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UPDATE

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SUPREME COURT

- *Crawford v. Metropolitan Government of Nashville*, ___ U.S. ___, 2009 U.S. LEXIS 870 (1/26/09) (Answering questions in an internal company investigation of rumors suggesting possible sexual harassment, held: protected opposition, to hold otherwise – as did the Sixth Circuit -- would be “freakish”).
- *14 Penn Plaza LLC v. Steven Pyett*, ___ U.S. ___, 2009 U.S. LEXIS 2497 (4/1/09) (Collective bargaining agreement can mandate arbitration by union, rather than litigation by individual, of EEO claims if its arbitration clause covers both contractual and statutory claims).
- *Locke v. Karass*, ___ U.S. ___, 2009 U.S. LEXIS 590 (1/21/09) (A union representing public employees may, without violating the First Amendment, charge as part of dues a fee used by the union’s national litigation fund, at least under the facts as presented on appeal).
- *Ysursa v. Pocatello Education Assoc.*, ___ U.S. ___, 2009 U.S. LEXIS 1632 (2009) (Idaho’s ban on political payroll deductions did not violate unions’ First Amendment rights because states are not required to “affirmatively assist political speech by allowing public employers to administer payroll deductions for political activities”).
 - In light of *Ysursa*, the Tenth Circuit reversed its January 2008 ruling in *Utah Educ. Assoc. v. Shurtleff*, ___ F.3d ___, case no. 06-4142 (10th Cir. 4/21/09) (holding now that Utah’s Voluntary Contributions Act was constitution, in other words, that the First Amendment did not require Utah public employers to implement payroll checkoffs that fund union political speech).
- *Vaden v. Discover Bank*, ___ U.S. ___, 2009 U.S. LEXIS 1781 (2009) (Federal trial courts lack jurisdiction to enforce an arbitration agreement under the Federal Arbitration Act, 9 USC § 4, unless the plaintiff’s underlying claims are themselves subject to federal jurisdiction).

- *Ricci v. De Stefano*, case nos. 07-1428 and 08-328 (Supreme Court accepted certiorari on 1/9/09 to hear claims by Caucasian and Hispanic fire department workers who claimed fire department violated Title VII by refusing to apply civil service tests when results showed a disproportionately higher score for Caucasian and Hispanic applicants).
- *Gross v. FBL Financial Services, Inc.*, case no. 08-441 (Supreme Court accepted certiorari to decide whether direct evidence is necessary mixed-motive claim of age discrimination).
- *Perdue v. Kenny A.*, case no. 08-970 (Supreme Court accepted certiorari to decide whether trial court may enhance a prevailing plaintiff's attorney fees award for superior representation and exceptional results).

CONGRESS

- Lily Ledbetter Fair Pay Act, Pub. L. No. 111-2 (reversing *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) and thereby incorporating the Equal Pay Act's paycheck rule into Title VII).
- American Recovery and Reinvestment Act of 2009 (ARRA) provided for, among other things, premium reduction and additional election options for COBRA coverage. See also the model notices and other information now available at www.DOL.gov/COBRA.
- Employee Free Choice Act (EFCA) (HR 1409, S560) has been introduced. Its changes to traditional labor law, if passed, would include allowing cardchecks in lieu of elections and requiring mandatory interest arbitration between employers and unions if unable to negotiate a first contract in 90 days.
 - See also the alternative National Labor Relations Modernization Act (NLRMA) (HR 1355), which would include a mandatory interest arbitration clause, among other changes, but not a cardcheck clause like EFCA's.

THE OBAMA ADMINISTRATION

- Executive orders reversing prior NLRB holdings and related labor law precedents:
 - Executive order no 13494 (1/30/09) (Federal contractors may not use government funds when expressing speech to workers considering whether or not unionize).
 - Reminder: The Supreme Court struck a similar California statute in *Chamber of Commerce v. Brown*, ___ U.S. ___, 2008 U.S. LEXIS 5033 (2008).
 - Executive order no. 13495 (1/30/09) (Requiring federal contractors and their subcontractors to retain the employees of the company that previously held the contract and thereby become successors to the existing union relationship and require to bargain a new collective bargaining agreement).
 - Executive order no. 13496 (1/30/09) (Reversing President Bush's executive order no. 13201, which had required federal contractors to inform workers of their right

- to protest the use of union dues for reasons unrelated to collective bargaining, such as political donations).
- Executive order no. 13202 (2/6/09) (Executive agencies may require project labor agreements on construction projects of \$25-million or more and the Secretary of Labor shall issue recommendations to help further promote the use of project labor agreements).

