WEIL GOTSHAL

Employer Update

Summer 2008

In This Issue

New Federal Law Prohibits Discrimination Based on Genetic Information

By Mark A. Jacoby and Jessica Marshall Glatt

On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act of 2008 ("GINA"), which prohibits discrimination by employers, employment agencies, labor organizations and health insurers on the basis of genetic information. The law takes effect in stages, with the health insurance provisions becoming effective in 12 months and the employment discrimination provisions becoming effective in 18 months.

Currently, 34 states, including New York,[1] have laws that prohibit genetic discrimination in the workplace. GINA will not preempt state laws that offer stronger protections.

Under GINA, "genetic information" is defined as: information about

i. [an] individual's genetic tests,

ii. the genetic tests of family members of [an] individual, and

iii. the manifestation of a disease or disorder in family members of [an] individual.

Employment Discrimination

Title II of GINA, governing employment discrimination, prohibits employers and employment agencies from discriminating based on genetic information in hiring, termination, compensation and other personnel practices. Employers and employment agencies are further prohibited from limiting, segregating or classifying employees in a way that would deprive the employee of employment opportunities based on genetic information. Additionally labor organizations may not exclude, expel or otherwise discriminate against individuals based on genetic information.

GINA also prohibits employers, employment agencies and labor organizations from requesting, requiring or purchasing the genetic information of an employee or of an employee's family member unless it falls within one of five exceptions such as where the information is necessary to comply with the certification provisions of the Family and Medical Leave Act or where the information will be used for monitoring of the hazardous effects of toxic substances in the workplace.

Employers, labor organizations and joint labor-management committees also are prohibited from discriminating against individuals based on genetic information in admission to or employment in training, retraining and apprenticeship programs.

As an additional precaution, GINA requires that genetic information possessed by employers be maintained confidentially and on separate forms in separate medical files. Such information may be disclosed only to the employee or in certain limited situations permitted by law.

GINA contains several provisions that were designed to limit the potential for litigation. For example, a "water-cooler" exception protects employers who inadvertently come across genetic information about an employee, such as through the obituary of an employee's family member who had a genetic disease.

In general, GINA's employment discrimination prohibitions will be enforced under the remedies and enforcement mechanisms of Title VII of the Civil Rights Act of 1964 for those employers governed by Title VII. However, GINA contains several provisions that were designed to limit the potential for litigation. For example, a "water-cooler" exception protects employers who inadvertently come across genetic information about an employee, such as through the obituary of an employee's family member who had a genetic disease. Furthermore, GINA is limited to acts of intentional discrimination. Thus, GINA expressly provides that "disparate impact" is not recognized as a cause of action.

Health Insurance Discrimination

Title I of GINA, prohibiting discrimination on the basis of genetic information in health insurance, applies to group health plans, individual plans and Medicare supplemental plans. Specifically, GINA prohibits enrollment restrictions and premium adjustments based on genetic information or genetic services; prohibits health plans and insurers from requesting or requiring genetic testing; and covers all health insurance plans, including those under the Employee Retirement Income Security Act of 1974 (ERISA), state-regulated plans, and individual plans.

GINA permits the labor secretary to impose a penalty of $100 a day per participant or beneficiary on plan sponsors of group health plans or health insurance issuers offering coverage in connection with the plan who violate the law. The penalty jumps to $2,500 per participant or beneficiary if the violation is not corrected. If violations over the course of a year are found to be more than de minimis, the penalty increases to $15,000 per participant or beneficiary. However, GINA provides that penalties are mitigated or inapplicable in various circumstances – for example, where a person exercising reasonable diligence would not have known that a compliance failure existed, or where the failure was due to reasonable cause and not to willful neglect and is corrected within 30 days of its discovery or when it reasonably should have been discovered.

GINA will also amend privacy regulations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) by requiring that genetic information be treated as health information and mandating that use or disclosure will not constitute a "permitted use or disclosure" under HIPAA regulations.

As noted above, GINA's employment provisions will go into effect in 18 months, and its health insurance provisions will go into effect for plan years beginning 12 months after enactment. This should provide employers and insurers ample time to make sure they are in compliance with the law. Furthermore, government agencies such as the Equal Employment Opportunity Commission and the Department of Labor are required to promulgate regulations implementing the law in the next year, which will provide clearer guidance for employers, insurers, and their attorneys.

In the interim, employers are advised to refrain from asking employees about genetic testing or test results. Employers also should refrain from asking whether a condition runs in the family and should keep confidential any genetic information about employees that is in their possession. Employers also are advised to update their employee handbooks and HR manuals to add the prohibition of employment discrimination on the basis of genetic information as well as to review their practices and policies regarding medical information and/or company-sponsored wellness programs to make sure they are in compliance with GINA. Employers also should confirm that they are in compliance with HIPPA. Finally, employers would be well advised to add information concerning the requirements of GINA to their training programs.

The law takes effect in stages, with the health insurance provisions becoming effective in 12 months and the employment discrimination provisions becoming effective in 18 months.

1 See N.Y. Civ. Rights Law §48-a ("no person who is otherwise qualified shall be denied equal opportunities to obtain and/or maintain employment and/or to advance in position in his job solely because said person has a unique genetic disorder…") and N.Y. Exec. Law §296 (prohibiting genetic discrimination in employment and prohibiting soliciting, requiring or administering genetic testing in employment unless pursuant to a specified exception).

FMLA Expanded To Accommodate Military Families

By Jeffrey S. Klein, Nicholas J. Pappas and Kenneth Gavsie

On January 28, 2008, President Bush signed into law the National Defense Authorization Act of Fiscal Year 2008 ("NDAA"), which expands coverage of the Family and Medical Leave Act of 1993 ("FMLA") to families of military personnel in two material respects. First, the new law extends the FMLA's entitlement of 12 weeks of leave from work to employees who experience a "qualifying exigency" relating to a family member's military service. Second, the law creates an entirely new category of FMLA leave called "servicemember family leave", which entitles eligible employees to 26 weeks of leave from work in order to provide care for a family member who has been injured during military service. Given the large number of employees who have family members who serve, or who have been injured, in U.S. conflicts overseas, employers need to be aware of and understand these recent changes to ensure compliance with the FMLA.

