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What's new, what's old and what a year it's going to be:

New CA laws and National Labor Relations Board Posting Requirements."

Employment Law Workshop

By

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CALIFORNIA BUSINESSES CANNOT LET GUARD DOWN

By

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Lots is going on here in the Golden State. Governor Jerry Brown was reelected to a third term (after a hiatus of almost 30 years since the end of his second term), and since that time, California employers have been on edge wondering what type of anti-business measures he would sign into law. Although several bills that businesses feared either did not pass or were vetoed, the governor has signed into law a number of measures that should give employers concern.

The following is a summary of the more significant recently-enacted legislation:

Limits on Pre-Employment Credit Checks
Health Insurance Must Be Provided for Pregnancy Disability Leaves
Better Not Misclassify Those Independent Contractors . . . er, Employees!
Leaves of Absence for Organ Donations
Wage Theft Prevention Act
Commission Agreements Must Be in Writing
BONUS: Schwarzenegger's Anti-Trafficking Certification Law Takes Effect January 1

AB 22 – Mendoza (D-Artesia) – Credit Checks

California has followed the growing trend in other states by barring employers from obtaining credit reports during the application process for many job positions. Currently, California employers are required to inform applicants that a credit check might be performed, and get written consent. But now, thanks to AB 22, employers cannot obtain or use the credit reports of prospective employees for many positions.

The new law has exceptions for certain types of jobs. The positions for which a credit report can be obtained during the hiring process include the following:

- a managerial position
- a position for which credit information is required by law
- a position that requires regular access to bank or credit card account information, social security numbers, and date of birth
- a position in which the employee would be a signatory on the employer's bank account, or authorized to transfer money on behalf of the employer, or authorized to enter into financial contracts on behalf of the employer

- a position that involves access to confidential or proprietary information, including trade secrets
- a position that involves regular access to cash totaling $10,000 or more of the employer, a customer, or client, during the workday, or
- any position with certain financial institutions.

When an employer does intend to obtain a credit report during the hiring process, the employer must inform the applicant of the specific reason the employer is obtaining the report, meaning the exception that applies to the position. This new requirement is in addition to the other requirements already imposed on employers under the federal Fair Credit Reporting Act and other similar laws.

SB 299 – Evans (D – Santa Rosa) – Health Insurance Coverage for Pregnancy Disability Leaves

Currently, employers with 50 or more employees are subject to the federal Family and Medical Leave Act as well as California's Family Rights Act. Both laws require that a covered employer provide health insurance coverage to an eligible employee who must take a leave of absence for a qualifying reason on the same basis as if the employee was continuing to work.

The right to have continued health insurance coverage applied only to employees who had worked for 1250 hours in the 12-month period preceding the leave, and at least 12 months of service with the employer.

Employers who were not covered by the FMLA or CFRA, but who had California employees who needed to take pregnancy disability leaves, were required to provide up to four months of leave. However, they were not required to continue health insurance coverage because the costs to smaller employers were considered too burdensome. SB 299 requires that companies with five or more employees (no tenure requirement) provide continued health insurance for up to four months for pregnancy disability leaves – more than what is required by either the FMLA or the CFRA. This may cause some smaller employers to reconsider whether they want to provide health insurance at all.

SB 299 will take effect January 1, 2012.

SB 459 – Corbett (D – San Leandro) – Independent Contractor Misclassification
This bill has now created an entire administrative scheme and additional causes of action for companies that engage the services of individual independent contractors. If the individual is found to have been improperly classified as an independent contractor, the contracting entity may be fined anywhere from $5,000 to $25,000 for each violation.

This new law is going to be difficult to comply with as the various state agencies use different criteria for determining who is an independent contractor. I have not seen clear guidance yet, but it would be my recommendation to comply with all of the tests, and in particular, **the 11-point test used by the California Labor Commissioner**. When in

doubt, treat the worker as employee rather than an independent contractor. By all means, seek legal advice if you have any individuals who are currently performing work for your company and are being paid on a "1099" basis.

SB 272 – DeSaulnier (D – Concord) Organ Donor/Bone Marrow Leave of Absence
Last year SB 1304 was enacted with relatively little fanfare. This law added sections 1508-1513 to the California Labor Code. SB 1304 created an additional leave of absence for employees of private organizations which entitled that employee up to 30 days of paid leave to donate an organ, and up to 5 days of paid leave for someone to donate bone marrow. This new bill brings renewed attention to this newer law and clarifies that the 30 days are business days and not calendar days. This new law also clarifies that the time off cannot be seen as a break in service for pay increases or the accrual of benefits, including vacation and seniority.

AB 469 – Swanson (D – Oakland) California Wage Theft Prevention Act

The Wage Theft Prevention Act of 2011 ("Act") imposes new requirements on California employers. One significant provision now requires employers to provide non-exempt employees with a written notice, at the time they are hired, of various compensation information and information on the company.

In particular, Labor Code Section 2810.5 (as of January 1, 2012) will require that at the time of hiring, an employer shall provide each employee a written notice, in the language the employer normally uses to communicate employment-related information to the employee, containing the following information:

1. The rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable.

2. Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances.

3. The regular payday designated by the employer in accordance with the requirements of this code.

4. The name of the employer, including any "doing business as" names used by the employer.

5. The physical address of the employer's main office or principal place of business, and a mailing address, if different.

6. The telephone number of the employer.

7. The name, address, and telephone number of the employer's workers' compensation insurance carrier.

8. Any other information the Labor Commissioner deems material and necessary.

The Labor Commissioner is in the process of preparing a template that complies with the above requirements and estimates that the template will be made available to employers any day now.

If an employer changes any terms or conditions of employment related to the eight items, it is required to notify the affected employees in writing of any changes within seven calendar days, unless all changes are reflected on a timely wage statement furnished in accordance with Section 226; or unless notice of all changes is provided in another writing required by law within seven days of the changes.

This "New Hire Statement" applies to private, non-exempt employees but does not apply to public employees; exempt employees; or employees who are covered by a valid collective bargaining agreement.

The Act also requires employers to maintain records itemized wage statements and records of deductions for three years. The Act also dramatically strengthens certain penalties and the enforcement powers of the California Labor Commissioner. One particular provision now allows the Labor Commissioner to collect penalties and fees for up to three years. The prior limit was one year.

