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The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed.

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Kollman & Saucier P.A.
The Business Law Building
1823 York Road
Timonium, MD 21093
www.kollmanlaw.com

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NLRB DELAYS NOTICE POSTING REQUIREMENT

By Eric Paltell

On October 5, 2011, the National Labor Relations Board ("NLRB" or "Board") announced that it was delaying for two months the effective date of its new Final Rule requiring virtually all employers to post a notice in the workplace informing employees of their rights to form unions and collectively bargain. The rule, which was set to take effect on November 14, 2011, has now been delayed until January 31, 2012. According to an NLRB press release announcing the postponement, the reason for the change is to "allow for enhanced education and outreach to employers, particularly those who operate small and medium-size businesses." https://www.nlrb.gov/news/posting-employee-rights-notice-now-required-jan-31-board-postpones-deadline-allow-further-educa. Significantly, the Board did not announce any outreach or training initiatives to go along with the delay.

The Board' s notice posting obligation has been controversial since it was initially published by the NLRB on August 27, 2011. The notice apprises employees of their right to organize unions, as well as negotiate wages, benefits, and other terms and conditions of employment with their employer. The notice also makes employees aware of their right to strike and picket, and to act collectively to voice work-related complaints.

Not only does the notice inform employees of their rights, but it also makes them aware of the types of employer conduct that may violate the National Labor Relations Act. Specifically, the notice states that employers cannot prohibit employees from discussing unions or soliciting on behalf of unions in non-working areas during non-working time. Employees are also told that employers cannot prohibit the wearing of union insignia in the workplace, except under some special circumstances, nor can they question employees about union activities or engage in any retaliatory action against

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AGENCIES CRACK DOWN ON MISCLASSIFIED CONTRACTORS

By Cliff Geiger

The Misclassification Initiative, which was launched by Vice President Biden's Middle Class Task Force, is picking up steam. The goal is to prevent, detect, and remedy employee misclassification, which happens when employers improperly classify employees as independent contractors. The government is interested for two reasons. First, unlike employees, independent contractors do not benefit from wage and hours laws, state unemployment insurance requirements, or workers' compensation statutes. Second, employers do not withhold income taxes from payments made to independent contractors, nor do they withhold employment taxes or unemployment and

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FEDERAL COURT APPROVES HOSTILE WORK ENVIRONMENT CLAIM BASED ON AGE

By Mike Severino

In *Dediol v. Best Chevrolet, Inc., et al.*, 2011 U.S. App. LEXIS 18819 (5th Cir. 2011), the Fifth Circuit Court of Appeals held that an employee can sue his employer for a hostile work environment based on age. While employees often file hostile workplace claims based on characteristics protected by Title VII (race, sex, etc.), the Fifth Circuit ruled that the policies behind such claims also justify recognizing hostile workplace claims raised under the Age Discrimination in Employment Act (ADEA).

The facts in *Dediol* set forth a textbook claim of workplace harassment. Dediol was 65 years old when he began working at Best Chevrolet in June 2007 as a salesman. Shortly after beginning his employment, Dediol, who was a devout Christian, requested time off to attend a church function. Dediol's supervisor colorfully rejected his request, allegedly telling him "[y]ou old mother*****, you are not going over there tomorrow." Dediol further claimed that his supervisor never referred to him by his name, instead calling him "old mother*****," "old man," and "pops." According to Dediol, this age-related harassment occurred up to a half-dozen times a day throughout his three months at Best Chevrolet. Dediol also alleged that his supervisor physically threatened him on numerous occasions. In August 2007, Dediol stopped coming to work because of the harassment and was terminated.

After receiving a right to sue letter from the EEOC, Dediol filed suit in federal court, alleging a hostile work environment based on age, religious harassment, constructive discharge and assault. The federal court subsequently granted summary judgment in favor of Best Chevrolet.

The Fifth Circuit reviewed Dediol's allegations and reversed the district court. The Court held that age-related hostile work environment is viable in the Fifth Circuit. Until then, the Fifth Circuit had never sanctioned a hostile work environment claim brought pursuant to the ADEA; indeed, only two other circuits have expressly adopted such a cause of action. *See e.g., Crawford v. Medina General Hosp.*, 96 F.3d 830, 834-35 (6th Cir. 1996) and *Collazo v. Nicholson*, 535 F. 3d 41, 44 (1st Cir. 2008) (both adopting claim).

