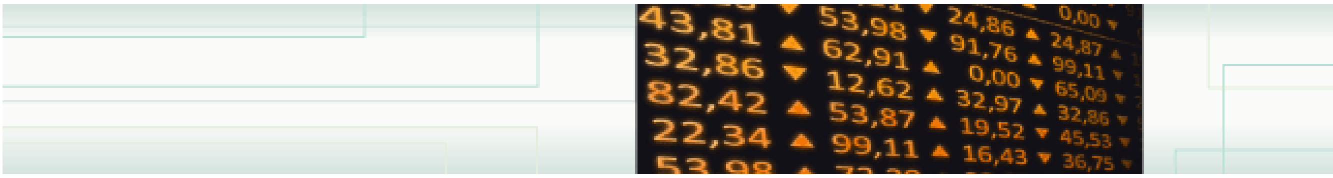

Financial Services Industry Employment Law Ticker
Spring 2010 Edition

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Orrick's *Employment Law Ticker* is the only publication dedicated to keeping in-house counsel and senior human resources executives informed on the most important employment law developments and trends in the global financial services industry.

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Ninth Circuit's *En Banc* Decision in *Dukes v. Wal-Mart* Affirming Certification of Massive Gender Discrimination Class and Congress' Consideration of Aggressive New Legislation Create "Perfect Storm" for More Class Litigation in the Financial Services Industry

On April 26, 2010, a closely divided Ninth Circuit *en banc* panel issued a long awaited decision affirming certification of a class in *Dukes v. Wal-Mart*-the largest sex discrimination class action in U.S. history. Noting that "mere size does not render a case unmanageable," the panel affirmed certification of a class of at least 500,000 women. This precedent poses a dramatic risk of increased class action litigation for financial services firms.

In 2004, the *Dukes* plaintiffs filed suit under Title VII on behalf of what has become a diverse class of roughly 1.5 million women, including both salaried and hourly employees in various positions who are or were employed at one or more of Wal-Mart's 3,400 stores across the country. The district court found that adjudicating the case as a class action (rather than through individual suits) was appropriate because plaintiffs presented: (1) facts reflecting a common practice of decentralized, subjective decision-making; (2) expert opinions suggesting a culture of gender stereotyping; (3) statistical evidence of universal pay disparities attributable to gender discrimination; and (4) anecdotal evidence from putative class members of management's discriminatory attitudes. Despite Wal-Mart's vigorous challenge to such a massive class, the district court held that employees' equal pay claims could be manageable on a class-wide basis because individuals who were paid less for comparable work could be identified by objective criteria through the use of computer software and would not require an individualized inquiry.

On appeal, a slim six-judge majority of the 11-member *en banc* panel agreed with the district court and voted to affirm certification of a class under Federal Rule of Civil Procedure 23(b)(2). The employees' "factual evidence, expert opinions, statistical evidence, and anecdotal evidence" were sufficient to "raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of [discriminatory] corporate policies (not merely a number of independent discriminatory acts)." While the *en banc* panel limited the class to current employees' claims for injunctive relief, declaratory relief and back pay, it recognized that the class is still about 500,000 women strong. Further, it did not reject the possibility of additional classes. Rather, it remanded to the district court to determine whether to certify an additional class or classes involving punitive damages or claims of former employees.

The court's timing could not be more striking. President Obama made eliminating pay bias a theme of his campaign, and he has continued to champion the issue since taking office.

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In January 2009, President Obama and the new House majority swiftly approved a sweeping bill on pay bias that not only overturned the Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, but also dramatically changed and expanded equal pay law. Most notably, the Lilly Ledbetter Fair Pay Act ("Ledbetter Act"):

- Reset the statute of limitations for filing a wage claim to each time an employee receives a paycheck, allowing employees to bring wage claims years after the alleged discrimination initially occurred; and

- Expanded the definition of an unlawful employment practice to not only include discreet "decisions" regarding compensation, but to include any "other practice" that affects an employee's compensation.

President Obama and various members of Congress have made clear that passing the Ledbetter Act was only the first step of their quest to crack down on employers and close the purported gender wage gap. They are now pushing legislation to modify the Equal Pay Act ("EPA") and close what they view as "loopholes" in existing laws and "barriers to effective enforcement." Possible new legislation includes the Paycheck Fairness Act ("PFA"). The PFA would materially alter the EPA by:

- Limiting the affirmative defenses currently available to employers;

- Enhancing employees' ability to seek un-capped compensatory and punitive damages; and

- Making it easier to pursue class actions for equal pay claims.

Other legislation being considered includes the Fair Pay Act of 2009 ("FPA"). The FPA would go further than the PFA by requiring employers to provide equal pay for men and women not only in the same jobs, but also "comparable" jobs – *i.e.*, those that "may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility and working conditions." This change in the degree of similarity required by courts would make it dramatically easier for women and to sue their employers for pay discrimination and could potentially make class sizes even larger.

In recent weeks, several new large class actions have been filed against major financial services firms with allegations of both gender and race discrimination in pay and promotion. Others are being threatened. Given these important developments, employers are well-advised to carefully scrutinize their pay policies and records and consider fixing past problems to better defend themselves against potentially crippling future wage discrimination claims.

Trade Secrets and Post-Employment Restrictions

Criminal Charges Filed Against Employees of Financial Services Firm

The financial crisis has resulted in a greater reliance on revenues from sales and trading desks at many financial services firms. With that, increased employee mobility has become a reality as firms struggle to attract the most successful trading teams and individuals who can contribute to improved profits. With that increased mobility there is a far greater risk that proprietary trading programs and methods will move with those individuals.

Financial services firms have a number of potential civil remedies against employees who misappropriate their trade secrets or confidential and proprietary information. There also are a number of federal and state statutes that make the theft of trade secrets a crime and that provide for severe penalties for such activities. Although criminal charges act as a powerful deterrent against the theft of trade secrets, federal and state law enforcement officials historically have not filed many criminal cases against employees for misappropriating trade secrets. However, this may be changing.

