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CA Employers, Heads Up!

Two New Laws for 2015

By Steven M. Schneider and Amara Russell Bromberg

Editor's Note: Beginning in 2015, California employers will be required by law to provide paid sick leave to employees. Because California is often a bellwether state for changes in others, this legislation is of national interest. Will your state be next?

Effective July 1, 2015, nearly all California employers will be required to provide at least three days of paid sick leave per year to their employees. The new law, AB 1522, also known as the "Healthy Workplaces, Healthy Families Act of 2014," was approved by the California Legislature on Aug. 30, 2014 and signed into law by Governor Jerry Brown. It will be enforced by the Labor Commissioner and the Attorney General, either of whom may bring civil actions.

While the vast majority of employers will be required to provide paid sick leave under AB 1522, the new law does carve out exceptions for: 1) providers of in-home supportive services; 2) flight deck or cabin crew members of air carriers subject to the Railway Labor Act; and 3) employees working under collective bargaining agreements, provided certain minimum requirements are met.

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The NLRB *McDonald's* Ruling and Franchisors

By Geoffrey A. Mort

The National Labor Relations Board (NLRB) general counsel's July 29, 2014, ruling that McDonald's is a joint employer of those who work for its roughly 14,000 franchised restaurants in the United States continues to send ripples through both the legal and business worlds. The NLRB general counsel's decision was made in an internal, unpublished memorandum concerning a group of cases filed with the board asserting that McDonald's as well as its franchisees had violated the rights of franchisee employees with respect to protests over wage and hour issues. Significantly, however, the NLRB usually follows the legal advice of its Office of the General Counsel, or OGC. Louis S. Chronowski, "NLRB Decision Shocks Franchise World: McDonald's, a 'Joint Employer' of Franchise Employees," *The Metropolitan Corporate Counsel*, Sept. 23, 2014, available at http://bit.ly/1Efm10V.

The OGC's ruling first will be tested before administrative law judges (ALJ) who hear the employees' claims in these cases. Assuming that the ALJs find against McDonald's, there seems little doubt that the company will appeal to the full, five-member NLRB. Steven Greenhouse, "Ruling Says McDonald's Is Liable for Workers," *N.Y. Times*, July 30, 2014, at B1.

Because three of the NLRB's members are former union representatives or employees, some consider the board to be sympathetic to the interests of employees and unions, which might well lead to decisions upholding ALJ decisions against McDonald's. Michael J. Burns, "NLRB Recognizes Franchisee-Franchisor as Single Employer, American Society of Employers," Aug. 6, 2014, available at http://bit.ly/10hKxPC.

Thereafter, the matter will likely end up in the courts, with ultimate review by the U.S. Supreme Court a real possibility.

Threat to Franchise Operations?

It is difficult to overstate the importance of this issue for the franchise sector of the U.S. economy. One prominent attorney who practices in the area of

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franchise law observed, prior to the NLRB ruling, that "[t]he most serious legal threats [to franchise operations] from an employment law perspective … are judicial and regulatory determinations that a franchisor's franchisees, the franchisees' employees, or both are the franchisor's hidden, disguised, or joint employees." Dean T. Fournaris, "The Inadvertent Employer: Legal Business Risks of Employment Determinations to Franchise Systems," available at 27 *Franchise L.J.* 224 (2007-2008).

One franchisee owner stated that, should the NLRB and then the courts uphold the OGC determination, "[t]his would be a huge impact on the economy." Kate Taylor, "Franchise Industry Strikes Back at NLRB's 'Joint Employer' Decision," *Entrepreneur*, Sept. 23, 2014, available at http://entm.ag/1phMcAY. There are now approximately 3,500 franchises, in all areas of business, in the United States. Maureen Farrell, "The Top Brand-Name Franchisees in the US," *Forbes Magazine*, Jan. 20, 2011, available at http://onforb.es/13DqjlC.