The Fifth Circuit held that in order for Dediol to prevail on his age-based hostile workplace claim, he must show (1) that he was 40 or older, (2) that he was subjected to harassment, either through words or actions based on age, (3) the nature of the harassment was such that it created an objectively intimidating, hostile, or offensive work environment (based on the totality of the circumstances), and (4) some basis for liability on the part of the employer existed. The Court also reversed the district court's grant of summary judgment based on Dediol's religious discrimination and constructive discharge claims.

Although hostile workplace claims are slowly entering ADEA jurisprudence, there remains an important distinction between that statute and Title VII. Successful Title VII plaintiffs can recover damages for emotional distress; the ADEA, however, provides no such remedy. Because of this, one would expect an employee bringing an age-related claim to also assert related state law claims (such as constructive discharge) where more expansive damages may be available.

A RETALIATION CLAIM THAT COULD HAVE BEEN AVOIDED

By Randi Klein Hyatt

Steven Linhart began working for a Pittsburgh dermatology practice in June 2008 as a histology technician (someone who prepares tissue samples for microscopic examination). He was fired two months later.

Linhart maintained that during his first two months of employment, he received positive feedback from his supervisors. The employer, however, maintained a different perspective and contended that he performed poorly because he prepared incomplete skin slides for cancer treatment procedures, had a bad attitude, and generally showed no interest in histopathology. Linhart also violated a variety of workplace rules by arriving late, smoking on facility grounds, and wearing dirty medical gloves while handling files or drinking coffee. As is often the case with employers who are too busy running a business to tend to internal matters, there was no record of discipline documents, nor any memos created regarding the verbal counseling sessions that the employer maintained (but Linhart denied) had occurred.

The lawsuit arose from the series of events that occurred in August. The employer claimed that two supervisors (Stein and Zitelli) had met in an August 2008 meeting (either August 18 or 19) and had agreed to terminate Linhart (however, the employer did not have any corroborative evidence to support the date or purpose of that meeting). Lo and behold, in a stroke of inconvenient timing for the employer, Linhart was diagnosed with avascular necrosis on August 19, 2008 and was advised by his doctor that he would need hip replacement surgery.

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THE RETALIATION CLAIM THAT SHOULD NOT HAVE BEEN

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On August 20, 2008, Linhart told both Stein and Zitelli of his diagnosis and need for surgery. A few hours later, he was fired, and was told that he "was not a good long term investment." He was not given any further explanation as to the reasons for his termination. Not surprisingly, Linhart sued for disability discrimination under the Americans with Disabilities Act and at the close of discovery, the employer moved for summary judgment.

The trial court denied the summary judgment motion and focused on the two big issues that were the obvious flaws in the handling of this termination. First, the trial court noted that the timing between Linhart's disclosure of his condition and need for surgery and his "almost immediate termination . . . a few hours later" sufficiently raised a "reasonable inference of discrimination."

Even though the employer argued that the termination decision had been made prior to Linhart's disclosure of his condition and need for surgery, the trial court could not get past that the employer did not have clear testimony as to when the meeting occurred or any documentation to corroborate that a meeting took place, much less what was discussed. There was literally not one email, calendar entry, or other shred of paper evidence that established there was a meeting.

Although this lack of corroboration was sufficient, in and of itself, for the trial court to deny the summary judgment motion, the judge also pointed out that there was no evidence to support the employer's claim that Linhart had violated workplace rules and been disciplined for those violations, which further created genuine issues of material fact in dispute.

The lessons learned are clear: *document, document, document!* Employers must be sure to document discipline; document counseling; and document meetings that discuss those items, particularly when a termination is on the agenda.

RELIGIOUS ORGANIZATIONS ALLOWED TO MAKE DISCRIMINATORY EMPLOYMENT DECISIONS

By Bernadette Hunton

Employers are well aware that making an employment decision based on religion is an invitation for trouble. But what happens when the employer is a religious organization? Do the same rules apply? Not necessarily.

First, built into Title VII's statutory scheme is a "religious exemption" which allows religious organizations to prefer employees who share their religion. While it applies to all of an organization's employees, it does not allow an organization to discriminate on the basis of any other protected class, such as race, color, national origin, sex, age, or disability.