FMLA Background

Congress enacted the FMLA in 1993 for the purpose of balancing the demands of the workplace with the needs of families. Since that time, more than 50 million American workers have taken leave for family or medical reasons. Prior to the passage of the NDAA, the FMLA guaranteed "eligible" employees up to 12 weeks of job-protected, unpaid leave from their employment in any 12-month period for one or more of the following reasons: (1) the birth of a child of the employee; (2) the placement of a child with the employee for adoption or foster care; (3) the employee's spouse, child or parent has a serious health condition; or (4) the employee has a serious health condition. 29 U.S.C. §2612(1). An "eligible employee" is any employee of a covered employer who has been employed by the employer: (1) for at least 12 months; and (2) for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave. *Id*. at §2611(2)(A).

The FMLA will now provide for 12 weeks of job protected leave because of any "qualifying exigency" arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty in the Armed Forces.

During FMLA leave, an employer must continue a departing employee's health coverage under the employer's group health plan at the level and under the conditions coverage would have been provided were the employee not on leave. 29 U.S.C. §2614(c)(1). Upon completion of the FMLA leave, the employer also must restore the employee to the same position held prior to the employee's leave or to an "equivalent" position. *Id*. at §2614(a). It is unlawful for an employer to "interfere with, restrain, or deny the exercise of" these rights, and violators are subject to liability for backpay, liquidated damages and appropriate equitable relief. Generally, employers with 50 or more employees must comply with the FMLA, but the law also excludes from coverage employees at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50. *Id*. at §2611(2) & (4).

12 Weeks of Leave for a "Qualifying Exigency"

As noted above, the FMLA formerly contained four bases for eligible employees to receive 12 weeks of job-protected leave. As a result of the NDAA, the FMLA will provide for such leave on the following fifth basis:

> Because of any *qualifying exigency* arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.

29 U.S.C. §2612(a)(1)(E).

Currently, there is no definition for the term "qualifying exigency." Rather, Congress has instructed the Secretary of Labor to implement regulations to define the term. Depending upon the scope of the definition, employees may be able to use FMLA leave for myriad reasons relating to the active duty of a family member. For instance, U.S. Representative Jason Altmire (D) made the following statement concerning the qualifying exigency leave provision on the House Floor:

> This amendment allows the immediate family of military personnel to use [FMLA] time for issues directly arising from deployment and extended deployments. The wife of a recently deployed military servicemenber could use the [FMLA] to arrange for childcare. The husband of a servicemember could use the [FMLA] to attend pre-deployment briefings

and family support sessions. The parents of a deployed service-member could take [FMLA] time to see their raised child off or welcome them back home.

Notably, the amendment requiring employers to provide leave due to a "qualifying exigency" is *not* binding upon employers until the Department of Labor promulgates regulations defining that term.

Just as employees are required to provide advance notice to employers when requesting traditional FMLA leave when the necessity for such leave is foreseeable, so too employees will be required to provide "reasonable and practicable" notice to the employer in advance of taking leave due to a qualifying exigency. 29 U.S.C. §2612(e)(3). An eligible employee may elect, or an employer may require the employee, to substitute any accrued paid vacation leave, personal leave, or family leave of the employee for any part of the 12-week period of such leave. *Id.* at §2612(d)(2)(A).

26 Weeks of Servicemember Family Leave

The NDAA expanded the coverage of the FMLA by creating an entirely new type of extended leave called "servicemember family leave." This leave – unlike the "qualifying exigency" leave described above – became binding upon employers with the passage of the NDAA on January 28, 2008.

Servicemember family leave entitles an eligible employee, who is the spouse, son, daughter, or parent of a covered servicemember to a "total of 26 workweeks of leave during a 12-month period to care for the servicemember." *See* 29 U.S.C. §2612(a)(3). In addition – unlike all other forms of FMLA leave – servicemember family leave is also available to the "next of kin" of a covered servicemember – *i.e.*, the nearest blood relative of that servicemember. *Id.* at §2611(18). A "covered servicemember" is generally any member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing treatment or therapy for a serious injury or illness incurred while on active duty. *Id.* at §2611(16) & (19).

Perhaps the most generous feature of the servicemember family leave is its length of 26 workweeks. Such a lengthy period of leave has the potential to impose significant new burdens on certain employers. There are two limitations on servicemember family leave that may ease this potential burden. First, servicemember family leave is available during a single 12-month period only. 29 U.S.C. §2612(a)(3). Thus, if medical treatment of a covered service-member lasts more than 12 months, the employer need not provide an additional 26 weeks of service-member family leave in the next 12-month period. Second, employees are entitled to a "combined total of 26 workweeks" of FMLA leave – and may not exceed that amount during the 12-month period by combining servicemember family leave with other forms of FMLA leave. *Id.* at §2612(a)(4).

Eligible employees generally must provide at least 30 days' notice of their intention to take servicemember family leave whenever the necessity for such leave is foreseeable based on planned medical treatment. Eligible employees may elect, or an employer may require the employee, to substitute accrued paid leave for any part of the 26-week period of servicemember family leave. 29 U.S.C. §2612(d)(2)(B).

Servicemember family leave entitles an eligible employee who is the spouse, son, daughter, parent or next of kin of a covered servicemember to a total of 26 workweeks of leave during a 12-month period to care for an injured servicemember.

Impact on Employers

The new military family leave provisions of the FMLA will have an immediate and, in many cases, substantial impact on many employers. Employers may be concerned with their ability lawfully to terminate the employment of an individual who is on FMLA leave – particularly given the current state of the U.S. economy and the increasing number of employee layoffs and reductions-in-force. Federal regulations interpreting the FMLA state that an employee has "no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period." 29 C.F.R. §825.216(a). In other words, an employer may lawfully terminate the employment of an individual on FMLA leave for legitimate business reasons. However, if the employee challenges the dismissal as a violation of his or her FMLA rights, the employer will have the burden of proving that the employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to reinstatement. *See id.*

Employers covered by the FMLA should update their leave policies in light of the new military family leave provisions. Again, service-member family leave became effective on January 28, 2008, so eligible employees already are entitled to such leave. However, FMLA leave due to a qualifying exigency arising out of a covered family member's active duty will not become mandatory until the Department of Labor issues regulations defining a "qualifying exigency." The Department has not announced an expected date for promulgation of the new regulations, but given the significant number of U.S. military servicemembers that are currently on active duty or call to active duty status, the Department can be expected to act expeditiously on issuing the necessary regulations. Until such time as regulations are issued, employers may, but are not required to, provide leave due to a qualifying exigency.