The battle lines, in what all indications suggest will be a lengthy dispute, have been drawn. On the one hand, opponents of the decision point to what they say are decades of established law in the United States regarding the franchise model, and to the fact that a common analysis used by courts in employment law franchise cases, *i.e.*, whether or not a franchisor has "significant control over the employment relationship," does not support the notion that McDonald's is a joint employer. 013 U.S. Dist. Lexis 105780 (D. Ariz). On the other hand, those who applaud the OGC's conclusion assert that McDonald's is "hid[ing] behind its franchisees" and that "McDonald's requires franchisees to adhere to … regimented rules and regulations that there's no doubt who's really in charge." Greenhouse, *supra*.

Before the OGC Ruling

Although the OGC ruling has brought the issue of franchisor liability in employment disputes to the forefront and generated considerable attention and publicity, whether franchisors can be held liable for violations of anti-discrimination and wage and hour laws by their franchisees actually has been litigated for decades. And, while the OGC decision found that McDonald's and its franchisees are joint employers of individuals who work in McDonald's facilities, in fact, the joint-employer concept is but one of a number of theories that have been employed since at least the 1980s in efforts to establish franchisor liability in employment actions.

Moreover, a common perception that "courts … have typically found that franchisors are not joint employers of franchise employees" (Chronowski, *supra*) is not entirely accurate. In reality, although a majority of such cases — including those that relied on a theory other than the joint-employer concept — have been decided in favor of the franchisor, many have resulted in decisions holding that a franchisor was an employer of franchisee employees.

Among the numerous theories other than joint employer that employees have advanced in attempts to hold franchisors liable for employment law violations are the common law agency theory, the single employer theory, the economic realities test and the integrated enterprise test. Although there are distinctions among these theories, they all essentially look to the degree of control a franchisor exercises over its franchisees, particularly with regard to employment matters.

Factors considered in most of these concepts are such issues as the degree to which the franchisor

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Social Media Invades and Modernizes Employment Practices

By Morey Raiskin and Celeste Thacker

Facebook now has more than 1.5 billion users worldwide, and chances are, most employment applicants are members of the ubiquitous social media site. LinkedIn, Twitter and other social media programs also have millions of members. For employers, these sites present a potential treasure trove of information on applicants, but mining this information for use in recruiting, hiring, firing and monitoring of employees is fraught with risk. Nonetheless, some studies show that 40% of employers search social media during the hiring process in order to weed out candidates before in-person interviews. While there are not currently any laws in the United States forbidding employers from gleaning information from social media — whether during the hiring process or at any point in the employment relationship — improper use can get them into trouble.

This article explores practices to avoid and offers guidelines on how to use social media in ways that minimize exposure.

Too Much Information?

Social media is a great tool for employers who want to fully assess the professional qualifications and cultural fit of an individual. On the other hand, employers will often be exposed to information that is illegal to use in making employment decisions such as hiring, disciplining or dismissing candidates or employees. Reviewing social media outlets potentially communicates much more about the individual — including an applicant's race, age, religion, disabilities and national origin, as well as health, lifestyle and privacy issues — which prudent employers would not ask about in an interview or when making employment decisions.

Employers who use social media as a tool to learn more about employees or job applicants must use only information that is outside of protections established by civil rights, anti-discrimination laws and the National Labor Relations Act (NLRA: http://1.usa.gov/1g3K7AZ). This is a difficult task because employers cannot simply forget the information they have discovered, and sometimes it's difficult for employers to isolate the factors that led to a decision not to hire a candidate or discipline an employee.

As might be expected, employers' forays into social media have spawned a significant increase in lawsuits and administrative actions alleging discrimination or unfair labor practices. Courts and legislators are actively looking into how employers use social media, and are trying to balance an employer's right to protect his or her business with an employee's interest in free speech and privacy.

Discrimination Doesn't Have To Be Deliberate

Some discrimination isn't deliberate, but it's difficult for employers, or anyone else, to compartmentalize what they learn about a person and to ignore their own biases. As an illustration, a Carnegie Mellon University study on employers' use of social media found that applicants whose social media profiles indicated they were Muslim were less likely to be interviewed than Christian applicants. *See* Hyman, J., "Social Media Background Checks as Discrimination," *Workforce*, Nov. 25, 2013 (available at www.workforce.com). In that study, researchers used dummy employee profiles, but if a real employer was found to have created this imbalance, it would be vulnerable to charges of discrimination.