The second safe harbor available to religious organizations is a court created doctrine known as the "ministerial exception." Unlike the statutory exemption, this exception applies only to employment decisions concerning "ministerial" employees; however, it does allow for discriminatory decisions to be made based on protected statuses other than religion. While both are valid attempts to limit government intrusion into religious affairs, they unfortunately leave a lot open for interpretation. Recently, the Court of Appeals of Maryland, the Fourth Circuit, and the Supreme Court have issued decisions offering some guidance on these issues.

In *Prince of Peace Lutheran Church v. Linklater*, 2011 Md. LEXIS 574 (Sept. 21, 2011) the Court of Appeals held that under Maryland law, not all claims of sexual harassment and sex bias are barred by the ministerial exception. Linklater, a former music director for the Church, sued the Church and its pastor for, among other things, sexual harassment, *quid pro quo* sexual harassment (which requires a plaintiff to prove that job benefits were made contingent on sexual favors), and sex discrimination. The Court of Appeals held that the ministerial exception was a bar to the *quid pro quo* claim because a decision would require an assessment of Linklater's work performance. Such an assessment would involve excessive entanglement in the Church's affairs, and accordingly, would run afoul of the ministerial exception. The sexual harassment and gender discrimination claims, however, could be decided without a performance evaluation, and therefore, were not barred by the ministerial exception. In its assessment of the sexual harassment claim, the Court of Appeals noted that the Church had failed to allege any doctrinal reason for the harassment, and that it had a policy in place which prohibited sexual harassment. Taking these factors into consideration, the Court of Appeals adopted a narrow interpretation of the ministerial exception, holding that, at least under Maryland law, it does not act as a bar to every discrimination claim by a ministerial employee against a religious organization.

In *Kennedy v. St. Joseph's Ministries, Inc.*, 2011 U.S. App. LEXIS 18936 (4th Cir., Sept. 14, 2011) the Fourth Circuit held that a terminated nursing assistant's religious harassment and retaliation claims were barred by Title VII's

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workers compensation insurance. These are strong incentives for government agencies to ensure that workers are properly classified.

Over the last several years, some states have enacted statutes addressing employee misclassification. Generally, these statutes impose record keeping and notice requirements, and they provide penalties for businesses that misclassify employees. A bill aimed at worker misclassification was recently reintroduced at the federal level. The Employee Misclassification Prevention Act (H.R. 3178) would amend the Fair Labor Standards Act to require that employers notify workers whether they are classified as an employee or a non-employee. This notice would also direct the worker to the Department of Labor (DOL) website for further information, as well as provide contact information for the DOL's local office. Those classified as non-employees would be told that rights to wage, hour, and other labor protections depend on proper classification as an employee or non-employee, and anyone who has questions or suspects they may have been misclassified should contact the DOL. There would be civil penalties, beginning at $1,100 per employee for first time offenders, for employers who misclassify employees as independent contractors. A similar bill, titled the Payroll Fraud Prevention Act (S. 770), was introduced in the Senate in April 2011.

Other provisions of the Employee Misclassification Prevention Act focus on increasing compliance and enforcement activity. Specifically, the DOL would perform targeted audits focused on employers in industries that frequently misclassify employees, and state unemployment insurance agencies would be directed to conduct additional audits to identify misclassification issues. Because employee misclassification impacts compliance with both employment laws and tax laws, the new law would permit the DOL to share information on misclassification cases with the Internal Revenue Service (IRS), which obviously has significant ramifications.

Even without federal legislation, however, the DOL and IRS have agreed to start sharing information. In September 2011 the DOL and IRS signed a memorandum of understanding pledging "to end the business practice of misclassifying employees in order to avoid providing employment protections." Representatives of eleven states, including Maryland, also signed memoranda of understanding with the DOL's Wage and Hour Division. The idea is to coordinate law enforcement with the IRS and participating states, which will level the playing field for law-abiding employers and ensure that employees receive the protections to which they are entitled under federal and state law.

Also in September 2011, IRS Announcement 2011-64 introduced a Voluntary Classification Settlement Program ("VCSP"). This program will allow employers to resolve past worker misclassification issues and obtain relief from unpaid employment taxes, penalties, and interest that result from improperly misclassifying employees as independent contractors. Employers will be able to correct misclassification issues prospectively and get into compliance by making a payment covering 10% of the past year's payroll tax obligations. To be eligible, employers must: (i) have consistently treated the misclassified workers as non-employees in past years; (ii) have filed all required Forms 1099 for the workers for the three previous years, (iii) not currently be under audit by the IRS; and (iv) not currently be under audit by the DOL or any state agency for worker classification issues.