AB 1369 – Assembly Committee on Labor & Employment – Written Commission Agreement

This new law requires all employers doing business in California to draft written contracts for any agreements with employees that involve commissions as a method of payment for services. Commission wages are defined as "compensation paid to any person for services rendered in the sale of an employer's property or services and based proportionately upon the amount or value thereof."

The deadline for employers to reduce all commission agreements to writing is January 1, 2013. In addition to outlining the commission plan in writing, employers must provide a signed copy of the contract to every employee covered by the commission agreement and obtain a signed receipt for the contract from each employee. There are no penalties associated with a violation of the new statute but presumably a violation could be a basis for suit under California's Private Attorneys General Act (PAGA) and Unfair Competition Law. Accordingly, we recommend that employers comply as soon as possible.

In at least one respect, this law may work to the advantage of employers. Frequently, when employers are sued for failing to pay promised commissions, there is no evidence of exactly what the commission arrangement was. Disputes frequently arise over at what stage in the sale is the commission considered "earned" by the employee, as well as how commissions are handled in the event of a termination. By requiring these terms to be put in writing, AB 1369 may have the effect of reducing employers' risk of litigation over unpaid commissions.

California Transparency In Supply Chains Act of 2010

Finally, a statute enacted in 2009 under former Governor Arnold Schwarzenegger will take effect on January 1, 2012.

The California Transparency In Supply Chains Act of 2010 requires every retail seller and manufacturer doing business in the State of California and having annual worldwide gross receipts that exceed $100MM to disclose its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.

The disclosure must be posted on the company's website with a conspicuous and easily understood link to the required information placed on the business's home page. If the company does not have a website, it must provide the written disclosure to a consumer within 30 days of receiving a written request for the disclosure.

The Act does not require covered companies to eliminate slavery or human trafficking. It does, however, require them to, at a minimum, disclose whether and to what extent they do each of the following:

1. Verify product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure must specify if the verification was not conducted by a third party.

2. Audit suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure must specify if the verification was not an independent, unannounced audit.

3. Require direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.

4. Maintain internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.

5. Provide training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products, to company employees and management who have direct responsibility for supply chain management, .

The exclusive remedy for a violation of the Act is an action brought by the Attorney General for injunctive relief.

NOTICE TO EMPLOYEE

Labor Code section 2810.5

Effective January 1, 2012, California Labor Code section 2810.5(a) requires that the following information be provided to each employee at the time of hire in the language the employer normally uses to communicate employment-related information. Exceptions to this requirement are indicated on the next page.
This notice is available in other languages at www.dir.ca.gov/DLSE.

EMPLOYEE

Employee Name: _____ Hire Date: _____

EMPLOYER

Name of Employer: _____

(Check all that apply): □ Sole Proprietor □ Corporation □ Limited Liability Company □ General Partnership

□ Other type of entity: _____

□ Staffing agency (e.g., temp agency or PEO)

Other Name Employer is doing business as (if applicable): _____

Physical Address of Main Office: _____

Employer's Mailing Address: _____

Employer's Telephone Number: _____

If the worksite employer uses any other business or entity to hire employees or administer wages or benefits, complete the information above for the worksite employer, complete the information below for the other business, and complete the remaining sections. If there is no other business or co-employer, or if the only other business is a recruiting service or a payroll processing service, skip the rest of this section, and complete the remaining sections.

Name of Other Business: _____

This other business is a:

□ Professional Employer Organization (PEO) or Employee Leasing Company or a Temporary Services Agency

□ Other: _____

Physical Address of Main Office: _____

Mailing Address: _____

Telephone Number: _____

WAGE INFORMATION

Rate(s) of Pay: _____ Overtime Rate(s) of Pay: _____

Rate by (check box): □ Hour □ Shift □ Day □ Week □ Salary □ Piece rate □ Commission

□ Other (provide specifics): _____

Employment agreement is (check box): □ Oral □ Written

Allowances, if any, claimed as part of minimum wage (including meal or lodging allowances):

_____

Regular Pay Day: _____

WORKERS' COMPENSATION

Insurance Carrier's Name: _____

Address: _____

Telephone Number: _____

Policy No.: _____

□ Self-Insured (Labor Code 3700) and Certificate Number for Consent to Self-Insure: _____

ACKNOWLEDGMENT OF RECEIPT

_____	_____
(PRINT NAME of Employer representative)	(PRINT NAME of Employee)
_____	_____
(SIGNATURE of Employer representative)	(SIGNATURE of Employee)
_____	_____
(Date provided to employee & signed by representative)	(Date received by employee & signed by employee)

Labor Code section 2810.5(b) requires that the employer notify you in writing of any changes to the information set forth in this Notice within seven calendar days after the time of the changes, unless one of the following applies: (a) All changes are reflected on a timely wage statement furnished in accordance with Labor Code section 226; (b) Notice of all changes is provided in another writing required by law within seven days of the changes.

This Notice is NOT required if (a) you are directly employed by the state or any political subdivision thereof, (b) you are an employee who is exempt from the payment of overtime wages by statute or wage order, or (c) you are covered by a collective bargaining agreement that expressly provides for wages, hours of work and working conditions, and provides for premium wage rates for all overtime worked.

The full text of Labor Code section 2810.5 may be found at www.leginfo.ca.gov/calaw.html. Check "Labor Code" and search for "2810.5" in quotes.

The employee's signature on this notice merely constitutes acknowledgement of receipt. In accordance with an employer's general recordkeeping requirements under the law, it is the employer's obligation to ensure that the employment and wage-related information provided on this notice is accurate and complete. Furthermore, the employee's signature acknowledging receipt of this notice does not constitute a voluntary written agreement as required under the law between the employer and employee in order to credit any meals or lodging against the minimum wage. Any such voluntary written agreement must be evidenced by a separate document.

Welcome to the California
DEPARTMENT OF INDUSTRIAL RELATIONS

Division of Labor Standards Enforcement (DLSE)

Frequently Asked Questions (FAQ)
Wage Theft Protection Act of 2011 - Notice to Employees

The Labor Commissioner provides the following answers to frequently asked questions about the new Wage Theft Protection Act, specifically with respect to the required notice by employers to all employees at the time of hire.