In two recent cases, the United States Attorney's Office for the Southern District of New York filed criminal charges against financial services industry employees for the theft of their employers' trade secrets. On April 19, 2010, the United States Attorney's Office filed a criminal complaint against a former Société Générale employee, charging the former employee with one count of theft of trade secrets in violation of the Economic Espionage Act. According to the complaint, shortly before resigning from his position as a trader in Société Générale's High Frequency Trading Group, the former employee printed out and took copies of Société Générale's proprietary high frequency trading computer code, which is used to run the firm's high speed trading operations in various securities markets. The Complaint alleges that the computer code had taken several years and millions of dollars to develop and that Société Générale had taken significant steps to ensure the confidentiality of the computer code. Following the denial of his bail application, the former employee remains in custody today.

On February 11, 2010, the United States Attorney's Office filed an indictment against a former Goldman Sachs computer programmer, charging the former employee with one count of theft of Goldman Sachs' high frequency trading computer code in violation of the Economic Espionage Act, one count of the transportation of stolen property in foreign commerce and one count of unauthorized computer access in violation of the Computer Fraud and Abuse Act. According to the Indictment, on his last day working at Goldman Sachs, the former employee transferred substantial portions of Goldman Sachs' proprietary computer code for its trading platform to an outside computer server in Germany. After transferring the files, the former employee deleted the computer's "bash history," which records the most recent

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commands executed on the computer. The Indictment also alleges that the former employee had transferred thousands of computer code files related to the firm's proprietary trading program from the firm's computers to his home computers, without the knowledge or authorization of Goldman Sachs. The former employee was arrested after he brought copies of Goldman Sachs' proprietary computer code to his new employer, a newly formed company that had hired him to develop a high frequency computer trading program.

These cases may signal an increased willingness by the United States Attorney's Office and the Federal Bureau of Investigation to pursue cases involving the theft of intellectual property. When confronted with a situation involving an employee's theft of confidential and proprietary information, employers should consider whether the matter should be referred to law enforcement authorities in addition to, or in lieu of, seeking traditional civil remedies against the employees.

Second Circuit Clarifies Standard for Preliminary Injunction in Trade Secrets Cases

Injunctive relief is sought in the majority of cases involving the misappropriation of trade secrets and violations of post-employment restrictive covenants. For several decades, the Second Circuit has applied the same standard when determining whether to grant a motion for a preliminary injunction. Under this standard, a party seeking injunctive relief must show (a) irreparable harm; and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. Other Circuits have refused to include the more flexible "serious question" alternative test as part of their preliminary injunction standard. In addition, three decisions of the Supreme Court in 2008 and 2009 arguably called into question the Second Circuit's continued use of the "serious question" standard.

However, on March 10, 2010, the Second Circuit rejected the argument that its "serious question" standard had been rejected by the Supreme Court and reaffirmed the use of the "serious question" standard. *See Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Funds Ltd.,* 08-6060-cv (2d Cir. March 10, 2010). The defendant in the *Citigroup* case argued that the Supreme Court's omission of the "serious question" standard in three recent cases involving preliminary injunctions precluded the use of the "serious question" standard as an alternative to demonstrating a likelihood of success on the merits. The Second Circuit rejected this argument, noting that the "serious question" standard was as rigorous as the "likelihood of success" standard and that the Supreme Court had not abrogated the "serious question" standard.

The Second Circuit's continued use of the more flexible "serious question" standard differs from the standards applied by other Circuits and state courts, including New York state courts. It is important for employers to consider these and other differences when drafting forum selection clauses for post-employment restrictive covenants and when selecting the forum in which to file an action for misappropriation of trade secrets.

California Supreme Court Rules That Forfeiture Provision in Deferred Compensation Plan Did Not Violate the California Labor Code

In *Schachter v. Citigroup*, 218 P.3d 262 (Cal. 2009), the California Supreme Court held that the forfeiture provision contained in Citigroup's incentive compensation plan did not violate the wage payment requirements under the California Labor Code. According to the terms of Citigroup's incentive compensation plan, eligible employees could elect to purchase shares of restricted stock at a reduced price in lieu of receiving a portion of their cash compensation. Pursuant to the plan, the restricted shares fully vested after two years, provided the employee remained employed by Citigroup during that period. The plan provided that, if an employee resigned or was terminated for cause during the two-year period, the employee would forfeit both the portion of cash compensation the employee had allocated to purchase the shares of restricted stock, as well as the restricted stock.

The plaintiff in *Schachter*, David Schachter, elected to receive a percentage of his annual compensation in shares of restricted stock that would vest in two years. Schachter later forfeited these shares and the amount of his compensation used to purchase these shares of restricted stock when he resigned from Citigroup before the shares had fully vested. Schachter then filed a putative class action against Citigroup arguing that the company's failure to pay him an amount equal to the portion of his cash compensation he had chosen to receive in the form of restricted stock violated Sections 201, 202 and 221 of the California Labor Code, which require the payment of earned wages when an employee's employment is terminated. The California Supreme Court rejected this argument, explaining that Schachter had agreed that remaining employed by Citigroup for the two-year vesting period was required and that, because Schachter had not remained employed by Citigroup for two years, he did not earn the restricted stock and had no right to receive it or the cash compensation that was used to purchase it. Thus, the California Supreme Court found that the forfeiture provision did not violate the California Labor Code.

Federal and State Governments to Target Misclassification of Employees as Independent Contractors

In a coordinated effort to enhance tax revenues and to enforce wage-and-hour laws, federal and state governments have begun an extensive effort to target employers who have misclassified employees as independent contractors. Financial services firms with any significant number of independent contractors can expect to be targeted for audits by federal and state authorities.

This recent crackdown began in 2009, when the Government Accountability Office ("GAO") issued a comprehensive report entitled "Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention." The report included several recommendations to Congress, including: (a) enhancing the Internal Revenue Service ("IRS") compliance programs; (b) enhancing coordination and information sharing between the IRS, the Department of Labor, and other federal agencies to address the misclassification of employees as independent contractors; and (c) passing legislation to limit the availability of the "safe harbor" provisions of Section 530 of the Internal Revenue Act of 1978, which many employers rely upon to designate workers as independent contractors for federal employment tax purposes.