New Law Restricts Employer Use of Social Security Numbers

By Jonathan Shiffman and Emily Friedman

The New York State legislature has passed a new law requiring employers to take steps to protect the confidentiality of employee social security numbers and to help prevent identify theft. Effective January 1, 2008, New York's "Social Security Number Protection Law[1]" restricts employers' use of social security numbers in the ordinary course of business and also mandates that employers provide safeguards to protect the privacy of their employees' social security numbers.

The law, which applies to "any person, firm, partnership, association or corporation,"[2] defines an individual's social security number as "the number issued by the federal social security administration and *any number derived from such number*."[3] It does not apply to any social security number that has been "encrypted."[4] Under the law, an employer is prohibited from:

- intentionally communicating to the public, "or otherwise making available" to the public, an employee's social security number;
- printing an employee's social security number on "any card or tag required for the [employee] to access products, services or benefits provided by the [employer]";
- requiring an employee to transmit his or her social security number over the internet, *unless* the internet connection is secure, or the social security account number is encrypted;
- requiring an employee to use his or her social security number to access an internet website, *unless* "a password or unique personal identification number or other authentication device is also required to access the internet website";
- printing an employee's social security number on materials mailed to an employee, *unless* state or federal law requires that the employee's social security number appear on the document mailed;[5]
- obtaining waivers from employees for use or disclosure of social security numbers.[6]

The law also lists the limited circumstances in which employers may make use of social security numbers. The law provides that employers may include employee social security numbers in "applications and forms sent by mail, including documents sent as part of an application or enrollment process, or to establish, amend or terminate an account, contract or policy, or to confirm the accuracy of the social security account number."[7] Equally important, the law does not prevent an employer's "collection, use, or release" of a social security number where: (i) it is required by state or federal law, (ii) it is used "for internal verification, fraud investigation or administrative purposes," or (iii) it is used for a "business function" that is specifically authorized by 15 U.S.C. 6802 (financial institutions' obligations with respect to disclosure of personal information).[8]

Because the law does not describe the requisite reasonable measures or safeguards that employers should implement, employers will have to arrive at cost effective, practical solutions that meet the law's legal standard.

The law also requires employers to take steps to limit disclosure of employees' social security numbers. Although the law does not mandate any particular methodology for limiting such disclosure, it does state that all employers having possession of employees' social security numbers "shall, to the extent that such number is maintained for the conduct of business or trade, take reasonable measures to ensure that no officer or employee has access to such number for any purpose other than for a legitimate or necessary purpose related to the conduct of such business or trade." Along the same lines, the law mandates that employers implement "safeguards" that are "necessary or appropriate to preclude unauthorized access to the social security numbers." The law does not, however, expressly detail what safeguards employers must take.[10]

Because the law does not describe the requisite reasonable measures or safeguards that employers should implement, employers will have to arrive at cost effective, practical solutions that meet the law's legal standard. For example, employers may want to consider taking the following steps to comply with the law:

- Explore the use of encryption techniques to ensure protection of social security numbers when they are not needed to accomplish a legitimate business objective.
- Take inventory of where employee social security numbers are used or stored. Re-evaluate whether such use or storage accomplishes a truly necessary business objective.
- Have a clear, written policy that dictates the treatment of employee social security numbers.
- Take protective measures to ensure that access to employee social security numbers is limited to those employees who have a legitimate or necessary business purpose in seeing or using them. This might include protecting materials that contain social security numbers in locked file cabinets or drawers.
- Train those employees who have access to employee social security numbers how to protect the privacy and confidentiality of such information.
- Create a clear set of document disposal procedures, in accordance with applicable state and local laws, that govern treatment of sensitive employee records and personal information containing social security numbers.

In light of the new law and the increased attention surrounding identity theft, employers are well advised to revise their policies and practices governing the use and disclosure of sensitive employee information accordingly.

The law imposes strict penalties for violations. Violations of provisions 2(a) through (e), discussed above, carry a penalty of up to $100,000 for multiple violations resulting from a single act or incident. An employer who violates the law for a second time faces penalties of up to $250,000 for multiple violations resulting from a single act or incident. However, the law provides a defense to any alleged violation. This safe harbor provision applies to those employers who can show, "by preponderance of the evidence, that the violation was not intentional and resulted from a bona fide error made notwithstanding the maintenance of procedures reasonably adopted to avoid such error."[11] The law does not on its face provide for a private right of action.

In light of the new law and the increased attention surrounding identity theft, employers are well advised to revise their policies and practices governing the use and disclosure of sensitive employee information accordingly. Given the potential for harsh monetary penalties, employers should implement safeguards that can also serve as a defense. The more precautionary measures an employer can show it took to protect the confidentiality of its employees' social security numbers, the stronger its defense will be against an alleged violation. Employers are also encouraged to explore the use of encryption techniques, as employers may use encrypted social security numbers without any fear of liability.

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1 N.Y. Gen. Bus. Law § 399-dd.

2 The legislation does not apply to the state or its political subdivisions. *Id.* at § 399-dd(2).

3 *Id.* at § 399-dd(1) (emphasis added). The definition includes any part of a social security number, including the often-used last four digits.

4 *Id.*

5 *Id.* at § 399-dd(2)(a)-(e).

6 *Id.* at § 399-dd(5) ("Any waiver of the provisions of this section is contrary to public policy, and is void and unenforceable.").

7 *Id.* at § 399-dd(2)(e).

8 *Id.* at § 399-dd(3).

9 *Id.* at § 399-dd(4).

10 *Id.*

11 *Id.* at §399-dd(6).

New York Court of Appeals Holds that Executives Are Entitled to Protections Under Article 6 of the New York Labor Law

By Lawrence J. Baer and Jonathan E. Sokotch

In its recent decision, *Pachter v. Bernard Hodes Group*, 2008 WL 2338595 (June 10, 2008), the New York State Court of Appeals resolved two important and unsettled questions under Article 6 of the New York Labor Law, which governs the payment of wages to employees in New York State. Those questions, which were certified in a unique and rarely used procedure to New York State's highest court by the United States Court of Appeals for the Second Circuit, were: (i) whether "executives" are entitled to the protections extended to employees by Article 6 of the New York Labor Law, and (ii) when a commission is deemed "earned" thus becoming a "wage" subject to the Labor Law § 193's prohibitions against deductions by employers.

In answering the first question, the Court held that "executives are employees for purposes of Labor Law article 6, except where expressly excluded." Second, the Court found that the question of when a commission is "earned" and becomes a "wage" can be determined by express or implied agreement or, if no agreement exists, by the common-law rule that a commission is earned upon the employee's production of a ready, willing and able purchaser of services.