The Wage Theft Prevention Act (AB 469) goes into effect on January 1, 2012. The new legislation amends existing laws (Labor Code sections 98, 226, 240, 243, 1174, and 1197.1), and adds new requirements (Labor Code sections 200.5, 1194.3, 1197.2, 1206, and 2810.5) which criminalizes willful violations for non-payment of wages after a court judgment or final administrative order; requires restitution to the employee in addition to a civil penalty for failure to pay minimum wages; requires that specified information be provided to employees at the time of hire and in wage claim proceedings and that employers update changes within specified periods; extends the time period for obtaining judgments on final orders for collection of penalties by the Division of Labor Standards Enforcement (DLSE); enhances bond requirements for employers with convictions or court judgments for non-payment of wages including requiring an accounting of assets upon request by DLSE or court order; establishes that penalties under the Labor Code for failure to comply with wage-related statutes are minimum penalties; and allows employees to recover attorney's fees and costs incurred to enforce a judgment for unpaid wages.

Specifically, new Section 2810.5 of the Labor Code requires that employers provide notice to employees of their rate (s) of pay, designated pay day, the employer's intent to claim allowances (meal or lodging allowances) as part of the minimum wage, and the basis of wage payment (whether paying by hour, shift, day, week, piece, etc.), including any applicable rates for overtime. The law requires that the notice contain the employer's "doing business as" names, and that it be provided at the time of hiring and within 7 days of a change if the change is not listed on the employee's pay stub for the following pay period. The notice must be provided in the language the employer normally uses to communicate employment-related information to the employee, through translated notices provided by the Department of Labor.

Based upon inquiries received by DLSE in anticipation of the effective date for this new requirement, the following are frequently asked questions regarding the new Notice requirements of the Wage Theft Prevention Act:

1. What is the Wage Theft Prevention Act?

A: A new law, effective January 1, 2012 which gives greater protection to workers, and makes changes in the way workers are notified of basic employment information.

2. Who is covered by the law?

A: All private sector employers are covered unless there is a specified exception. The notice is not required for an employee: directly employed by the state or any political subdivision, including any city, county, city and county, or special district; an employee who is exempt from the payment of overtime wages by statute or the wage orders of the Industrial Welfare Commission; or for an employee who is covered by a valid collective bargaining agreement if it meets specified conditions. It is important to note that charter schools, private schools, and not-for-profit corporations are covered, as they are not public entities. Subject to the foregoing exceptions, as of January 1, 2012, employers are required to provide the written notice to each employee "[a]t the time of hiring." The notice requirement was intended to apprise employees of basic information material to their employment relationship, and to ensure employees are given up-to-date employment information through notice of any changes to that information; as such, it would be a best practice for employers not only to provide the notice to new hires, but also to current employees. *(Underlined portion added 1/23/12)*

3. What does the law require?

A: Workers have to receive the required notice containing specific information at the time of hire: (A) the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable; (B) allowances, regular payday designated by the employer as required by law; (D) the name of the employer, including any "doing business as" names used by the employer; (E) the physical

address of the employer's main office or principal place of business, and a mailing address, if different; (F) the telephone number of the employer; (G) the name, address, and telephone number of the employer's workers' compensation insurance carrier; and (H) any other information the Labor Commissioner deems material and necessary.

It also requires that the employer notify the employee in writing of any changes to the information set forth in the Notice To Employee within seven (7) calendar days after the time of the changes, unless one of the following applies: (a) All changes are reflected on a timely wage statement furnished in accordance with Labor Code section 226, or (b) Notice of all changes is provided in another writing require by law within seven days of the changes.

4. What if a worker's primary language is not English?

A: Notices need to be given in the language the employer normally uses to communicate employment-related information to the employee. DLSE will be posting versions of the notice template in other languages and will be available on our website for use by employers.

5. For what languages will the Labor Commissioner provide templates?

A: Templates will be available in non-English languages on our website as they are completed. In an effort to assist employers as much as possible with translations, Spanish, Chinese, Korean, Vietnamese and Tagalog will be provided. We will endeavor to provide other translations.

6. Do I have to use the Labor Commissioner's template?

A: No, employers can develop their own notices so long as they contain all the information required by the law, including all the information requested on DLSE's template. The template includes all required information, including that which the Labor Commissioner deems material and necessary for purposes of the notice. Employers should keep a record of the notices provided to their employees.

7. May the notice be included in letters and/or employment agreements provided to new hires?

A: Yes, it can be given with other materials that are presented at the time of hire, but the notice required under Labor Code 2810.5 must be on its own form. Employees should not be required to piece together the information from several separate documents or pages of a manual.

8. Can a worker waive the notice requirement?

A: No, it is a notice required by statute and is not subject to waiver (Labor Code 2804).

9. Can the notice be given electronically?

A: Yes, but there needs to be a system where the worker can acknowledge the receipt of the notice and print out a copy of the notice.

10. What if a worker refuses to sign the notice?

A: The employer should still give the notice to the worker and note the worker's refusal on its copy of the notice. A worker's signature on the notice merely constitutes acknowledgement of receipt. In accordance with an employer's general recordkeeping requirements under the law, it is the employer's obligation to ensure that the employment and wage-related information provided on the notice is accurate and complete. Furthermore, a worker's signature acknowledging receipt of the notice does not constitute a voluntary written agreement between the employer and employee to credit any meals or lodging against the minimum wage. Any such voluntary written agreement (as required under the law) must be evidenced by a separate document

11. Do I have to give a new notice every time a wage rate changes?

A: If the wage rate is the only change, notice is not required where there is an increase in a rate and the new rate is shown on the pay stub (itemized wage statement) with the next payment of wages. Note: Decreases in wage rates can only be made prospectively and not retroactively where work was performed and earned under a specified rate.

12. What procedures should be followed if an employee has multiple pay rates?

A: An employer must put all pay rates on the notice (and on the wage statement). The notice must include "[t]he rate or rates of pay and basis thereof whether paid by the hour, shift, day, week, salary, piece commission, or otherwise, including any rates for overtime, as applicable." (Labor Code 2810.5(a)(1)(A)). The Legislature's inclusion of language referring to "the rate or rates of pay" contemplates that several rates may apply to an employment relationship and

thus all applicable rates must be provided in the notice (or may be attached as a separate sheet to the notice with a clear reference in the notice to the attachment, indicated in the space for "Rate(s) of Pay"). *(Underlined portion added 1/23/12)*

13. What should we do if the worker has multiple hourly or piece rates?

A: The purpose of the notice is to inform workers of the wage rates that apply to them. Multiple rates need to be identified as part of the notice. Only the rates used to determine a worker's pay need be shown on the wage statement for that period.

