



Employment Law & Litigation



NEW YORK CITY SETTLES EMPLOYMENT DISCRIMINATION CASE FOR \$98 MILLION

By: Kenneth A. Novikoff and Jacqueline K. Siegel

INTRODUCTION

New York City, in a settlement announced on March 18, 2014, agreed to pay a groundbreaking \$98 million in back pay and benefits to minority firefighters and applicants who allege that the New York Fire Department (“FDNY”) implemented discriminatory hiring practices that adversely affected them. This article provides a brief summary of the case as well as the future effect of the settlement on New York municipalities.

CASE SUMMARY

In May 2007, Plaintiff United States of America filed suit in the United States District Court for the Eastern District of New York against the City of New York pursuant to Title VII of the Civil Rights Act of 1964 alleging that the City’s procedures for screening and selecting firefighter candidates discriminated against black and Hispanic applicants. Specifically, the United

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LETTER FROM THE CHAIR

Dear Committee Members,

We hope to see you all in Boston in August for the Annual Meeting! We plan to have a fabulous speaker for our committee business meeting, so stay tuned for details. We will also be co-sponsoring a CLE entitled “From Kindergarten to the NFL: Combating Bullying without Violating Rights “ with the Section of Individual Rights and Responsibilities and the Young Lawyers Division. The CLE will feature members of our committee and workplace bullying will be one of the topics discussed.

We have had a great year thus far and continue to be inspired by the interest in our Committee and the great ideas proposed by our members at our business meetings.

Please stay connected by attending our monthly conference calls and also by joining our ABA TIPS Employment Law & Litigation Committee LinkedIn page: www.linkedin.com/groups.

Please feel free to contact me with any questions or if you are interested in being more involved with our Committee. ☺

All the best,

Amy Wilson



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THE NLRB'S EXPANDED AGENDA: AT-WILL EMPLOYMENT DISCLOSURES, SOCIAL MEDIA POLICIES AND CONFIDENTIALITY REQUIREMENTS MAY BE ILLEGAL.

By: Frank L. Day¹

Congress enacted the National Labor Relations Act (“NLRA”) in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, that Congress felt could harm the general welfare of workers, businesses, and the U.S. economy.² Despite the fact that the law applies to almost all employers engaged in interstate commerce³, nonunion employers have, historically speaking, paid little attention to the NLRA. In fact, it is likely that many attorneys have even made the incorrect assumption that the NLRA is only applicable to issues directly relating to unions. Nonetheless, Section 7 of the NLRA protects the rights of all employees covered by the act to engage in “other concerted activities for mutual aid and protection,” which has generally been interpreted as a right to discuss wages, terms and conditions of employment, and working conditions. The law, however, applies to union and nonunion employers alike.

Although the original NLRA created the National Labor Relations Board (“NLRB”) itself, amendments to the act made the NLRB as an adjudicative body charged with deciding charges brought by the NLRB’s general counsel, who is appointed for a four year term by the president. The duties of the general counsel include prosecuting unfair labor practices while also supervising the NLRB regional field offices.⁴

Historically speaking, the general counsel and the NLRB have focused their efforts on prosecuting and adjudicating charges of unfair labor practices, which have generally originated from employers with unionized workforces or union representation cases. This traditional focus has changed in recent years, and the agency has pursued an unprecedented agenda that targets standard employment policies as unlawful based on the agency’s very board interpretation of the protections afforded by Section 7 of the NLRA.

As part of its expanded agenda to target nonunion employers, the NLRB has initiated a campaign to educate employees about their rights under the NLRA, and it has created a website that specifically seeks to explain what it now believes qualifies as protected “concerted activity” under the law.⁵ A number of charges have already been filed with the NLRB as a result of these efforts, and the agency has issued a number of noteworthy decisions that declare standard employment policies under the NLRA. While the new agenda of the NLRB goes well beyond decisions invalidating workplace rules, the scope of this article will be

limited to the rulings that attack standard employment at will disclaimers that are routinely included in employee handbooks, social media policies, and rules requiring confidentiality for internal investigations. These three areas of

focus illustrate the agency’s new approach and why attorneys should take note.

THE AGENCY ATTACKS AT-WILL EMPLOYMENT DISCLOSURES INCLUDED IN EMPLOYEE HANDBOOKS AS UNLAWFUL

The NLRB has taken the position that certain “at will” employment disclaimers used by employers across the country are unlawful because they interfere with rights guaranteed under Section 7 of the NLRA. Of course, employers routinely rely on disclaimers

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¹ This article was originally published in *Tenn. Bar Journal*, Jan. 2013, Vol. 49, No. 1, which is a publication of the Tennessee Bar Association.

² <http://www.nlr.gov/national-labor-relations-act>

³ The FLSA is not applicable to the federal government, state or political subdivisions, railroads, airlines, or other companies subject to the Railway Labor Act, and several other very specific groups. Certain employees are also exempt, but this issue goes beyond the scope of this article.

⁴ As background, the process begins when a charge is filed in one of the NLRB regional offices. The regional office investigates the charge and attempts to resolve the issue in dispute. The Regional Director has authority to either issue a formal complaint or dismiss the charge. If a complaint is issued, a hearing is conducted by an Administrative Law Judge, who issues findings of fact and a recommendation. This decision from the ALJ is reviewed by the NLRB, which issues a final order. The NLRB can then initiate a case in the U.S. Court of Appeals to seek an order enforcing its order, or the other party to the proceedings can initiate a case in the U.S. Court of Appeals to challenge the NLRB order.

⁵ <http://www.nlr.gov/concerted-activity>



EATING YOUR CAKE AND HAVING IT TOO: CAN EMPLOYEES TAKE AND PRESERVE FMLA LEAVE AT THE SAME TIME?

By: Dana Peterson and Leo Q. Li

The Family and Medical Leave Act (“FMLA”) entitles eligible employees to take protected leave for various qualifying reasons, such as to care for a parent with a serious health condition or to obtain treatment for the employee’s own serious health condition. Sometimes eligible employees do not expressly mention the FMLA when they request a leave, thus leaving it up to the employer to determine whether the absence qualifies as FMLA leave. Once the employer has obtained sufficient information to make that determination, it is not uncommon for an employer to advise the employee that the time off has been (or will be) designated as FMLA leave and counted against the employee’s FMLA entitlement.