Following the GAO's recommendations, the IRS and the Department of Labor recently announced a comprehensive joint initiative to strengthen and coordinate efforts to identify and deter employees' misclassification as independent contractors. The proposed 2011 federal budget allocates $25 million to this joint initiative, which would target misclassifications with 100 additional enforcement personnel and provide competitive grants to boost states' incentives and capacity to address misclassifications. In addition, the Department of Labor has indicated that it is drafting rules that would require employers to prepare written statements explaining why they are treating workers as independent contractors and to provide these statements to the Department of Labor and to the workers. *See* Steven Greenhouse, *U.S. Outlines Plan to Curb Violations of Labor Law*, N.Y. Times, April 29, 2010.

Congress also has gotten involved by proposing legislation that would amend and significantly limit the "safe harbor" provision contained in Section 530 of the Internal Revenue Act of 1978, which would provide workers with enhanced rights to petition the IRS to determine their status as employees and would significantly increase the penalties for the misclassification of employees as independent contractors. This bill, the "Taxpayer Responsibility, Accountability, and Consistency Act of 2009," would increase the penalties imposed upon a taxpayer that files an incorrect information return, from maximum penalties of $50 per return and a limit of $250,000 in penalties in a calendar year, to maximum penalties of $250 per return and $3,000,000 per calendar year.

State governments also are focusing on the misclassification of employees as independent contractors. For example, in Connecticut, the Attorney General and the acting Labor Commissioner have established a Joint Enforcement Commission on Worker Classification, which is intended to target the misclassification of employees as independent contractors. On April 21, 2010, the Connecticut legislature passed a bill that was proposed by the Joint Enforcement Commission on Worker Classification and that would increase the penalties for misclassifying employees as independent contractors. Similarly, New York state has created the Joint Task Force on Employee Misclassification, headed by the Director of the

New York State Department of Labor and including the New York State Attorney General and the Comptroller of the city of New York.

Given the heightened scrutiny on misclassifications and the proposed legislation that would increase exposure to liability and enhance the penalties for misclassifications, employers need to take steps now to minimize their risks. Employers should consider having counsel conduct audits to determine whether workers are properly classified as independent contractors. If an employer determines that it may have misclassified workers as independent contractors, it should consider reclassifying workers as employees and taking other remedial actions. In any event, acting now could save employers from large fines down the road.

Health Care Reform Law Establishes New Whistleblower Protections

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (the "Act"), the most sweeping overhaul of the health care system in the nation's history. One aspect of the 906-page Act that may have escaped the attention of many was Section 1558 of the Act, which is an employee whistleblower protection provision.

Section 1558 of the Act amends the Fair Labor Standards Act to prohibit retaliation against any employee who provides or is about to provide to an employer, the federal government, or a state's attorney general information the employee reasonably believes to be a violation of Title I of the Act. The provision also protects an employee's objection to, or refusal to, engage in conduct the employee reasonably believes is a violation of Title I of the Act and protects employees testifying in or assisting in proceedings concerning a violation under the Act. Title I of the Act is broad and contains a host of requirements relating to the provision and administration of health insurance for employees.

Section 1558 adopts the complaint procedures, burdens of proof and remedies set forth in the Consumer Product Safety Improvement Act of 2008. Aggrieved employees have 180-days to file a complaint with the Secretary of the Department of Labor, who conducts an investigation into the complaint. Similar to the burdens of proof under the whistleblower provision of the Sarbanes-Oxley Act ("SOX") and the American Recovery and Reinvestment Act ("ARRA"), the employee first has the burden to demonstrate that his or her protected activity was a "contributing factor" in the adverse personnel action. Once the employee meets this *prima facie* burden, the employer can avoid liability by demonstrating by "clear and convincing evidence" that it would have taken the same unfavorable personnel action even in the absence of protected activity. This burden has been recognized as higher than the preponderance of the evidence standard, but less than proof beyond a reasonable doubt.

Once the Department of Labor issues its investigative determination as to whether reasonable cause exists to believe that a violation has occurred, a party wishing to appeal may do so before an Administrative Law Judge, and appeals of rulings of Administrative Law Judges go to the Administrative Review Board and then the United States Court of Appeals.

If the Department of Labor has not issued a final decision within 210-days after the filing of a complaint under the Act, the complainant is deemed to have exhausted all administrative remedies as to the complaint and may bring an action *de novo* against the employer in federal district court. This is the same time frame provided for under ARRA, and is longer than the 180-day period provided for under SOX. Moreover, unlike SOX, a trial by jury is expressly made available in federal court actions under the Act.

The Act provides for remedies, including "all relief necessary to make the employee whole," and may consist of reinstatement, back pay with interest, attorneys' fees and litigation costs. Significantly, the rights and remedies afforded under the Act "may not be waived by any agreement, policy, form or condition of employment." Thus, unlike SOX where court claims can be compelled to arbitration, that will not be the case under the Act.

Given the immense scope and breadth of Title I of the Act, employers can expect to see an increase in whistleblower litigation as a result of the Act's passage. The tide of litigation will most likely be a gradual one, as not all of the requirements of Title I become effective immediately. The plaintiff's bar has already taken notice of this new whistleblower law, and it won't be long before we see the first wave of whistleblower cases brought under the Act.

Recent Developments in SOX Whistleblower Law

SOX Whistleblower Suits Allowed to Proceed Against Private Investment Advisor

A federal district court ruled on March 30, 2010, that Fidelity Investments ("Fidelity"), a private investment advisor to public mutual funds, is covered by the whistleblower provision of SOX. In *Lawson v. FMR LLC*, 2010 WL 1345153 (D. Mass. March 31, 2010), the plaintiffs alleged that their employment was terminated after they reported improper business activities at Fidelity. Fidelity responded by arguing that it was not a proper respondent under SOX because it is not publicly traded. Both an OSHA investigator and an Administrative Law Judge agreed with Fidelity and dismissed the plaintiffs' claims.