Factual and Procedural Background

Elaine Pachter served as a Vice President for Bernard Hodes Group, Inc., ("Hodes") a recruitment, marketing and staffing services company, from April 1992 to December 2003. Her primary duties involved preparing and placing client advertising in various media slots on behalf of Hodes's clients. Pachter was compensated on a commission basis. Pachter's gross commissions were based on a percentage of monthly billings generated by her services, from which Hodes deducted certain expenses before paying Pachter the net remainder. These deductions included half of the costs of Pachter's assistant's salary and benefits, finance charges for late payments by customers, losses resulting from errors in placing adds, uncollected debts, and all of Pachter's business and entertainment expenses.

. . . the Court held that "executives are employees for purposes of Labor Law article 6, except where expressly excluded."

While there was no express agreement between Pachter and Hodes regarding the method for calculating Pachter's commission pay, Pachter conceded that she was well aware of, and continued to work under, the compensation scheme. Specifically, each month Pachter received a statement listing the total billings generated by her services, the percentage of billings that represented her "gross commission," and the expenses and other amounts that were deducted from the gross commission to reach her net commission for the period. Despite receiving these statements, Pachter never complained during her employment about the deductions from her gross commissions.

After Pachter left Hodes in December 2003, she sued the company in federal court, asserting that Hodes's practice of deducting certain business expenses from her percentage of client billings violated Labor Law § 193's prohibition against employers making certain deductions from employees' earned "wages." The employer, Hodes, countered that Labor Law § 193 did not apply to Pachter because, as an executive, she was not an "employee" under Article 6 of the Labor Law. Hodes also argued that the deductions were permissible as they were not taken from Pachter's actual commission wages, but were instead used to calculate her commissions before her commission wages were "earned." The United States District Court for the Southern District of New York granted summary judgment for Pachter, concluding that executives are covered by Labor Law § 193 and that the adjustments made to Pachter's income were illegal deductions from her wages.

Executives are Covered by Article 6 of the New York Labor Law

On appeal, the United States Court of Appeals for the Second Circuit certified the two previously unsettled questions of state law to the New York Court of Appeals, New York's highest court. In determining that executives are covered by Article 6 of the New York Labor Law (and thus subject to the prohibition against deductions from wages), the Court relied on the statute's broad definition of "employee" within § 190(2), which the Court concluded plainly embraced executives. New York courts had long been split over the question of whether executives are covered by Article 6 of the Labor Law. This confusion stemmed from the New York Court of Appeals' decision in *Gottlieb v. Kenneth D. Laub,* 82 N.Y.2d 457 (1993), in which the Court noted that high level executive employees are in certain respects "excluded from wage enforcement protection" under Article 6 of the Labor Law. Indeed, various provisions of Article 6 expressly exclude executives from their protection. Some courts had found, and Hodes argued, that such exclusions modified the general definition of "employee" contained in Article 6 to exempt executives from its protections. The Court, however, clarified its earlier decision, and rejected Hodes's argument, noting that the very fact that certain specific provisions of Article 6 exclude executives (while others do not) demonstrates that the New York State Legislature intended that executives fall within the definition of "employee." The Court reasoned that it would have been superfluous to exclude executives from certain provisions of Article 6, had they not already been included in the general definition of "employee."

Commissions Are Deemed Earned Based Upon the Agreement Between the Parties

In resolving the second certified question, the Court observed that, once "earned," commissions are considered "wages" subject to the prohibition against deductions contained in Section 193 of Article 6. The Court further found that the deductions made by Hodes to Pachter's gross commissions amount were not among the variety of permissible deductions from wages set forth in § 193. Permissible deductions from wages include deductions for: "insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee." The legality of the employer's deductions, therefore, depended on whether Pachter's gross commissions had been "earned" and had thus become "wages" prior to Hodes deductions of various expenses. If the charges had been deducted after Pachter's commissions were "earned" then, the Court stated, Hodes had engaged in an impermissible practice under the Labor Law.

The Court's holding that executives are considered employees under Article 6 of the Labor Law is significant for New York employers, because executives who prevail on Article 6 based-claims may be entitled to attorneys' fees as well as liquidated damages in the amount of twenty-five percent of the amount of wages found to be due.

In the absence of express guidance from the Legislature contained in the Labor Law on this issue, the Court cited the general common law rule that a commission is earned upon the employee's production of a "ready, willing and able buyer," but that the employer and employee are free to depart from the common law rule by entering into a different arrangement (citing *Srour v. Dwelling Quest Corp*. 5 N.Y.3d 874, 875 (2005)). The Court then found that while the parties had not entered into a written contract regarding the method of calculating Pachter's commission entitlement, the parties had engaged in an extensive course of dealing with one another on this subject. Based upon the parties' course of dealing, the Court concluded there was an implied contract between them under which the disputed deductions could be made. The Court found particularly significant Pachter's acceptance of the written monthly statements from Hodes detailing its deductions and adjustments to her pay. The Court held that under the parties' implied agreement the commissions were not earned and were therefore not "wages" until all expense deductions had been applied. Accordingly, Hodes had not made unlawful deductions from Pachter's "wages."

Guidance for Employers

The Court's holding that executives are considered employees under Article 6 of the Labor Law is significant for New York employers, because executives who prevail on Article 6 based-claims may be entitled to attorneys' fees as well as liquidated damages in the amount of twenty-five percent of the amount of wages found to be due. Employers should note, however, that this decision does not affect the express exclusion of executives from certain protections of Article 6. For instance, executive level employees are excluded from (i) the protections under § 191 regarding the timing of payments to employees, (ii) the requirement under § 192 that employees consent to direct deposit of their wages, and (iii) the criminal protections under § 198-c relating to the provision of benefits and wage supplements to employees. Moreover, employers should be mindful that some payments sought by executives, such as certain structured bonus payments, may not be "wages," and are therefore not subject to the protections contained in Article 6.

The Court's determination of when a commission is deemed an earned wage and not subject to deduction strongly suggests that employers should enter into express agreements with their commission-based employees setting forth any deductions to be made from gross commissions prior to the payment of net commissions. Employers would be wise to avoid relying on a "course of dealing" or "implied agreement" with their employees, instead of using express written agreements. Indeed, the litigation in Pachter undoubtedly would have been avoided had the parties entered a written agreement describing the computation of Pachter's commissions.