And if the discrimination is deliberate, an employer's review of social media may turn out to be useful to the employee's legal team. During discovery in one case, plaintiff's lawyers found a sticky note attached to a file with the notation "too old." Since the employer never met the applicant, there was no way of knowing the age of the applicant. However, the employer had a policy of reviewing social media sites. The case settled for a large sum of money. *See* Levinson, M., "Social Networks: A New Hotbed for Hiring Discrimination Claims," *CIO*, Apr. 18, 2011 (available at www.cio.com).

Disparate Treatment and Disparate Impact

There are two theories of discrimination: disparate treatment and disparate impact.

Disparate treatment occurs when an employer intentionally treats people differently based on protected statuses such as race, disability, gender, age or religion. An example of disparate treatment is when an employer only asks women applicants about plans to have children. The best way to avoid disparate treatment claims is to ask all applicants the same questions.

Disparate impact occurs when the employment process is facially neutral but disproportionately affects a class of applicants. For example, requiring a certain level of education may result in racial discrimination because, statistically, one segment of society does not obtain degrees as frequently as others.

Employers should also be wary of relying on social media for information because it can be inaccurate and outdated, or it could even be posted falsely by someone else. According to one study, there are more than 81 million fake Facebook profiles. *See* "Facebook Statistics," *Statistic Brain*, Jul. 1, 2014 (available at www.statisticbrain.com/facebook-statistics).

Despite the perils, there are benefits to using social media to vet job applicants. Social media pages can provide a wealth of useful information that can be used in a hiring decision. Employers can use social media to determine whether an applicant has appropriate professional demeanor and communications skills, possibly disparages their current or past employers, or divulges

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Social Media

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confidential or proprietary information. Social media postings can also reveal character issues, such as the fact that a particular applicant is comfortable making disparaging racist comments. Additionally, employers can compare what they see on social media with a job application to test an applicant's truthfulness.

Four Ways to Minimize Risk

Discrimination or unfair labor practice claims cannot always be avoided, but employers can use these tactics to protect themselves from discrimination claims:

1. Employ the "Dutch Policy." The so-called "Dutch Policy," promulgated by the Dutch Association for Personnel Management & Organization Development, requires that employers discuss any information obtained from social media sites with the applicant and treat all information as confidential. This gives the applicant an opportunity to respond to false information.

2. Disclose Intentions. Employers should inform applicants at the start of the application process that social media will be used in the vetting process. This puts applicants on notice, and gives them the chance to clean up or shut down their social media profiles, if they wish to protect their privacy.

3. Be Consistent. Employers should standardize the hiring and interview processes. Consistency is a strong defense in discrimination cases. Employers may also wish to document detailed reasons for not hiring an applicant.

4. Build a Wall. Removing hiring decision-makers from the social media screening process adds another level of protection for employers. Having a trained third party review applicants' profiles may allow the employer to utilize the benefits of social media screening without burdening the employer with unfiltered information. The more removed the hiring personnel are from the social media screening, the better for the employer.

Conclusion

Since social media has become unquestionably ubiquitous, many issues will likely arise down the road that are hard to predict at this time. Progressive employers are looking for innovative ways to balance the risks and benefits of adopting hiring practices related to social media. More conservative employers may avoid the use of social media altogether because of the associated dangers. There are risks and rewards to be weighed for either option, and each employer must make its own decision.

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Franchisors

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controls franchisee hiring practices and the manner in which employees perform their work; franchisor participation in the training of employees; and franchisor involvement in employee disciplinary decisions.