But what if an employee whose leave qualifies for FMLA does not want the time off counted against FMLA entitlement? Is the employer obliged to honor the employee’s choice? Consider the following:

Hypothetical One: An employee sustains an injury that requires hospitalization. The employee requests time off as a reasonable accommodation under the federal Americans with Disabilities Act (“ADA”) and California’s Fair Employment and Housing Act (“FEHA”). Nevertheless, the employee expressly declines to use FMLA leave because his wife is expecting a baby and he wants to preserve his FMLA leave to use after the childbirth. How should the employer respond? Is the employer allowed to designate the time off as FMLA leave, even though the employee does not want it designated as such?

Until recently, one would have thought that an employer could designate an employee’s leave as FMLA leave, even if the employee’s preference would be to take leave under a different leave entitlement, in order to save FMLA leave for later use. Now, however, one might have to think again, in light of the Ninth Circuit’s decision in [*Escriba v. Foster Poultry Farms, Inc.*, 11-17608, 2014 WL 715547 \(9th Cir. Feb. 25, 2014\)](#). Based upon the highly

unusual facts in [*Escriba*](#), the Ninth Circuit held that an employee can decline to use FMLA leave, even if taking leave for an FMLA qualifying reason. The Ninth Circuit also suggested that employers who force an employee to take FMLA leave instead of vacation might be liable for interfering with FMLA leave.

The Facts In *Escriba*

The plaintiff, Maria Escriba, worked in a processing plant at Foster Farms. In November 2007, Escriba’s supervisor granted Escriba’s request to take two weeks of vacation time to see her sick father in Guatemala, but the supervisor denied Escriba’s further request to take an additional one to two weeks of unpaid time off. The supervisor asked Escriba if she needed the extra time to care for her father, but Escriba said “No.”

Once the supervisor denied the request for additional time off, Escriba tried her luck with the superintendent. The superintendent, understanding that Escriba was seeking additional vacation time, denied the request. Then Escriba, although lacking any approval to be absent for more than two weeks, remained off work and did not return until sixteen days after her approved vacation had ended. During this absence, Escriba made no effort to contact Foster Farms to seek more time off.

Foster Farms discharged Escriba under its “three day no-show, no-call rule,” which dictates an automatic termination for employees who are absent for three work days without notifying the company or seeking time off. Escriba sued Foster Farms under the FMLA and the California Family Rights Act (“CFRA”).¹

After the jury found for Foster Farms, Escriba appealed.

The Ninth Circuit’s Decision

Escriba argued that the underlying reason for her leave—caring for her ailing father—triggered FMLA

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¹ The Ninth Circuit held that identical standards applied to the FMLA and the CFRA, and referred to both causes of action as arising under the FMLA.



EFFECTIVE AND COMPLIANT WORKPLACE INVESTIGATIONS: A LOOK AT THE MIAMI DOLPHINS INVESTIGATION

By: Sindy Warren

On October 28, 2013, halfway through the football season, Miami Dolphins offensive tackle Jonathan Martin abruptly walked out of the practice facility and checked himself into a nearby hospital for psychological treatment. The impetus, per Martin, was persistent bullying and harassment by some of his teammates. The allegations caught major media attention right away – a 300 plus pound NFL player was complaining about bullying? The Dolphins responded quickly by asking the NFL to commission an independent investigation into the allegations. Thus, on November 6, 2013, the NFL announced it had engaged attorney Ted Wells and the law firm Paul, Weiss, Rifkind, Wharton & Garrison to conduct an independent investigation. The investigation report, all 144 pages of it, was made public on February 14, 2014.

When an employee complains of some kind of workplace misconduct, employers must respond by conducting an impartial investigation. If the allegations concern harassment, discrimination, or some other conduct prohibited by the anti-discrimination laws (Title VII, ADA, ADEA, and their state counterparts, to name just a few), the law imposes a strict duty on employers to respond quickly and effectively. Appropriate employer responses invariably begin with workplace investigations. Not surprisingly, then, the law of workplace investigations has evolved and continues to instruct employers on what to do and, just as importantly, what not to do. In the best of scenarios, a solid workplace investigation can insulate employers from litigation and/or provide an unassailable defense in the event litigation ensues.

What, then, does a successful workplace investigation entail? Two buzzwords the courts repeat time and again are “prompt” and “thorough.”

Prompt means getting the ball rolling quickly and generally involves a fact-specific analysis. Typically, an employer should respond to a complaint within a couple of days, at least to inform the complainant the employer intends to initiate an investigation. In the case of the Miami Dolphins, less than a week elapsed from

the time the organization learned of Martin’s complaints to its commencement of the investigation. If employee safety is an issue – i.e., the complainant and alleged wrongdoer are in continued contact – action should be taken immediately to ensure the cessation of the alleged contact. The alleged wrongdoer could be placed on a paid leave of absence pending the outcome of the investigation, for example. This is what the Dolphins did with offensive lineman Richie Incognito, the primary alleged wrongdoer. Employers should be careful in changing any working conditions of the complainant, however, lest they create the perception of retaliation.

