

## LABOR & EMPLOYMENT LAW ALERT

SEPTEMBER 2011

### UNION ORGANIZING UPDATE:

### Non-Union Employers Beware: NLRB Issues Proposed Rule Requiring All Employers to Notify Employees of Their Right to Organize

By: Jed L. Marcus

**We want to alert you to a new posting rule that the National Labor Relations Board (“NLRB”) has just issued.** The proposed rule would require all employers, both union and non-union, to post a notice telling employees they have a right to organize. The form of notice the NLRB proposes would inform employees of their right to act together to improve wages and working conditions, to form and join a union, to bargain collectively, or to choose not to take any of these steps. The notice will consist of an 11 x 17 inch poster. It must be distributed electronically if the employer customarily communicates with employees in that manner. The rule is intended to go into effect on November 14, 2011. The NLRB states that copies of the notice will be available by November 1, 2011.

According to the rule, the notice must be posted in conspicuous places, including all places where notices to employees are customarily posted. The employer must take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material, or otherwise rendered unreadable. Employers who maintain internet or intranet sites where they “customarily” post or communicate personnel rules or policies to employees must post the notice electronically as well. The employer can either post the actual notice or provide a link to the notice on the NLRB’s website. Employers also must provide non-English-speaking employees with a language-specific copy of the notice if that employee group constitutes at least 20 percent of the employer’s workforce. Employers can meet this obligation by providing the language-specific notice to the individual employees or posting that notice in the required languages. Employers can obtain translated

notices from the NLRB and can request that the NLRB translate the notice into languages not already available. Government contractors and subcontractors who are already posting the Department of Labor notice required by Executive Order 13496 do not have to post the NLRB’s notice because the language is the same.

The penalties for ignoring this new posting rule are serious. A failure to post the notice will be an unfair labor practice under Section 8(a)(1) of the Act. The Board could also find a willful refusal to post the notice as evidence of unlawful motive in a case in which motive is an issue. If an employer fails to post the required notice, the Board may find that the six-month period for filing charges does not begin to run until the notice is posted.

**The Bottom Line.** Union organizing is at an all-time low. While the Unions have had no luck convincing Congress to make it easier to organize, their influence within the Administration and its agencies is substantial. Now, employers are forced to provide their workers with a road map to unionization. The unanswered question is whether employers will have the right to post notices with their own opinion about unions and the effectiveness of organizing. After all, federal labor law specifically allows for an employer’s right to “express views, arguments, and opinions” on unions so long as the statements contain “no threat of reprisal or force or promise of benefit.” Our concern is that the Board could view any counter notice as an unfair labor practice itself. The take-away here is that employers must understand that union avoidance is a 24/7 job. Our practice has developed a relevant program that will address questions you may want to bring to our attention. ■

## ARBITRATION UPDATE:

### The Third Circuit Court of Appeals Adopts *Concepcion*: Waivers of Class Actions in Arbitration Are Enforceable

By: Jed L. Marcus

We have been following developing case law ever since the U.S. Supreme Court, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), struck down a California policy prohibiting waivers of class claims in consumer arbitration agreements in April 2011. So far, developments have been very favorable for those who believe in arbitration. On August 12, 2011, for example, the U.S. District Court for the Eastern District of Pennsylvania held that the Federal Arbitration Act (“FAA”) preempted a Pennsylvania law that rendered unconscionable arbitration provisions containing a class action waiver. *Alfeche v. Cash Am. Int’l Inc.*, No. 09-cv-0953, 2011 U.S. Dist. LEXIS 90085 (E.D. Pa. Aug. 12, 2011). Then, on August 24, 2011, the Third Circuit Court of Appeals (with jurisdiction over cases in New Jersey, Pennsylvania, Delaware and the Virgin Islands), relying on *Concepcion*, held that the FAA preempted New Jersey case law rendering unconscionable arbitration provisions containing a class action waiver. *Litman v. CELLCO P’ship*, No. 08-4103, 2011 U.S. App. LEXIS 17649 (3d Cir. Aug. 24, 2011). Here is what the Third Circuit said:

We understand the holding of *Concepcion* to be both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration “is desirable for unrelated reasons.” Therefore, we must hold that, contrary to our earlier decisions in *Homa* and in this case, the rule established by the New Jersey Supreme Court in *Muhammad* is preempted by the FAA. It follows that the arbitration clause at issue here must be enforced according to its terms, which requires individual arbitration and forecloses class arbitration.