Rather than appealing the decision of the Administrative Law Judge and obtaining a final decision of the Department of Labor, the plaintiffs sought *de novo* review of their SOX claims in federal district court. Fidelity argued that the plaintiffs should be collaterally estopped from seeking *de novo* review because an Administrative Law Judge had already issued a summary judgment decision that should be entitled to deference. The district court rejected this argument, holding that SOX plaintiffs are entitled to *de novo* review of their claims as long as a final decision has not been reached by the Department of Labor. This ruling was in accord with the Fourth Circuit's recent decision in *Stone v. Instrumentation Laboratory Co.*, 591 F.3d 239, 245-46 (4th Cir. 2009), which held that district courts must review SOX claims *de novo* unless a final agency decision has been issued by the Department of Labor.

The *Lawson* court then turned to the question of whether private investment advisors that perform services for public mutual funds are covered by SOX, and held that such non-publicly traded entities are covered by SOX because they are agents or contractors of the public mutual funds. Although Fidelity was not necessarily acting as the mutual funds' agent for purposes of the plaintiffs' employment or termination, the court held that this was not required for SOX coverage; rather, it was sufficient for purposes of SOX that Fidelity was the funds' agent for other business purposes.

Notably, the *Lawson* court's holding on the employer coverage issue is broader than that of the Administrative Review Board in *Klopfenstein v. PCC Flow Technologies*, 2004-SOX-11 (ARB Aug. 31, 2009), which held that nonpublic subsidiaries are covered by SOX as agents only if they act as agents for purposes of the complainant's employment and termination. The Administrative Review Board's decision remains precedent for purposes of SOX proceedings at the Department of Labor; however, district courts applying *de novo* review may reach a different result on this issue as the court did in *Lawson*.

Administrative Law Judge Orders Reinstatement Even Though Not Sought in SOX Complaint

In *Brown v. Lockheed Martin Corp.*, 2008-SOX-49 (ALJ Jan. 15, 2010), the Administrative Law Judge found a violation of SOX and ordered that the successful complainant be reinstated by the respondent, despite the fact that she never sought reinstatement in her complaint and argued that reinstatement would be inappropriate. The respondent did not appear to weigh in on the issue of reinstatement one way or the other.

Brown alleged that Lockheed Martin terminated her employment in retaliation for complaints she raised about her manager. Brown had reported that her manager was having affairs with soldiers she met through the company's Pen Pal program and was expensing personal gifts and travel to the company, which expenses were then passed on to the U.S. government. After an evidentiary hearing, the Administrative Law Judge held that the complainant's reports constituted protected activity because woven into the story of Brown's reporting were elements of mail or wire fraud if proven, including the possible billing of the government for items purchased for personal purposes. The Administrative Law Judge held that the company terminated Brown's employment at least in part based on her reporting activity.

Brown sought relief in the form of back pay, reimbursement of medical expenses and insurance premiums, emotional distress damages and front pay. Despite the fact that Brown did not seek reinstatement in her SOX complaint, the Administrative Law Judge concluded that this was the presumptive remedy under SOX, whereas front pay is a remedy only awarded in exceptional circumstances where reinstatement is proven inappropriate.

Brown made several arguments in support of her claim that reinstatement was inappropriate and that front pay should therefore be awarded. First, she argued that her relationship with Lockheed Martin was "pervaded by hostility," making a return to work impracticable. The Administrative Law Judge rejected this argument, noting that the one individual who harbored a retaliatory animus against Brown was no longer employed there. Second, she argued that she suffered emotional distress while employed by Lockheed Martin and implied that such distress would resume if she were reinstated. The Administrative Law Judge noted that front pay may be used as a substitute for reinstatement only when a complainant is physically unable to perform her job. Brown had not submitted any medical reports or records in support of such a claim. Third, Brown argued that there was no position to which she could be reinstated, because her former position had been eliminated. The Administrative Law Judge rejected this argument because there was evidence in the record that comparable jobs were available.

Thus, contrary to Brown's wishes, the Administrative Law Judge held that Brown was entitled to immediate reinstatement. The Administrative Law Judge clarified that, should Brown decline a bona fide offer of reinstatement, the respondent's back pay liability would end.

The Brown decision is of significance to employers because it demonstrates that even in cases where a complaint does not seek reinstatement, there is still a risk that an Administrative Law Judge will order reinstatement as the presumptive remedy under SOX.

Globalization of SOX-Type Whistleblower Protections

In the years since the passage of SOX, several countries have enacted their own versions of SOX, or at least certain provisions of SOX. Meanwhile, in Europe, multinational financial services companies are still struggling to reconcile their obligation under SOX Section 304 to establish an anonymous reporting mechanism with prohibitions against such systems in certain EU member states. These developments are discussed below.

China: The Basic Standard for Enterprise Internal Control for Chinese companies, otherwise known as China SOX or C-SOX, became effective in July 2009. Similar in some respects to SOX, under C-SOX, listed companies must conduct self-evaluations of their internal controls, must publish an evaluation report on an annual basis and must hire external auditors to audit the effectiveness of their internal controls.

Japan: Japan's Financial Instruments and Exchange Law became effective on April 1, 2008. Although commonly called "J-SOX," this law does not completely mirror SOX, but it does include provisions similar to Sections 302 and 404 of SOX, which deal with certification of internal financial controls. The law requires listed companies to implement assessments of internal controls over financial reporting and for such assessments to be audited.

Canada: After SOX was enacted, Canadian Securities Commission Administrators proposed Multilateral Instrument 52-110, which covers Audit Committees and includes an identical provision to SOX 301. It requires that the audit committee establish procedures for anonymous submission of complaints or concerns regarding auditing or accounting matters.

Europe: Through a series of letters published in 2006, the SEC and EU Working Party 29 ("WP 29") have attempted to reconcile the apparent conflict between SOX's requirement that companies provide an avenue for anonymous reporting and EU data privacy laws which prohibit certain anonymous reporting systems. The agencies have opined that concurrent compliance may be achieved by ensuring that certain steps are taken, such as encouraging employees to engage in confidential rather than anonymous reporting, taking special precautions when processing anonymous reports, notifying employees of their rights under the system, ensuring data security and deleting or archiving personal data as soon as possible upon the completion of an investigation or legal proceedings.