Unfortunately, deciding whether to take advantage of the VCSP is not that simple. Voluntarily reclassifying workers as employees for tax purposes may significantly impact other legal obligations and create different (i.e., non-tax) legal risks, especially if information is shared among various state and federal agencies. For example, using the VCSP will not relieve an employer from potential liability under minimum wage and overtime laws or employee benefits statutes.

Although there is a perception among some that employers intentionally misclassify employees to avoid legal obligations, workers are treated as contractors for a variety of reasons, including their own preference Nevertheless, given the emphasis placed on compliance and enforcement efforts at all levels of government, employers should discuss employee classification issues with counsel and be prepared to defend their classification of workers as employees or non-employees.

NLRB NOTICE POSTING OBLIGATIONS DELAYED

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employees because of their support for a union. While each of these statements is true in a general sense, there are numerous exceptions to these rules, and the oversimplified summary in the NLRB notice may give employees a misguided notion of what is and is not prohibited by the law.

Because of the controversy surrounding the Final Rule, the business community has taken steps to challenge its implementation. At present, there are three lawsuits contesting, among other things, the Board's authority to issue the

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COURTS OFFER GUIDANCE ON DISCRIMINATION BY RELIGIOUS INSTITUTIONS

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religious exemption. St. Joseph's is a nursing care facility that operates according to Catholic tenets. Kennedy was a nursing assistant and a member of the Church of the Brethren. In accordance with her religion, she wore long skirts and a hair cover. The Assistant Director of Nursing Services told Kennedy that residents and their families were disturbed by her dress, and that it was improper for a Catholic facility. Kennedy refused to alter her dress and was fired shortly thereafter. The Fourth Circuit held that Title VII's religious exemption is not limited to hiring and firing decisions, and that it extends to the entire employer-employee relationship. Accordingly, not only was Kennedy's discharge claim barred, but so were her claims for harassment and retaliation.

Recently, in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, No. 10-553. the Supreme Court heard oral arguments regarding the scope of the ministerial exception. The plaintiff in this case, Cheryl Perich, taught both secular and religious subjects at a sectarian school run by the Church. Following her completion of a course of study, the Church elected her to be a "called" teacher and commissioned minister. In 2004, she went on disability leave to seek treatment for narcolepsy. When she attempted to return, the Church told her that her position was no longer available. Perich threatened to sue, and shortly thereafter, the Church terminated her employment. The EEOC sued for retaliation under the Americans with Disabilities Act, and Perich intervened to file similar claims. Overturning the lower court's decision, the Sixth Circuit concluded that Perich was primarily a secular employee who was not covered by the ministerial exception. The Supreme Court granted review and recently heard oral arguments. The Court faces a difficult dilemma. Unless it decides that the exception should not be recognized, it will need to articulate a test to determine when the exception applies. However, in crafting a test, it must avoid requiring judicial assessment of religious tenets. Such an assessment, argues Hosanna-Tabor, is constitutionally prohibited. So what will the Court do? With the decision still pending, we will have to wait and see.

DOL SEEKS TO LIMIT ROLE OF MANAGEMENT-SIDE LABOR ATTORNEYS IN ORGANIZING CAMPAIGNS

By Adam Simons

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), overseen by the U.S. Department of Labor, imposes certain disclosure and reporting requirements on unions and employers. Section 203 of the LMRDA requires an employer to file reports when it hires a consultant to persuade employees regarding their National Labor Relations Act rights. These are the services an employer might receive from a consulting firm, who will essentially run an employer's union avoidance campaign. The LMRDA reports require extensive disclosure of financial information, such as the fees and expenses paid to the consultants.

Traditionally, attorneys have been exempt from these reporting requirements. The LMRDA exempts any entity from the reporting requirement that (1) gives only advice; (2) represents the employer before any court, administrative agency, or tribunal of arbitration; or (3) engages in collective bargaining on behalf of an employer. The first exemption, commonly called the "advice exemption," has been interpreted by numerous courts, and the DOL to apply when a lawyer has no direct contact with the employees, and limits his contact to providing materials to the employer during the organizing campaign, which the employer is free to accept or reject. Consequently, the only entities that were covered under the LMRDA were those that directly advocated on behalf of the employer to the employees.