Despite the fact that the very nature of the franchise relationship entails a measure of franchisee independence in managing personnel matters such as benefits, prior to the OGC ruling a number of courts found franchisors liable for franchisee employment law violations. In *Myers v. Garfield & Johnson Enterprises*, 10 679 F.Supp.2d 598 (E.D. Pa. 2010). for example, the court found that the franchisor and franchisee had sufficiently "apportioned the various duties of employer between themselves," so that a joint-employer relationship had been alleged with enough specificity to allow the case to continue. *Myers*, 291 at 610.

Earlier, in *Cook v. Arrowsmith Shelburne*, 69 F.3d 1235 (2d Cir. 1995). the U.S. Court of Appeals for the Second Circuit denied a summary judgment motion by a franchisor in a case brought using the single employer theory. Under the single employer theory, a plaintiff must establish that there is a high enough degree of franchisor involvement in the personnel process so that the franchisor and franchisee essentially operate as an integrated enterprise — as opposed to the franchisor and franchisee being separate but sharing and co-determining personnel decisions as joint employers. The *Cook* court concluded that there was enough evidence of an "interrelationship of operations" between the franchisor and franchisee to find for the employee. *Cook* at 1241.

Apparent Authority

Arguably, the most successful as well as the most unconventional theory used by employees seeking to establish franchisor liability for franchisee employment actions is the apparent authority concept. Apparent authority is a recognized principle in New York and exists where "words or conduct of the principal, communicated to a third party … give rise to the appearance and belief that the agent possesses authority to enter into a transaction." *In re Nigeria Charter Flights Contract Litigation*, 520 F.Supp.2d 447, 463 (E.D.N.Y. 2013). Put more simply, when a franchisor possesses apparent authority to act on behalf of its franchisee, although their franchise agreement may not provide for that authority, franchisor liability may be found.

Two district court cases from the U.S. Courts of Appeals for the Ninth and Fourth Circuits demonstrate particularly well how apparent authority has been used to establish franchisor liability. In *Miller v. Zee's*, 31 F.Supp.2d 792 (D. Ore. 1998) an employee of a Denny's franchisee brought a sexual harassment suit against both the franchisee and Denny's. The court observed that in the franchisee's restaurants there were no indications of a connection to any entity other than Denny's. Not only was the Denny's trademark ubiquitous both inside and outside these establishments, but the plaintiffs did not know their workplace was owned by a franchisee and believed themselves to be Denny's employees. The perception of Denny's as the real employer was reinforced by the fact that it had the right to train managers, decide employee disciplinary matters and conduct

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With All Due Deference

Following the ARB's Lead in Defining Protected Activity

By Tom Harrington and R. Scott Oswald

In the courtroom, a business transaction, or on a ball field, a loss can also be a victory. Such is the case for employees in the matter of *Nielsen v. AECOM Technology*, decided by the Second Circuit Court of Appeals in August 2014. Employment law practitioners eagerly awaited the court's decision on the appropriate standard for evaluating whether a plaintiff engaged in protected activity under the Sarbanes-Oxley Act's (SOX) whistleblower protection provisions. The court found against the plaintiff, an employee of AECOM Technology, but in doing so, became the latest circuit to hold that employees need not "definitively and specifically" identify a particular securities law or category of fraud in order to be protected from retaliation. This is a significant victory for employees.

In this article, we provide a brief history of how the "definitively and specifically" standard came to be, how the tide began to turn against the application of this standard, and what this means for practitioners and employees who blow the whistle on securities fraud.

Sarbanes-Oxley's Anti-Retaliation Provision

Enacted in July 2002, Section 1514A of the Sarbanes-Oxley Act protects employees, consultants, and contractors of publically traded companies who provide information regarding conduct that they "reasonably believe" violates certain specified security laws. *See* 18 U.S.C. § 1341, §1343, § 1344, and § 1348. It also protects an individual from retaliation when he provides information about company wrongdoing that violates "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." *See* 18 U.S.C. § 1514A.

