NYSBA SPRING/SUMMER 2014 | Vol. 32 | No. 1

Inside

A publication of the Corporate Counsel Section
of the New York State Bar Association

Message from the Chair

To the Members of the Corporate Counsel Section:

Having previously served as your Chair in 2002, it is an honor and a privilege to do so once again in 2014. I want to thank Howard Shafer for a job very well done during his term as Chair in 2013, with special thanks for the most excellent and very well received Fifth Corporate Counsel Institute, ably co-chaired by Anne Atkinson and Steve Nachimson, that the Section presented under his chairmanship last November. It covered such timely and forward-looking topics as "Alternative Fee Arrangements and the Future of the Billable Hour" and "Advertising and Brand Protection in the Digital Age," and featured a Keynote luncheon address by New York State Attorney General Eric Schneiderman as well as a panel of prominent General Counsel who examined ethics issues from an in-house standpoint, ably moderated by the Section's long-time friend and mentor, Robert L. Haig of Kelley Drye & Warren LLP.

There are several topics I would like to bring to your attention as I start my second term.

Annual Meeting 2014

This year on January 29th the Section joined forces with the Business Law Section to present a two-part Annual Meeting program. In the first part the focus was on Ethics in Transactions; in the second part a three-speaker panel examined issues arising for New York lawyers in handling international matters.

KGS Diversity Internship Program

The Section continues its long-standing strong commitment to the Kenneth G. Standard internship program for law students who self-identify as "diverse." The program is named in honor of past NYSBA President Ken Standard because of his commitment to initiatives aimed at increasing diversity in the legal profession. This year's recipient of the New York Bar Foundation Fellowship (funded by the Section) that funds and places a second- or third-year law student as an intern in a charitable or not for profit organization is The Visiting Nurse Service of New York. In addition

Inside

Editors: Janice Handler and Allison B. Tomlinson

to the Foundation intern, the program expects to place 6 additional law student interns with law departments in ACE(2), Alliance Bernstein, NYSTEC, Salesforce.com and Pitney Bowes. The program identifies and financially supports 50% of two in-house internship opportunities for law students from a diverse range of backgrounds to provide them with the chance to experience in-house legal practice. This year ACE, Alliance Bernstein, NYSTEC and Salesforce.com are enabling the Section to extend the scope of the program by supporting the full salary of their student interns. The annual reception to honor the year's Diversity Interns and their employer sponsors is planned for July 23, 2014. The Section has also instituted the practice of appointing an alumnus or alumna of this program to our Executive Committee; this year's alumnus is Richard Kim.

Mentoring Program and Young Lawyers

The Section maintains its mentoring program for current and past student interns. It also continues to be a generous sponsor of and provides a scholarship to the Young Lawyers Section Trial Academy for a deserving candidate. This year the Liaison from the Young Lawyers Section serving on the Executive Committee is Naomi Hills.

Continuing Legal Education Programs

I have already mentioned the biennial Fifth Corporate Counsel Institute ("CCI") offered last November. Both the CCI and the CCS Spring Meeting CLE held on June 11, 2013 examined issues relating to the use of social media in the workplace and employment decisions. An Update CLE program on these hot cyber liability topics, which also addressed how companies can best deal with a security breach once it has occurred, was presented in conjunction with the Intellectual Property Section on April 3, 2014. Our Section's signature Ethics for Corporate Counsel CLE program will be offered once again this year on the afternoon of Thursday, October 23, 2014 at the Cornell Club in Manhattan under the guidance of long-standing Program Chair Steve Nachimson; please save the date and keep an eye out for further details as they become available.

Member Appreciation Events

The Corporate Counsel Section regularly provides no-cost "Membership Appreciation and Networking" (MA&N) receptions to benefit its members. We held the last one on October 24, 2013 at Upstairs at the Kimberly in NYC. The first 2014 MA&N event will be held on June 18, 2014 from 6 p.m. to 9 p.m. once again at Upstairs at the Kimberly Hotel in Manhattan (Section members should already have received the invitation in their email), and a second one has been planned in conjunction with the Ethics for Corporate Counsel program on October 23rd at the Cornell Club, also in Manhattan.

Corporate Counsel Section "Community"

As Howard Shafer previously has reported, the New York State Bar Association is gradually rolling out electronic "communities" as an adjunct to the nysba.org website. The idea is to provide a central electronic forum to bring together NYSBA members around their various common interests, on a purely "opt-in" basis. The Community pages host posted messages that will automatically be distributed to all Community members who choose to receive them, as well has hosting blogs and providing a common space to store documents of interest, start blogs on various subjects, etc. Your Section's Executive Committee, with my strong encouragement, is currently experimenting with a Community page accessible only to EC members so we can all better understand how this can work to benefit the Section's members as a whole. We plan to roll out a Community page that will be accessible to all members of the Section later this year. Please watch for an announcement of more details as soon as we are ready to proceed. In the meantime, I encourage you to explore existing Communities, such as the Technology Community, that are already open to all interested NYSBA members and can be accessed from the nysba.org home page.

Transition Time at *Inside*

Finally, I wish to express my great thanks to the wonderful team of Editors of *Inside*, Janice Handler and Allison Tomlinson, who have worked most diligently for the last half-dozen years or more to bring you the many topical and valuable articles and other items that appear in its pages three times a year. Allison and Janice have decided that it's now time for them to move on to other pursuits, so I'm happy to announce that whereas Allison is editing this issue, and Janice will handle the Fall 2014 issue, a new team comprised of Executive Committee member Jessica Thaler and Matthew Bobrow, a law student member of the Section from New York Law School, will take over the editorship of *Inside* beginning with the Winter 2014 issue. Among her many other accomplishments, Jessica co-edited, together with former Chief Judge Judith Kaye of the New York State Court of Appeals, the very well received recent special issue of the *New York Bar Journal* devoted to the topic of Lawyers in Transition.

Feedback

As your Chair, I welcome comments, questions and feedback from Section members at any time. Please feel free to email me at: tareed1943@gmail.com, and I will respond as promptly as possible.

Tom Reed

Inside Inside

We are so excited to present this first issue of 2014.

We have a great article on new developments in Employment Law, the employment implications of the *Comcast* case, what's new in paid sick leave laws, and then a special article on data breaches.

As always, if you would like to contribute an article to a future issue of the *Inside*, feel free to reach out.

And on a personal note, as this is my last issue co-editing *Inside*, many thanks to my co-editor, Janice Handler, and all of my friends and colleagues who have graciously contributed articles over the past five years that I've been voluntarily working on this publication.

It's been a true pleasure!

Enjoy!

Allison

Allison B. Tomlinson is Regional Counsel at Gensler, a global architecture and design firm, where she is lead counsel for the Northeast and Latin America regions. She is also a member of the Executive Committees of the Corporate Counsel and International Sections of the New York State Bar Association.

Recent Developments in New York Employment Law

By Evandro C. Gigante and Jason A. Georges

Introduction

2013 was a year marked with new developments in employment law, nationally and on the state and local levels. Not surprisingly, New York has been a trendsetter in this regard. This past year, there have been statutory, regulatory and/or judicial developments in New York affecting everything from the payment of wages to leave allowances, disability accommodations, and unemployment insurance claims. Below is a brief overview of some of the more recent developments affecting employers in New York.