International Employment Law

Applicability of UK Labour Law to Cross-Border Business Acquisitions

By Peter van Keulen and Jeremy Smith

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") provide that where there is a sale of assets which constitute an undertaking (an economic entity which retains its identity post-transfer – essentially the sale of a business as a going concern) employees employed in England and Wales have certain rights. These rights include a right to be consulted over the transfer and a right to transfer with the assets to the new owner and be employed on the same terms and conditions.

The Employment Appeal Tribunal ("EAT") has recently held, in *GMB and another v Holis Metal Industries Ltd* [2007] All ER (D) 304 (Dec) that TUPE can apply to transfers of businesses outside the UK. This is the first case to consider this issue and the implications are that foreign companies that are buyers of assets constituting an undertaking and who intend to transfer operations of that undertaking to another country (perhaps through integration with their existing business) can no longer ignore the potential of the extra-territorial reach of TUPE.

In February 2006 the employees of Newell Ltd ("Newell"), a company which manufactured track, poles and blinds, were notified that the UK site where they worked was to be closed as the track and pole business had been acquired by Holis Metal Industries Ltd ("Holis") and the undertaking was to be transferred to Israel. While some of the machinery was transferred to Israel, none of the relevant employees

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Preparing for China's New Labor Contract Law

By Hong Zhang

After years of contentious debates and unprecedented attention all over the country concerning the drafts of the Labor Contract Law of the PRC ("Labor Contract Law"), the Standing Committee of the National People's Congress of the PRC ("NPC") officially passed the *Labor Contract Law* in June 2007, which became effective on January 1, 2008. Although it may seem that most provisions of the new law are familiar as it incorporated many provisions from the prior *Labor Law of the PRC* (effective since January 1, 1995) and numerous concepts from local labor regulations, the new Labor Contract Law also revises many of the current practices and policies, and will have a significant impact on all employment relationships within the PRC, including those between multinational companies and their employees, laborers and seconded staff.

This article highlights certain significant changes introduced by the *Labor Contract Law.*

Employers Must Consult with Employees on Company Policies and Disciplines

The *Labor Contract Law* requires an employer to discuss with all its employees, or designated representatives of the employees, the drafting or amending of any company policies, labor disciplines or other regulations involving employees' interests.[1] This law further provides that any labor union representing the employees should be consulted before such policies are finalized and adopted. Alternatively, if the labor union is not yet set up within the employer, it must consult with the representatives of the employees (or with the employees, if there are no designated representatives).

Even after a certain policy, rule or regulation is adopted or amended by an employer, the *Labor Contract Law* entitles employee(s), or labor unions, to question or challenge the merits of such policy, rule or regulation. If this occurs, the employer must "revise and improve" the policy, rule or regulation in question through further consultation with such employee(s) or labor union. More significantly, this law makes another powerful weapon available to the employee against the employer: where an employer's policy, rule or regulation is determined to cause damages to its employee(s), such employer shall indemnify the employee(s) from such damages. Further, any affected employee has the right to immediately terminate

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moved and Holis dismissed them shortly after the transfer.

GMB, the union, presented complaints against Newell and Holis to the Employment Tribunal relating to, *inter alia*, alleged breaches of the duty to inform and consult representatives under Regulation 13 of TUPE. Holis applied to the Employment Tribunal to strike out GMB's claim on the basis that GMB had no reasonable prospect of success but this application. The Employment Tribunal held that TUPE did apply to the transfer of the business because the undertaking had been situated in the UK immediately before the transfer. Holis appealed the decision to the EAT.

The normal considerations as to whether TUPE applies still need to be considered but the ruling demonstrates that TUPE cannot be ignored simply because there is a cross-border transfer.

One of the main issues for the EAT's determination was whether Regulation 3(1)(a) of TUPE means that TUPE applies to transfers of businesses outside the jurisdiction, and particularly outside the EU.

Regulation 3(1)(a) provides that TUPE applies to *"a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity."*

In his judgement, Judge Ansell noted that he was persuaded that the drafting of TUPE was such that it applied to the transfers of undertakings which are situated in the UK immediately before the transfer but commented that *"set against the purpose of protecting the rights of workers in the event of change of employer, it seems to me that a purposeful approach requires that those employees should be protected even if the transfer is to be across borders outside the EU."* He also said that he did not think that this was a case of either the UK or the EU seeking to legislate outside of their jurisdictions without good reason but that the pre-transfer requirement of location in the UK acted as a significant enough limitation on the application of TUPE and as such did not offend the general principle that legislation should not normally be regarded as having extra-territorial jurisdiction.

Judge Ansell also considered it significant that regulation 3(4) of TUPE makes it clear that an international element can be governed by TUPE, for example TUPE applies even if the transfer is governed or effected by the law of a country or territory outside of the UK, and that the service provision changes, which apply to an organised grouping of employees situated in Great Britain immediately before a service change, were clearly aimed at the modern outsourcing of service provision whether inside or outside of the EU.

The EAT ruled that the combined effect of the wording of TUPE and the weight of academic commentary and European jurisprudence led to the conclusion that TUPE does apply to a transfer of an undertaking (pursuant to TUPE) from the UK to a non-EU entity even where on transfer the economic entity does not remain in the jurisdiction. The normal considerations as to whether TUPE applies still need to be considered but the ruling demonstrates that TUPE cannot be ignored simply because there is a cross-border transfer. The court noted in particular that where the business transfer is to another country, whether the undertaking can be said to retain its identity as a discrete economic undertaking will be a question of fact for each case.

Judge Ansell also considered the issue that enforcement might be a problem in respect of transfers outside of the EU, but noted that *"in these days of multi-national corporations and economic interdependency I would regard the issue of enforcement as less difficult than it used to be."* By way of example he pointed to the willingness of Holis to submit to the jurisdiction in the current situation.

China's New Labor Contract Law

Continued from page 9

the employment relationship without any prior written notice.[2]

The burden placed on the employers by this provision seems onerous. For example, there doesn't seem to be any limitation or minimum number of employees who are entitled to request the employer to initiate such "consultation" process. Currently, from reading Article 4, which sets forth such provision, it seems that even only one employee is entitled to such a right. That being the case, obviously it would be burdensome and time consuming for the employer to respond to every single employee's question, challenge or doubt. Fortunately, the upcoming *Implementing Rules of the Labor Contract Law* (presently being drafted by the State Council of the PRC and the Ministry of Labor and Social Security) is expected to clarify this issue, as well as many others.