To make out a *prima facie* case of retaliation under SOX, an employee must demonstrate that: 1) she engaged in protected activity; 2) the employer knew or suspected that the employee engaged in the protected activity; 3) the employee suffered an adverse personnel action; and 4) the circumstances were sufficient to raise an inference that the protected activity contributed to the adverse personnel action. This formulation is followed by the Eleventh Circuit. *See, e.g., Johnson v. Stein Mart, Inc.*, 440 F. App'x 795, 800 (11th Cir. 2011). Most circuits follow the same or similar framework for an employee to establish a *prima facie* case of retaliation. Once an employee makes such a showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the same personnel action absent the employee's protected activity. *See, e.g., Welch v. Chao,* 536 F.3d 269, 275 (4th Cir. 2008).

Administrative Deference

Though this article focuses on how courts evaluate the first prong of the plaintiff's *prima facie* burden (whether the employee engaged in protected activity), an overview of how SOX claims are litigated and of the concept of administrative deference is necessary to understand the significance of recent circuit court developments regarding protected activity.

An employee who alleges retaliation under SOX must first file a complaint with the Occupational Safety and Health Administration (OSHA). *See* 18 U.S.C.A. § 1514A(b)(1). After 180 days or if the OSHA investigator issues his findings, the employee has the right to either file in U.S. District Court or proceed administratively before the Department of Labor's (DOL) Office of Administrative Law Judges (OALJ). From there, the employee has the right to appeal a decision from the OALJ to the DOL's Administrative Review Board (ARB). It should be noted that a complainant may abandon the administrative review process in favor of bringing a claim in district court if the ARB "has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant." 18 U.S.C. § 1514A(b)(1)(B).

Importantly, Congress delegated to the Secretary of Labor the responsibility for adjudicating claims brought under § 1514A. *See* 18 U.S.C. § 1514A(b). The ARB, the highest appellate authority within the DOL, "has been delegated the authority to act for the Secretary and issue final decisions" with regard to whistleblower complaints arising under § 1514A. See 29 C.F.R. § 1980.110(a).

Thirty years ago, the Supreme Court decided the case of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In that case, the Court established what has come to be known as "*Chevron* deference." The *Chevron* Court wrote, "If the choice [of an agency to which Congress has delegated adjudicative authority] represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 845. In essence, the Supreme Court acknowledged that an agency's decisions regarding "the meaning or reach of a statute" should be afforded significant deference when the relevant provisions of that statute are at issue in court.

A similar principle was recognized almost 50 years earlier in *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) (establishing so-called *Skidmore* deference). In that case, the Supreme Court opined that "the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. … The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect." The combined lesson of *Skidmore* and *Chevron* is that courts need to seriously consider, and generally defer to, guidance from agencies entrusted to interpret various statutes.

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CA Sick Leave

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What the Law Entails

Under AB 1522, employees who work in California for 30 or more days within a year will be eligible to accrue at least one hour of sick leave for every 30 hours worked. This includes both full-time and part-time employees who, on or after July 1, 2015, work in California for 30 or more days. Employees will be entitled to use their accrued sick days beginning on their 90th day of employment.

The new law gives employers the authority to limit an employee's use of paid sick days to 24 hours (three days) in each year of employment, as well as the authority to limit an employee's total accrual of sick pay to 48 hours (six days). An employee's unused sick pay will carry over to the following year, although employers will not be required to pay out accrued but unused sick days upon termination of employment.

Upon the oral or written request of an employee, an employer must allow the employee to use accrued sick days for: 1) the diagnosis, care, or treatment of an existing health condition of, or preventative care for, the employee or the employee's family member (which is defined broadly to include a child or legal ward, parent, parent-in-law, parent of one's registered domestic partner, spouse. registered domestic partner, grandparent, grandchild and a sibling); and 2) time off for an employee who is the victim of domestic violence, sexual assault or stalking.

Tips for Employers

One way for employers to satisfy the accrual and carry-over requirements of the new law will be to provide employees with all three paid sick days at the beginning of each year (although the law does not clarify whether "year" is defined as calendar year, employment year, or on a 12-month basis). Employers with existing paid sick or paid time off (PTO) policies may similarly satisfy the statute by making available under their existing policies three days of leave that can be used for the same purposes stated in the law, if the policy also satisfies the accrual, carryover, and use requirements of the statute.