N.Y. Wage & Hour Developments

Wage Deductions by Employers

In October 2013, the New York State Department of Labor ("NYSDOL") issued its final regulations on permissible wage deductions under New York State Law. Section 193 of the New York Labor Law (which was amended in June 2012) outlines specific wage deductions that employers can take and sets forth the procedures that employers must follow to recover wage overpayments and advances.[1]

Section 193 permits employers to make deductions from wages that are "authorized" by, and for the "benefit" of, the employee. These include deductions for:

(i) insurance premiums and prepaid legal plans;

(ii) pension or health and welfare benefits;

(iii) contributions to a bona fide charitable organization;

(iv) purchases made at events sponsored by a bona fide charitable organization affiliated with the employer where at least twenty percent of the profits from such event are being contributed to a bona fide charitable organization;

(v) United States bonds;

(vi) dues or assessments to a labor organization;

(vii) discounted parking or discounted passes, tokens, fare cards, vouchers, or other items that entitle the employee to use mass transit;

(viii) fitness center, health club, and/or gym membership dues;

(ix) cafeteria and vending machine purchases made at the employer's place of business and purchases made at gift shops operated by the employer, where the employer is a hospital, college, or university;

(x) pharmacy purchases made at the employer's place of business;

(xi) tuition, room, board, and fees for pre-school, nursery, primary, secondary, and/or post-secondary educational institutions;

(xii) day care, before-school and after-school care expenses;

(xiii) payments for housing provided at no more than market rates by nonprofit hospitals or affiliates thereof; and

(xiv) similar payments for the benefit of the employee.[2]

The recently issued NYSDOL regulations set forth rules that employers must follow prior to taking deductions from wages. For example, the regulations require that deductions made "for the benefit of the employee" can only be made pursuant to an "express, written, voluntary, and informed" agreement between the employer and the employee. Written notice of the terms and conditions of the deductions must be given to the employee before any deduction is taken. In keeping with the statute, the regulations also limit the types of deductions that can be made "for the benefit of the employee" to deductions for health and welfare benefits, pension and savings benefits, charitable benefits, representational (or union-related) benefits, transportation benefits, as well as food and lodging. The regulations also make clear, however, that mere convenience to an employee is not considered a benefit on which a deduction may be based.

In addition, the regulations outline the procedures governing deductions taken due to overpayments caused by a "mathematical or other clerical error made by the employer," as well as deductions to recoup wage advances provided to employees. With regard to overpayments, the regulations require that employers provide employees with notice of their intent to recover overpayments in advance of the deductions, which will inform the employee of the amount of the total overpayment, the amount to be deducted and the dates of each deduction. The amounts that employers can deduct are subject to specific limitations contained in the regulations, and employers cannot deduct for overpayments made more than eight (8) weeks before issuing the notice of intent to deduct. With regard to wage advances, the NYSDOL defines an advance as the payment of money to an employee "based on the anticipation of the earning of future wages." Deductions made to

recover wage advances can only be taken pursuant to a written agreement before the advance is given, and once the advance is given no further advances may be extended until the existing advance is fully repaid. A written agreement governing the repayment of a wage advance must state the timing and duration of the repayment, and the employee must be given a written authorization in advance specifying the amounts and dates of such deductions.

Under the new regulations, employers looking to recoup overpayments or wage advances must also make available to employees a dispute resolution procedure that would allow employees to dispute the overpayments or challenge the deductions, including the amounts or frequency of the deductions.

New York State Minimum Wage Increase

On December 31, 2013, the New York State minimum wage increased to $8.00.[3] The minimum wage will increase to $8.75 on December 31, 2014, and then to $9.00 on December 31, 2015. In addition, laws that pertain to certain industries, such as the food service industry, make allowances for tips and thus set a lower hourly rate for certain employees.

Leave and Accommodation Laws

Indefinite Leave under *Romanello v. Intesa Sanpaolo, S.p.A* (2013)

In a significant decision affecting New York City employers, the New York Court of Appeals recently held that an accommodation request for indefinite leave is not *per se* unreasonable under the New York City Human Rights Law ("NYCHRL"). In *Romanello v. Intesa Sanpaolo, S.p.A.*, 22 N.Y.3d 881 (2013), the court reinstated a former executive's disability discrimination claim under the NYCHRL, while dismissing his disability claim under the New York State Human Rights Law ("NYSHRL"). In doing so, the Court acknowledged that the NYCHRL affords broader protection to litigants in discrimination cases when compared to the NYSHRL and the federal Americans with Disabilities Act.[4]

In 2008, Giuseppe Romanello, a long time executive at Intesa, went on leave due to a variety of medical issues, including major depression. After five months on leave, Intesa's counsel inquired about Romanello's intent to return to work by asking the employee's counsel "whether [Romanello] intends to return to work or abandon his position." Romanello's attorney responded with a letter stating that Romanello "has not at any time evinced or expressed an intention to 'abandon his position' with [Intesa]. Rather, he has been sick and unable to work, with an uncertain prognosis and a return to work date that is indeterminate at this time." Without further discussion, the employer terminated Romanello's employment. Romanello commenced an action in New York State court alleging that his termination was discriminatory in violation of the NYSHRL and the NYCHRL.

On appeal, the New York Court of Appeals affirmed the dismissal of Romanello's NYSHRL claim, finding that indefinite leave is not considered a reasonable accommodation under the State statute. Specifically, the Court held, under the NYSHRL "the complaint and supporting documentation must set forth factual allegations sufficient to show that, 'upon the provision of reasonable accommodations, [the employee] could perform the essential functions of [his] or her job." Since Romanello never offered any indication as to when he planned to return to work, and did not demonstrate how he could perform the functions of his job if given the accommodation he requested, the Court found that Romanello did not state a claim for disability discrimination under the NYSHRL.

On the other hand, the Court reinstated Romanello's NYCHRL claim relying, in part, on the notion that the City statute provides broader protections than the State law. Contrary to the NYSHRL, to establish that an employee is disabled under the City law an employee need not demonstrate that he or she can perform the job with or without a reasonable accommodation. Instead, under the City law, it is the employer's burden to prove that a reasonable accommodation is not required, either because the employee cannot, with a reasonable accommodation, "satisfy the essential requisites of the job," or because the accommodation would present an undue hardship on the employer. In this case, the employer had not demonstrated, or even sought to demonstrate, that Romanello could not perform the essential functions of his job with the reasonable accommodation sought, or that the accommodation would impose an undue hardship on the company. As a result, the Court reinstated Romanello's NYCHRL claim.

Under this important case, which presents a departure from prior cases holding that requests for indefinite leave were *per se* unreasonable, employers in New York City must be prepared to demonstrate how an employee's request for an indefinite leave of absence presents an undue hardship on the employer.

New York City Earned Sick Time Act

Effective April 1, 2014, New York City employers must provide mandatory sick leave to employees working in New York City. Under the new law, employees must accrue at least 1 hour of sick leave for every 30 hours worked. Using this formula, employers with 5 or more employees must provide up to 40 hours of paid sick leave per calendar year, while employers with fewer than 5 employees must provide up to 40 hours of job-protected unpaid sick leave. With certain limited exceptions, the law covers employees who work more than 80 hours per year, which means that employers will be required to pro-

vide paid sick leave to qualifying temporary or part-time employees as well as full-time staff. The law also requires the carryover of sick leave from one year to the next, but makes clear that employers need not allow employees to use more than 40 hours of sick leave in any calendar year.

The statute permits employees to use sick time for absences from work due to a number of reasons, including, for example, the employee's own illness, medical diagnosis, care or treatment, as well as to allow employees to take leave to care for a family member needing medical diagnosis, care, treatment or preventive medical treatment. "Family members" are defined broadly in the statute to include an employee's child (biological, adopted, foster or to whom the employee stands in loco parentis), spouse, domestic partner or parent (or who stands in loco parentis to the employee), the child or parent of an employee's spouse or domestic partner, sibling (including adopted, half- or step-sibling), grandparent or grandchild. In addition, the law permits employees to use paid sick leave in the event of the employer's place of business closes due to a public health emergency or to care for a child whose school or child care provider is closed due to a public health emergency. The law also mandates that employers provide notice to employees of their right to sick leave, and other rights contained in the statute. Such notice should be provided to all new employees hired on or after April 1, 2014, and to all current employees by May 1, 2014.

In light of the detailed requirements in the law, and the broad implications it would have on sick leave policies, employers in New York City should carefully review their leave policies to ensure that they are in compliance.