Employers Must Have Written Labor Contracts with All Employees

The *Labor Contract Law* now requires employers to execute a written labor contract with employees within one (1) month after the employee's first day on the job. If the employer doesn't execute such a written contract, the employee is entitled to two times his/her monthly salary for every month there is no contract. Furthermore, if the employer continues to fail to execute any written contract after one year of employment, the employee will be deemed automatically to have an open-ended term contract.[3]

Employers Must Pay Severance If They Don't Renew Fixed-Term Labor Contracts

This topic was probably one of the most contentious issues throughout the whole process of drafting the *Labor Contract Law*. Formerly, the employer could let an employee's contract term expire and the employee would have to leave, without any payment of severance, before this new law was in place. The current law puts an increased cost on the employer, requiring an employer to pay severance to an employee whose employment term expires but is not renewed.[4] The only exception is that no severance will be required if the employee himself/herself decides not to renew the contract, even after the employer has offered at least the same or better benefits to such employee.[5]

The Labor Contract Law now requires employers to execute a written labor contract with employees within one (1) month after the employee's first day on the job.

Open-ended Employment Relationships Will Be More Common

Unlike in other countries, employment relationships in China are not "at-will" at all. In contrast, the termination of any employment relationship has always been highly regulated and restricted in China. Hence, employers in China preferred entering into fixed-term employment relationships with their employees, which were at least easily terminable at their expiration. However, the new *Labor Contract Law* now makes great efforts to insert open-ended employment relationships between employer and employee, which, consequently, the employer may not easily terminate.[6]

This law introduces certain circumstances under which employment relationships would default into open-ended terms. Amongst other things, an employer is required to execute open-ended labor contracts with employees upon the third consecutive renewal of any fixed-term labor contracts after January 1, 2008. This does not say the employer cannot terminate, or choose not to renew (and pay severance, as discussed above). But if the employer does renew the contract, after two prior fixed-term renewals,[7] then the contract which is "renewed" will be an open-ended one.

Further, the *Labor Contract Law* requires an employer to execute an open-ended contract in the event that an employee has worked for this specific employer for more than 10 years consecutively. Before the Labor Contract Law, the employer could decide whether to renew the employment of an employee who worked with the employer for more than 10 years. Under the previous law, if the employer chose not to renew, the employer could terminate the employment by letting the original employment term expire. However, now, under the Labor Contract Law, an employer is obligated to execute an open-ended employment contract with such long-term employee. Even more important, the employer may NOT terminate the relationship and pay severance unless the employee is willing to be dismissed.

The Law Clarifies Probation Periods[8]

This law also standardizes the permissible length of probation periods. Similar to the original regulatory regime, the maximum duration of a probation period depends on the length of the employment contract. Specifically, the probation period may not exceed one month for a contract lasting between three months and one year. The probation period for a contract lasting between one year and three years may be up to two months. The probation period for a contract of at least three years, or an open-ended contract, should be less than six months.

The *Labor Contract Law* further provides that the monthly salary of an employee undergoing probation must be at least 80% of the minimum salary applicable to this employee's same function or position. The salary should also be at least 80% of the employee's expected salary after probation.

Finally, the *Labor Contract Law* now requires an employee under probation to provide at least three (3) days' prior written notice to effectuate his/her resignation. This modifies the previous position that an employee was able to resign any time during probation without any prior written notice.

Only Certain Employees May Be Required to Undertake Non-Compete Commitments

The *Labor Contract Law* narrows the scope of non-compete provisions. Previously, employers might subject any employee to non-compete obligations so long as adequate cash consideration was paid. Now, however, only senior management, senior technical personnel and other personnel who undertake non-disclosure obligations, may be subject to non-compete agreements. Further, the maximum non-compete term is now shortened to two (2) years after the termination of the employment relationship.[9] During this non-compete period, the law expressly requires an employer to pay cash consideration for those employees' non-compete obligations on a monthly basis. The amount of such consideration is unclear under the general provisions of the new law, but will probably be clarified by the aforementioned *Implementing Rules of the Labor Contract Law*.

With respect to non-compete provision, it is worth noting that the original Ministry of Labor (once renamed Ministry of Labor and Social Security, and now named Ministry of Humar Resource and Social Security) issued a circular before the *Labor Contract Law* was passed. This circular provided that, if an employer didn't enter into a non-compete contract or term with its employee, the employer could require its employee to give advance written notice (between one and six months[10]) of his/her intention to resign. This was to enable the employer to relocate the departing employee during such notice period, and limit his/her access to confidential information. However, the Labor Contract Law is silent with respect to whether the employer would still be entitled to such an option after the new law's effectiveness.

... the new Labor Contract Law now makes great efforts to insert open-ended employment relationships between employer and employee, which, consequently, the employer may not easily terminate.

Mass Layoffs

Article 41 of the *Labor Contract Law* addresses an employer's right to conduct mass layoffs. "Mass layoffs" are layoffs of at least 20 employees, or, if the company is small, then layoffs of more than 10% of the employer's total workforce. In the event of such a "mass layoff," the employer is required to consult with the labor union, or all the employees 30 days in advance, and to report to the competent labor authority such intention to layoff. This law further restricts mass layoffs to the following circumstances:

- an employer is undergoing bankruptcy-related restructuring;
- an employer is experiencing serious difficulties in production and/or business operations (the meaning of "serious difficulties" is unclear);
- an employer must reduce workforce due to a significant technological evolution or change in business model, even after modifications to employment contracts have been attempted;
- a major change in the "objective economic circumstances" renders it impossible to perform the original employment contracts (the meaning of "objective economic circumstances" is also unclear).

In addition to the foregoing limitations, the employer's discretion in choosing which employees to retain is limited as well. Irrespective of an employee's job performance, employers must give priority to retaining those employees (a) who have executed labor contracts with comparatively long fixed-terms, (b) who have executed open-ended labor contracts, and/or (c) who are sole wage earners for their families, especially if there is an elderly person or a minor to be supported. Clearly, all these changes relating to layoffs will create increased administrative burdens on struggling employers.

Conclusion

Obviously, the *Labor Contract Law* aims to increase protections for employees, but in doing so, it unfortunately places extra burdens on the employers. Though this law has been in place for more than two months, it still remains to be seen what practical impact the new law will have on labor relationships throughout China. There are many ambiguities in the text of this new law which will create even more uncertainties in assessing and enforcing this landmark law. Fortunately, the detailed implementing rules are expected to be in place soon,[11] so employers will be better able to understand how to abide by this new law.

