclusion that because an employer's general request for a diagnosis might tend to reveal a disability, it therefore constitutes a prohibited disability-related inquiry. The appeals court held that a general diagnosis — or, in this case, an even less specific statement regarding the "nature" of an illness — is not tantamount to asking whether a person is disabled or for the severity of a disability. The court distinguished situations in which an employer goes too far by asking whether an employee is taking prescription drugs or medications, or inquiring about illnesses or impairments the employee has or had in the past (inquiries, the court noted, which trigger the ADA's protections). Merely asking an employee to describe the nature of an illness "is not necessarily a question about whether the employee is disabled."

The proper boundaries under the ADA of medical testing were at issue in *Bates, et al. v. Dura Automotive Systems, Inc.* There, seven former employees sued after they were discharged for violating the company's drug

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policy. The policy prohibited use of legal prescription drugs if doing so adversely affected safety, company property, or job performance. Each of the plaintiffs had tested positive for use of legal drugs. Dura argued that the plaintiffs were not “disabled” simply because they used those drugs and that the ADA consequently had no application. The Sixth Circuit agreed, noting that while non-disabled individuals may bring claims under certain ADA provisions, the challenged medical testing provision was not one of them. Its plain language refers to “qualified individuals with disabilities.” Summary judgment was entered for the employer.

**Restrictive Causation Standard Under ADA Questioned.** In *Lewis v. Humboldt Acquisition Corp.*, the Sixth Circuit upheld the causation standard it has for years required for proving an ADA discrimination claim — *i.e.*, that the plaintiff show that he or she was discharged *solely* by reason of the disability. Lewis had been employed as a registered nurse. She developed a medical condition that affected her lower extremities and required her to use a wheelchair. After her discharge following a workplace incident in which she yelled, criticized her supervisors, and used profanity, Lewis filed an ADA lawsuit claiming that she had been fired due to her disability. The case went to trial, and Lewis requested a jury instruction that she needed to show only that her perceived disability was “a motivating factor” in the discharge decision. The trial court denied that request, instead instructing the jury that Lewis could recover only if her disability was “the sole reason” for the decision. This jury instruction was consistent with the Sixth Circuit’s 1996 opinion in *Monette v. Electronic Data Systems Corp.*

The Sixth Circuit panel reluctantly ruled against Lewis, noting that, while a majority of the federal appellate courts have adopted the lesser “motivating factor” or “substantial cause” standard for causation, they were

bound to follow the *Monette* precedent. The panel signaled, however, that if Lewis’ case were heard *en banc*, the *Monette* precedent might be reversed on the ground that the “sole reason” standard had been improperly imported from the Rehabilitation Act. While that Act shares many similarities with the ADA, the causation standard is different. The ADA prohibits discrimination “on the basis of disability” and “by reason of such disability” without mention of a “sole reason” or any other similarly restrictive term. Reconsideration of this causation question may be in the Sixth Circuit’s cross-hairs in the near future.

**Reasonable Accommodation Issues.** The Sixth Circuit recently considered a failure-to-accommodate claim brought by a medical resident with Asperger’s Disorder. The plaintiff in *Jakubowski v. The Christ Hospital* had struggled during several medical residency programs. He failed to effectively communicate with patients and medical personnel. His supervisors lost trust in him after he wrote a dangerously incorrect prescription for a patient. The hospital eventually informed him that he would be terminated from the program. Jakubowski then informed the hospital that he had Asperger’s Disorder and asked that he be accommodated “with knowledge and understanding” concerning his condition and its affects on social behavior and interactions. The hospital responded that it did not have sufficient resources to do so and, instead, it offered him a residency in pathology where he would have little or no patient interaction. Jakubowski declined, was terminated, and sued.

The court held that Jakubowski was not a “qualified individual with a disability” under the Act because he failed to show that he could perform the essential functions of his residency with or without accommodation. He could not demonstrate that his proposed accommodation (that hospital personnel be informed regarding



## Sixth Circuit Addresses ADA Issues *from page 15*

the effects of Asperger's and be "understanding") addressed the obstacles to appropriately communicating with patients. The court further rejected his argument that the hospital failed to engage in the interactive process, finding that it had in good faith met with Jakubowski, considered his proposed accommodation, explained why it was unreasonable, and offered the alternative of a pathology residency.

In *Steward v. New Chrysler*, the Sixth Circuit considered job restructuring as a proposed reasonable accommodation. Steward, an assembly line worker, developed carpal-tunnel syndrome and other conditions that prohibited her from lifting, pushing, or pulling more than ten pounds. Chrysler subsequently laid her off, and she sued claiming a failure to accommodate her disability. The Sixth Circuit affirmed the trial court's entry of summary judgment for Chrysler. The appeals court held that, while Steward claimed she should have been given a full-time helper or reassigned to a non-physical job, the duty of reasonable accommodation does not require an employer to restructure essential duties. Nor is an employer required to displace existing employees from their positions or create a new job for a disabled worker.

*Jay C. Boger*

## Ryan D. Bohannon Joins The Firm

We are pleased to announce that Ryan D. Bohannon has joined Kienbaum Opperwall Hardy & Pelton, P.L.C. as an associate attorney. Prior to joining the firm in early 2011, Mr. Bohannon was an associate at a business law firm in Detroit where he represented clients in labor and employment, general corporate, commercial, and other business litigation, as well as before federal and state agencies. He is a 2009 *magna cum laude* graduate of Wayne State University Law School, where he was awarded the Order of the Coif, and was an Associate Editor of *The Journal of Law in Society*, a Dean's Scholar, and a Lombard Fellow. He graduated with honors from Wayne State University in 2006 with a Bachelor of Arts degree, where his studies focused on history and mathematics. He has represented management clients in a range of employment claims, including breach of contract, discrimination, harassment, retaliation, and workplace torts.



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