New York City Pregnant Workers Fairness Act

The New York City Pregnant Workers Fairness Act, which amends the New York City Human Rights Law, went into effect on January 30, 2014. It requires employers to provide reasonable accommodations for pregnancy, childbirth, or related medical conditions, some of which were not previously covered by disability discrimination laws that require reasonable accommodations. Examples of accommodations that should be provided to pregnant employees may include "bathroom breaks, leave for a period of disability arising from childbirth, breaks to facilitate increased water intake, periodic rest for those who stand for long periods of time, and assistance with manual labor, among other things."

The law applies to employers with four or more employees in New York City, and similar to other disability discrimination laws, employers need not provide accommodations that would impose an "undue hardship in the conduct of [the] employer's business."

A similar bill is pending before the New York State legislature that would amend the state law to require employers to provide reasonable accommodations to an employee for conditions related to pregnancy.[5]

Unemployment Status in New York

Unemployment Insurance Integrity Act

In 2011, Congress passed the Unemployment Insurance Integrity Act (the "Act") as part of the enactment of the Trade Adjustment Assistance Extension Act of 2011. On October 21, 2013, the Act went into full effect across the country. The purpose of the Act is to improve the integrity of the Unemployment Insurance ("UI") system by ensuring that only individuals who are in fact entitled to UI benefits receive them. Prior to the Act, employers have often chosen not to contest UI claims by simply not responding to claim notices. The federal law now requires states to implement statutes requiring that employers respond to a state agency's information requests in a timely and adequate manner, regardless of whether the employer believes an individual is entitled to benefits.[6]

In March 2013, Governor Cuomo signed Senate Bill S.2607 to bring New York State in compliance with the federal Unemployment Insurance Integrity Act.[7] Under the New York law, employers must respond to an initial claim notice within ten (10) calendar days of the date on the claim notice. In addition, if an employer failed to timely or adequately respond to a request for information relating to a claim, that employer's UI account will not be relieved from charges resulting in an overpayment of benefits. However, employers will not be liable for charges incurred upon the first occurrence of an untimely or inadequate response if the employer can establish good cause for such a failure.

In addition, under the amended statute, former employees are ineligible for UI benefits during any week in which the former employee receives severance pay. If severance is paid in a lump sum amount, the law provides that severance will be allocated over a weekly basis for purposes of the statute. Thus, a former employee will not be eligible for UI benefits during any week for which dismissal or severance pay is allocated. However, employees are only disqualified from receiving UI benefits if they receive severance pay within 30 days of termination of employment.

New York City Prohibition Against Unemployment Status Discrimination

In March 2013, the New York City Council amended the NYCHRL to prohibit discrimination against job applicants on the basis of their unemployment status.[8] Under the new law, employers are prohibited from basing employment decisions on an applicant's unemployment status. Employers and employment agencies are also forbidden from publishing, in print or in any other medium, advertisements: (i) stating that current employment is a

requirement or qualification for the job; and / or (ii) stating or indicating that individuals will not be considered based on current unemployment status.

However, there are limitations and exceptions built-in to the law. For example, employers may consider an applicant's unemployment where there is a substantially job-related reason for doing so, and may inquire into the circumstances surrounding an applicant's separation from prior employment. Employers may also make employment decisions and post advertisements regarding "substantially job-related qualifications," give priority to applicants currently employed by the employer, and may also set compensation or other terms or conditions of employment based on prior work experience.

Conclusion

Given the significant legal developments that are highlighted above, employers in New York should review their policies and consult with employment counsel to ensure that they are in compliance with the laws affecting the workplace.

Endnotes

1. *See* N.Y. LAB. LAW § 193, *available at* https: / / labor.ny.gov / formsdocs / wp / LS605.pdf.
2. *Id.* at (1)(b)(i)-(xiv).
3. New York State Department of Labor, Minimum Wages, http: / / labor.ny.gov / workerprotection / laborstandards / workprot / minwage.shtm (last visited Mar. 24, 2014).
4. *See Romanello v. Intesa Sanpaolo, S.p.A.*, 22 N.Y.3d 881 (2013).
5. An Act to Amend the Executive Law, In Relation to Requiring the Provisions of Reasonable Accommodations for Pregnant Women, New York State Bill S.1479-2013, *available at* http: / / open.nysenate.gov / legislation / bill / S1479-2013.
6. 26 U.S.C. § 3303(f)(1)(A)(B).
7. New York Senate Bill S.2607, *available at* http: / / open.nysenate.gov / legislation / bill / s2607d-2013.
8. New York City Council. Int 0814-2012, *available at* http: / / www.nyc.gov / html / cchr / downloads / pdf / 031313_newamendment.pdf.

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I'm Sick and Can't Come In—State and Local Governments Take the Lead in Requiring Employers to Provide Paid Sick Time

By William P. Perkins, Tara Conroy and Joshua Seidman

I. Introduction

Tired of waiting for Washington to act,[1] cities and states have resorted to legislative vigilantism and in the process they have created a patchwork of paid sick leave laws across the United States. Although the rationale for such action is the fact that some 41 million workers in the U.S. lack access to paid sick leave, with low income workers being least likely to have access,[2] the laws have created a headache for employers with multiple facilities within the U.S. or even within the same state.

II. Landscape of Paid Sick Leave Activism

A. Rush to Legislate

During the first three months of 2014, four paid sick leave laws have or are scheduled to become effective. As of mid-March 2014, there were pending proposals for paid sick leave legislation in 17 states: Alaska, Arizona, California, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New York State, North Carolina, Oregon, South Carolina, Vermont and Washington. Pending bills in many cases differ quite significantly from sick leave laws currently effective either at a state or local level.

For example, some proposed legislation allows for fast accrual of paid sick time. Iowa's proposed legislation sets a sky-high accrual rate of five and fifty-four one hundredths hours of paid leave for every 40 hours worked, with a cap of nearly 18 full work days per year.[3] New York State's proposed legislation also allows for fast accrual: one hour of paid leave for every 20 hours worked.[4] However, New York State's proposed accrual rate is somewhat tempered by its 80- or 40-hour accrual cap.[5]

B. Not in My Backyard—States Attempt to Rein-in Activist Cities

Ten states—Georgia, Wisconsin, Louisiana, North Carolina, Tennessee, Mississippi, Kansas, Arizona, Indiana, and Florida—have enacted preemption laws prohibiting cities, counties, and other state municipalities from passing mandatory paid sick leave laws.[6]

For example, the Louisiana preemption law, which became effective in 2012, restricts local governments from passing any workplace protections regarding minimum wage, employee benefits, vacation days, and sick days.[7] The stated justification for these preemption laws is twofold: 1) paid sick leave laws hurt businesses by imposing burdensome costs; and 2) enacting paid sick leave legislation on a city- or county-wide level will create patchwork, inconsistent legislation throughout the state.

State preemption laws may preempt a local government's previously enacted paid sick leave law, as some have been retroactively applied.[8] It is thus vital for employers and employees alike to track not only laws favoring mandatory paid sick leave, but also laws opposing them since seven of the current ten state preemption laws have gone into effect since 2013.

C. Employer Headaches

Paid sick leave, previously a wholly unregulated area of employment within which employers had free rein, is now becoming highly regulated. This push towards increased regulation means heightened administrative burdens and costs.

Employers with pre-existing paid sick leave policies may need to revise their policies to ensure compliance with applicable legislation, while employers without a pre-existing policy need to create an entirely new policy. Concurrent with the adaption or drafting of a policy is the question of how such policies will be administered. For starters, employers must decide how they will record and monitor employees' hours, both for purposes of determining how much paid sick leave an employee accrues and when an employee becomes eligible for paid sick leave.[9] Employers may also need to consider whether any previously used timekeeping systems are sufficient for these purposes, and whether the individual or department responsible for tracking time can handle this increased workload.