GENERAL EEO

- *EEOC v. Agro Distribution LLC*, 555 F.3d 462 (5th Cir. 2009) (EEOC's failure to engage in good faith conciliation is a violation that precludes litigation "but not a jurisdictional prerequisite;" therefore, a remedy short of dismissal, such as a stay, is appropriate).
- *Kellog v. Energy Safety Services Inc.*, 544 F.3d 1121 (10th Cir. 2008) (Although "driving is an extremely important daily activity to many, even most, adults," it is not a major life activity under the ADA).
- *Maston v. St. John Health System, Inc.*, 296 Fed.Appx. 630 (10th Cir. 2008) (Noncooperation in workplace investigation, including evasiveness, defiance, and "swearing at an investigator," could, in the employer's business judgment, constitute insubordination and, therefore, provide a legitimate business reason for discharge, defeating the plaintiff's assertion of pretext).
- *McCullough v. University of Arkansas*, 559 F.3d 855 (8th Cir. 2008) (Employer's good faith belief in the results of its investigation clears assertion of pretext).
- *Pelletier v. Yellow Transportation, Inc.*, 549 F.3d 578 (1st Cir. 2008) (Mandatory predispute arbitration agreement held enforceable, including as to claims of sex discrimination, age discrimination, and whistleblower retaliation under both federal and state law, despite entirety-of-agreement clause in application for employment because arbitration is not, itself, one of the terms related to either the employer or employee's "right to terminate employment").
- *Carter v. Ford Motors Co.*, 561 F.3d 562 (6th Cir. 2009) (Plaintiff is barred from attempting to add to her deposition testimony in her response to summary judgment because she had not supplemented her Rule 26 disclosures or amended her complaint with those additions and the discovery cutoff had passed by the time of her response to summary judgment).
- *Turner v. Public Service Co. of Colo.*, ___ F.3d ___, 2009 WL 1132126 (10th Cir. 2009) (In affirming the entry of summary judgment, the Tenth Circuit surveyed the blackletter law on EEO claims, including a number of issues commonly briefed on such motions, such as temporal proximity, subjective decisionmaking, statistics and spoliation).
- *Perkins v. Silver Mountain Sports Club and Spa, LLC*, 557 F.3d 1141 (10th Cir. 2009) (The Tenth Circuit surveyed the blackletter law regarding the after-acquired evidence doctrine and the manner in which an employer can tender an offer of such proof, sufficient to create an appealable record).

- *Pinkerton v. C.D.O.T.*, ___ F.3d ___, 2009 WL 1014589 (10th Cir. 4/16/09) (The Tenth Circuit discussed at length the blackletter law regarding sexual harassment, constructive discharge, and retaliation claims).
- Speech by EEOC Chairman Stuart Ishimaru before the D.C. bar (2/11/09) (The EEOC intends to reform itself from a charge-driven agency to an agency that mines the data in its charges and, thereby, identifies then pursues more class actions seeking systemic relief).
- 74 Fed. Reg. 9056 (March 2, 2009) (EEOC proposed regulations under Genetic Information Nondiscrimination Act of 2008 to be published as 29 CFR 1635).
 - BNA Daily Labor Report, 85 DLR A-10 (Folded into GINA were enhanced penalties for child labor law violations -- \$50,000 maximum civil enalty for child labor law violations that result in work-related death or serious injury to a minor, \$100,000 if willful or repeated. DOL issued the first such penalty, \$50,000 against Demon Demo, Inc., in Atlanta, GA, for the death of a teenager who fell to his death during demolition work, plus an additional \$3,162 for alleged recordkeeping violations).