1 Pursuant to Article 4 of the *Labor Contract Law*, the company's policies, labor disciplines or other regulations "involving employees' interests" include those policies relating to the employees' remuneration, working schedules,

employees' leave or rest, occupational health and safety, insurance or other benefits, employees' training, and quota allocation for job tasks amongst workers, etc.

2 For the details, please see Articles 4, 38 and 80 of the *Labor Contract Law*.

3 For the details, please see Articles 10, 11, 14, 82 and 96 of the *Labor Contract Law*.

4 The severance payable by the employer in such a scenario will be determined by using the same formula as is used in other circumstances requiring severances. It should be calculated based upon the affected employee's average monthly salary, and one month's salary should be paid for each service year. If the dismissed employee worked for less than six months, the severance payable will be equal to half a month's salary. Further, if the employee's monthly salary is higher than three times the average monthly salary of all local employees, as published by the local government, then the lower amount should be used to calculate the severance, and such severance will only be calculated over a period of up to 12 years.

5 For the details, please see Articles 13, 46, 47, 48, 85 and 87 of the *Labor Contract Law*.

6 For the details of such circumstances, please refer to Articles 14, 41, and 82 of the *Labor Contract Law*.

7 There is some ambiguity in the language of Article 14 of the *Labor Contract Law* which may lead an employee to argue that his/her fixed term contract should be converted to an open-ended one after only one prior renewal. Further, it may be argued by some that the employer has no veto right and must renew a contract with an employee who wishes to renew such contract for the second (or third) time. The text of Article 14 does not give us a clear answer in such respect. These issues will hopefully be clarified soon by either case precedents or interpretations by competent authorities.

8 For the details of the clauses relevant to the probation period, please refer to Articles 19, 20, 21, 37, 38, 39, 83 and 85 of the *Labor Contract Law*.

9 For the details, please see Articles 23, 24 and 25 of the *Labor Contract Law*.

10 In normal cases, an employer is only entitled to require one month's prior written notice by an employee who wishes to resign.

11 Initially, the *Implementing Rules of the Labor Contract Law* were expected to be adopted by the end of year 2007 so that such rules could become effective simultaneously with the *Labor Contract Law*. However, the process of legislating such *Implementing Rules* was delayed due to contentious debates about certain provisions, and so far it is expected to be issued in early 2008, though no fixed schedule is available yet.

The Issue of Telecommuters Under the WARN Act: When the Office Place Becomes Virtual

By Lawrence J. Baer, Philip F. Repash and Layne S. Roistacher

The Worker Adjustment and Retraining Notification Act (hereinafter, the "WARN Act" or the "Act") and the regulations interpreting it set forth the circumstances under which employers must provide employees with advance written notice of an intended mass layoff or plant closing. Notwithstanding the breadth of legal authority establishing the Act and interpreting its provisions, various ambiguities nonetheless exist under the WARN Act that may leave employers unsure how they must comply with the Act. This article will address one such ambiguity that has become increasingly important in today's world of rapid innovation in information technology and rising gasoline prices for commuters, namely, where a telecommuter works for WARN Act purposes. Specifically, is the telecommuter's site of employment his or her employer's physical office location or the telecommuter's remote work location, such as his or her private home, from which he or she regularly telecommutes?

The location of telecommuters' sites of employment for WARN Act purposes and the number of telecommuters an employer employs can have a significant impact in determining an employer's obligations under the Act. According to one recent study, approximately 45 million Americans telecommuted for at least some part of 2006, up from approximately 41 million in 2003.[1] Moreover, approximately 14.7 million Americans regularly telecommuted to work in 2006, and this number is expected to increase dramatically in the future. By one estimate, 30 percent of the U.S. workforce is expected to be telecommuting to work by the year 2020.[2] Indeed, largely because of the financial burdens of commuting caused by the rising cost of gasoline, the federal government has recently promoted and urged the use of telecommuting by civil servants.[3] In fact, the House of Representatives has recently approved legislation requiring the head of each federal agency to develop policies permitting qualified workers to telecommute from their homes.[4] Private employers also are increasingly permitting employees to telecommute to work.[5] However, the WARN Act, which is now twenty years old, fails to provide employers with clear guidance as to where telecommuters should be deemed to work (and thus be counted) in determining whether a planned reduction in force involving telecommuters will trigger an employer's obligations under the Act.[6]

The WARN Act – Background

The WARN Act was enacted in 1988 following public outcries over numerous plant closings and mass layoffs that resulted in widespread dislocations for workers who received little or no advance notice. The WARN Act is intended to offer protections to workers by requiring employers to provide employees and certain state and local government officials with 60 days' advance written notice of a "plant closing" and/or "mass layoff."

The Department of Labor's regulations interpreting the WARN Act (hereinafter, "the WARN Act Regulations") define a "plant closing" as "the permanent or temporary shutdown of a 'single site of employment,' or one or more 'facilities or operating units' within a single site of employment, if the shutdown results in an 'employment loss' during any 30-day period at the single site of employment of 50 or more employees, excluding any part-time employees." 20 C.F.R. § 693.3 (b). The WARN Act Regulations further provide: "An employment action that results in the effective cessation of production or the work performed by a unit, even if a few employees remain, is a shutdown." *Id*. A "mass layoff" is defined under the WARN Act Regulations as a reduction in force which first, is not the result of a plant closing, and second, results in an employment loss at a single site of employment during any 30-day period for 50 or more employees who constitute at least 33% of the workforce. If a "mass layoff" involves 500 or more employees, the 33% requirement does not apply. Notably, employees who have worked less than six of the last twelve months or those employees who work an average of less than 20 hours a week are defined as "part-time" employees and are not counted toward the 50 employee threshold necessary to trigger a "plant closing" or "mass layoff."[7] However, such part-time employees are still entitled to notice.

Failure to comply with the WARN Act can trigger significant financial liabilities for employers. An employer who fails to comply with the Act may be liable to each affected employee for up to 60 days' backpay and benefits, plus the employees' attorneys' fees. In addition to notice to employees, the WARN Act also requires that "notice . . . be served on the State dislocated worker unit and the chief elected official of the unit of local government within which a closing or layoff is to occur."[8] 20 C.F.R. § 639.6.