A thorough investigation, per the courts and agencies, is one that is fair and unbiased. Each party receives a full opportunity to share his or her side of the story. Relevant witnesses are interviewed and follow up interviews occur where necessary, particularly with the alleged wrongdoer, who should have every chance to respond to the allegations against him or her. Documents are reviewed. No conclusions are drawn until all the evidence is in, where it can be weighed fairly and impartially. An essential starting point to a thorough investigation is the selection of a neutral and unbiased investigator; someone who has no skin in the game, so to speak. Sometimes, employers need to look outside their organizations to retain this individual. For example, say an HR Director is tasked with investigating allegations of misconduct by the CFO, to whom the HR Director reports. There is an obvious issue of bias (both perceived and actual) before the investigation is even underway. The Dolphins sidestepped this potential danger by immediately hiring an independent investigator with no relationship to the team. To leave no unanswered questions about his or his firm’s independence, Mr. Wells included the following statement in the investigation report: “There were no constraints placed on our work or that were aimed to guide our results – not from the NFL, the NLFPA, the Dolphins or any player. The opinions set forth in the findings and conclusions below and elsewhere in this Report are our own.” (Report, p. 11)

Mr. Wells and his team conducted, in their words, a “comprehensive” investigation. This involved interviewing all players, coaches, and members of

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SECOND CIRCUIT UPHOLDS EMPLOYER'S ABILITY TO CURTAIL EMPLOYEE CLASS ACTION LAW SUITS

By: [Kenneth A. Novikoff](#) and [Jacqueline K. Siegel](#)

The Second Circuit has demonstrated a clear distaste for class action waiver provisions, making it difficult to enforce such provisions included in arbitration agreements even in cases where both parties expressly and unequivocally agree to such terms. In fact, in [In Re: American Express Merchants' Litigation, 554 F.3d 300 \(2nd Cir. 2009\)](#) (“AmEx I”), the Court invalidated a clear and unambiguous class action waiver clause in an arbitration agreement.¹ The Court reasoned that compelling each plaintiff to individually arbitrate their claims would cause them to incur unreasonably excessive fees, thereby prohibiting them from vindicating their rights under federal antitrust statutes.²

The U.S. Supreme Court overturned the [AmEx I](#) decision, undoubtedly forcing the Second Circuit to alter its outlook on class action waivers.³ An example of this “new attitude” is the Second Circuit’s recent opinion rendered in [Sutherland v. Ernst & Young, LLP, Docket No.12-304-cv \(2nd Cir. August 9, 2013\)](#). Indeed, in what can only be interpreted as a sweeping victory for employers, the Second Circuit ruled that an employee may not invalidate a class-action waiver provision in an arbitration agreement even when that waiver removes the financial incentive for an employee to pursue the claim under the Fair Labor Standards Act (“FLSA”).⁴ This article summarizes the [Sutherland](#) decision and addresses the impact it will have on employers in the future.

CASE SUMMARY

Stephanie Sutherland (“Sutherland”) filed a collective action in the United States District Court for the Southern District of New York alleging that she and others similarly situated were not paid overtime compensation

in violation of federal and state labor laws. Specifically, Sutherland alleged that her former employer, Ernst & Young (“E&Y”), improperly classified audit staff members, like herself, as “exempt” and were therefore compensated on a “salary” only basis. As such, Ms. Sutherland claimed that she was owed overtime wages for all the hours that she worked over forty (40) per week, amounting to a total of \$1,867.02.

Critically, Ms. Sutherland had executed an offer letter upon accepting her employment with E&Y. The offer letter provided that “if an employment related dispute arises between you and the Firm, it will be subject to mandatory mediation/arbitration under the terms of the Firm’s alternative dispute resolution program, known as the Common Ground Program, a copy of which is attached.”⁵ The Common Ground Program (“Arbitration Agreement”) attached provided that “[c]laims based on federal statutes . . . such as the Fair Labor Standards Act[,]” “[c]laims based on state and local ordinances, including state and local anti-discrimination laws . . . and [c]laims concerning wages, salary, and incentive compensation programs are subject to the terms of the Arbitration Agreement.”⁶ The Arbitration Agreement further specified that “[n]either the Firm nor an Employee will be able to sue in court in connection with a Covered Dispute” and that “Covered Disputes pertaining to different [e]mployees will be heard in separate proceedings.”⁷

In addition, Ms. Sutherland executed a confidentiality agreement which provided, in pertinent part, “I further agree that any dispute, controversy, or claim . . . arising between myself and the Firm will be submitted first

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¹ [In Re: American Express Merchants' Litigation, 554 F.3d 300 \(2d Cir. 2009\)](#).

² [Id.](#)

³ [American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 \(2013\)](#).

⁴ [Sutherland v. Ernst & Young, LLP, Docket No.12-304-cv \(2d Cir. August 9, 2013\)](#).

⁵ [Id.](#) at 5.

⁶ [Id.](#) at 6.

⁷ [Id.](#)

CASE NOTE: APPLE, GOOGLE ENGINEERS WIN CERT. IN EMPLOYEE POACHING SUIT

By: [Nicholas Foderaro](#) and [Matthew Popp](#)

Recently, a California Federal Court Judge certified a class of former software engineers in a class action lawsuit against a number of technology giants for anti-trust claims. As of April 2014, the number of plaintiffs reached almost 65,000 past and current employees of the companies.

The engineers are taking issue with the discovery that many large technology companies, including, Google, Apple, Adobe, Pixar, Intel, Intuit, and Lucasfilm, have long-standing agreements in place which significantly limit their employees' opportunity for advancement in the industry. Specifically, they have alleged that the companies have agreed to prevent recruiting of each other's employees, to inform each other when making an offer to an employee of a competing company, and to limit initial offers. In essence, these agreements allow companies to govern the employment market by reducing competition, limiting ability for advancement and capping wages. The affected employees claim that,

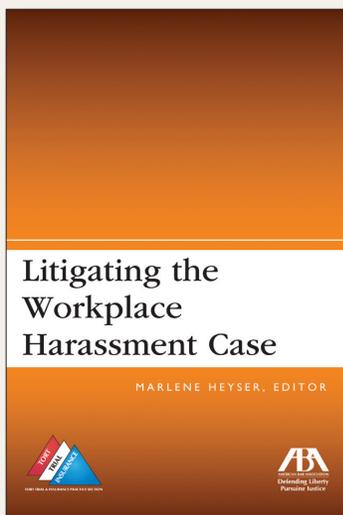
as a result of these agreements, their pay rate has been reduced by about 10%.

Many of the companies reached settlements with the employees shortly after the suit was filed. As of late April 2014, the remaining defendants, Apple, Intel, Google and Adobe also reached settlement. The settlement amount has been reported to be in excess of \$320 million.