*Id.* at \*16-17 (Internal citations omitted).

On this score, the New Jersey Appellate Division, in *NAACP of Camden County East v. Foulke Management Corp.* beat the Third Circuit to the punch on August 2, 2011 by adopting *Concepcion*, reversing prior case law, and holding that the arbitration clause was not *per se* unconscionable. No. A-1230-09, 2011 N.J. Super. LEXIS 151 (App. Div. Aug. 2, 2011). Other courts have followed suit. *Green v. SuperShuttle Int’l, Inc.*, No. 10-3310, 2011 U.S. App. LEXIS 18483 (8th Cir. Sept. 6, 2011)(FLSA collective action); *Swift v. Zynga Game Network Inc.*, No. C-09-5443, 2011 U.S. Dist. LEXIS 85983 (N.D. Cal. Aug. 4, 2011)(consumer fraud); *Kanbar v. O’Melveny & Meyers*, No. C-11-0892, 2011 U.S. Dist. LEXIS 99147 (N.D. Cal. Sept. 2, 2011)(fraud, retaliation and discrimination); *D’Antuono v. Service Rd. Corp. Room, Inc.*, No. 11-cv-33, 2011 U.S. Dist. LEXIS 57367 (D. Conn. May 25, 2011)(FLSA collective action).

The ruling in *Concepcion* does not mean that all class action waivers will be held enforceable. In *Foulke*, for example, although the Court reversed prior law, it still held the clause in question unconscionable because it contained convoluted and inconsistent arbitration provisions in an automobile purchase contract. Moreover, in July 2010, the Second Circuit Court of Appeals (hearing cases from New York, Connecticut, Vermont and Puerto Rico), in *Fensterstock v. Education Finance Partners*, refused to enforce an explicit class action waiver finding it unconscionable based on the facts and circumstances of the case, and therefore unenforceable. 611 F.3d 124 (2d Cir. 2010). Further, the Second Circuit, in *In re American Express Merchants’ Litigation* (“*American Express II*”), 634 F.3d 187 (2d Cir. 2011), reaffirmed its earlier conclusion that the arbitration clause was unconscionable because the merchant plaintiffs had carried their burden of showing that they were likely to incur prohibitive costs if they were required to pursue their extremely low-value antitrust claims against the credit card company defendant by way of individual arbitrations. In

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*Chen-Oster v. Goldman, Sachs & Co.*, No. 10-cv-6950, 2011 U.S. Dist. LEXIS 73200 (S.D.N.Y. July 7, 2011), the district court refused to dismiss a putative class action in which plaintiffs alleged that their employer engaged in a pattern of gender discrimination against its female professional employees in violation of Title VII of the Civil Rights Act of 1964 and New York City Human Rights Law. The court determined that federal law creates a substantive right to be free from a “pattern or practice” of discrimination by an employer; absent the ability to arbitrate on a class basis, mandating arbitration would preclude the plaintiff from enforcing this right. Finally, in *Plows v. Rockwell Collins, Inc.*, No. SACV-10-01936, 2011 U.S. Dist. LEXIS 88781 (C.D. Cal. Aug. 9, 2011), the district court refused to enforce an arbitration provision because the employer had waived any entitlement to arbitration, finding that the defendant had behaved in a manner “inconsistent with a demand

for arbitration” by availing itself of the court system with venue transfer and removal motions, propounding discovery, participating in meetings and scheduling conferences, and waiting to move to compel arbitration until nearly 13 months after the case was filed, just a matter of days after *Concepcion* was issued.