Employers who violate this law may be subject to penalties including but not limited to three times the dollar amount of paid sick days withheld from each employee or $250, whichever is greater, up to an aggregate penalty of $4,000. In addition, the Labor Commissioner may impose upon a non-complying employer a $50 per day enforcement charge for each affected employee.

Importantly, if an employer denies an employee the right to use accrued sick days, discharges, threatens to discharge, demotes, suspends or in any manner discriminates against an employee within 30 days of the filing of a complaint or of cooperation with an investigation concerning alleged violations, or opposition by the employee to a policy prohibited by the new law, there will be a rebuttable presumption of unlawful retaliation.

Other States

AB 1522 will make California the second state in the country to mandate paid sick leave for employees, Connecticut being the first in 2011. However, there are a number of cities — including New York City, Portland OR, San Francisco, Seattle, Washington DC, and Newark, NJ, that have already implemented similar mandatory paid sick leave for their employees. Most recently, the San Diego City Council approved an ordinance granting up to five days sick leave per year beginning in 2015 and raising the city's minimum wage to $11.50 per hour by 2017.

'Abusive Conduct'

California employers must educate supervisors about "abusive conduct" during sexual harassment training sessions. Recently, CA Governor Brown also signed AB 2053. Under Section 12950.1 of the Government Code, employers with 50 or more employees are already required to provide at least two hours of sexual harassment training to all supervisory employees once every two years. AB 2053 amends this section effective Jan. 1, 2015 to require such employers to include in their sexual harassment prevention training education on preventing "abusive conduct" in the workplace.

Pursuant to the new law, "abusive conduct" is defined as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." For example, abusive conduct may include "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance." According to the law, "a single act shall not constitute abusive conduct, unless especially severe and egregious."

Conclusion

While it does not appear that AB 2053 is intended to expand the definition of unlawful harassment under the California Fair Employment and Housing Act, nor does it appear to make "abusive conduct" per-se unlawful, the statute may be argued as establishing a new standard of care with respect to unlawful conduct. Moreover, since the law does not expressly make "abusive conduct" unlawful, it is unclear why it includes the statement that "a single act shall not constitute abusive conduct, unless especially severe and egregious." That said, this new law might in some cases support an intentional or negligent infliction of emotional distress claim for worksite bullying.

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Whistleblowers

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Platone v. Flyi

As referenced at the outset, there was a time when plaintiffs had to meet a high burden to establish that they engaged in protected activity under SOX. In 2006, the ARB decided *In The Matter Of: Stacy M. Platone v. Flyi, Inc.*, 2006 WL 3246910 (U.S. Dept. of Labor SAROX). Stacy Platone was a Manager of Labor Relations for Atlantic Coast Airlines Holdings (ACA) who filed a motion to amend the caption to reflect its new name, "Flyi, Inc." During her employment, she sent several e-mails to her supervisors disclosing concerns about the seemingly improper manner in which ACA was billing one of its customers, the Air Line Pilots Association (ALPA). Platone testified that she told one of her supervisors she "thought it was illegal … what some of the pilots were doing" and that [the pilots] were cheating … the company [out] of money. … " *Platone*, 2006 WL 3246910 at 11.

Though what Platone described in her e-mails and conversations was a scheme whereby ACA billed ALPA for services that it should not have billed, she never specifically alleged that her employer was engaging in fraud. ACA terminated Platone's employment shortly after her disclosures.

The ARB noted that Platone never "definitively and specifically" alleged that ACA was engaged in fraud under SOX. The Board, relying heavily on prior decisions dealing with the Energy Reorganization Act, 42 U.S.C.A. § 5851, wrote, "[T]he employee's communications must "definitively and specifically" relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1). Thus, for example, an employee's disclosure that the company is materially misstating its financial condition to investors is entitled to protection under the Act." *Platone*, 2006 WL 3246910 at 8.