14. Does the notice requirement apply to workers covered by a union contract?

A: Generally no. If the workers are under a valid collective bargaining agreement which expressly provides for the wages, hours of work, and working conditions of the employee and provides premium wage rates for all overtime hours worked and a regular hourly rate for those employees of not less than 30% more than the state minimum wage, the notice is not required for those employees. If these conditions are not satisfied, then a notice is required for such employees.

15. Are exempt employees, including professionals, executives, or administrators, excluded from the notice requirements?

A: Yes, as they are not "employees" *only* for purposes of the notice requirement (Labor Code 2810.5(c)(2).

Additional questions and responses added 1/23/12

16. In construction projects where workers in trades are paid on a piece rate (e.g. expressed in measurement such as linear feet/yards, roofing squares, etc.) which are adjusted based upon complexity or difficulty of the job, employees may work on different structures or projects with different piece rates. Would it be permissible to provide a piece rate sheet showing the range of piece rates for each type of work?

A. Yes. An employer can modify the DLSE template or attach a sheet to the existing template with a clear reference to the attachment in the space for "Rate(s) of Pay." The employer should specify multiple rates within a range the worker will be paid by the employer, including the basis for variation that informs the employee when certain rates within a range will apply (based upon stated criteria such as complexity/difficulty of project work).

17. Regarding prevailing wages payable on public works projects, can an employer simply state on the notice that they will be paid the appropriate or applicable prevailing wage on a project without having to keep disclosing or re-disclosing changes as they occur?

A: As with all private sector employers, private contractors or subcontractors on public works projects are subject to the notice requirement under Labor Code 2810.5. It would be *insufficient* to simply state "appropriate prevailing wage" or "variable prevailing wage" when providing the rate(s) of pay for purposes of the notice. For a worker in a public works project, the applicable prevailing rate is dependent on the location and project work performed by the worker. Accordingly, the employer must include in the notice all rates applicable to such work that are known or can be determined at the time the notice is to be provided. Any subsequent changes in wage rates for a later project (or at subsequent locations with a different prevailing rate) must be reflected in itemized wage statements provided to employees under Labor Code 226 in order for the employer to be exempt from issuing a new notice to the employee. (Labor Code 2810.5(b)).

18. Does "the rate or rates of pay" required on the notice require inclusion of other compensation for work performed?

A: Yes. For purposes of the notice requirement, "pay" is *not* limited to a time-based or piece-based measure of compensation for labor performed by an employee, but includes all rates fixed or ascertained by calculation. DLSE views the term "pay" synonymously with the term "wages." The word "pay" ordinarily means "a paying or being paid; payment" and "money paid, esp. for work or services; wages or salary." (Webster's New World Collegiate Dictionary, 4th Ed, 2001, p. 1058). This ordinary meaning for "pay" thus consists of the concept of a payment of money for work or services performed which is fundamentally consistent with the definition wages. "Wages" is statutorily defined to include "all amounts for labor performed by employees of every description whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (Labor Code 200(a)). Accordingly, if a rate is *fixed* by hour, commission, piece rate, or a combination thereof, such rates must be provided in terms of a money value and basis for earning such rate. If the rate is ascertained by *some other method of calculation*, basic information specifying the calculation must be provided and an employer must include all rates of compensation in the notice. An employer need only nominally and briefly provide each type of the pay and rate an employee will receive. For example, specific detail of formulas need not be included, as long as accurate information

stating the *basis* of pay is provided, e.g. "$10.00 per hour, plus commissions of ___% of sales closed during prior month." Any additional reference to or incorporation of another document or attachment must be specifically described on the notice.

19. Can an employer state that the regular rate of pay varies from pay period to pay period as the hours or amount of includable pay varies? Can the employer simply state on the notice that the overtime rate is a multiplier (1½ times or double) of the regular rate of pay?

A: An important distinction must be maintained between the "the rate or rates of pay" required for the notice under 2810.5 and "a regular rate of pay" for purposes of specifying and calculating statutory overtime compensation. A single rate of pay may be fixed by various measures such as time, task, commission, or piece rate. A single fixed pay rate does not constitute a variable rate of pay simply because it results in potentially different amounts of *total wages* earned over different pay periods. But if an employee is to receive different types of pay (e.g., hourly wage plus commission), the rate for each type and basis of pay must be provided in the notice. If any part of the pay (wage) is ascertained by some other method of calculation, then basic information for calculating that rate must be provided in the notice. The notice must accurately inform employees of all applicable rates of pay determinable at the time the notice is to be provided that the employee will receive under his or her employment.
Section 2810.5 also requires inclusion of "any rates for overtime, as applicable." Simply stating the multiplier for overtime (e.g., 1½ and/or double the regular rate) does not specify an overtime rate. When providing information regarding applicable overtime rates, only rates known and determinable must be specifically provided to the employee. By law, overtime rates are required to be based upon a "regular rate of pay" which has a special meaning in calculating statutory overtime compensation for hours worked over 8 in a day or 40 in a week (Labor Code 510, IWC Orders §3). Where an employee receives only an hourly pay rate (wage), the hourly pay is the regular rate of pay (as long as it is at least equal to minimum wage) for purposes of overtime. If the employee receives other types of pay (other than the hourly pay such as supplementary commissions, bonuses, or piece rates), such other pay must be included in determining "the regular rate of pay" for purposes of overtime compensation. In such cases, it is sufficient that an employer provide the minimal overtime rate based upon a multiplier of 1½ or double times the hourly rate *and* also indicate that such specified overtime rate is subject to upward adjustment when other specified forms of wages are earned during the applicable pay period. This is allowable because statutory overtime is based upon a "regular rate of pay" which includes all wages earned during the period of time for which overtime compensation is determined as applicable under statute. Only in this context may an overtime rate vary and not be subject to ascertainment for a specific overtime rate. Of course, an employer may provide overtime rates above the statutory rates which may be specified in the notice if ascertainable at the time the notice is to be provided, but all rates of pay (wages) must in combination comply with statutory and regulatory requirements for overtime compensation. More specific information for determining the "regular rate of pay" for overtime compensation under various scenarios is available in the DLSE Enforcement and Interpretations Manual, §49 "Computation of Regular Rate of Pay and Overtime Compensation" available on this website.