As this case has shown, use of such agreements has had significant impact on the technology industry and holds possible implications affecting the U.S. job market as a whole. Thus, it will be interesting to see if there is any ripple effect from this lawsuit that causes other companies, who may have similar agreements in place, to rethink such policies. ⚖️

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LITIGATING THE WORKPLACE HARASSMENT CASE

Edited by Marlene Heyser

Over the past few years, courts have recognized harassment based on criteria extending beyond sexual harassment in the workplace. As a result, litigation in this area has increased and expanded to include all protected classes under the Title VII of the 1964 Civil Rights Act. Litigating the Workplace Harassment Case provides a comprehensive look at litigation and settlement strategies for such cases. Written by renowned defense and plaintiff counsel, the book begins with an exhaustive review of the law governing workplace discrimination and discusses all aspects of the workplace harassment case from both the defense and plaintiff side.

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States alleged that the FDNY's use of (i) a written examination as a "pass/fail screening device[]" to eliminate applicants; and (ii) a "rank-order processing" of applicants, where candidates who passed the written examination and a physical performance test ("PPT") were positioned on a ranked hiring list in order of their combined written-examination and PPT scores, had a disparate impact on black and Hispanic applicants and were further unrelated to the job.

In September of the same year, the Vulcan Society, Inc., Marcus Haywood, Candido Nuñez, and Roger Gregg intervened (the "Intervenors") as a class in the subject action, seeking relief pursuant to Title VII, the United States and New York State Constitutions, and the New York State Human Rights Law. The Intervenors challenged the same hiring practices as the United States only against black, rather than black and Hispanic, applicants.¹ Moreover, the Intervenors also claimed that the Defendants' use of hiring procedures constituted intentional discrimination against black applicants.

After the District Court bi-furcated the case into separate liability and relief phases, the United States and the Intervenors moved for partial summary judgment on the disparate impact claim. In support of its motion, the Plaintiffs presented evidence that when the action was commenced, only 3.4% and 6.7% of the FDNY's firefighters were black and Hispanic, respectively. Moreover, it was argued that the FDNY had the lowest representation of black firefighters as compared to other major cities, including Los Angeles, San Antonio, San Diego, Dallas, Houston, Chicago, and Philadelphia.

In July 2009, the District Court granted the motion for summary judgment on the disparate impact claim. The District Court held that the hiring practices at issue disproportionately impacted black and Hispanic applicants, and that the City was not able to satisfy its burden of demonstrating that the employment procedures were "job-related" or "consistent with business necessity." The Court's holding was primarily based on the statistical evidence demonstrating that black and Hispanic applicants disproportionately failed the City's exams (the "Disparate Impact Opinion").

In October 2009, the Intervenors filed a separate

motion for partial summary judgment on the issue of discriminatory intent. In granting the Intervenors' motion (the "Disparate Treatment Opinion"), the District Court held that "the City's use of written exams with discriminatory impacts and little relation to the job of firefighter was not a one-time mistake or the product of benign neglect. It was part of a pattern, practice, and policy of intentional discrimination against black applicants that has deep historical antecedents and uniquely disabling effects." The District Court further held that the City was unable to satisfy its burden of responding to the Intervenors' prima facie case, particularly because of its inability to challenge the Intervenors' statistical evidence. Accordingly, the District Court found that it "must find the existence of the presumed fact of unlawful discrimination and must, therefore, render a verdict for the plaintiff."

On January 21, 2010, about one week after the Disparate Treatment Opinion was issued, the District Court rendered an Order requiring the City to implement a new testing procedure. In December 2011, the Court issued another Order mandating the City to, among other things, improve its recruiting and screening practices under the supervision of a Court Monitor. The City appealed.

SECOND CIRCUIT COURT OF APPEALS RULING

On May 14, 2013, the Second Circuit Court of Appeals ("Second Circuit") issued a ruling affirming, as modified, most of the injunctive relief granted by the District Court. However, most significantly, the Second Circuit overturned the District Court's finding of intentional discrimination and remanded that claim to a new district court judge for trial. Specifically, a divided panel held that the City's articulation of a nondiscriminatory reason for utilizing the challenged exams, *inter alia*, the exams where facially neutral, sufficiently rebutted the plaintiff's arguments for summary judgment. Indeed, the Second Circuit found that the City was not required to refute the plaintiff's empirical data. Rather, the Second Circuit opined, an employer can rebut the prima facie case "by accepting a plaintiff's statistics and producing non-statistical evidence to show that it lacked such an intent [to discriminate against a protected class]."

SETTLEMENT

On March 18, 2014, the parties announced that they had reached an agreement to settle the case. Among other things, the City agreed to pay approximately

¹ The Intervenors' Complaint added four defendants to the action: the FDNY, the New York City Department of Citywide Administrative Services ("DCAS"), Mayor Michael Bloomberg, and former New York City Fire Commissioner Nicholas Scoppetta (collectively with the City, the "Defendants").

\$98 million to black and Hispanic candidates affected by the FDNY hiring practices. The agreement must be approved by District Court Judge Nicholas Garaufis, who will conduct a fairness hearing regarding the same.

FUTURE EFFECTS OF THE SETTLEMENT AND PRIOR RULINGS

The Courts' rulings and the hefty settlement should serve as a cautionary tale to other New York municipalities.

Indeed, whether intentional or not, a hiring practice which has a disparate impact on a protected class will expose an employer to potential liability.

In fact, just last year, the City announced a \$1 million settlement with five female Emergency Medical Service ("EMS") officers who had alleged the City failed to promote them based on their gender. According to the EMS officers' counsel, there were approximately 400 lieutenants and captains in the EMS, while only 16 percent of those positions were held by women. We recommend that other municipal New York Fire Departments carefully scrutinize their candidate screening tests, promotion policies and conduct an audit of the demographic make-up of their respective departments. 

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THE NLRB'S EXPANDED...