These laws impose new direct costs for some employers who previously did not provide paid sick time, including the cost of the actual paid sick days themselves, and overtime exposure for replacement workers. Even though most large employers already have sick leave policies and are not subject to new cost issues, these employers will face significantly increased administrative burdens resulting from the need to sync the new legal requirements with their existing leave policies. For example, the concept of sick time accrual in hourly units is a foreign concept to most companies that have traditionally dealt in the accrual of sick time in units of days. Carryover of sick days from one year to the next is a new requirement for many employers and, to make it worse, some laws require the employer to provide employees records of current and carryover accrued sick days every payroll day.[10] Most of the laws place significant restrictions on when employers can request documentation of the employee's inability to work, and raise the specter of retaliation claims if the employer uses government-imposed sick days as a basis for disciplinary action.

The list of headaches created by paid sick leave legislation is even longer for multiple-location employers, because of differing and conflicting requirements and the inability to craft a one-size-fits-all policy. For example, this will be especially true for employers with operations in both Jersey City and Newark, New Jersey.[11] Although there is some overlap between the two ordinances, there are critical differences. For example, while both require private employers with ten or more employees to provide paid sick time,[12] the Newark ordinance also requires that each calendar year employers with fewer than ten employees provide i) child care, home health care, and food service worker employees with a maximum of five days of paid sick time, and ii) all other employees with a maximum of three days of paid sick time.[13]

These differences will require Newark and Jersey City-based employers to expand their paid sick leave coverage in certain situations, based solely on whether employees work in Newark or Jersey City. The challenge of complying with inconsistent legislation may also create employee dissatisfaction, in the event that employees in different locations are perceived as being offered more favorable paid sick leave than other employees.

In short, the transition from unregulated to regulated brings with it a multitude of headaches for employers.

III. Legislative Activism in the New York Metropolitan Area

A. Jersey City, NJ

There are at least three paid sick leave ordinances currently effective or slated to become effective in the New York City metropolitan area in 2014. The first of these is the Jersey City Earned Sick Time Ordinance ("JCESTO"), which became effective on January 24, 2014.[14] Under JCESTO, employers with ten or more Jersey City employees must provide employees one hour of paid sick leave for every 30 hours worked, up to a maximum of 40 hours each year.[15] Employees of employers with fewer than ten Jersey City employees accrue at the same rate and are subject to the same caps, but the leave is unpaid.[16] Employees are only covered by JCESTO if they work at least 80 hours per year in Jersey City.[17]

Additionally, if an employee's accrued sick time goes unused within a given calendar year, up to 40 hours of sick leave will carry over to the following year.[18] However, employees are subject to a usage cap of 40 hours per calendar year.[19]

B. New York City, NY

New York City's Earned Sick Time Act ("ESTA"), the next anticipated effective paid sick leave ordinance in the metropolitan area, became effective as of April 1, 2014. ESTA requires employers with five or more New York City employees to provide a minimum of one hour of paid sick time for every 30 hours worked,[20] up to a maximum of 40 hours per calendar year.[21] ESTA only covers employees who work at least 80 hours per year in New York City.[22]

ESTA does not establish usage caps, but does cap employees' carryover of their accrued, unused leave from one calendar year to the next at 40 hours.[23] As an alternative to carrying leave over from one year to the next, employers can pay employees the cash equivalent of their unused, accrued sick time at the end of the year.[24]

C. Newark, NJ

Finally, Newark's Sick Leave for Private Employees Ordinance (the "Newark Law") will go into effect on May 29, 2014.[25] Under the Newark Law, employers with ten or more Newark-based employees must provide up to five days of paid sick leave per year, and employers with fewer than ten employees must provide up to three days of paid sick leave per year.[26] An employee must work at least 80 hours in Newark in a single calendar year to obtain the paid leave.[27]

Under the Newark Law employees' usage of leave and carryover of unused, accrued leave from one year to the next is capped at 40 hours per year. In lieu of carryover, employers can opt to pay employees the cash value of any accrued, unused leave at the end of the year.[28]

IV. Early Frontrunners of Paid Sick Leave Activism

A. San Francisco, CA

Other states and cities' legislative activism on paid sick leave may have helped pave the way for the recent wave of activism in the New York metropolitan area. On February 5, 2007, the San Francisco Paid Sick Leave Ordinance (the "SF Law") became the first operative paid sick leave law.[29] Under the SF Law, employees who perform more than 56 hours of work in San Francisco in a calendar year, regardless of employers' location or size, accrue one hour of paid leave for every 30 hours worked.[30] For employers with fewer than ten employees (defined as "small businesses"), employees' accrual is capped at 40 hours. For employers with ten or more employees, employees' accrual is capped at 72 hours.[31]

In addition, under the SF Law, employees' unused, accrued paid leave carries over from one calendar year to the next, but this carryover is capped at the maximum number of hours that employees can accrue.[32]

B. Washington, DC

The Washington, DC Accrued Sick and Safe Leave Act (the "DC Law"), with an effective date of November 18, 2008, was the next paid sick leave law to become operative.[33] Under the DC Law, employers with 100 or more employees must provide employees one hour of paid leave for every 37 hours worked, of up to seven days per calendar year. Employers with at least 25, but not more

than 99 employees, must provide employees one hour of paid leave for every 43 hours worked, up to five days per calendar year. Finally, employers with 24 or fewer employees must provide employees one hour of paid leave for every 87 hours worked, up to three days per calendar year.[34]

The DC Law covers employees who spend more than 50% of their time working in the District of Columbia, regardless of employers' size or location.[35] Under the DC Law, employees' unused, accrued leave carries over from one calendar year to the next, with no cap.[36] The DC Law does, however, limit employees' usage of paid leave to the maximum number of hours that employees can accrue per calendar year.[37]

C. Connecticut

The Connecticut Paid Sick Leave Law (the "Conn. Law"), which became effective on January 1, 2012, is currently the only statewide mandatory paid sick leave law. The Conn. Law mandates that employers with 50 or more employees in the state provide employees who are service workers[38] one hour of paid sick leave for every 40 hours worked, up to 40 hours per year.[39] Employees must work 680 hours in Connecticut during the calendar year to be eligible to use accrued leave.[40] Under the Conn. Law, employees' usage of leave and carryover of accrued, unused paid sick time from one calendar year to the next is capped at 40 hours per year.[41]

D. Seattle, WA

The next effective paid sick leave law was Seattle's Paid Sick and Safe Time Act (the "Seattle Law"), which became operative on September 1, 2012.[42] Under the Seattle Law, employers with more than four and fewer than 250 employees must provide employees one hour of paid leave for every 40 hours worked.[43] Employers with more than 250 employees must provide employees one hour of paid leave for every 30 hours worked.[44] The Seattle Law covers employees who work at least 240 hours in Seattle in a calendar year for employers with five or more employees, regardless of the employers' location.[45]

The Seattle Law does not limit employees' accrual of paid leave. Although employees are allowed to carry over their accrued, unused leave from one calendar year to the next, there is a carryover cap, which varies between 40 and 72 hours, depending upon the employer's size.[46] The Seattle Law also establishes usage caps, which generally match the accrual caps.[47] The Seattle Law also requires employers to give employees notification, either by paystub or online, of their available paid sick and safe leave each time wages are paid.[48]

E. Portland, OR

In addition to the new legislation in the New York metropolitan area, Portland's Protected Sick Time Law is another new ordinance, becoming effective on January 1, 2014 (the "Portland Law").[49] Under the Portland Law, employers with six or more employees must provide their employees one hour of paid sick leave for every 30 hours worked. Employers with five or fewer employees must provide their employees one hour of unpaid sick leave for every 30 hours worked.[50]

The Portland Law covers employees who perform any work within Portland's city limits, regardless of the employer's location; however, employees are only eligible to begin using accrued leave when they have worked within Portland's city limits for at least 240 hours in a calendar year.[51] The Portland Law establishes accrual, usage and carryover caps for employees, all of 40 hours per year.[52]

IV. A Future Common Ground

As evidenced by the above, the frontrunners of paid sick leave activism have enacted patchwork, widely varied legislation which differs with respect to coverage, accrual, and usage. Notwithstanding these differences, this legislation, at baseline, evidences a common desire for employees to have access to paid sick leave, a desire that is echoed by the paid sick leave legislation current pending in roughly 20 states,[53] as well as the Healthy Families Act, which has recently received additional support.[54] The growing statewide push for paid sick leave legislation and renewed support for the Healthy Families Act arguably indicates a trend towards more widespread support for such laws, and corresponding turn away from preemption efforts.