20. When does a "hire" occur for purposes of providing the required notice to an employee?

A: The statute states that employers shall provide the written notice "[a]t the time of hiring," without defining the phrase. In the absence of a statutory definition for "hiring," its ordinary meaning is "to get the services of a person or use of a thing in return for payment; employ or engage." (Webster's New World Collegiate Dictionary, 4th Ed, 2001, p. 675). The concept does not necessarily depend on the first day of work by the employee but may be sooner where there has been an offer and acceptance of employment establishing an employment relationship. (See Labor Code 2750). While the obligation for payment of wages for work performed arises when work is performed, the employment contract may be created prior to performance. Thus, the first day of work may be used as the time of hire (date of hire) for unilateral contracts, such as where an offer is made by an employer and only accepted by the employee when performance of work commences. More often, however, employment contracts (written or oral) are bilateral where the offer of employment is made by the employer and accepted by the employee, at which time an employment relationship arises (which may be several days prior to commencement of work). The notice requirement presumes an employment relationship as it requires that the notice be given to an "employee" at "the time of hire" by the employer. Thus, the employer must provide the notice to new hires reasonably close in time to the inception of the employment relationship, whether it is created under a unilateral contract (commencing only upon performance by an employee) or a bilateral/executory contract (commencing upon acceptance of an offer of employment made by an employer).
Also, it is important to note that even where an employment contract in fact does not exist, an obligation to pay wages (minimum wages and overtime) may still exist if the employment is otherwise established under statute or regulation under applicable definitions contained in the Labor Code and/or Industrial Welfare Commission orders. (See *Martinez v. Combs* (2010) 49 Cal.4th 35 [discussing employment relationship under statute and regulation definitions]). This means that a denial of the existence of an employment agreement or a failure of an employer to provide the required notice does not dispense with the statutory obligation to pay wages (or to provide the required notice) to one performing labor or services if employment is established under statutory or regulatory provisions.

21. Why does specification of a written agreement require that a box be checked to indicate whether it is written or oral? Does this information affect the employment at-will doctrine?

A: As previously stated, the notice requirement is premised upon an employment relationship. The designation of whether an employment agreement or contract is written or oral is directly relevant to the existence of an employment relationship. (See Labor Code 2750 which provides definition of contract of employment). The information is one of fact—either a written agreement or oral agreement exists. Providing this information on the notice makes it clear to the employee whether the full terms and conditions of employment are contained in a writing or based upon oral terms. Labor Code 2810.5 is aimed at informing employees about such fundamental and material information concerning the employment relationship.

The designation in the notice of such agreement or contract information has nothing to do with "at will" employment in California, which refers to termination of an employment relationship having no specified term. Prior to the enactment of Labor Code 2810.5, written and oral employment agreements have existed without conflict with the "at will" doctrine in Labor Code 2922. Indicating whether an employment agreement is written or oral on the notice has no legal effect on Labor Code 2922.

22. If workers' compensation policy information is required on the notice, does any change in policy carrier or policy number require that a new notice be issued to every employee?

No. The statute clearly provides that notice of a change may be accomplished (without having to issue a new notice) if all changes are provided in *another writing required by law* within 7 days of the changes. (Labor Code 2810.5(b)). Any change to the policy number could be accomplished through a posting of the workers' compensation notice (a writing required under Labor Code 3550-3351), which contains current policy information, and which all employers are required to post in a conspicuous location where employees can readily view the notice during the hours of the work day.

23. Why does an employer representative have to sign an acknowledgment on the notice?

A: Employers often consist of various legal entities which are not individuals/persons. The acknowledgment provides assurance that the information on the notice is from the employer and that the employer is providing the information to each employee. This acknowledgment better protects both the employer and employee that the statutory notice is in fact provided as intended by the Legislature. The employer representative may be any person the employer has authorized to sign the acknowledgment.

24. When providing information regarding the regular pay day, can an employer simply state "bimonthly, bi-weekly," etc., rather than a specific date?

An employer need not provide a specific *date* (month, day, and year) for each pay day, but the information provided should be sufficient for an employee to understand when she will be paid. Thus, the *regular day(s) of the month when wages will be paid* should be specified in addition to the measure of time between pay days (e.g., semi-monthly, monthly, bi-weekly, weekly, etc.). Examples include: 1st and 15th of every month; 1st and 2nd Friday of every month, each Friday of every month.

25. Is there a requirement that a notice is required to be given annually to employees as in New York's wage theft law?

A: No. Unlike New York's law, annual notices to employees are not required under California's wage theft protection law. California requires that changes to information initially provided in the notice shall be accomplished by issuing a new notice containing all changes within 7 calendar days after the change or in the manner described in Labor Code 2810.5(b)(1)-(2).

Independent contractor versus employee

Not all workers are employees as they may be volunteers or independent contractors. Employers oftentimes improperly classify their employees as independent contractors so that they, the employer, do not have to pay payroll taxes, the minimum wage or overtime, comply with other wage and hour law requirements such as providing meal periods and rest breaks, or reimburse their workers for business expenses incurred in performing their jobs. Additionally, employers do not have to cover independent contractors under workers' compensation insurance, and are not liable for payments under unemployment insurance, disability insurance, or social security.

The state agencies most involved with the determination of independent contractor status are the Employment Development Department (EDD), which is concerned with employment-related taxes, and the Division of Labor Standards Enforcement (DLSE), which is concerned with whether the wage, hour and workers' compensation insurance laws apply. There are other agencies, such as the Franchise Tax Board (FTB), Division of Workers' Compensation (DWC), and the Contractors State Licensing Board (CSLB), that also have regulations or requirements concerning independent contractors. Since different laws may be involved in a particular situation such as a termination of employment, it is possible that the same individual may be considered an employee for purposes of one law and an independent contractor under another law. Because the potential liabilities and penalties are significant if an individual is treated as an independent contractor and later found to be an employee, each working relationship should be thoroughly researched and analyzed before it is established.