Notwithstanding WP 29's guidance, **Spain** and **Portugal's** data protection authorities have now banned anonymous reports to whistleblower hotlines. **France's** Supreme Court has also weighed in, and while not going this far, issued a decision in December 2009 limiting the permissible uses of whistleblower hotlines within France to reports of financial or accounting irregularities.

On the other hand, the guidelines published by **Germany**, **Belgium**, **Ireland** and the **Netherlands** on the issue of anonymous reporting under SOX are similar to WP 29's guidance in terms of the types of reporting permitted, making concurrent compliance with both sets of laws feasible.

The **United Kingdom** has not issued specific guidelines for whistleblower hotlines or anonymous reporting. Compliance with the WP 29 guidance appears sufficient to comply with UK data protection laws.

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Recent Interpretations of New York Anti-Discrimination Laws Create New Risks for Financial Services Firms

Extraterritorial Application of New York State and City Human Rights Laws

Last year, in *Hoffman v. Parade Publishing*, 878 N.Y.S.2d 320 (N.Y. App. Div. 2009), New York's intermediate-level court departed from a long line of state and federal caselaw by providing that, to take advantage of the broad protections of the New York State Human Rights Law, N.Y. Exec. Law § 290 *et seq.* ("NYSHRL") and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq.* ("NYCHRL"), nonresident plaintiffs would no longer have to show that the "impact" of the complained-of conduct was felt in New York or New York City, respectively.

In the place of the so-called "impact rule," the *Hoffman* Court held that jurisdiction will obtain so long as a discriminatory decision is made, or a discriminatory act committed, within New York, regardless of whether the impact is felt elsewhere. While the full extent of the ruling is not yet clear, at the very least, the *Hoffman* decision makes it more likely that those employers with significant management and administrative functions in New York will see an increased incidence of claims under the NYSHRL and NYCHRL asserted by out-of-state employees.

In the year since *Hoffman* was decided, various courts have been asked to reconcile its holding with the established line of case law endorsing the "impact rule." In three instances, *Vuong v. New York Life Ins. Co.*, 2010 WL 93157 (2d Cir. Jan. 12, 2010), *Popa v. PricewaterhouseCoopers LLP*, 2009 WL 2524625 (S.D.N.Y. Aug. 14, 2009), and *Spilkevitz v. Chase Inv. Servs. Corp.*, 2009 WL 2762451 (E.D.N.Y. Aug. 27, 2009), courts ultimately avoided the issue by reasoning that no discriminatory decision was alleged to have originated in New York. Meanwhile, in one case, *Rohn Padmore, Inc. v. LC Play Inc.*, 679 F. Supp. 2d 454 (S.D.N.Y. 2010), the court clearly sided with *Hoffman*.

Going forward, the question of the level of New York involvement that will be sufficient to support a claim by an out-of-state employee is far from clear. On one side of the spectrum is *Rohn*, where not only was the discriminatory decision made in New York, but discriminatory e-mails were also sent from New York by the New York-based decision-maker. The court upheld jurisdiction. On the other side is *Popa*, where the plaintiff complained only of discrete discriminatory conduct in the Chicago and London offices in which she worked. The only connection to New York–the remote and non-discriminatory involvement of senior New York-based managers in a performance review process–was held insufficient to support the exercise of jurisdiction.

Meanwhile, employers may take comfort in the court's decision in *Spilkevitz*, wherein jurisdiction was declined as the only relevant contacts were where the out-of-state plaintiff herself contacted senior legal and human resources personnel in New York to complain about discriminatory treatment at a branch office. The decision, undermining the ability of out-of-state plaintiffs to affirmatively and strategically tie themselves to New York, was based on a key limiting principle–addressed in *Hoffman* itself–that there must be some discriminatory act within New York.

Consistent with this limiting principle, for example, the mere approval of a broad-based reduction in force at an employer's New York headquarters would not support the invocation of the NYSHRL or NYCHRL in the absence of some further allegation that the decision to implement the reduction in a discriminatory manner also originated in New York. Nor would the mere fact that the human resources function, including the administration of anti-discrimination policies, is centralized in New York itself suffice to support such a claim.

Despite this limitation, the distinction between a discriminatory employment decision made in New York and a neutral employment decision made in New York but implemented in a discriminatory manner elsewhere, is unlikely to be of much relevance at the pleading stage. Rather, it seems more likely that sophisticated plaintiffs will be able to avoid dismissal with even modest changes to their pleadings, as evidenced by *Hoffman* itself. As such, employers may very well find themselves facing costly and burdensome discovery in actions by out-of-state employees under the NYSHRL and NYCHRL, the negative effect of which is only heightened when considered alongside the expansive and broad protections afforded employees under those statutory schemes.

Expansive Interpretations of the New York City Human Rights Law in the Post-*Williams* Era

Over the last year, the NYCHRL has been transformed from essentially paralleling federal and state anti-discrimination laws to a statute that affords plaintiffs broader protections than were ever provided for under federal and state laws. Given this recent trend, the *Hoffman* decision is of particular significance for all financial service firms with offices in New York City.

The transformation of the NYCHRL began with the New York Appellate Division decision in *Williams v. New York City Housing Authority*, 61 A.D.3d 62 (N.Y. App. Div. 2009). The *Williams* Court interpreted the Restoration Act, which amended the NYCHRL in 2005, and found that the revised city law mandates an "independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language." *Williams*, 61 A.D.3d at 67. In *Loeffler v. Staten Island Hospital*, 582 F.3d 268 (2d Cir. 2009), the Second Circuit accepted the *Williams* Court's suggestion to liberally construe the NYCHRL and reversed the district court's dismissal of a NYCHRL claim on the grounds that the court failed to appropriately consider the distinction between the city and federal law. While the *Loeffler* case is a public accommodation case rather than an employment discrimination suit, the Second Circuit's acceptance of the *Williams*' Court construction of the NYCHRL will undoubtedly impact the way that district courts analyze city claims in all situations.

In addition to announcing the general framework with which all NYCHRL are now expected to be analyzed, the *Williams* Court addressed the issues of retaliation, continuing violations and harassment.