Notwithstanding this apparent trend, it is unlikely the Healthy Families Act will be passed in 2014, opening the door for additional, piecemeal legislation at the city and state level, and perpetuating the employer headaches associated with the compliance obstacles of these laws. Moreover, even if federal legislation is passed in the future, it is doubtful that it will preempt existing state and city laws, but rather, like the federal and state WARN laws, it will just create yet another layer of regulatory compliance imposed on employers.

Endnotes

1. In May 2011, Senator Thomas Harkin and Representative Rosa DeLauro introduced the Healthy Families Act in the Senate and House of Representatives, respectively. S. 984, H.R. 1876 (112th Cong.). The Act would require that employees of employers with at least 15 employees accrue paid sick leave at the rate of one hour for every 30 hours worked, up to 56 hours per calendar year. The Act died in Committee, but was reintroduced in mid-March 2013. S. 631, H.R. 1286 (113th Cong.). After its re-introduction, the Act was referred to Committee, but to date, no official action has been taken, and the future of the Act in 2014 remains uncertain.
2. Fact Sheet, *Institute of Women's Policy Research* (March 2014), http://www.iwpr.org/publications/recent-publications.
3. H.F. 149 85th Iowa Leg. Sess. § 4.
4. A3894-2013, S2626-2013, 236th N.Y. Leg. Sess. § 173.
5. *Id.* Employees of employers with fewer than 10 employees are capped at 40 hours per year, whereas all other employees are capped at 80 hours per year.

6. Similar preemption laws are currently pending in three additional states—Michigan, Oklahoma, and Pennsylvania.
7. La. Rev. Stat. Ann. § 23:642.A.(3).
8. In 2008, the city of Milwaukee, WI enacted a mandatory paid sick leave law. *See* Milwaukee, Wis. Ordinance 080420 (Nov. 12, 2008). Despite withstanding the state government's initial efforts to block the law, s*ee Metro. Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*, 798 N.W.2d 287, 294 (Wis. Ct. App. 2011), a May 2011 state statute ultimately preempted the city law, thereby forcing city legislators to repeal its paid sick leave law. *See* Wis. Stat. Ann. § 103.10.
9. As discussed in further detail below, the majority of the paid sick leave legislation requires that employees have worked a set number of hours within the pertinent state or city in order to be eligible for paid sick leave.
10. For example, Seattle's Paid Sick and Safe Time Act requires employers to give employees notification, either by paystub or online, of their available paid sick and safe leave each time wages are paid. *See* Seattle Municipal Code, § 14.16.030(K).
11. Jersey City currently has a paid sick leave ordinance in effect, and Newark enacted a paid sick leave ordinance earlier this year, which is expected to become effective in May or June 2014. *See infra* Sections 3.A. and 3.C. below for more details.
12. Jersey City, N.J., Ordinance 13.097 § 3-52.A.1-2; Newark, N.J. Ordinance 13-2010 § 1.3(1)-(3).
13. Newark, N.J. Ordinance 13-2010 § 1.3(1)-(3).
14. Jersey City, N.J., Ordinance 13.097 § 3-52.9.
15. *Id.* at § 3-52.A.1-2.
16. *Id.* at § 3-52.B.1-2.
17. *Id.* at § 3-50.
18. *Id.* at § 3-52.A.6 and B.6.
19. *Id.*
20. N.Y.C. Admin Code § 20-913.a.1. and § 20-913.b.
21. *Id.* at § 20-913.b. In addition, employers with one or more domestic workers who have worked for the employer for at least one year and work more than 80 hours a calendar year must provide their employees with up to two days of paid sick leave per calendar year. *Id.* at § 20-913.d.2.
22. *Id.* at § 20-912.f.
23. *Id.* at § 20-913.h.
24. *Id.*
25. Newark, N.J. Ordinance 13-2010 § 1.14.
26. *Id.* at § 1.3(1)-(3).
27. *Id.* at § 1.1(4).
28. *Id.* at § 1.3(7).
29. San Francisco Administrative Code, § 12W, et seq.
30. City and County of San Francisco, Office of Labor Standards Enforcement, Rules Implementing the San Francisco Paid Sick Leave Ordinance, Rule 6.1-6.4.
31. S.F. Admin. Code § 12W.3(c).
32. *Id.*
33. Washington D.C. Administrative Code § 32.131.01-32.131.17, as amended by District of Columbia Act 20-259. The amendment to the DC Law, effective February 22, 2014, added certain categories of employees who had previously been excluded from the DC Law's purview to now be included in the DC Law's protections.
34. *Id.* at § 32.131.02(a)(1)-(a)(3).
35. *Id.* at § 32.131.01(2)(A).
36. *Id.* at § 31.131.02(c)(2).
37. *Id.*
38. The Conn. Law specifically lists who is considered a service worker—those who fall within the listed occupation codes, as defined by the federal Bureau of Labor Statistics Standard Occupational Classification System. *See* Conn. Gen. Stat. § 31-57r(7).
39. *Id.* at § 31-57s(a).
40. *Id.* at § 31-57s(b).
41. *Id.* at § 31-57s(a).
42. Seattle Municipal Code, § 14.16.010, et seq.
43. *Id.* at §§ 14.16.020(B)(1), 14.16.010(T).
44. *Id.* at §§ 14.16.020(B)(2), 14.16.010(T).
45. *Id.* at § 14.16.010(J).
46. Employers with more than four and fewer than 50 employees are referred to as "Tier One" employers. Employers with at least 50, but fewer than 250 employees, are referred to as "Tier Two" employers. Employers with 250 or more employees are referred to as "Tier Three" employers. *See id.* at § 14.16.010(T). Tier One employees are subject to a 40 hour carryover cap, Tier Two employees are subject to a 56-hour carryover cap, and Tier Three employees are subject to a 72-hour cap. *Id.* at § 14.16.020(G).
47. However, employees of Tier Three employers are subject to one of two usage caps: 1) where an employer maintains a sick and safe leave policy, which is separate from a vacation policy, employees can use up to 72 hours of paid sick and safe leave per calendar year; or ii) where an employer maintains a universal leave policy, employees can use up to 108 hours of paid leave per calendar year. *See id.* at §§ 14.16.020(C); 14.16.020(I).
48. *Id.* at §14.16.030(K).
49. Code of the City of Portland, § 9.01.010, et seq.
50. *Id.* at § 9.01.030(A)-(B).
51. Once an employee becomes eligible to use accrued leave, the employee remains eligible to accrue leave in subsequent years, regardless of the number of hours worked. *See id.* at § 9.01.040(A).
52. *Id.* at §§ 9.01.030 (F)-(G), 9.01.040(C)(3).
53. The paid sick leave laws currently in effect also have some significant substantive commonalities. For instance, all allow employers with a paid leave policy, such as PTO, equal to or more generous than the respective law's requirements to forgo offering additional leave to employees, provided that time can be used under the same conditions and for the same purposes. In addition, all permit an employer to require employees to provide advance notice of the use of paid sick leave, typically between seven and ten days, when the absence is foreseeable. If the absence is not foreseeable, the employees typically must provide notice of the leave "as soon as practicable." Furthermore, when an employee uses paid sick leave on more than three consecutive days, employers under all eight laws can require that the employee provide "reasonable documentation" that the sick time was used for a permissible purpose. "Reasonable documentation" includes, for example, a note from a health care professional indicating that paid sick time is necessary.
54. In the House, the Healthy Families Act has 126 co-sponsors, nine of whom just became co-sponsors in 2014. H.R. 1286 (113th Cong.).