There is a rebuttable presumption that where a worker performs services that require a license pursuant to Business and Professions Code Section 7000, *et seq.*, or performs services for a person who is required to obtain such a license, the worker is an employee and not an independent contractor. Labor Code Section 2750.5

1. Q. How do I know if I am an employee or an independent contractor?

A. There is no set definition of the term "independent contractor" and as such, one must look to the interpretations of the courts and enforcement agencies to decide if in a particular situation a worker is an employee or independent contractor. In handling a matter where employment status is an issue, that is, employee or independent contractor, DLSE starts with the presumption that the worker is an employee. Labor Code Section 3357. This is a rebuttable presumption however, and the actual determination of whether a worker is an employee or independent contractor depends upon a number of factors, all of which must be considered, and none of which is controlling by itself. Consequently, it is necessary to closely examine the facts of each service relationship and then apply the law to those facts. For most matters before the Division of Labor Standards Enforcement (DLSE), depending on the remedial nature of the legislation at issue, this means applying the "multi-factor" or the "economic realities" test adopted by the California Supreme Court in the case of *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341. In applying the economic realities test, the most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work done and the manner and means in which it is performed. Additional factors that may be considered depending on the issue involved are:

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
2. Whether or not the work is a part of the regular business of the principal or alleged employer;
3. Whether the principal or the worker supplies the instrumentalities, tools, and the

place for the person doing the work;

4. The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;

5. Whether the service rendered requires a special skill;

6. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;

7. The alleged employee's opportunity for profit or loss depending on his or her managerial skill;

8. The length of time for which the services are to be performed;

9. The degree of permanence of the working relationship;

10. The method of payment, whether by time or by the job; and

11. Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.

Even where there is an absence of control over work details, an employer-employee relationship will be found if (1) the principal retains pervasive control over the operation as a whole, (2) the worker's duties are an integral part of the operation, and (3) the nature of the work makes detailed control unnecessary. *(Yellow Cab Cooperative v. Workers Compensation Appeals Board* (1991) 226 Cal.App.3d 1288)

Other points to remember in determining whether a worker is an employee or independent contractor are that the existence of a written agreement purporting to establish an independent contractor relationship is not determinative *(Borello, Id.*at 349), and the fact that a worker is issued a 1099 form rather than a W-2 form is also not determinative with respect to independent contractor status. *(Toyota Motor Sales v. Superior Court* (1990) 220 Cal.App.3d 864, 877)

2. Q. The person I work for tells me that I am an independent contractor and not an employee. He does not make any payroll deductions or withholdings for taxes, social security, etc., when he pays me, and at the end of the year he provides me with an IRS form 1099 rather than a W-2. By paying me in this manner does it mean I am automatically an independent contractor?

A. No. The fact that a person who provides services is paid as an independent contractor, that is, without payroll deductions and with income reported by an IRS form 1099 rather than a W-2, is of no significance whatsoever in determining employment status. Your employer cannot change your status from that of an employee to one of an independent contractor by illegally requiring you to assume a burden that the law imposes directly on the employer, that being, withholding payroll taxes and reporting such withholdings to the taxing authorities.

3. Q. Does it make any difference if I am an employee rather than an independent contractor?

A. Yes, it does make a difference if you are an employee rather than an independent contractor. California's wage and hour laws (e.g., minimum wage, overtime, meal periods and rest breaks, etc.), and anti-discrimination and retaliation laws protect employees, but not independent contractors. Additionally, employees can go to state agencies such as

DLSE to seek enforcement of the law, whereas independent contractors must go to court to settle their disputes or enforce other rights under their contracts.

4. **Q. When I started my current job my employer had me sign an agreement stating that I am an independent contractor and not an employee. Does this mean I am an independent contractor?**

A. No. The existence of a written agreement purporting to establish an independent contractor relationship is not determinative. The Labor Commissioner and courts will look behind any such agreement in order to examine the facts that characterize the parties' actual relationship and make their determination as to employment status based upon their analysis of such facts and application of the appropriate law.

5. **Q. How can it be that the Labor Commissioner determined I was an employee with respect to a wage claim I filed and won, and the Employment Development Department (EDD) determined I was an independent contractor, and denied my claim for unemployment insurance benefits?**

A. There is no set definition of the term "independent contractor" for all purposes, and the issue of whether a worker is an employee or independent contractor depends upon the particular area of law to be applied. For example, in a wage claim where employment status is an issue, DLSE will often use the five-prong economic realities test to decide the issue. However, in a separate matter before a different state agency with the same parties and same facts, and employment status again being an issue, that agency may be required to use a different test, for example, the "control test," which may result in a different determination. Thus, it is possible that the same individual will be considered an employee for purposes of one law and an independent contractor under another.

6. **Q. What can I do if I believe my employer has misclassified me as an independent contractor and as a result am not being paid any overtime?**

A. You can either file a wage claim with the Division of Labor Standards Enforcement (the Labor Commissioner's Office), or you can file an action in court to recover the lost overtime premiums. In both situations, it will first be necessary to determine your employment status, that is, employee or independent contractor, before the issue of overtime can be addressed and decided. Additionally, if it is determined that you are an employee and you no longer work for this employer, you can make a claim for the waiting time penalty pursuant to Labor Code Section 203. Eligibility for this penalty is dependent upon your employment status, as independent contractors are ineligible for the waiting time penalty.

7. **Q. What is the procedure that is followed after I file a wage claim?**

A. After your claim is completed and filed with a local office of the Division of Labor Standards Enforcement (DLSE), it will be assigned to a Deputy Labor Commissioner who will determine, based upon the circumstances of the claim and information presented, how best to proceed. Initial action taken regarding the claim can be referral to a conference or hearing, or dismissal of the claim.

If the decision is to hold a conference, the parties will be notified by mail of the date, time and place of the conference. The purpose of the conference is to determine the validity of the claim, and to see if the matter can be resolved without a hearing. If the claim is not resolved at the conference, the next step usually is to refer the matter to a hearing or dismiss it for lack of evidence.

At the hearing the parties and witnesses testify under oath, and the proceeding is

recorded. After the hearing, an Order, Decision, or Award (ODA) of the Labor Commissioner will be served on the parties.

Either party may appeal the ODA to a civil court of competent jurisdiction. The court will set the matter for trial, with each party having the opportunity to present evidence and witnesses. The evidence and testimony presented at the Labor Commissioner's hearing will not be the basis for the court's decision. In the case of an appeal by the employer, DLSE may represent an employee who is financially unable to afford counsel in the court proceeding.

See the Policies and Procedures of Wage Claim Processing pamphlet for more detail on the wage claim process procedure.