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in employee handbooks and other documentation to confirm that the employment relationship can be terminated at any time by either party. Disclaimers such as these help protect employers from claims that some inadvertent and unintended act or statement made by an agent of the employer could alter the nature of the at will relationship. Of course, disclaimers such as these have essentially become a standard employment practice. Nonetheless, the agency has recently issued rulings that would likely make many if not most of the at-will disclaimers used by employers unlawful.

The agency targeted a standard employment at will disclaimer in *Am. Red Cross Arizona Blood Servs. Region & Lois Hampton, an Individual*,⁶ where an employee was required to sign an acknowledgement to confirm receipt of, and acceptance of all of the terms stated in an employee handbook. The acknowledgement also stated that the employment offered was "at-will." This disclaimer also specifically stated, "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."⁷ The general counsel argued that this language was overbroad and discriminatory and infringed on rights protected under Section 7.

The Administrative Law Judge ("ALJ") did not find the language of the acknowledgement to be an express restriction on protected activity; hence, the ALJ had to

perform a separate analysis to determine whether (1) employees would reasonably construe the language of the disclaimer to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule had been applied to restrict the exercise of Section 7 rights. After evaluating the issue, ALJ agreed with the general counsel that the disclaimer was unlawful by stating, "In my view there is no doubt that employees would reasonably construe the language to prohibit Section 7 activity."⁸ In support of this finding, the ALJ noted that the acknowledgement, as written, would reasonably convince an employee that he or she had "waived the right to advocate concertedly . . . to change his or her at will status" . . . "or to engage in any conduct that could result in union representation and in a collective bargaining agreement, which would amend, modify, or alter the "at will" relationship."⁹ This decision made by the ALJ is based on the idea that a reasonable employee would construe the language of the acknowledgment to mean that they could not change their status from at-will employment by seeking union representation or by way of collective bargaining. This case settled before it could be decided by the NLRB itself.

The NLRB advanced a similar challenge in *Hyatt Hotels Corp. and UNITE Here Int'l Union*,¹⁰ where the disclaimer stated as follows:

I understand that my employment is "at-will." This means I am free

⁶ *Am. Red Cross Arizona Blood Servs. Region & Lois Hampton, an Individual*, 28-CA-23443, 2012 WL 311334 (Feb. 1, 2012).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Hyatt Hotels Corp. and UNITE Here Int'l Union*, 28-CA-061114 (Feb. 29, 2012)

to separate my employment at any time, for any reason, and that Hyatt has these same rights. Nothing in this handbook is intended to change my at-will employment statute. I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's Executive Vice-President/Chief Operating Officer or Hyatt's President.

The parties reached a settlement to resolve this case before it could be decided by an ALJ, but attacks on commonly accepted employment at-will disclaimers caused alarm, and the agency was criticized for its reasoning and approach by many. In an effort to provide some guidance and limit the concern that the agency planned to target all employment at-will disclaimers, the agency issued two Advice Memoranda on October 31, 2012. Both memoranda apply the same reasoning so only one will be addressed herein.

In *Rocha Transportation*,¹¹ the at-will employment acknowledgement stated as follows: "No representative of the Company has authority to enter into any agreement contrary to the foregoing 'employment at will' relationship." The general counsel explained that this at-will acknowledgement is lawful because it did not suggest that an employee had waived the right to engage in concerted activity to alter the nature of the employment relationship. To explain the decision, the advice memorandum further notes,

We conclude that the contested handbook provision would not reasonably be interpreted to restrict an employee's Section 7 rights to engage in concerted attempts to change his or her employment-at will status. First, the provision does not require employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way. Instead, the provision simply highlights the Employer's policy that its own representatives are not authorized to modify an employee's at-will status. Moreover, the clear meaning of the provision at issue is to reinforce the

Employer's unambiguously stated purpose of its at-will policy: it explicitly states '[n]othing contained in this handbook creates an express or implied contract of employment.' It is commonplace for employers to rely on policy provisions such as those at issue here as a defense against potential legal actions by employees asserting that the employee handbook creates an enforceable employment contract.

The memoranda issued on October 31, 2012, provide employers some guidance that will help employers better understand what at-will employment language the agency finds unlawful, but it is worth noting that the issue has not yet arisen before the actual NLRB. Nonetheless, it is clear that the agency believes that the section general rights guaranteed by Section 7 offer broad protections that reach as far as the language of an at-will employment acknowledgment. While the NLRB has provided guidance that will allow employers to adopt new language that could not theoretically be read as a waiver of the right to engage in concerted activity, many if most employers will need to revise their at-will employment acknowledgments in light of this decision.

THE AGENCY STRICTLY APPLIES SECTION 7 TO INVALIDATE MOST SOCIAL MEDIA POLICIES

The agency has also been waging a war against social media policies adopted by many employers, which the general counsel considers overbroad and in violation of Section 7 rights. As before, if a rule expressly restricts Section 7 protected activity, it violates the NLRA. If it does not expressly violate the NLRA, the rule will only be unlawful if (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

After the agency issued decisions in a number of cases, the general counsel issued Memorandum OM 12-59 to provide all Regional Directors guidelines for determining whether a company's social media policy violates the NLRA. The examples set forth in the memorandum emphasize that social media policies that are broadly worded or ambiguous are unlawful. According to the general counsel, where the language of the policy is ambiguous employees will reasonably conclude the rule as a restriction of their right to engage

¹¹ *Rocha Transportation*, 32-CA-086799, Advice Mem. (Oct. 31, 2012)

in concerted activity. It is noteworthy that of the twenty-one pages of example language regarding social media usage policies included in the memorandum, only a few were deemed lawful. The following are examples taken from the advice memorandum that illustrate the approach the agency is taking with respect to such policies:

A Rule forbidding employees from releasing confidential, guest, team member, or company information was deemed unlawful on the grounds that it would reasonably be interpreted to as prohibiting employees from exchanging information about terms and conditions of employment.

A company policy warning employees not to “share confidential information with another team member unless they have a need to know the information to do their job” found to violate NLRA because overbroad. The memorandum notes that “employees would construe these provisions as prohibiting them from discussing” topics protected by Section 7.