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Unpacking the Employment Implications of *Comcast Corp. v. Behrend*: The Second Circuit Prepares to Dive In

By Lisa E. Cleary, Helen O'Reilly and Adam Pinto

Class actions (and even the threat thereof) are one of the most powerful tools wielded by plaintiffs in employment matters. Much to the dismay of many plaintiff-side attorneys, recent Supreme Court decisions have made it significantly harder for plaintiffs to certify classes. The Court's watershed 2011 opinion in *Wal-Mart Stores, Inc. v. Dukes* heightened the threshold for certification generally and specifically under Fed. R. Civ. P. 23(b)(2).[1] And, describing class actions as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Wal-Mart* appeared to signal that the Supreme Court would be taking a more rigorous approach to class certification generally.[2] This was confirmed last year in *Comcast Corp. v. Behrend*, a case in which the Supreme Court held that the predominance requirement of Fed. R. Civ. P. 23(b)(3) had not been met and vacated the lower court decisions certifying the class.[3]

Justice Scalia's majority opinion in *Comcast* emphasized that the predominance requirement cannot be satisfied where "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."[4] That statement left lower courts to determine when and in what circumstances questions of individual damage calculations are so "overwhelming" that they defeat common questions of law or fact. Seizing on the Supreme Court's repeated emphasis on classwide adjudication as a limited, procedural exception to individualized determinations, some have argued that *Comcast* severely limits instances in which class certification is appropriate, particularly in cases where damages awards will vary widely based on the individual circumstances of different plaintiffs. But others caution that an overly broad interpretation of *Comcast*'s admonition would effectively eliminate classwide relief—even when the questions of liability are overwhelmingly common.

This battle of interpretation is currently being played out in the lower courts. In a pair of wage-and-hour cases, two New York district courts in the Second Circuit recently relied on *Comcast* to reach different conclusions on similar sets of facts. In *Roach v. T.R. Cannon Corp.*, plaintiffs alleged that an Applebee's franchisor violated the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (FLSA), and the New York Labor Law §§ 650 *et seq.* (NYLL) by (among other things) failing to make "spread of hours" payments.[5] Relying on *Comcast*, the Northern District declined to certify the class in light of the highly individualized damages for each plaintiff. In *Jacob v. Duane Reade*, the Southern District reached a different conclusion when faced with similar facts.[6] There, the plaintiffs also alleged FLSA and NYLL violations. Though the court concluded that damages could not be assessed on a classwide basis, it permitted the class action to proceed on liability rather than deny certification outright. In both *Roach* and *Jacob*, the losing parties appealed the decision to the Second Circuit.

In October 2013, the Second Circuit agreed to hear the two cases in tandem, indicating that it intends to shed light on the proper interpretation of *Comcast* in wage-and-hour class actions in its Circuit.[7]

I. Did Comcast Add a Damages Model Requirement to Rule 23(b)(3)?

Class certification is governed by Federal Rule of Civil Procedure 23. A party seeking class certification has the burden to prove that the four prerequisites of Rule 23(a) are satisfied: numerosity, commonality, typicality, and adequacy of representation.[8] It then must prove that the proposed class falls within one of the three categories of Rule 23(b).[9] If none of the elements of Rule 23(b) have been satisfied, certification must be denied.[10] To certify a damages class under the third category, Rule 23(b)(3), a plaintiff must prove that common issues predominate and that the proposed class action is superior to other available methods for adjudicating the controversy. To satisfy the predominance requirement, "questions of law or fact common to class members [must] predominate over any questions affecting only individual members."[11]

In *Comcast*, plaintiff consumers brought an antitrust class action against a cable provider under Rule 23(b)(3). Plaintiffs alleged that Comcast obtained (or attempted to obtain) a monopoly in sixteen counties across Pennsylvania, New Jersey, and Delaware in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1 *et seq.* The district court stated (and it was uncontested throughout the litigation) that plaintiffs had to show that "the damages resulting from that [antitrust] injury were measurable 'on a class-wide basis' through use of a 'common methodology.'"[12] At the district court level, plaintiffs proposed four theories of antitrust impact, and plaintiffs' expert designed a regression model that calculated damages based on all four theories. But the district court only accepted one such theory—the "overbuilder" theory. Critically, plaintiffs' expert acknowledged that the model did not isolate damages resulting only from this theory. Despite this acknowledged limitation, the district court certified plaintiffs' class under Rule 23(b)(3), rejecting defendants' argument that the model's shortcomings were fatal to

class certification.[13] A divided Third Circuit panel affirmed, concluding that Comcast's "attack[] on the merits of [plaintiffs'] methodology [had] no place in the class certification inquiry."[14]

The Supreme Court granted certiorari. In its 5-4 decision, Justice Scalia's majority opinion reiterated the Court's admonition from *Wal-Mart Stores* that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only'…. To come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23."[15] To determine whether this requirement is met, the Court instructed lower courts to engage in "a rigorous analysis" of the plaintiff's evidence; it added that "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."[16]

Applying this standard to the facts at issue, the Court held that the class was improperly certified. The majority opinion concluded that plaintiffs' damages model fell "far short of establishing that damages [were] capable of measurement on a classwide basis."[17] Since the regression model did "not even attempt" to measure damages resulting from the "overbuilder" antitrust injury, accepting such a model would mean that "at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be."[18] Allowing this would, according to the Court, reduce Rule 23(b)(3)'s predominance requirement to "a nullity."[19]

The Court's opinion provoked a strong dissent, jointly authored by Justices Ginsburg and Breyer and joined by Justices Kagan and Sotomayor. The dissenting justices tried to minimize the reach of the majority's holding, arguing that the majority's opinion "breaks no new ground on the standard for certifying a class action under [Rule] 23(b)(3)."[20] And anticipating the potentially broad implications of the majority's holding, the dissent underscored that "the [majority] decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a classwide basis.'"[21]

II. A Split Within the Second Circuit

Federal courts construing *Comcast* have offered inconsistent views as to whether, and under what circumstances, individualized damages issues preclude class certification. The class-certification decisions applying *Comcast* can be broken down into three groups: (1) those distinguishing *Comcast* and finding a common damages formula that satisfies the predominance requirement, *see, e.g.*, *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 511 (9th Cir. 2013); (2) those applying *Comcast* and rejecting class certification because no common damages formula exists, *see, e.g.*, *Roach v. T.L. Cannon Corp.*, No. 3:10 Civ. 0591 (TJM) (N.D.N.Y. Mar. 29, 2013); and (3) those that maintain class certification as to liability only, leaving damages for a separate, individualized determination; *see, e.g.*, *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013). The *Roach* and *Jacob* cases, both of which are fully briefed on appeal at the Second Circuit and which that court will decide in tandem, highlight the divergent interpretations *Comcast* has spawned.

A. *Roach v. T.L. Cannon Corp.*

In *Roach v. T.L. Cannon Corp.*, current and former employees of Applebee's alleged a series of violations of the FLSA and NYLL. Most relevant to *Comcast* was plaintiffs' "spread of hours" claim under the NYLL. Plaintiffs asserted that they did not receive an additional hour of pay at the minimum wage on any day in which their work extended over a period of 10 hours, something required by the NYLL until January 1, 2011. Though the magistrate judge recommended certifying the "spread of hours" class, Judge McAvoy held that the class could not be certified in the wake of *Comcast*. Finding that individualized questions predominated regarding which employees were owed spread of hours payments and on which occasions they earned those payments, the court held that class certification was improper because individual damages calculations would overwhelm any common questions.