8. Q. What can I do if I prevail at the hearing and the employer doesn't pay or appeal the Order, Decision, or Award?

A. When the Order, Decision, or Award (ODA) is in the employee's favor and there is no appeal, and the employer does not pay the ODA, the Division of Labor Standards Enforcement (DLSE) will have the court enter the ODA as a judgment against the employer. This judgment has the same force and effect as any other money judgment entered by the court. Consequently, you may either try to collect the judgment yourself or you can assign it to DLSE.

9. Q. What can I do if my employer retaliates against me because I thought I was misclassified as an independent contractor and objected to not being paid overtime?

A. If you are an employee and your employer discriminates or retaliates against you in any manner whatsoever, for example, he discharges you because you question him about your employment status, or about not being paid overtime, or because you file a claim or threaten to file a claim with the Labor Commissioner, you can file a discrimination/retaliation complaint with the Labor Commissioner's Office. In the alternative, you can file an action in court against your employer. If, on the other hand it is determined that you are in fact an independent contractor, DLSE cannot assist you as it does not have jurisdiction over independent contractors, and you would have to go to court to enforce your rights.

CONSTANGY
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The Employers' Law Firm Since 1946

EXECUTIVE LABOR SUMMARY

September/October 2011

IN THIS ISSUE

By Cliff Nelson
Atlanta Office

NEWS & ANALYSIS

Posting of poster is postponed. – The National Labor Relations Board has postponed the implementation date for its new notice-posting rule until January 31, 2012. According to the Board, the decision to postpone followed questions from businesses and trade associations indicating uncertainty about which businesses fell under the Board's jurisdiction and, consequently, had to post the new notice.

In addition to these "questions," five organizations have sued the NLRB, seeking orders from federal courts to enjoin the rule. The suits, filed by the National Association of Manufacturers, the National Right to Work Legal Defense Foundation, the National Federation of Independent Businesses, and the South Carolina and U.S. Chambers of Commerce, allege that the rule is not authorized by the National Labor Relations Act and violates the First Amendment rights of employers.

Board's "August Onslaught" expands unions' power. – As we reported in **September 2009**, immediately before the Bush labor board was reduced to only two members upon the expiration of Chairman Batista's term, it issued more than 60 decisions, many in favor of business. Organized labor dubbed that period the "September Steamroll." Now, the Democrat-majority Board has done likewise, this time benefitting unions. This past August, immediately before the expiration of Democrat Chair Wilma Liebman's term, the Obama board unleashed its "August Onslaught" against business, including four noteworthy decisions:

Union Organizing Made Easier. As Constangy has **previously reported**, in ***Specialty Healthcare and Rehabilitation Center***, the Board's three-member Democrat majority rejected more than 20 years of precedent to rule that a petition for an election in only one job classification was appropriate when the employees shared a community of interest. The Board majority called a 1991 Board decision in ***Park Manor Care Center***, an "obsolete" ruling that failed to provide clear guidance to employees and unions. The decision will have a significant effect on non-acute health care facilities, but the scope of the decision is much broader. According to the Board, in any case where a union petitions based on a group with a community of interest, an employer arguing for a larger unit will have to show that "employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit." Among the critics of the decision was John Kline (R-Minn.), chair of the U.S. House of Representatives Education and the Workforce Committee. The Board "discarded decades of precedent," Kline said, and the new standards "empower union leaders to manipulate workplaces for their own gain," leaving employers vulnerable to constant labor disputes.

Decertification Petition After Voluntary Recognition Now Barred for Reasonable Period of Time. The Bush Board's controversial decision in ***Dana Corp.***, part of its "September Steamroll," modified the Board's recognition-bar doctrine by allowing employees 45 days after voluntary recognition to challenge the action through a decertification vote. In the Obama Board's "August Onslaught" decision of ***Lamons Gasket Co.***, the Board overruled *Dana* and returned to the old rule that the filing of a representation election petition is barred for a reasonable period of time after voluntary recognition of a union designated by a majority of employees. The Board said the "reasonable" period of time would be no less than 6 months after the parties' first bargaining session and no more than one year after that first session.

Successor Bar Doctrine Restored. In a companion case to *Lamons Gasket*, the Obama board has restored the successor bar doctrine that was eliminated in 2002 by ***MV Transportation***. In ***UGL-UNICCO Serv. Co.***, the three Democrat board members said that *MV Transportation* "has its origins in a bygone era," and that restoring the successor bar doctrine "better achieves the overall purposes of the Act, in the context of today's economy." Under the restored rule, a union will be allowed a reasonable period of time to bargain with the successor employer before a representation election petition is allowed. As in *Lamons Gasket*, the Board established as "reasonable" no less than 6 months after the parties' first bargaining session and no more than one year after that first session.

"Core Purposes" Bargaining Exemption Narrowed. Almost 20 years ago in ***Peerless Publications***, the Board ruled that where an employer's decision served a "core purpose" of the employer, it was not considered a mandatory subject of bargaining. In *Peerless*, the publisher was excused for its failure to bargain over its new ethics code because the code served a "core purpose" that was protected by the First Amendment. In ***Virginia Mason Hospital***, Board Chair Liebman and then-Member Mark Pearce reversed the decision of the administrative law judge who had ruled that the hospital was not required to bargain over the implementation of a flu prevention policy because the policy went to a "core" purpose of the institution. Liebman and Pearce found that *Peerless* should be limited to the publishing context because the ethics code served a core purpose protected by the First Amendment. Republican Member Brian Hayes dissented, saying that *Peerless* should not be so restricted.

Union can't finance employee lawsuit during critical period before election. – In ***Stericycle, Inc.***, Board members Craig Becker, Pearce and Hayes overruled a 1996 Board decision in ***Novotel New York***, and held that a union engaged in objectionable conduct by providing unit employees with free legal services to prepare and file a wage and hour lawsuit under the Fair Labor Standards Act during the critical period before an election. Liebman dissented. Members Becker and Pearce also laid out the scope of what would constitute unobjectionable conduct, saying that a union could educate employees about their rights under the labor laws and could even *refer* them to legal counsel who then filed suit on behalf of the employees – as long as the union did not fund the litigation itself. Member Hayes dissented from this part of the opinion, criticizing his colleagues for creating "what is essentially a road map for how unions can provide gratuitous benefits, in the form of legal services, to voting employees without engaging in objectionable conduct."