IMMIGRATION REFORM

- 8 C.F.R. § 274a (2008), Department of Homeland Security, final supplemental “no-match” rule (DHS restated its previous rule, which is still subject to stay by a California district court, but in doing so, DHS provided additional justification for its rule) (to become effective if and after the court lifts that stay).
- *Chamber of Commerce v. Chertoff*, case no. 08-cv-03444-AW (USDC-Md 1/8/09) (By agreement with US Department of Justice, the federal government’s prior rule (48 C.F.R. §§ 2, 22, 52) requiring federal contractors to run all employees, not just new hires, through e-Verify was held in abeyance). See also 74 Fed. Reg. 17793 (same, delaying it at least until June 30, 2009).
- 8 CFR 274a, Department of Homeland Securities regulation holding in abeyance new I-9 form until at least April 3, 2009.
- *DerKervorkian v. Lionbridge Tehnologies, Inc.*, ___ F. 3d ___, 2008 U.S. App. LEXIS 24566 (10th Cir. 12/3/08) (Where employer agrees to take responsibility for shepherding employee through the green card process, employer may have assumed a fiduciary duty to the employee, and its failure to ensure that process is completed successfully may give rise to a claim for breach of that fiduciary duty. Remedies for that breach may include mental anguish. However, that fiduciary duty is not one-sided. Employee also had a duty to assist in that process and mitigate any damages. Her failure to accept a lower position, which would have allowed her to stay in the country, may constitute a failure to mitigate. Note: Employer allegedly not only agreed to sponsor the employee for a green card, but also to pay for the attorney fees to obtain a green card, and perhaps most importantly instructed the employee to communicate with the attorney through company personnel alone.).
- *Avila v. Jostens, Inc.*, ___ F.3d ___, 2009 WL 721705 (10th Cir. 3/19/09) (Supervisor’s twice allegedly saying, “This is America You need to speak American,” is

circumstantial evidence, which, along with other evidence presented by plaintiff, warranted denial of summary judgment).

- *Zokari v. Gates*, 561 F.3d 1076 (10th Cir. 2009) (Judgment for employer affirmed despite evidence that supervisors told plaintiff, a Nigerian immigrant, who worked as an auditor-trainee that he should take English-language classes because of his accent).

DOL

- 29 C.F.R. §§ 3 and 5 (2008), Department of Labor, final rule (Federal contractors no longer required to include workers' home addresses and full Social Security numbers on certified payrolls, for example, under Davis-Bacon) (effective 1/18/09).

FMLA

- 29 C.F.R. § 825 (2008), Department of Labor, final rules regarding FMLA and family military leave (effective 1/16/09).

NLRB

- Compare *Northeastern Land Services, Ltd., v. NLRB*, 560 F.3d 36 (1st Cir. 3/13/09) and *New Process Steel v. NLRB*, ___ F.3d ___, 2009 WL 1162556 (7th Cir. 5/1/09) (The NLRB's delegation of its power to a 2-member quorum held lawful) versus *Laurel Baye Healthcare v. NLRB*, ___ F.3d ___, 2009 WL 1162574 (D.C. Cir. 5/1/09) (That delegation of power was not and the 2-member Board, therefore, lacks and has lacked authority to issue orders).
- *Narricot Industries, L.P.*, 353 NLRB No. 82 (1/30/09) (Workers' vote to decertify union voided because management "impermissibly assist(ed)" the workers by providing "more than the permissible 'administrative aid'" even though management arguably provided only administrative aid).
- *UFCW Local 4*, 353 NLRB No. 47 (10/31/08) (Detailed explanation of the right of workers (*Beck* protesters) to refuse to pay less than dues and of the obligation of the union, then, to inform the workers of the amount and basis for a reduced service fee, including by providing audited financials).
- *Tribune Publishing Co. v. NLRB*, ___ F.3d ___, 2009 WL 1118952 (D.C. Cir. 4/28/09) (Employer violated §8(a)(5) and (d) of the NLRA by unilaterally ceasing dues-checkoff during negotiations after collective bargaining agreement had expired where the company had, first, properly ceased dues-checkoff when agreement expired, but, then, voluntarily reimplemented it; although the company had voluntarily reimplemented dues-checkoff for just one payroll period, its having done so created "a new term and condition of employment" that the company could change only after notice and an opportunity to bargain were given to the union).
- *Dean Transportation, Inc., v. NLRB*, 551 F.3d 1055 (D.C. Cir. 2008) (Company that took over transportation operations became successor to prior company's bargaining relationship with one union, the drivers did not accrete into the bargaining unit successor already had with a different union).

- *Southern California Painters & Allied Trades, District Council No. 36 v. Rodin & Co.*, 558 F.3d 1028 (9th Cir. 2009) (Rejecting the concept of a “reverse alter ego” in claim by union against non-union contractor alleging that defendant set up a unionized alter-ego company “to avoid future collective bargaining obligations”).
- “Guideline Memorandum Concerning Withdrawal of Recognition Based on Loss of Majority Support,” NLRB General Counsel Memorandum GC 09-04 (11/26/08).