After forty years of this understanding of the advice exemption, the Clinton administration attempted to narrow its scope by issuing new interpretative guidance that "advice" means "oral or written recommendation regarding a decision or course of conduct, as opposed to engaging in direct or indirect persuasion of employees." This represented a substantial change from the traditional understanding of "advice." Almost immediately, the George W. Bush administration rejected this interpretation. Before the Clinton interpretation could take effect, it returned the advice exception to the traditional understanding. This is the interpretation that has been controlling since.

Now, the Obama administration, continuing it's "pro-union" agenda, is once again seeking to limit the applicability of the advice exemption. Adopting the Clinton administration's approach, the latest attempt to limit the advice exemption seeks to infringe on the ability of management-side labor lawyers to adequately advise their clients during organizing campaigns. In June 2011, the DOL proposed a new interpretation of the advice exemption. According to the DOL, it believes that the "current interpretation of the advice exemption may be overbroad, and could sweep within it agreements and arrangements between employers and labor consultants

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DOL SEEKING TO LIMIT ROLE OF ATTORNEYS IN R-CASES

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that involve certain persuader activity that Congress intended to be reported under the LMRDA." The Obama proposed interpretation is as folows:

"With respect to persuader agreements or arrangements, 'advice' means an oral or written recommendation regarding a decision or a course of conduct. In contrast to advice, 'persuader activity' refers to a consultant providing material or communications to, or engaging in other actions, conduct, or communications on behalf of an employer that, in whole or in part, have the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively. Reporting is thus required in any case in which the agreement or arrangement, in whole or part, calls for the consultant to engage in persuader activities, regardless of whether or not advice is also given."

Clearly, this interpretation will limit what has long been understood to be non-reportable lawyer advice in organizing and collective bargaining. In so doing, it will interfere with the relationship between management-side labor lawyers and their employer clients. Recognizing this infringement, the American Bar Association has taken up the side of management-side lawyers, issuing a public comment against the proposed interpretation. The ABA argued that the new interpretation would put lawyers, particularly management-side labor lawyers, in the difficult position of "report[ing] sensitive and confidential client information that has not previously been subject to disclosure." The proposed interpretation may also undermine the employers' fundamental right to counsel, notes the ABA, because it may discourage employees from seeking, or lawyers from offering, advice regarding traditional labor relations, particularly in the context of organizing campaign.

The comment period for this regulation expired on September 21, 2011. It is currently awaiting further review by the Department of Labor.

FIRST RESPONDERS ENTITLED TO OVERTIME UNDER FLSA

By Kelly Hoelzer

One active area of Fair Labor Standards Act ("FLSA") litigation revolves around "first responders," public sector safety and law enforcement employees such as police, fire fighters, and EMTs. Over the past few decades, courts have struggled to analyze the job duties of first responders within the context of the statutory overtime exemptions, such as those for executive employees, administrative employees, and professional employees.

In 2004, the U.S. Department of Labor ("DOL") issued long-awaited revisions to the FLSA's overtime exemptions. In those same revisions, the DOL issued a new "first responder" regulation, limiting the scope of the executive exemption as it pertains to first responders. *See* 29 C.F.R. § 541.3(b)(1).

Specifically, the regulation states that First Responders are not exempt executive employees because their primary duty is not management, even though they direct the work of other employees in the conduct of a crime investigation. The regulation expressly excludes from the overtime exemption several types of first responders – such as police officers, detectives, fire fighters, paramedics, EMTs, and similar employees – regardless of pay rank or level, who perform such work as preventing or detecting crimes, conducting crime investigations or inspections for violations of law, performing surveillance, dealing with suspects, detaining suspected and convicted criminals, interviewing witnesses, interrogating suspects, preparing investigative reports, or other similar work.

In *Mullins v. City of New York*, No. 09-3435-cv, 2011 U.S. App. LEXIS 16132 (2d Cir. Aug. 5, 2011), the Second Circuit considered whether more than 4,000 New York City Police Department sergeants qualified for the executive exemption or whether the first responder regulation entitled them to overtime. Because the parties had litigated the case since 2001, this was the court's first opportunity to analyze the scope of the first responder regulation. The Second Circuit asked the DOL to weigh in as *amicus curiae*. The DOL interpreted the first responder regulation to mean that when first responders direct the work of subordinate officers as part of their field law enforcement duties, they are not engaging in management activities for the purposes of the executive exemption test.