- **Retaliation claims:** *Williams* explains that the appropriate inquiry is whether a jury could conclude that the conduct was reasonably likely to deter a person from engaging in protected activity. *Id.* While this sounds like the standard announced by the Supreme Court in *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53 (2006), the court cautioned that *Burlington* invoked the term "material adversity," which could lead some courts to improperly screen out some types of conduct prior to conducting "reasonably likely to deter" analysis. *Id.* at n. 12.

- **Continuing violations:** *Williams* holds that the concept of continuing violations under the NYCHRL is not as restrictive as the Supreme Court's decision in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002), which limits the theory of continuing violations to harassment claims. Instead, *Williams* held that "the Restoration Act's uniquely remedial provisions are consistent with a rule that neither penalizes workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble nor regards covered entities that discriminate by insulating them from challenges to their unlawful conduct that continues into the limitations period." *Williams*, 61 A.D.3d at 72-73.

- **Harassment claims:** The *Williams* Court rejected the "severe or pervasive" test for determining whether an employee was subjected to harassment in the workplace. Instead, the court determined that for liability to exist, the issue is whether the plaintiff has proven that he or she was treated less well than other employees because of a protected classification. *Id.* at 78. Despite this much lower standard, to address the "truly insubstantial cases," the First Department announced an affirmative defense where an employer can avoid liability if it can prove that the complained of conduct was "nothing more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences." *Id.* at 79.

The separate and liberal analysis of the NYCHRL contemplated by *Williams* has already impacted the outcomes of employment discrimination cases. At summary judgment, courts are routinely looking at the NYCHRL claims separately from the discrimination claims asserted under federal and state law. Nevertheless, despite this separate construction, courts are often granting or denying summary judgment as to all of the plaintiff's claims. While *Williams* has certainly not been dispositive of summary judgment motions, in the post-*Williams* era, employers must separately consider their chances of success under the city law.

Employers must also be cognizant of the impact a NYCHRL claim can have on a trial of a discrimination claim. For example, in *Weiss v. JPMorgan Chase & Co.*, 2010 WL 114248 (S.D.N.Y. Jan. 13, 2010), Judge Cote held that the causation standard for age discrimination claims under the federal Age Discrimination in Employment Act is different from the causation standard for age discrimination claims raised under the NYCHRL. Specifically, the court determined that even though the Supreme Court in *Gross v. FBL Financial Services* determined that a jury must find that an age discrimination plaintiff proved that age was the "but for" cause of the adverse employment action to satisfy its burden, a different "motivating factor" jury charge was appropriate for the plaintiff's age discrimination claim under the NYCHRL. Thus, a jury would be forced to determine whether age was the "but for" cause of an employment action, while simultaneously considering whether age was "a motivating factor" of that same employment action. Similar jury charge complications could arise in trials of harassment claims, where jurors would be required to assess whether the harassing conduct was sufficiently severe or pervasive to be actionable under the federal or state law, while the jury might find liability under the NYCHRL for lesser conduct. These types of separate jury charges must be considered when employers are preparing for trials in the post-*Williams* world.

Other Notable NYCHRL Decisions:

- ***Phillips v. City of New York, 2009 WL 2225617 (N.Y. App. Div. 2009):*** The court determined that the NYCHRL, as compared to the NYSHRL, does not tie the issue of the ability to perform essential functions of the job with the definition of disability or reasonable accommodation. *Phillips*, 2009 WL 2225617, at *6. The court explained that the inquiry into whether an individual is disabled under the city law is whether the individual suffers from a physical, medical, mental, or psychological impairment, without any discussion of the individual's ability to perform the job. *Id.* at *6. Next, looking at the text of the NYCHRL, the First Department concluded that the burden is on the employer to prove that plaintiff could not, with reasonable accommodation, satisfy the essential requisites of the job. *Id.* at *7. This shifting of the burden on reasonable accommodation to the employer could impact the situations where a court might grant summary judgment. However, to date, there have not been any reported decisions specifically addressing this shifted burden.

- ***Zakrzewska v. The New School, 598 F. Supp. 2d 426 (S.D.N.Y. 2009)*****:** In a significant decision concerning employers' potential defenses to discrimination claims, Judge Kaplan analyzed the language of the NYCHRL and determined that, on its face, the city law imposes vicarious liability for discriminatory acts of a manager, without regard to whether the employer knew or should have known of those acts. *Zakrzewska*, 598 F. Supp. 2d at 434. Accordingly, Judge Kaplan determined that the *Faragher-Ellerth* defense, which absolves an employer from liability if the employer exercised reasonable care to prevent and correct harassment and the plaintiff failed to take advantage of preventive opportunities, is inapplicable to claims under the city law. *Id.* at 435. Nevertheless, determining that his own decision "is not free from doubt," Judge Kaplan certified the question of the application of the defense to city claims to the Second Circuit. *Id.* at 437. Thereafter, on July 27, 2009, the Second Circuit certified the following question to the New York Court of Appeals: Does the affirmative defense to employer liability articulated in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth* apply to sexual harassment and retaliation claims under section 8-107 of the NYCHRL? The Court of Appeals held oral arguments on March 22, 2010, but has yet to rule on this issue. The decision will have great impact on employers' potential liability under the NYCHRL, and will hopefully provide some clarity as to how the NYCHRL should be analyzed as compared to its federal and state counterparts.

Massachusetts' Data Protection Regulations to Have Nationwide Impact on Financial Services Employers

Like the changes to courts' interpretations of the New York anti-discrimination laws, Massachusetts' amendments to its data privacy laws could have far-reaching impact for employers. In August 2009, the Massachusetts Office of Consumer Affairs and Business Regulation issued a new version of its proposed regulations on data security of personal information. After several iterations of proposed regulations, it is the August 2009 version of the regulations that took effect on March 1, 2010. Notably, the regulations govern any employer that "receives, stores, maintains, processes, or otherwise has access to personal information" of any Massachusetts resident, regardless of whether the employer has any other ties to the state. Moreover, "personal information" is broadly defined to include the retention of a Massachusetts resident's name in connection with any of the following other information: social security number, driver's license, or financial account number or credit or debit card number. Given the breadth of the definitions in the regulations, any employer who employs Massachusetts residents, and thus retains personal information about those residents, is obliged to meet the standards of protection set forth in the regulations.