According to the Board, Platone did not engage in protected conduct because her allegations did not specifically describe how ACA shareholders were being harmed by the company's conduct. Moreover, the Board found that Platone's disclosures were not protected because they did "not even approximate any of the basic elements of a claim of securities fraud — a material misrepresentation (or omission), scienter, a connection with the purchase, or sale of a security, reliance, economic loss and loss causation." *Id*. at 11. Basically, the ARB required Platone to specifically disclose that the company's conduct was defrauding shareholders and demanded that Platone identify in her disclosures how that conduct satisfied each of the elements of a securities fraud claim.

For the next five years, the ARB's decision in *Platone*, which severely restricted the scope of protected conduct, was precedent in the ARB and, under *Chevron*, afforded deference in federal courts. *See Harvey v. Home Depot USA, Inc.*, ARB Case No. 04–114, 2006 WL 3246905, at *11 (ARB June 2, 2006) ("[A]n employee's complaint must be directly related to the listed categories. … "). *See also Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008).

'Reasonable Belief'

In 2011, the ARB significantly departed from the requirements of Platone's "definitively and specifically" test. In *In the Matter of: Kathy J. Sylvester and Theresa Neuschafer v. Paraxel Int'l, LLC*, ARB Case No. 07-123, 2011 WL 2165854 (May 25, 2011), the Board announced that the standard from *Platone* "has evolved into an inappropriate test," and shifted its focus to whether the complainant had a reasonable belief that the company had engaged in securities fraud and away from "whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities." *Id*. at 12. In abrogating the ARB's decision from *Platone*, the *Parexel* Board noted that relying on the "definitive and specific" standard was contrary to "the plain language of the SOX whistleblower protection provision, which protects 'all good faith and reasonable reporting of fraud.'" *Id*. (internal citations omitted).

The *Parexel* Board further discussed the impropriety of requiring that a complainant establish the elements of criminal fraud in order to prevail on a retaliation claim under SOX. *Id*. ("[R]equiring a complainant to prove or approximate the specific elements of a securities law violation contradicts the statute's requirement that an employee have a reasonable belief of a violation of the enumerated statutes."). The ARB concluded that requiring a plaintiff to make such a showing was in clear conflict with the requirement that the employee need only make a disclosure related to a reasonable belief of securities fraud.

Paraxel's Reasonable Belief Test

Following *Paraxel*, most practitioners anticipated a circuit split regarding adoption of the Board's "reasonable belief" test in evaluating protected activity under SOX. As noted, court decisions from 2006 to 2011 generally required a plaintiff to meet a heightened standard of protected activity, and a significant amount of circuit precedent had developed in the five years following *Platone*. It was unclear which circuits would defer to the ARB's new interpretation of Section 806 and which would instead adhere to circuit precedent following *Platone*. Many practitioners expected that the anticipated circuit split would soon lead to intervention by the Supreme Court.

Fortunately for whistleblowers, this circuit split has not occurred. The *Platone* dominoes began to fall in March 2013 with the Third Circuit's decision in *Wiest v. Lynch*, 710 F.3d 121, 130 (3d Cir. 2013), in which the court held that "the ARB's rejection of *Platone's* "definitive and specific" standard is entitled to *Chevron* deference." Only three months later, the Tenth Circuit followed in the Third Circuit's footsteps, finding that "[t]his court affords deference to the Board's interpretation of [SOX] as expressed in formal adjudications under *Chevron*." *See Lockheed Martin Corp. v. Admin. Review Bd.*, U.S. Dep't of Labor, 717 F.3d 1121, 1131 (10th Cir. 2013).

In February 2014, the Fifth Circuit joined the Tenth and Third, finding that "the critical focus is on whether the employee reported conduct that he or she reasonably believes

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Franchisors

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internal audits of franchisee operations. Denny's summary judgment motion was denied.

Thomas v. Freeway Foods, 406 F.Supp.2d 610 (M.D.N.C. 2005), was a case where the court rejected the plaintiffs' argument that franchisor Waffle House, Inc., was liable for discriminatory conduct by its franchisee under agency theory, only to arrive at the opposite conclusion when assessing the issue in terms of apparent authority. In *Thomas*, the court found significant the fact that, among other things, Waffle House's website did not distinguish between restaurants owned by the parent and those that were franchisees.