WARN

- *Gross v. Hale-Halsell Co.*, 554 F.3d 870 (10th Cir. 2009) (The “unforeseeable business circumstances” exception is measured objectively -- comparing the defendant to a reasonable business in the same circumstances -- and is not to be applied narrowly).

STATE LAW AND MISCELLANEOUS

- *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009) (OSHA is not a federal law that preempts Oklahoma from adopting a statute that prohibits employers, and imposes criminal penalties against employers who prohibit workers from leaving guns in their personal cars on company-owned parking lots).
- *Whittenburg v. Werner Enterprises Inc.*, 561 F.3d 1122 (10th Cir. 2009) (Plaintiff’s counsel – in a personal injury case -- whose closing argument consisted largely of “an imagining thing” in which he read an imaginary letter from defendant that portrayed defendant’s position in an exaggerated light and included argumentative statements suggesting even the defendant knew it was wrong warranted reversal of the plaintiff’s \$3.2-million verdict despite the fact that counsel repeatedly advised the jury it was merely imagination and argument).
- *U.S. v. Nicholas*, ___ F.Supp.2d ___, 2009 WL 890633 (C.D.Cal. 4/1/09) (Attorneys who consulted with corporation’s CFO as part of a “fact finding” investigation but, in doing so, did not provide the so-called “corporate Miranda” described in *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981) [advising individual that client is the corporation, not the individual, the privilege is the corporation’s not the individual’s, and therefore that information is not privileged as against the corporation], owed CFO an attorney-client privilege and were thus unauthorized to disclose any of the information learned from the CFO and were further subject to ethical discipline for having done so).
- *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008) (Under Colorado’s Dispute Resolution Act, CRS 13-22-301, *et seq.*, a mediated agreement can become enforceable as an order of the court if reduced to writing and signed; however, barring that – for example if reduced to writing but one party refuses to sign – it can still be enforced as a contract, so long as there is evidence of the parties’ agreement outside of the mediation itself – for example, evidence contained in their subsequent discussions. Tip: If concerned that the other side might back out of a mediated agreement, consider attempting to document the agreement otherwise.).
- *Watson v. Public Serv. Co. of Colorado*, ___ P.3d ___, 2008 Colo. App. LEXIS 1431 (Colo. App. 10/16/08) (An OSHA complaint might constitute lawful, off-duty conduct protected by CRS 24-34-402.5. Claims under that statute are equitable in nature and, therefore, are not triable to a jury and do not trigger prejudgment interest as an available

remedy. Note: The court did not consider whether such a claim would be preempted, though, by OSHA's anti-retaliation provisions. Also, held: the internet job posting was not sufficiently specific to constitute either an offer or a promise triggering either an implied contract or promissory estoppel claim.).

- *Long View Systems Corp. USA v. ICAO*, 197 P.3d 295 (Colo. App. 2008) (A computer consultant who signed a computer consulting agreement may nonetheless be an employee for unemployment purposes, depending among other things on the language of his consulting agreement and the extent to which the putative employer – not the employer's client to whom he is assigned – customarily and regularly controls his work).
- *Acoustic Marketing Research, Inc. v. Technics, LLC*, 198 P.3d 96 (Colo. 2008) (Applying the rule of certainty to a claim for future economic losses).
- *Harris Group, Inc. v. Robinson*, ___ P.3d ___, 2009 WL 540662 (Colo.App. 3/5/09) (Extensive discussion of the blackletter law regarding intentional interference claims and a competitor's privilege).
- *Sullivan v. Oracle Corp.*, 547 F.3d 1177 (9th Cir. 2008) (Out of state employer that has out of state employee perform any work in California may need to comply, not only with their home state's wage and hour law, but also California's).
- *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2/9/09) (Plaintiff asserting a Sarbanes-Oxley claim must show he blew the whistle on securities fraud as opposed to any other kind of wrongdoing or even fraud).
 - See also *Harp v. Charter Communications, Inc.*, ___ F.3d ___, 2009 U.S. App. LEXIS 5356 (7th Cir. 3/16/09) (Same and the reasonableness of the plaintiff's belief that she was complaining about securities fraud is measured by both a subjective and objective standard taking into account only the information available to her at the time, not considering information she later learned).

OSHA

- 73 FR 75568 (2008), OSHA final rule authorizing separate citations for each employee who is not provided required PPE (personal protective equipment) (effective 1/12/09).