In their appellate briefing to the Second Circuit, plaintiffs emphasize that *Comcast* was an antitrust matter, not an employment matter, in which plaintiffs conceded that class certification depended on a classwide damages model—something unique to that case and not a new prerequisite for Rule 23(b)(3) certification.[22] To hold that such a model was required for 23(b)(3) certification in all contexts, as the district court did, would alter a "basic tenet of class-action jurisprudence."[23] And because plaintiffs' damages theory (that they were owed spread-of-hours wages) was tied directly to their theory of liability (that those wages were unlawfully denied), they argue that *Comcast* poses no impediment to class certification.[24]

The National Employment Lawyers Association (NELA) filed an *amicus* brief in support of plaintiffs' appeal. NELA states that the interpretation of *Comcast* adopted by the *Roach* court would be the "stake in the heart" for class actions generally, and for wage-and-hour class actions in particular.[25] Further, because individualized inquiries like those in *Roach* are often required when employers fail to maintain time records, affirming the case would provide incentives to keep inaccurate records.[26]

B. *Jacob v. Duane Reade, Inc.*

The Southern District of New York reached a different conclusion after considering a similar set of facts. Prior to the Supreme Court's decision in *Comcast*, the Southern District had granted Rule 23 class certification to plaintiffs

claiming that Duane Reade had misclassified pharmacy assistant store managers as exempt from FLSA overtime requirements.[27] On a motion for reconsideration, the court partially decertified the class, finding that the Supreme Court's opinion in *Comcast* meant that the class must be decertified for damages purposes, although it could remain certified as to liability.[28] The court concluded that it had the authority to bifurcate adjudication of liability and damages by limiting its class certification order to a liability-only class under Rule 23(c)(4).[29] It stated that doing so was appropriate in cases in which individualized proof of damages could overwhelm common questions to defeat predominance under Rule 23(b)(3).[30] Although Judge Oetken recognized a disagreement among the circuits as to the use of this approach,[31] he noted that *Comcast* does not foreclose the possibility of certifying a liability-only class under Rule 23(c)(4) and that damages questions would prevent classwide treatment of the vast majority of employment class actions. The court further explained:

> Rule 23(c)(4) cannot cure every ill that troubles a putative class. It can, however, serve as a useful and fair case management tool where (1) damages track liability in the manner contemplated by Comcast; (2) Rule 23(a) and (b) are satisfied as to common issues; and (3) individualized issues of proof predominate over a discrete, uncommon issue, such as damages, and due process impels that a defendant have the opportunity to respond to such individual positions.[32]

On appeal, appellants take issue with this approach. Although acknowledging that the Second Circuit has in the past looked favorably on the use of (c)(4) classes[33] appellants and their amicus argue that this approach is impermissible in the wake of *Comcast* and *Wal-Mart Stores*. According to appellants, once the District Court determined that Named Plaintiffs' claims as a whole did not satisfy Rule 23(b)(3)'s predominance requirement and thus that "certification of [the] class for all purposes would be inappropriate," the District Court had no choice but to deny class certification in light of the Supreme Court's holding in *Comcast*.[34]

III. What Will the Second Circuit Do?

While it is impossible to predict how the Second Circuit will interpret *Comcast* when it decides *Roach* and *Jacob* in the coming months, the views of the case detailed above offer a look at some possible approaches. If the Second Circuit reads *Comcast* broadly and states that these cases present facts under which individualized damages issues overwhelm any common questions, it may limit the availability of wage-and-hour class actions or force an increasing reliance on bifurcation of these class actions into liability and damages phases. A more narrow reading of *Comcast*, however, as a case that simply requires that some classwide damages model exist—not that the model be deployable in the same manner for every plaintiff—may also suffice. In a simple unpaid wages case, for example, a sufficient "model" could be: (unpaid hours worked by each employee) X (rate of pay for each employee) = damages. Though the model will provide different results for each individual employee, it would operate in the same way for each class member, and calculating individual damages would be a ministerial task. Requiring a model of this sort would not doom wage-and-hour class actions, though it could make things more challenging for plaintiffs attempting to certify more complex class actions involving discrimination or other fact-intensive claims. Finally, the Second Circuit could apply a very narrow reading of *Comcast* and simply require that plaintiffs' damages theory be tied to their liability theory, something that would pose little obstacle for employment class actions.

Whatever the Second Circuit decides, it is clear that the heady days of easily obtaining class certification are now gone. In cases in which the facts result in plaintiffs being situated differently, class certification is increasingly likely to be out of reach for plaintiffs. And the stakes are high for all involved. Class certification "turns a $200,000 dispute…into a $200 million dispute…and may induce a substantial settlement even if the [plaintiff's] position is weak," while the denial of class certification "may sound the 'death knell' of the litigation on the part of plaintiffs."[35] The Second Circuit's ruling is sure to be closely watched, as it will powerfully affect both plaintiffs and defendants in putative employment class actions.

Endnotes

1. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011).
2. *Id.* (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).
3. 133 S. Ct. 1426 (2013).
4. *Id.* at 1433.
5. *Roach v. T.L. Cannon Corp.*, No. 10 Civ 0591 (N.D.N.Y. Mar. 29, 2013).
6. *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013).
7. Oral argument, which had been scheduled for May 14, 2014, has been adjourned and not yet re-scheduled (as of April 1, 2014).
8. Fed. R. Civ. P. 23(a).
9. *Wal-Mart Stores*, 131 S. Ct. at 2548-49.
10. Rule 23(b)(1) allows an action to be maintained as a class action if "the prosecution of separate actions by or against individual members of the class would create the risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class." Fed. R. Civ. P. 23(b)(1). And Rule 23(b)(2) allows a class to be certified if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Id.* 23(b)(2).
11. Fed. R. Civ. P. 23(b)(3).

12. *Id.* at 1430 (citation omitted).
13. *Id.* at 1431.
14. *Behrend v. Comcast Corp.*, 655 F.3d 182, 207 (3d Cir. 2011).
15. *Comcast*, 133 S. Ct. at 1432 (citations omitted).
16. *Id.*
17. *Id.* at 1433.
18. *Id.* (emphasis in original).
19. *Id.*
20. *Id.* at 1436 (Ginsburg J. and Breyer J., dissenting).
21. *Id.*
22. Appellant's Br. 1, 20-21.
23. *Id.* at 14.
24. *Id.* at 20.
25. NELA Brief at 3.
26. *Id.* at 22-23.
27. *Jacob v. Duane Reade*, 289 F.R.D. 408, 413-18 (S.D.N.Y. 2013) (*Jacob I*).
28. *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013) (*Jacob II*).
29. Rule 23(c)(4) states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4).
30. *Jacob II*, 293 F.R.D. at 588-89.
31. *Id.* at 585-86.
32. *Id.* at 589.
33. *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) ("a court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement.").
34. Defs. Appellants Br. and Special App. at SA-57.
35. *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001).

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Data Breach? The Best First Responder Is a Law Firm

By Scott Aurnou

News reports and articles concerning high profile data breaches have been hard to miss in recent months. The highly publicized cyber attacks against Target,[1] Neiman Marcus[2] and Las Vegas Sands[3] are just a taste of what's to come.

As you might expect, a data breach—high profile or not—can be a nasty surprise to deal with. In addition to potentially negative publicity (sometimes *very* negative), there are often significant costs associated with a breach. These include forensic analysis of the victimized organization's electronic systems to figure out what happened, taking steps to fix the problem, notifying clients / customers that their data has been potentially compromised, possible statutory fines, and extra costs like credit monitoring services for the affected clients and / or customers and engaging public relations and crisis management firms to try to mitigate the damage done to the organization's brand.

Upon discovery of a data breach, it may seem natural for an organization to contact forensics and security experts (and possibly other vendors) immediately in an effort to sort out the inevitable problems ahead. But that's actually a mistake. A breached organization's *first* call should be to an outside law firm with cybersecurity expertise. Doing so can greatly mitigate an organization's ultimate exposure, not only by ensuring that the seemingly endless patchwork of state, federal and perhaps international laws are properly addressed, but also for two critical and frequently overlooked reasons: (1) attorney client privilege; and (2) the work product protection.