The Second Circuit readily deferred to the DOL's interpretation of the tension between the executive exemption and regulations, holding that the DOL's interpretation of its regulations was entitled to controlling deference. The court held that the agency followed its statutory mandate to "define and delimit" the scope of the executive exemption by excluding certain types of activities performed by first responders from the meaning of management. Pursuant to the first responder regulation, those activities, such as directing subordinates in the field as part of the sergeants' front-line duties, do not involve management of the enterprise and should not be deemed "management" for the purposes of the executive exemption.

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FIVE EMPLOYMENT CASES ON THE SUPREME COURT'S PLATE THIS TERM

By Darrell VanDeusen

On the first Monday in October, the Supreme Court opened its term with five labor and employment-related cases on the docket (last term there were eight). None of this year's cases will have the impact we saw last term: there will be no revamping of class actions as in *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541(2011); or expansion of protection from retaliation as in *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), and *Kasten v. Saint-Gobain Plastics Corp*., 131 S. Ct. 1325 (2011). Nevertheless, there are some interesting issues to be decided.

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, U.S., No. 10-553 (Oral Argument held Oct. 5, 2011). The Court will consider the scope of the "ministerial exception" to employment discrimination claims against religious schools. The EEOC sued the Church School on behalf of Cheryl Perich, claiming she was retaliated against because of her disability. The district court dismissed the case, holding that Perich's job duties were a part of the Church's religious mission, and protected by the First Amendment. The Sixth Circuit reversed, applying the "primary duties" test, and held that Perich's teaching was mainly of secular subjects that were not addressing religious doctrine. Although this case involves the ADA, the ministerial exception also applies to Title VII. For more information about this case and the application of the ministerial exception in the Fourth Circuit and in Maryland, see the article on page 3 of this Newsletter.

Roberts v. Sea-Land Servs. Inc., No. 10-1399 (cert. granted Sept. 27, 2011). The Court has agreed to decide what wage rate should be used to calculate an injured employee's disability benefits under the Longshore and Harbor Workers' Compensation Act. Roberts, a dispatcher at Sea-Land, slipped on a patch of ice at work in 2002. The resulting injury left him permanently partially disabled and his longshore work ended. Under the LHWCA, Sea-Land's insurer paid Roberts for a while, but then disputed his claim and stopped paying him in 2005. An administrative law judge determined that Sea-Land was still responsible for Roberts's injuries after 2005. The question remained as to how much Sea-Land owed, because the LHWCA's method of calculation was unclear.

Sea-Land and Roberts both appealed to the Benefits Review Board, which decided that the maximum compensation rate was based on the year in which the disability began, rather than the year in which the compensation was awarded. The Ninth Circuit affirmed this decision.

Pacific Operators Offshore LLP v. Valladolid, U.S., No. 10-507 (Oral Argument held Oct. 11, 2011). In another workplace injury case, the Court will decide whether the widow of a laborer who spent nearly all of his work time on an offshore oil rig, but was killed in a work-related accident onshore, is entitled to benefits under the Outer Continental Shelf Lands Act (OCSLA). There is no dispute that accidents suffered by workers who are actually working at a site on the Continental Shelf come within the protections of the OCSLA. But what happens when the accident happens on land, outside the area covered by the law? There is no legislative history to consider, so the issue is one of simple statutory construction. Well, not exactly simple. The *Valladolid* case (604 F.3d 1126 (9th Cir. 2010)), came out of the Ninth Circuit, and created the third interpretation of the provision. The other two interpretations are from the Third and Fifth Circuits. The Third Circuit took the position that the only requirement is that there be some "but for" connection of the activities on site and the injury. The injury itself can occur just about anywhere once a causal connection is established. The Fifth Circuit's holding required that both the operations and the injury take place on site for the Act to apply.

In *Valladolid*, the Ninth Circuit agreed with the Third Circuit that the injury itself could be off site, but required a substantial connection between that injury and the site activities. This split of authority was bound to get the Court's attention. This is not the first time the Supreme Court has considered the language of the OCSLA. In *Offshore Logistics Inc. v. Tallentire*, 477 U.S. 207 (1986), the Court noted that the OCSLA's "general focus on the situs of the injury, not the status of the worker" should determine whether an injury is compensable.