The regulations require employers to create a written comprehensive information security program, which focuses on the specific data security risks of its company and the type of information it stores and maintains. Specifically, the regulations require employers to do the following: designate an employee to maintain the security program; conduct risk assessments as to the company's safeguards in protecting personal information; develop security policies for the storage, access, and transportation of personal information; impose disciplinary measures for violations of the program rules; prevent terminated employees from accessing records containing personal information; take reasonable steps to ensure that third-party vendors can protect personal information; restrict physical access to records containing personal information; and routinely monitor and adapt the program to limit risks of improper use of personal information.

Additional comprehensive requirements exist if the personal information is electronically stored or transmitted. For employers who electronically store information deemed personal under the regulations, the employer must do the following: ensure that there are security protocols in place that govern access to electronically stored information, including control of user ID's and the selection and distribution of passwords; restrict access to private records to those who need that information and issue unique identification and passwords to those employees; encrypt any electronically stored personal information; monitor the systems for unauthorized access or use of personal information; routinely update security agent software so that the software is reasonably up to date; and educate and train employees as to the proper use of the computer security system.

Even if an employer has only a few Massachusetts employees, employers are arguably required to develop company-wide policies that comply with the new regulations. Employers who retain Massachusetts residents should immediately consider whether their information security and electronic security protocols are up to date and comply with the extensive requirements listed in Massachusetts new regulations. While it is unclear how the courts will ultimately decide what constitutes a "violation" of these regulations, it is clear that a court can impose a $5,000 civil penalty for each violation, however that term is ultimately defined. Accordingly, it is imperative that employers ensure that they have examined their policies and update them as necessary to satisfy the substantial Massachusetts requirements.

New York Department of Labor Issues Revised WARN Regulations

At the beginning of 2009, New York became the newest member of a growing number of states, including California and New Jersey, enacting statutes that afford more expansive protections to employees affected by job loss than those available under federal law. The entry into force of the New York State Worker Adjustment and Retraining Notification Act ("NY WARN"), codified as Article 25-A of the New York Labor Law, was followed shortly in time by emergency regulations issued by the New York Department of Labor ("NY DOL"), 12 N.Y.C.R.R. Part 921-1.0 *et seq.*, ostensibly designed to clarify the scope of employees' rights under the Act, which, in a nutshell, requires covered employers planning a plant closing, mass layoff or relocation to provide at least 90-days notice to affected employees, their union representatives, the NY DOL and local workforce investment boards.

In the year intervening since its effective date, the NY DOL has revisited its first set of regulations, recently issuing revised regulations effective upon their issuance in February of this year. As compared to the NY DOL's first stab at regulations, which was directed more towards defining employers' broad-based obligations under NY WARN, the revised regulations will likely have their primary impact in the margins, in the discrete application of NY WARN to particular employment actions taken by particular employers. In that vein, the majority of the NY DOL's revisions may fairly be described as technical or procedural in nature. Examples include a new allowance for e-mail notice to employees and a helpful clarification that employee notices need only be postmarked (not received) 90-days prior to a triggering event.

The revisions also include more significant procedural changes, particularly in regards to the content of notices to be provided governmental entities. For example, employers must now articulate whether they believe their action falls within the scope of a particular exception to the full notice requirements (for example, the "unforeseen business circumstances" exception) at the time they provide notice, include a sample of the notice provided to employees and provide the addresses of affected employees, all of which has the effect of making employers' disclosure obligations under NY WARN, already far more comprehensive than under federal law, only more extensive.

While many of the revised regulations may have more relevance to employers working their way through a reduction in force, others will decide whether the notice requirements come into play in the first instance. Here, examples include provisions clarifying how the 50-employee coverage threshold should be calculated, provisions affecting the so-called 90-day "look-back period" used in determining whether separate employment actions should be aggregated to meet the Act's minimum thresholds for employment loss, provisions describing in greater detail when separate physical facilities are properly aggregated into a single site of employment, and provisions clarifying when a "reduction in hours of work," previously ill-defined, may trigger notice requirements.

Still, other components of the NY DOL's new regulations respond to more significant ambiguities troubling employers in the immediate wake of the statute's enactment. Several relate specifically to the scope of employers' monetary liability. For instance, the revisions more clearly express the NY DOL's view that the period of the violation for which the employer is liable is set at 90 days, undermining the argument–based on an ambiguity in the statute itself–that the Act itself caps damages at 60 days of liability. Further, employers are now consistent with the federal approach, expressly prohibited from setting off payments made pursuant to pre-existing severance obligations from their payment obligations under the Act. Finally, and perhaps most notably, employees' "date of layoff" is now defined as the "the last day an employee is eligible or permitted to work for his/her employer," regardless of whether the "employer continues to pay an employee after the date of the layoff." This particular definitional shift appears to limit an employer's ability to truncate the notice period and completely avoid liability by keeping affected employees on the payroll for the remainder of the notice period. That said, the practical impact is minimal, as employers will still be able to deduct and offset any such payments from their obligations under the Act.

At bottom, while the NY DOL's revised regulations are far from an extensive reworking of the overall regulatory landscape, they nevertheless serve as a reminder to employers with a significant presence in New York of the importance of staying attuned to the idiosyncratic and often burdensome requirements imposed under New York law. It is also a reminder that the NY DOL will not shy away from issuing regulations affecting employers throughout the state on an emergency basis and without prior opportunity for comment. Employers planning a reduction in force or other triggering event would thus be well-advised to consult the statute and regulatory landscape as early as possible in the planning process.