Presented with similar facts, however, other courts have not found apparent authority arguments persuasive. In *Cha v. Hooters of Am.*, 2013 U.S. Dist. Lexis 144750 (E.D.N.Y. 2013), the court concluded that essentially the same evidence that the employees presented in *Miller* was not enough to establish franchisor liability. In part, the outcome of such cases depends on how significant a court finds the presence of logos, uniforms and signs referring only to the franchisor and employees' perceptions of who their employer is. Whether a court will be receptive to an apparent authority argument depends not only on what district the case is in, but what judge is assigned to the matter. (New York State courts have generally not been sympathetic to apparent authority claims, nor to employee claims based on agency theory and similar concepts. *See, e.g., Martinez v. High Powered Pizza*, 43 A.D.3d 670 (1st Dept. 2007)).

Conclusion

As one commentator observed with regard to the franchisor liability controversy that was inflamed by the OGC ruling, "it will take years before there is clarity." Chronowski, *supra*. Business interests, including the International Franchise Association, have already mobilized to oppose adoption of the OGC opinion by the NLRB and the courts, and some have urged Congress to pass legislation nullifying the OGC ruling. If franchisors are deemed to be joint employers with their franchisees of franchisee employees, they fear, that "could force franchisors to take responsibility for everything from employee wages to worker harassment cases" rather than leaving such matters in the hands of local franchisees. *Taylor*, *supra*.

In the event that the OGC ruling becomes established law, that would probably put an end to decades of litigation over franchisor liability in employment cases involving the theories discussed above and establish the joint-employer theory as the governing principle in franchise employee cases. Alternatively, if the NLRB or the courts decline to adopt the OGC's rationale, litigation along the same lines as has been seen in recent decades is likely to continue — with the possible exception that the joint-employer theory may be somewhat discredited and cases based on apparent authority or agency theory more prevalent.

In either case, the stakes are clearly high for franchisors, unions and franchisee employees. An outcome favorable to the OGC's interpretation of the franchisor as joint employer question has the potential of, consistent with franchisor concerns, transforming a significant sector of the U.S. economy.

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Whistleblowers

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constituted a violation of federal law." *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103, 109 (5th Cir. 2014); *see also Feldman v. Law Enforcement Assoc. Corp.*, 752 F.3d 339, 345 (4th Cir. 2014) (embracing the ARB's "reasonable belief" standard as set forth in *Parexel*). In August 2014, the Second Circuit decided the case of *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214 (2d Cir. 2014) adopting the ARB's "reasonable belief" standard but finding that plaintiff was not objectively reasonable in believing that the complained-of conduct constituted shareholder fraud. In so doing, the court became the fifth and most recent circuit to adopt the ARB's "reasonable belief" standard for evaluating whether an employee has engaged in protected activity.

A Warning to Employers

With this new decision, *Nielsen v. AECOM Technology Corp.*, a circuit split looks increasingly unlikely. As circuit and district courts continue to align themselves with the ARB's "reasonable belief" test, wise employers should expect that the era of easy dismissals in SOX retaliation cases for lack of protected activity is at an end. As a result of the demise of *Platone's* overly restrictive standard, contesting employees' retaliation claims at the Department of Labor and in federal courts has become a risky and expensive proposition. Many more cases will be thoroughly investigated or reach discovery. Moreover, in in the wake of the Supreme Court's 2013 *Lawson* decision, more employees and employers are now covered by the whistleblower provisions of SOX.

In this new judicial environment, companies should take extra care to treat whistleblower claims with respect, and avoid even the appearance of retaliation against employees who raise concerns about actual or potential wrongdoing. Employers can no longer expect to get a SOX retaliation complaint dismissed because the whistleblower never "definitively and specifically" cited the laws supposedly being broken. Instead, employers should now expect that any whistleblower with good-faith concerns will have access to a public tribunal and an adjudication that presents substantial risk to the company's money, time, and reputation.

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