9th Circuit finally breaks NLRB deadlock on dues checkoff in right-to-work states. – The U.S. Court of Appeals for the Ninth Circuit has ended a 15-year dispute over an employer's unilateral termination of union dues checkoff in Nevada, a right-to-work state. The court commented that, during a 15-year period, the NLRB had ruled three times on charges that the employer violated the Act by unilaterally terminating dues deductions when the labor agreements expired in May 1994. The court found each ruling arbitrary, and said that the Board failed to provide a workable rule and that the parties could not be expected to wait any longer. In ***Local Joint Executive Board of Las Vegas v. NLRB***, the court wrote that in a right-to-work state, dues checkoff is not a benefit to the union forced upon employees, but rather is a benefit to those employees who choose to be a part of the union and also choose dues checkoff. Therefore, the termination of dues checkoff is a mandatory subject of bargaining and must be negotiated. The court distinguished the dues checkoff provisions in union contracts in non-right-to-work states where union-security agreements are permitted and dues checkoff arrangements are, effectively, forced upon employees.

Facebook posts about chintzy food at BMW event are protected concerted activity, but not snarky comments about auto accident, ALJ rules. – Employers must be cautious in handling employees' critical comments about work-related issues on Facebook or other social media sites, but it appears that they may have some recourse. In ***Karl Knauz Motors, Inc.***, the first ALJ decision on social media and protected concerted activity, the judge found in favor of a Chicago BMW dealership that terminated a salesman for posting on his Facebook wall embarrassing photos and "rude and sarcastic" comments about an auto accident. The accident occurred at a Land Rover lot next door, which was owned by the same company. After a Land Rover was driven into a pond during a test drive, the BMW salesman took photos of the accident and posted them, along with caustic comments, on his Facebook account. The ALJ found that this posting was neither protected nor concerted, "and had no connection to any of the employees' terms and conditions of employment." Because this was the basis of the dealership's decision to terminate the salesman, the ALJ upheld the termination.

However, the ALJ found that postings about a customer event were protected. When the dealership hosted a promotion to launch the redesigned BMW 5 Series automobile, the same salesman and several others complained that the menu of hot dogs, cookies and chips should have been replaced by fancier food and beverages. They complained that the modest tone of the event would negatively affect their ability to earn commissions. When management went ahead with the event as planned, the salesman took photos of the hot dog car and other food offerings and posted the photos on his Facebook wall, with comments ridiculing the event. In this instance, the ALJ found that the issue pertained, in part, to compensation and, although the Facebook posts clearly had a mocking and sarcastic tone, that, in itself, did not deprive the activity of the protection of the Act.

THE GOOD, THE BAD AND THE UGLY

Sodexo, SEIU settle suit. – Sodexo and the Service Employees International Union have have reached an "amicable" settlement of a lawsuit brought by Sodexo alleging that the union violated the federal Racketeer Influenced and Corrupt Organizations Act. As part of the settlement, the SEIU has agreed to end the corporate campaign it has waged against Sodexo for nearly two years, and Sodexo will dismiss its lawsuit. The parties also agreed to a set of principles to guide organizing and bargaining at the company, which included a call for both sides to refrain from engaging in public campaigns or using third parties to do so in connection with organizing drives.

The settlement was reached after a federal district judge denied a motion by the SEIU to dismiss Sodexo's lawsuit. Sodexo alleged that the union and other defendants conducted a campaign of extortion in an attempt to force Sodexo to recognize the SEIU as the bargaining representative for many of its currently non-union workers. **As we previously reported**, Sodexo had uncovered an "intimidation" manual published by the SEIU. News reports about the manual have prompted Sen. Orrin Hatch (R-Utah) to send a letter to NLRB Member Becker, asking whether he had any role in drafting the controversial manual when he was an attorney for the SEIU. An NLRB spokesperson recently refused to comment on the letter but said that Becker would respond directly to Hatch.

Machinists go public with Boeing's "smoking gun" documents. – Boeing Corporation continues to duke it out with the International Association of Machinists over its production line in South Carolina, we **reported** in our last edition that the Machinists had what it called "smoking gun" documents based on a Power Point presentation in 2009. Since that time, **the union has released 15 pages of documents**, culled from presentations to the Boeing Board of Directors in 2009 when the company was deciding where to build its second production line for the 787 Dreamliner. In addition to alleged unlawful statements by numerous management officials, the union claims that the documents prove that Boeing moved production to South Carolina to punish union members for exercising their rights. Boeing contends the documents confirm that it made a legitimate business decision based upon a variety of factors, including the need to ensure its future competitiveness and provide delivery stability for its customers.

During three separate presentations, the Boeing board was shown pros and cons of locating the new assembly line in either Washington state or South Carolina. One stated risk of using the Washington location was "union dependence"; another was the ramifications of having all major production at a single site. Among the risks of putting the work in South Carolina were an "inexperienced" workforce; capability and capacity of dual source suppliers; short-term productivity hit; higher start-up costs; negative impact to the profitability of the 787 program; a cost of $1.5 billion in cash; reducing earnings on a third of backlog; additional supply chain complexity; and limited delivery management experience. Among the "pros" for putting the facility in South Carolina were creating a non-union, competitive labor force; lowering labor costs and avoiding the current "hostage" situation; creating a counterbalance to union leverage; and increasing options for future workplace decisions.

Given the NLRB's current pro-labor agenda, the Boeing dispute is expected to end up in the federal courts.

Longshoremen get civil contempt for uncivil, contemptible behavior. – A federal court in Washington state **recently fined** two union locals $250,000 for violating a temporary restraining order and preliminary injunction that the court had entered to halt violent protests at a Washington port facility. The judge fined the locals of the International Longshore and Warehouse Workers for damages caused during two days of demonstrations and violence that included overwhelming security guards at the port, van-

dalizing vehicles, smashing windows, and threatening law enforcement personnel with bodily harm. **Most Americans approve of unions, but . . . .** – 52 percent of Americans who responded to a recent Gallup poll approve of unions, but 55 percent believe unions will become weaker in the future. The poll also showed that 42 percent of respondents want unions to have less influence than they have today. Thirty percent want unions to have more influence, and 25 percent prefer no change.

About Constangy, Brooks & Smith, LLP

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.

Employee Rights

Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.

- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: **http://www.nlrb.gov.**

You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or **(TTY) 1-866-315-NLRB (1-866-315-6572)** for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.

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