Developments Affecting Financial Services Firms in the United Kingdom

New Rules on Bankers' Remuneration

Following much press coverage of statements from the UK's Prime Minister, Gordon Brown, regarding his intent to put an end to big bonuses and short-term bonus culture and extensive consultation by the Financial Services Authority in the UK (the "FSA") regarding changes to its Remuneration Code, proposed legislation to regulate bankers' remuneration has now been enacted. The Financial Services Act 2010 (the "Act") became law on April 8, 2010 and provides for HM Treasury to make regulations requiring detailed disclosure of executive remuneration in certain financial services firms, as well as enabling and requiring the FSA to make rules governing these firms' remuneration policies and practices. It is important to note that this Act is an enabling act rather than making these rules itself–however, we expect the FSA to act quickly.

The Treasury Regulations have already been issued in draft form, subject to consultation. If enacted in their current form, they will require certain banking institutions (those with 1,000 or more employees and company or group aggregate balance sheet assets of £100 billion for the relevant financial year) to disclose the remuneration packages of executives earning £500,000 or more. Failure to do so could constitute a criminal offense. The proposal is that these requirements would apply to annual reports issued in early 2011 in respect of 2010.

In response to the enactment of this Act, the FSA issued a statement outlining the key changes to its powers arising from the provisions of the Act and confirming that it intended in due course to issue a consultation paper on implementing the relevant provisions–this is expected over the course of the next couple of months. The broad provisions are that the FSA must impose new rules on firms to have and act in accordance with a remuneration policy which is consistent with and promotes effective risk management and as part of that they can issue rules preventing people being remunerated in certain ways. Resulting regulations are likely to be in line with the Remuneration Code of the FSA, which became effective in January 2010 for 26 large banks and building societies in the UK. The FSA had originally talked about extending this Code for other financial services institutions this year, but it would appear that this has now been shelved (perhaps superseded by the regulations which will be put in place under the Act).

FSA-driven regulations under the Act will effectively make both the provisions of the Code and the guidance on their implementation legal obligations rather than "comply or explain" requirements and are likely to extend their remit beyond the current 26 entities. For example, current guidance in the Code suggests that guaranteed minimum bonuses extending beyond one year are "likely to be inconsistent with" the requirements of the Code–remuneration policy requirements enshrined in regulations under the Act may well prohibit any such guarantee arrangements. Furthermore, the FSA may be empowered under such regulations to provide that any provision in an individual employment contract which contravenes these requirements will be void and that payments made under those provisions may be clawed back.

The one piece of good news for financial services employers in all of this is the removal of what was perhaps the most controversial proposed provision in this legislation before it was enacted. The bulk of the press coverage in this area focused on the proposal that the FSA could require firms to "unpick" contractual agreements which were already in existence if they violated the provisions which were subsequently enacted under the Act, notwithstanding that this would leave those firms subject to clear breach of contract claims by the individuals concerned. This has been removed in order to enable the legalization to be passed and the "void terms" provision referred to above will only apply to contractual arrangements entered into after the relevant prohibition (i.e. the future regulations) have been enacted.

Career-Long "Stigma Damages" Awarded in Discrimination Claim

In *Chagger v. Abbey National plc*, a Trading Risk Controller of a financial institution (who earned a relatively modest £100,000 a year) has been awarded almost £3 million in damages largely as a result of his claim for stigma damages, following a redundancy which was found to be tainted by race discrimination. He alleged-and the English Court of Appeal agreed-that he would never again be able to find employment in the financial services industry, due to the "stigma" of having brought a discrimination claim against his former employers (by virtue of the fact that no employer would therefore want to take him on). Aside from any claim for injury to feelings (which runs from around £500-£30,000), damages in this sort of case will often largely be composed of loss of earnings to the date of hearing and then estimated into the future. A typical rule of thumb would be around 6-12 months earnings, unless the Claimant can show that they cannot work again-for example, because of a breakdown in health caused by the treatment they received from the employer. In this case, the vast estimated future loss of earnings related entirely to the fact that the Court believed he would no longer be able to pursue his chosen-and high-earning–profession, and, therefore, it extended far beyond the typical case. The Court was quick to emphasize that this sort of argument will not readily be accepted, but, nevertheless, we will no doubt see it advanced in every discrimination claim going forward.

Continued Trend Towards Employer Protection in Team Move Cases

The lengthy dispute between inter-dealer brokers, Tullet Prebon plc and BGC Brokers LP, has finally concluded in favor of the "wronged party," Tullet Prebon. Tullet Prebon had claimed that BGC had engaged in an "illegal plot" to poach its staff and ruin its business, specifically through the use of "recruiting sergeants," senior employees it had already taken on from Tullet Prebon who were then encouraged to poach more staff. BGC were alleged to have encouraged these employees to resign from Tullet Prebon, claiming constructive dismissal (so that their non-compete and non-poaching requirements would not have applied), whether or not they had legitimate grounds to do so. This amounted to inducement of breach of contract by BGC (damages to be decided) and entitled Tullet Prebon to claw back retention and loyalty bonuses it had paid the individual employees, on the basis that the contractual provisions allowing them to do so were not in restraint of trade, nor penalty clauses. Another particularly interesting facet of the case was that Tullet Prebon obtained protection which went beyond the original covenants, as a result of BGC's extreme behavior, effectively preventing them from taking on any Tullet Prebon staff (i.e. even those who left lawfully) for a certain period.

Upcoming Orrick Events

Program on the Protection of Trade Secrets and the Enforcement of Post-Employment Restrictions: New Strategies and Approaches

New York City—May 13, 2010

On May 13, 2010, Orrick's Michael Delikat and James McQuade and Credit Suisse's Alexander Barnard will provide a high-level discussion of new strategies and best practices that companies should consider to best protect their trade secrets and human resources and to avoid costly claims. Included in this discussion will be an analysis of new litigation approaches and claims that are being used successfully today.

ORRICK

Orrick's Annual Roundtable on Critical Employment Law Issues in the Financial Services Industry

New York City—June 15, 2010

Orrick's Annual Roundtable on Critical Employment Law Issues in the Financial Services Industry will be held in New York City on June 15, 2010. This advanced, half-day program is offered to in-house counsel and senior human resources executives in the financial services industry. It provides a forum for you to interact with your peers at financial services firms who have day-to-day responsibility for claims prevention and resolution.

There is limited space for both programs. CLE credit is available for attendees.

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