What Is the Lawyer's Role?

In recent years, data breaches have also increasingly led to lawsuits (Target already has plenty[4]). Engaging an outside law firm with cybersecurity expertise at the outset of a breach will preserve privilege in the face of those lawsuits. Otherwise, every panicked email, detailed investigative report and potentially embarrassing internal memo could be subject to discovery in a subsequent government investigation or lawsuit and in the hands of class action plaintiffs' attorneys determined to make that organization pay. On the other hand...

If a data breach victim starts by retaining an outside law firm (a number of firms even have dedicated data breach response teams), that firm can then hire the information security, computer forensics, public relations and crisis management firms needed to address, analyze and recover from the attack. Attorney-client privilege will protect the organization struck by the data breach from the discovery process during a subsequent investigation or any ensuing litigation.

Attorney Roberta Anderson, a partner with K&L Gates' cybersecurity practice group, agrees: "A company's decision to retain outside counsel at the outset is critical, since the results of a breach investigation may be pivotal in avoiding or minimizing liability in subsequent litigation and regulatory investigations." She adds that a company "must be vigilant to ensure those results are protected from discovery."

Likewise, the communications and materials exchanged between lawyers and the various firms they engage on a victimized company's behalf would be protected from discovery as attorney work product or material prepared in anticipation of litigation. On the other hand, direct communications, reports, presentations and other materials exchanged between the company and any forensic, security or other firms it may engage directly will not have those protections to a large extent.

As a result, the crisis management, forensic, security and other personnel working to help the victimized organization recover from the attack can be compelled to turn over investigative reports, correspondence and other materials revealing inadequate security practices and / or procedural mistakes that can be used against it in court (or to exact a larger settlement from the organization). Anderson adds that "the retention of outside counsel sends a clear message that the company sought advice in anticipation of potential litigation."

A Caveat

While any attorney-client relationship can give rise to the aforementioned privilege protections, a law firm that doesn't actually have the proper cybersecurity expertise can both exacerbate the damage suffered by the victimized organization and expose itself to liability—malpractice and otherwise—for any additional harm arising out the mishandling of the breach response (typically a fast-moving situation that can go wrong in more than a few ways).

What if an Organization Has Its Own In-House Counsel?

If an organization has in-house legal counsel, you may be wondering if its communications with internal or external IT, security or forensic personnel would be entitled to the same protections. It's *possible*, though a number of courts have limited the scope of privilege for those types of communications. In *Upjohn Co. v. United States*,[5] the U.S. Supreme Court ruled that the communications *could* be privileged if 1) the communications pertain to matters within the scope of the employee's corporate duties, and 2) the employee is aware that the information is being

furnished to the attorney to enable him or her to provide legal advice to the corporation. While this may sound sufficient, a number of courts have construed the privilege more narrowly with respect to in-house counsel. For example, the New York Court of Appeals has reasoned that it should be limited[6] if the counsel has both legal and business responsibilities within the company and the advice is part of an ongoing business relationship (as opposed to periodic requests for legal advice). The short answer is: it's probably not worth the risk. If a court rules against the victimized organization in subsequent litigation, it could have a tremendous (and expensive) effect on the outcome of the lawsuit.

"The risk may be amplified in a data breach case," Anderson notes, "given the technical issues associated with figuring out what happened, which could strike a court as more 'business' than 'legal.'"

Not Just in Response to a Breach

In addition to those potentially chaotic hours immediately after a data breach has been discovered and the subsequent investigation, attorney-client privilege can also serve to shield communications and associated materials with respect to security-related compliance and due diligence practices under various state and Federal laws, rules and regulations. It can also be used with respect to compliance with industry standards like the Payment Card Industry Data Security Standard (aka PCI DSS), as well as the negotiations for and purchase of cyber liability insurance coverage. That way, an organization can limit its disclosures to what is required by law, rather than being subject to potential "fishing expeditions" in the future. Anderson adds that "outside counsel can assist in preserving information that will assist the company, while avoiding the potential spoliation issues—and considerable potential sanctions—that can be especially prevalent when companies are dealing with electronic records."

It's critical for any organization with the potential to suffer a data breach (i.e., *every* organization) to understand the potential impact of the first phone call after a data breach is discovered.[7] Going through an outside law firm with the proper cybersecurity expertise will allow those organizations a measure of control over potentially damaging information that can be used against them in subsequent litigation. Control they won't be able to get back later.

Endnotes

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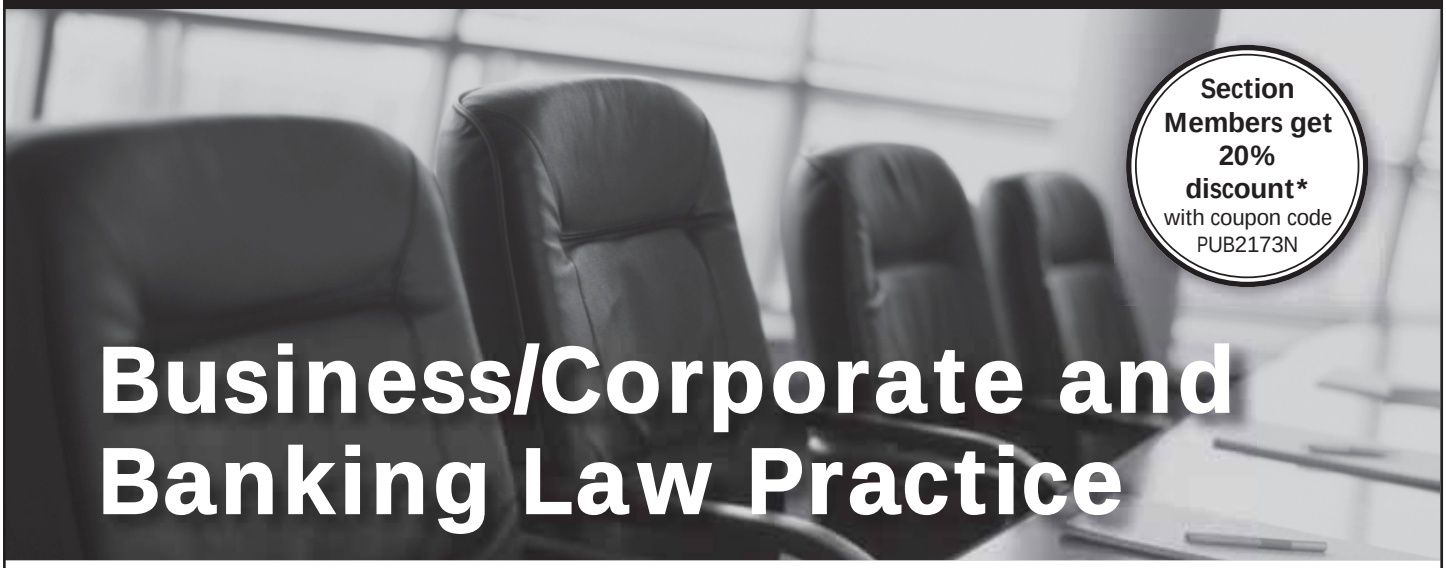

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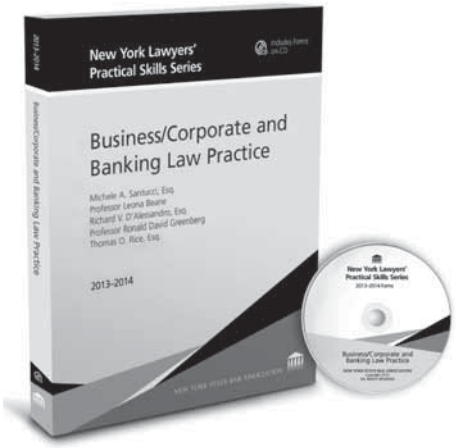

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ISSN 0736-0150 (print) 1933-8597 (online)

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