A Social media policy instructing employees to treat everyone with respect and stating, “offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline” was designated unlawful. The general counsel noted the policy was overbroad because it could be deemed to prevent an employee from criticizing the employer’s policies.

One employer policy that required employees who use the social media tools provided by the employer to report any unusual or inappropriate internal social media activity was designated unlawful even where the policy also stated that “it will be administered in compliance with applicable laws and regulations, including Section 7 of the National Labor Relations Act.” The memorandum explains that requiring employees to report anything unusual is essentially requiring employees to report to management the union activities of other employees, and the general counsel notes that even

a statement that the employer would comply with Section 7 of the NLRA could not cure the fact that the policy was overbroad.

An international health care company’s policy was considered unlawful that informed employees that if they become aware of personal information about fellow employees, . . . customers, patients, etc., that they should not disclose that information online. In support, the memorandum explains that without additional detail employees “would reasonably construe it to include information about employee wages, etc.”

The general counsel, however, did approve of a policy that did not impose any actual restrictions on its employees. Instead, the policy merely instructed employees to respect all copying and other intellectual property. The memorandum approves of this employer drafted recommendation because it did not prohibit employers from doing anything and merely suggested respect. On the other hand, a later section of the rule governing copyright and intellectual property was deemed unlawful because it would require the employee to get the permission of the copyright holder before using any protected materials. This restriction was considered unlawful because it could restrict an employee’s right to take and post photos of employees on a picket line.

The NLRB memorandum also found it unlawful for an employer to encourage employees to resolve concerns about work by speaking with co-workers, supervisors, or managers because it might limit an employee from airing his or her grievances online or in a separate medium.

The above examples and others stated in the guidance memorandum suggest that employers cannot adopt any rule that prohibits any form of social media communication unless the employer defines what is restricted with specificity. Based on the examples

provided, it appears that the agency has taken a very broad view of what can reasonably be construed as restricting Section 7 rights. In fact, one could argue that the general counsel's position suggest that any rule that an employee could theoretically construe as restricting Section 7 rights make the rule unlawful. Regardless of the merits of the position advocated by the agency, the scope of its focus and the strict approach it has taken when it applies the law to such policies further illustrates the agency's new expanded agenda.

REQUESTING EMPLOYEES KEEP INFORMATION RELATING TO INTERNAL INVESTIGATIONS CONFIDENTIAL MAY BE UNLAWFUL

Almost all employers understand that it is important to maintain confidentiality during the course of the internal investigations. In the absence of confidentiality, it is reasonable to assume that some employees would be reluctant to report theft, discrimination, retaliation, and other forms of wrong doing. Furthermore, the EEOC has emphasized that confidentiality is an important element of any anti-harassment policy.¹² Nonetheless, the NLRB has held in *Banner Health System d/b/a Banner Estrella Medical Center*,¹³ that an employer that suggests that an employee maintain confidentiality violates the NLRA. The job duties of the employee in *Banner* include sterilizing surgical instruments using a specific machine that used heat and steam. A broken pipe, however, made this machine inoperable, and the employer's supervisor told the employee to use a different machine to sterilize the surgical instruments. The employee was concerned that this alternative method might not sufficiently sterilize the instruments, and the employee began researching the issue rather than following instructions. When the supervisor learned that the employee had not followed his instructions the following day, the supervisor warned the employee and suggested that his failure to follow directions would be discussed at a later date. The employee raised the issue with a human resources professional, who asked the employee not to discuss the matter with his coworkers while the investigation was ongoing. This request for confidentiality was oral, and the employer did not have a formal written rule that required confidentiality.

The general counsel argued that the confidentiality given by the HR employee has a reasonable tendency to coerce employees and that it constituted an

unlawful restraint of Section 7 rights. The ALJ who originally decided the case found that the employer's desire to maintain the integrity of its investigation by recommending confidentially qualified as a legitimate business justification that outweighed the infringement of Section 7 rights. The NLRB majority disagreed, finding the employer's general desire to protect the integrity of its investigation an insufficient business justification.

According to the NLRB, the employer had an obligation to identify a specific rather than general justification before it could infringe on Section 7 rights. The NLRB specifically suggested that to have a legitimate justification to request confidentiality the employer first needed to confirm whether any witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or if there was reason to fear a cover up. In short, the decision makes it unlawful for an employer to ask an employee to keep information confidential until the employer has identified a specific need.

THE IMPACT OF THE AGENCY'S EXPANDED AGENDA

Whether the NLRB's aggressive new agenda has been intended to further the pro-union agenda of the Obama administration,¹⁴ or this new focus is merely its effort to remain relevant at a time when only 6.9 percent of private sector employees are represented by unions,¹⁵ the approach has created a number of new subjects for litigation that affect union and nonunion employers alike. On one hand, the NLRB has broadly interpreted the protections afforded under Section 7 to challenge at-will employment, rules governing social media, and the confidentiality of internal investigations. At the same time, the NLRB has strictly applied Section 7 to limit the ways that employers can attempt to control their workforce. While the agency's traditional focus has been generally limited to issues that had a more direct connection with labor unions, the agency's expanded agenda is far more significant, and practitioners should consider the impact of their decisions and recognize that if this trend continues then the NLRB may be a new forum for litigating employment disputes that would not otherwise be actionable under other federal law. 

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¹² <http://www.eeoc.gov/policy/docs/harrassment.html>

¹³ *Banner Health System d/b/a Banner Estrella Medical Center*, 358 N.L.R.B. No. 93 (2012).

¹⁴ Kimberly Strassel, "The Silent Second Term Agenda," *The Wall Street Journal*, Aug. 23, 2012.

¹⁵ Bureau of Labor Statistics, Economic News Release, Jan. 27, 2012.

EATING YOUR CAKE AND...

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protection, so Foster Farms was *required* to designate her leave as such, and to provide her with appropriate notices regardless of whether she had declined such a designation. She further argued that employees cannot waive their FMLA rights, and therefore her declination of FMLA leave was invalid. The Ninth Circuit disagreed.