**The Bottom Line.** Employers who do not have arbitration agreements with their employees should strongly consider one. Those that do should make sure it contains a class waiver provision. Given the extraordinary costs of defending employment related lawsuits in today’s environment, especially those involving class and collective actions, an enforceable arbitration agreement is an important risk management tool. Employers who fail to use it do so at their peril. ■

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## WORKERS’ COMPENSATION UPDATE:

### Establishing a Drug and Alcohol Prevention Program Can Reduce New York Employers’ Workers’ Compensation Premiums

By: Emily Wexler

**New York State employers who establish a drug and alcohol prevention program may be eligible for a discount on their workers’ compensation costs through the New York Department of Labor.** This voluntary discount program, called the Workplace Safety and Loss Prevention Incentive Program (“WSLPPI”), encourages New York employers to start programs that will decrease workplace injuries and reduce workers’ compensation costs. New York employers are eligible for credits if they are individually self-insured, or insured by an authorized workers’ compensation insurance

carrier, or by the New York State Insurance Fund. These employers must have premiums of at least \$5,000, and have and maintain an experience rating under 1.30.

To qualify for a credit, an employer’s program must be in writing and in languages clearly understood by all employees. An acceptable Drug and Alcohol Prevention Policy (“Policy”) must include, but not be limited to, several key elements. To name just a few: the intent and objectives of the program; a confidential procedure for employees to request counseling and treatment of drug and alcohol problems; and a method for follow-up. Employers must also include a statement assuring that collective bargaining rights will not be diminished.

Confidentiality is also key. The Policy must ensure confidentiality for all who utilize the program, and most importantly, employers must ensure confidentiality of employee records. Finally, employers must also provide for training, including an orientation program for new supervisors and employees and additional training for all employees

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An effective Drug and Alcohol Prevention Program can assist New York employers in lowering their workers' compensation premiums.  
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to discuss the goals of the program and to ensure an overall awareness of drug and alcohol abuse in the workplace. It is also important to note that the final, approved Program plan must be provided to the designated employee representative(s) in each workplace location (or to the collective bargaining representative) and be available to all employees upon request.

**The Bottom Line.** An effective Drug and Alcohol Prevention Program can assist New York employers in lowering their workers' compensation premiums.

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This Alert merely provides employers with a snapshot of the statute's requirements. Employers interested in implementing this type of program should obtain more specific information and an application form from the New York Department of Labor's website. Experienced counsel can also assist employers with the application process. ■

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## WAGE AND HOUR UPDATE:

### Oral Wage and Hour Complaints Are Entitled to FLSA Anti-Retaliation Protection

By: **Andrée Peart Laney**

**In recent years, federal and state wage and hour legislation – such as the Lilly Ledbetter Fair Pay Act of 2009 and the New York Wage Theft Prevention Act, passed in 2011 – has shown a clear trend toward broadening the scope of employees' rights to address perceived pay inequities.** The Supreme Court's recent decision, in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) appears to be following suit.

On March 22, 2011, the Supreme Court issued its decision which, although relatively short, may significantly impact how employers respond to employees' grumblings about their pay or certain employer policies. Employers will now have to determine whether those grumblings constitute a formal complaint under the FLSA. On its face, the issue in *Kasten* seems straightforward:

The sole question presented is whether an oral complaint of a violation of the Fair Labor Standards Act is protected conduct under the Act's anti-retaliation provision.

*Kasten*, 131 S. Ct. at 1330 (emphasis added). The facts are as follows: Plaintiff, a former employee, alleged that plastics manufacturer Saint-Gobain's practice of placing the time clock in between the employees' changing area and the work areas violated FLSA. The placement of the time-clock resulted in Saint-Gobain not paying its employees for time they spent putting on or taking off their work-related protective clothing. Kasten complained, orally, first to his supervisor, then to a Human Resources representative and, finally, to a Human Resources manager. Under the FLSA, employers generally must compensate non-exempt employees for the time spent "donning and doffing" the protective gear required by federal or state regulations or the employer's internal policies. *Steiner v. Mitchell*, 350 U.S. 247, 252-56 (1956).

When the employer took no action, Kasten filed suit in the district court, which agreed that Saint-Gobain's actions did in fact violate FLSA. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 954 (W.D. Wis. 2008). Shortly thereafter, Kasten was terminated. He said it was in retaliation for his complaint. Saint-Gobain countered that it terminated Kasten because he had failed repeatedly to use the time clock or disclose his whereabouts. Saint-Gobain denied that it retaliated against Kasten; indeed,

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it disputed that Kasten had even complained. More importantly, Saint-Gobain reasoned, even if Kasten's grumblings amounted to a complaint, it was oral and, therefore, not a complaint within the meaning of the FLSA.