Coleman v. Maryland Court of Appeals, No. 10-1016 (cert. granted June 27, 2011). In *Coleman*, 626 F.3d 187 (4th Cir. 2010), the Fourth Circuit joined five other appellate courts in holding that the self-care provision of the Family and Medical Leave Act (FMLA) does not apply to the states because Congress did not properly abrogate the states' Eleventh Amendment immunity. The Eleventh Amendment bars suit in federal court against a non-consenting state and any governmental units that are arms of the state, unless Congress has abrogated the immunity. To do so, Congress must unequivocally declare its intent to abrogate and must act pursuant to a valid exercise of its power. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996).

Despite the lack of any apparent Circuit split on the issue, the Supreme Court granted Coleman's petition to address the question of "[w]hether Congress constitutionally abrogated

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SUPREME COURT'S TAKES ON EMPLOYMENT ISSUES

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the states' Eleventh Amendment Immunity when it passed the self-care provision of the Family and Medical Leave Act." This is the Court's second look at FMLA Eleventh Amendment immunity. In *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003), the Court considered whether the FMLA's third provision -- care of an immediate family member -- validly abrogated states' Sovereign immunity. Concluding that there was a valid abrogation of Sovereign immunity, the Court focused exclusively on the gender discrimination that motivated enactment of the FMLA. No date for oral argument has been set yet as of this writing.

Knox v. SEIU, Local 1000, U.S., No. 10-1121 (cert. granted June 27, 2011). Do the First and Fourteenth Amendments permit public employment to be conditioned upon the payment of a special union assessment (read "dues") intended for political contributions without the union notifying public employees of the assessment and giving them the chance to object?

This case was brought by SEIU, which represented state employees in California who are not union members, but who nevertheless must pay a yearly "fair share fee" as a condition of employment. (Maryland has legislation requiring state employees to make a similar payment). In August 2005, SEIU Local 1000 made both members and nonmembers pay a special assessment to be used for political purposes related to special ballot measures Local 1000 considered "anti-union."

Knox and other nonmembers sued, claiming that special assessment violated their constitutional rights. The district court granted partial summary judgment, holding that nonmembers were improperly deprived of notice and an opportunity to object. The Ninth Circuit, 628 F.3d 1115 (9th Cir. 2010) reversed (2-1), finding that the union complied with the constitutional requirements established by the Court in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), called a "*Hudson*" notice. The Court will determine whether the union was required to send out a new *Hudson* notice about the special assessment, and whether a state may require continued public employment on payment of union agency fees that finance political expenditures.

FIRST RESPONDERS ENTITLED TO OVERTIME UNDER FLSA

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Agreeing with the DOL, the court determined that the sergeants' performance of non-exempt field law enforcement work involving supervision of other officers did not transform that work into exempt management work. The court also agreed with the DOL that, even though directing operations at a crime scene may appear to be "management," those activities are part of the police sergeants' primary law enforcement duties in the field.

Because the first responder regulation makes the sergeants' primary duty law enforcement – not management – the sergeants did not meet the requirements of the executive exemption, and were, therefore, entitled to overtime pay under the FLSA. Accordingly, the court remanded the case with instructions to enter judgment in favor of the plaintiffs.

The Second Circuit's opinion in *Mullins* leads to the conclusion that first responders employed in the public sector, more often than not, will be considered non-exempt, even though they engage in managerial activities in their field duties. The *Mullins* decision also underscores the deference courts will give to the DOL's narrow interpretation of the overtime regulations – something that should give pause to all employers.

NLRB NOTICE POSTING OBLIGATIONS

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Final Rule requiring the notice. A hearing in one of the cases is scheduled for December 19, 2011, and it is quite possible that one of the courts may act to strike down the Rule before the scheduled January 31, 2012 effective date.

If and when the notice posting obligation takes effect, any employer covered by the National Labor Relations Act (which includes all but the smallest of businesses) will be required to post the notice in the same location where other work notices are posted. Additionally, if the employer regularly posts workplace related notices to employees on an intranet or Internet site, the NLRB notice must be posted there as well. The failure to post the notice would be an unfair labor practice in violation of section 8(a)(1) of the NLRA, and would also result in "tolling" of the six-month study limitations for filing unfair labor practice charges. The Board also can use the failure to post the notice as evidence of an employer's unlawful motive and other unfair labor practice charges.

A copy of the poster can be down - loaded from the NLRB website at: https://www.nlrb.gov/sites/default/files/documents/1562/employee_rights_fnl.pdf.