The Ninth Circuit concluded “that an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection.” The Ninth Circuit reasoned that an employee, under certain circumstances, might seek time off but still decline to invoke FMLA leave, in order to preserve her FMLA rights for future use. The employee who exhausts paid vacation first, for example, can save unused FMLA leave for future use.

Escriba argued that she did not expressly decline to take FMLA leave. But the jury found otherwise, and the Ninth Circuit concluded that the following evidence substantially supported this verdict: (1) Escriba answered “no” when asked if she needed more time in Guatemala, (2) the superintendent testified that Escriba asked only for “vacation time,” not “family leave,” (3) Escriba knew that only human resources—not her supervisor or the superintendent—handled all FMLA requests, as she successfully had requested similar leaves on prior occasions, and (4) company policy required FMLA leave to run concurrently with accrued vacation, so Escriba had an incentive to decline her FMLA leave in order to save it for future use.

Back to Hypothetical One:

In light of *Escriba*, may the employer designate time off as FMLA leave, even though the employee does not want it designated as such? There are grounds to do so, notwithstanding the broad language of the *Escriba* decision.

The *Escriba* court’s statement that employees have the right to decline FMLA leave, although expressly in apparently categorical terms, should not be taken out of context. *Escriba* involved leave to care for a family member; it did not involve leave for the employee’s own serious health condition. Thus, *Escriba* did *not* address whether an employee could decline to have leave counted against FMLA entitlement—thereby saving it for future use—while demanding leave, under the ADA or the FEHA, to accommodate the employee’s own disability.

A California employer faced with that situation could argue that it is entitled to designate and count the leave against FMLA and CFRA entitlement, because a disability leave under the FEHA would not be reasonable unless it also counted against available FMLA or CFRA leave. See [2 Cal Code Regs § 11068\(c\)](#) (when an employee cannot perform the essential functions of the job, or otherwise needs time away from the job for treatment and recovery, the employer may extend CFRA or FMLA leave as a form of reasonable accommodation under the FEHA). In fact, this regulation suggests that any available FMLA or CFRA leave should be taken *before* considering further leave as a reasonable accommodation.

In addition, FMLA opinion letters issued by the U.S. Department of Labor support the conclusion that an employer may designate a leave as FMLA leave despite the employee’s own preference. While the employer must designate leave as FMLA qualifying and give notice of the designation, “[t]he employee may not, however, bar the employer from designating any qualifying absence as FMLA leave.” 30 Op. FMLA 83 (1996). In fact, “the employer may designate and count the absence against the employee’s 12-week FMLA entitlement even if the employee has not requested that it be counted as such,” as long as the leave is FMLA-qualifying. 24 Op. FMLA 68 (1995).

But what about the *Escriba* dictum that employers may be liable for forcing FMLA leave on an unwilling employee? For this point the Ninth Circuit cited [Wyson v. Dow Chem. Co.](#), 503 F.3d 441 (6th Cir. 2007), but *Wyson* did not contemplate situations where an employee qualifies for an FMLA leave but declines to use it. Instead, *Wyson* held that an employee may have an interference claim under FMLA if the employer forces the employee to take FMLA leave when the employee does *not* have a qualifying event, i.e., a “serious health condition.”

Similarly, the case that *Wyson* examined at length—[Hicks v. Leroy’s Jewelers, Inc.](#), 2000 WL 1033029 (6th Cir. July 17, 2000), cert. denied, 531 U.S. 1146—presented a much different set of facts. In *Hicks*, the employee expressed a desire to preserve FMLA leave to care for her expected newborn, but she suffered a kidney infection before the baby was born. Although the employee was willing to work, the employer forced her to take FMLA leave and would not allow her to return to work before the baby’s birth. The *Hicks* ruling (that the employer was liable for interfering with FMLA leave) relied on the fact

that the employee was willing to work but was nonetheless involuntarily placed on FMLA leave.

And at least one court (albeit outside of the Ninth Circuit) has held that nothing in the FMLA expressly prohibits an employer from placing an FMLA-qualifying employee on involuntary leave. *Love v. City of Dallas*, 1997 WL 278126, at *6 (N.D. Tex May 14, 1997).

Hypothetical Two:

Suppose that the same employee from our first hypothetical has made a full recovery and returned to work. A couple of months later, he asks for three weeks of continuous leave to care for his sick mother. Again, he requests that the leave not be counted against his remaining FMLA entitlement, so that he can save FMLA leave for future use. He wants to use his accrued vacation instead. Is the employer obligated, in light of the *Escriba* decision, to honor this employee’s request?

In *Escriba*, the court did conclude, based upon the unusual facts before it, that *Escriba* could opt to take vacation in lieu of FMLA in order to care for her ailing father. But remember that, in *Escriba*, the employer chose to grant the vacation request. In our hypothetical, let’s assume that the employer decides to deny the three-week vacation request (because, for example, company policy is to limit vacations to two weeks). Here the employer could deny the employee’s request for the extra week of continuous leave and provide the required FMLA paperwork to permit the employee to seek the requested time off under the FMLA.

Of course, out of the abundance of caution, employers should consult legal counsel when confronted with this situation or whenever tricky leave issues arise. ⚖️

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EFFECTIVE AND COMPLIANT...

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management. Some witnesses were interviewed multiple times. In all, over 100 interviews were conducted. In addition, thousands of (voluntarily produced) text messages were reviewed. There is no question the investigation was thorough, as that term is defined and understood by the courts. However, not every investigation needs to be quite so comprehensive. The scope of the investigation – including the number of witnesses and types of documents sought – will vary greatly depending on the particular facts. There are some cases where the smaller the witness list, the better. If an investigation is looking into the somewhat nebulous issue of workplace culture, as Mr. Wells’s team was, it is appropriate to cast a wide net. But if an investigation is reviewing a specific alleged event with a limited number of potential witnesses, it would be more appropriate to speak to a smaller circle. The dangers in casting too wide a net can be multiple: rumors, risking defamation and invasion of privacy claims, and needlessly affecting morale, to name a few.