The district court and Seventh Circuit agreed with Saint-Gobain that the FLSA did not protect oral complaints. Acknowledging a split among the circuits; *e.g.*, compare *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 625-26 (5th Cir. 2008) (FLSA covers oral complaints) with *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55-56 (2d Cir. 1993) (FLSA does not cover oral complaints); the Supreme Court took the matter on a writ of certiorari.

The Court then began a painstaking analysis of its straightforward issue: whether an oral complaint constitutes a complaint under FLSA. Determining that FLSA required that an individual "file" a complaint to be protected by FLSA, the Court referred to various sources – the dictionary, other legislation, administrative regulations, and judicial decisions -- to discern the meaning of "file" within FLSA.

Then the Court looked at the intent behind FLSA. At its essence, the Court determined that its crafters intended FLSA to have a broad remedial effect and encourage all workers to convey their wage and hour concerns, including illiterate, less educated, or overworked employees for whom it would be impractical to take time off or impossible to write a complaint.

Saint-Gobain challenged the inclusion of oral complaints in the FLSA framework, citing the uncertainty that employers would experience. How was an employer to know, Saint-Gobain inquired, whether an employee is complaining or just "letting off steam?" Saint-Gobain noted that FLSA had to provide fair notice to employers that a complaint was in fact being made. In other words, how is an employer to know that a FLSA complaint has been "filed"?

That's a good question. The Court's guidance is to look at context and content surrounding the oral complaint. "To fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and call for their protection." *Id.* at 1335. A good rule of thumb for employers: where it is unclear whether the employee's comment is a complaint, the employer should err on the side of caution and treat it as a complaint.

There is still a gray area, though: the Court left open the possibility that employees might only be able to "file" oral wage and hour complaints with the government, not their private employers. Citing Saint-Gobain's failure to raise the issue timely, the Court expressly declined to decide the employer's assertion that Kasten's oral complaint was not entitled to FLSA protection because he did not file it with the government. *Id.* at 1336. Presumably, then, a lower court could determine those who raise wage and hour complaints to private employers are not entitled to FLSA anti-retaliation protection unless their complaints are in writing. So stay tuned.

**The Bottom Line.** Unless and until a lower court draws a distinction between filing an oral complaint with the government and a private employer, all employers are on notice that its employees' grumblings may constitute a "filed" complaint within the meaning of FLSA and warrant statutory protection. Accordingly, to combat a retaliation claim, employers should:

- implement best practices that allow them to demonstrate the business-based, non-retaliatory reasons for their employment decisions;

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- train managers to recognize and act upon oral complaints, which managers should reduce to writing and share with the employee to “lock down” and clarify the employee’s concerns;
  - review all proposed “adverse employment decisions” to determine whether the employee has made any prior oral complaints that might subject the employer to a retaliation claim; and
  - investigate the complaint and advise the employee of the outcome in writing;
  - regularly audit its wage and hour policies and practices. ■
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## Upcoming Speaking Engagements:

**October 17, 2011:** Jed Marcus, Dan Korb, Jr., Mark Knoll, Andrée Laney, and David Campbell, General Counsel of Silvercrest Asset Management Group, LLC will be speaking on employment law issues in Financial Services - Managing Risks. Topics will include “Current Issues in U-4 and U-5 Filings, the Whistleblower and Executive Compensation Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the U.S. Department of Labor, Wage and Hour Division’s assault on the Financial Services Industry”, *The Yale Club, New York, NY, 12:30 pm to 2:30 pm (registration starts at 12:00 noon)*.

**November 2-4, 2011:** Jed Marcus will be speaking on current trends in labor and employment law at the Tennessee Employment Relations Research Association Annual Conference. Topics will include “Trends in Collective Bargaining” and “Social Media and Employment: Sour Grapes or Protected Activity?”, *Arnold Engineering Development Center, Tullahoma, TN*.

**December 20, 2011:** Jed Marcus will be participating in a panel discussion on Litigating and Trying Employment Cases, *The Sheraton Meadowlands Hotel in Secaucus, NJ, 9:30 am to 12:30 pm*. Sponsored by the New Jersey State Bar Association.

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