Once all the evidence is in, the investigator must synthesize it to make findings of fact. Generally, workplace investigators are retained to render factual conclusions, not legal conclusions. Thus, a typical finding could be that “the harassment policy was violated” instead of “harassment occurred.” This distinction can help insulate employers from being bound

by admissions of liability. Ideally, the harassment policy (or whatever policy is at issue) contains a broader reach than the law, meaning that a finding of a policy violation is not tantamount to a finding of a legal violation. Once again, Mr. Wells and his team hit the right note in this regard. The report concluded that the alleged behavior violated the Dolphins’s anti-harassment policy. It did not address issues of legal liability.

Generally, investigators should not include recommendations for employer action in their reports, unless they are specifically asked to do so. If an employer does not follow a written recommendation, the fact of the recommendation could expose the employer to liability. However, employers should be prepared to formulate their own responses to investigations, in a manner that will enhance the workplace and/or stop any wrongful conduct.

The Dolphins investigation is instructive in many ways for workplace investigators and employers who need to engage them. Equally important is how the team and the NFL will respond. As the report notes, the Dolphins have indicated they will review current policies and procedures and amend them to improve the workplace culture. It will be interesting to see the outcome of these efforts. ⚖️

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SECOND CIRCUIT UPHOLDS...

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to mediation and, if mediation is unsuccessful, then to binding arbitration I acknowledge that I have read and understand the E&Y Common Ground Dispute Resolution Program and that I shall abide by it.”⁸

Based upon the terms of the aforesaid agreements, E&Y filed a motion to dismiss or stay the collective action proceedings and to compel arbitration on an individual basis. Ms. Sutherland did not dispute that these agreements barred civil actions as well as collective actions in arbitration. Instead, Ms. Sutherland argued that the requirement that she arbitrate her FLSA claims individually prohibited her from “effectively vindicating” her rights under the FLSA and New York Labor Law because the costs and attorneys’ fees that she would incur in prosecuting her claims would far exceed her award. In fact, Ms. Sutherland submitted an estimate that her attorneys’ fees and costs plus expert witness fees would total to approximately \$200,000.00, while her estimated recovery would have been less than \$2,000.00. As such, Ms. Sutherland argued that the subject provision in the Arbitration Agreement, much like the waiver in Amex I, was unenforceable.

In denying E&Y’s motion, the District Court held that enforcing the subject provision would essentially bar Ms. Sutherland from vindicating her rights under the FLSA.⁹ Later that month, E&Y moved for reconsideration of the Order. The District Court, however, denied the motion,¹⁰ and, as such, E&Y appealed.

THE SECOND CIRCUIT HOLDING

The Second Circuit began its evaluation by implementing the analysis used by the Supreme Court in Italian Colors. This required the Court to determine whether the FLSA language contains a “contrary congressional command” precluding waiver of class arbitration. In support of the contention that the statute does contain such language, Ms. Sutherland argued that Section 216(b) created a “right” to file FLSA class actions. Specifically, the statute provides: “[a]n action

to recover the liability . . . may be maintained against any employer . . . in any Federal or State Court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves or other employees similarly situated.”¹¹

The Court found Ms. Sutherland’s interpretation of the statutory text unavailing. Rather, the Second Circuit held that because Section 216(b) also requires an employee to affirmatively opt into a collective action, it evinces the ability of an employee to also waive participation in a collective action.¹² As such, the statutory language did not preclude waiver of collective actions.

Next, the Court went on to examine whether the “effective vindication” doctrine nullified the subject provision. Indeed, although it is well-recognized that the Federal Arbitration Act (“FAA”) strongly favors the enforcement of arbitration clauses, this judicially created exception allows a court to invalidate an arbitration clause when its enforcement would eliminate a plaintiff’s right to pursue a federal statutory right. In relying on the Italian Colors opinion, the Court determined that the doctrine could not be invoked here. Indeed, the Court found that the doctrine was intended to be applied when an agreement actually “forbid[s] the assertion of certain statutory rights.”¹³ The Court went on to explain that this may include an instance where “filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impractical.”¹⁴ The doctrine, however, cannot be used to render an arbitration provision invalid simply because a claim is not financially worth pursuing. Indeed, as the Supreme Court professed, “the fact that it [a claim] is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”¹⁵ Accordingly, the Court upheld the class action waiver provision and remanded the case for further proceedings.

FUTURE EFFECTS OF THE RULING

Given the major influx of wage and hour cases filed within the last few years, this decision can give

⁸ *Id.* at 5-6.

⁹ Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547 (S.D.N.Y. 2011).

¹⁰ Sutherland v. Ernst & Young LLP, 847 F. Supp. 2d 528 (S.D.N.Y. 2012).

¹¹ 29 U.S.C. § 216(b).

¹² 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which the action is brought.”)

¹³ Sutherland, Docket No.12-304-cv at 12 (quoting Italian Colors, 133 S. Ct. at 2310-11).

¹⁴ *Id.*

¹⁵ Sutherland, Docket No.12-304-cv at 12 (quoting Italian Colors, 133 S. Ct. at 2311).

employers a sigh of relief. Sutherland allows an employer to enforce properly constructed class action waiver clauses within employment agreements, thereby protecting itself from potentially messy, costly, and time-consuming FLSA collective actions. The Sutherland decision suggests employers interested in class action waivers should provide employees with a complete description of the company's dispute resolution plan and further draft arbitration agreements which, in the main, explain that (i) employment related disputes, including, inter alia, those brought under the FLSA, are subject to mandatory and binding mediation/arbitration pursuant to the company's dispute resolution program,

(ii) neither the company nor the employee will be able to sue in court in connection with said disputes, and (iii) said employment related disputes pertaining to different employees will be heard in separate proceedings. The terms of the subject agreements should be easily understood and unequivocal. As such, we recommend that employers consult with counsel to carefully draft these agreements so as to ensure that the terms are clear, plain, and unmistakable.¹⁶ ⚖️

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¹⁶ The content of this article is intended only to provide a summarization of the subject matter. Legal advice should be sought regarding specific circumstances.

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