[O]ne such ambiguity [under the WARN Act] that has become increasingly important in today's world of rapid innovation in information technology and rising gasoline prices for commuters [is] . . . where a telecommuter works for WARN Act purposes. Specifically, is the telecommuter's site of employment his or her employer's physical office location or the telecommuter's remote work location . . . from which he or she regularly telecommutes?

Further, an employer who fails to provide notice to a "unit of local government" can be required to pay a civil penalty not to exceed $500 for each day of violation, which may be avoided only if the employer satisfies any WARN Act liability with each affected employee within three weeks following the plant closing or mass layoff. 29 U.S.C. § 2104(a)(3).

A Single Site of Employment

In order to determine its obligations under the WARN Act, an employer must identify the number of employees impacted by a planned plant closing or mass layoff at each of its single sites of employment. A "single site of employment" is defined by the Department of Labor ("DOL") as "either a single location or a group of contiguous locations." 20 C.F.R. § 639.3(i). The DOL provides examples of contiguous and noncontiguous locations that are deemed "single sites of employment," including (1) a single building, such as an office building, housing an employer's business, even if any number of other employers' businesses also are housed within the same office building, and (2) separate buildings or areas that are not directly connected or in immediate proximity if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment.

Determining a telecommuter's single site of employment presents unique issues, not easily resolved under the current statutory and regulatory framework. The WARN Act Regulations provide the following guidance relating to employees who work outside of their employer's regular site of employment:

> [F]or workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

20 C.F.R. § 639.3(i)(6).

Although this regulation might appear to apply to telecommuters, some courts have concluded that 20 C.F.R. § 639.3(i)(6) does not apply to employees with a fixed place of work. Rather, such courts have determined that the regulation was intended to apply only to mobile workers. For example, in *Meson v. Gatx Tech. Services Co. et al.*, 507 F.3d 803 (4th Cir. 2007), the United States Court of Appeals for the Fourth Circuit determined that 20 C.F.R. § 639.3(i)(6) did not apply to a traveling saleswoman because, although she spent a significant amount of her working time traveling for her employer, she also was found to have maintained a regular, fixed place of work at the employer's satellite office. Specifically, the *Meson* court noted:

> Although [20 C.F.R. § 639.3(i)(6)] could be read literally to cover almost any employee who leaves her office, we believe it was intended to apply only to truly mobile workers without a regular, fixed place of work. A close scrutiny of the provision's language supports this conclusion. The terms "travel . . . from point to point," "outstationed," and "home base," all connote the absence of a fixed workplace. The examples provided in [20 C.F.R. § 639.3(i)(6)] also support this view. Bus drivers and railroad workers have no fixed workplace or office. Indeed, their jobs are characterized by travel and mobility. Although the provision includes "salespersons" as examples, the context suggests that this reference is to traveling salespersons who work primarily out of their homes or cars, rather than those who work out of fixed offices.

Id. at 809.

Moreover, the United States Court of Appeals for the Tenth Circuit in *Harbert v. HealthCare Services Group, Inc.*, 391 F.3d 1140, 1152 (10th Cir. 2004), which examined the regulation in question for the purpose of construing a similar regulation under the Family and Medical Leave Act, noted, in dicta:

> First, we believe that this provision of the WARN Act governs only employees without a fixed place of work, not employees who, like Plaintiff, do have a fixed place of work. All three examples listed in the parenthetical in the WARN Act regulation are employees who do not have a fixed place of work. *See* 20 C.F.R. [§] 639.3(i)(6) (listing railroad workers, bus drivers, and salespersons). Furthermore, the [DOL], in enacting the WARN Act regulation referred to [20 C.F.R.] § 639.3(i)(6) as "that part of the regulation relating to mobile workers." Finally, for employees who do have a fixed place of work, there is no reason to believe the [DOL] for purposes of the WARN Act would have named any different place as the employee's employment site. Accordingly, we conclude that the applicable WARN Act regulation, 20 C.F.R. § 639.3(i)(6), applies only to employees without a fixed place of work and is not relevant to employees who, like Plaintiff, do have a fixed place of work.

Id. (internal citations omitted).[9]

The lack of clear guidance for employers in this area is likely to become a more important issue as the number of telecommuters continues to grow. Indeed, whether employees' home offices are deemed individual single sites of employment may be outcome determinative of an employer's obligation to provide notice and/or backpay under the WARN Act.

Thus, under the reasoning of *Harbert* and *Meson*, this regulation would appear not to apply to telecommuters who primarily work from home as such employees would presumably be deemed to have a fixed place of work in their private home offices.[10]

In the recent and directly relevant *Gray v. Oracle Co.*, a Utah district court specifically considered an employer's argument that an employee's private "virtual office" was the employee's single site of employment for WARN Act purposes. *Gray v. Oracle Co.*, No. 2:05-CV-534-TS, 2005 WL 3132344, at *1 (D. Utah Nov. 22, 2005). Plaintiff Gray was a former employee of Oracle Corporation who alleged that his employment was terminated in violation of the Age Discrimination in Employment Act and the WARN Act. Gray alleged that Oracle's California headquarters, which was the location of the "mass layoff" at issue in the case, was his applicable single site of employment for WARN Act purposes and that he never received proper notice and/or backpay in lieu thereof. Oracle argued that Gray's private home office in Utah was his single site of employment under the WARN Act. *Gray v. Oracle Corp.*, No. 2:05-CV-534-TS, 2006 U.S. Dist. LEXIS 75781, **3-4 (D. Utah Oct. 17, 2006). Relying heavily on the Tenth Circuit's *Harbert* decision, Oracle argued that an employee who works from his or her private home office has a fixed place of work in his home for purposes of the WARN Act, and 20 C.F.R. § 639.3(i)(6) could not possibly apply. Noting that the issue presented "is a close question," the *Gray* court initially denied the parties' cross-motions for summary judgment, finding that "there is an issue of fact on the single site of Gray's employment." *Id.* at *5.

Approximately one year later, Oracle renewed its motion for summary judgment on Gray's WARN Act claim after discovery had shown that Gray was relieved of all his duties originating from the California headquarters prior to the time the "mass layoff" at issue occurred there. The court granted Oracle summary judgment on Gray's WARN Act claim because, based on the undisputed evidence, there was "no longer a jury question on whether, at the time he was laid off, his site of employment was the California headquarters . . . ." *Gray v. Oracle Corp.*, No. 2:05-CV-534-TS, 2007 U.S. Dist. LEXIS 83202, at *5 (D. Utah Nov. 8, 2007). In short, the court in *Gray* was not required to ultimately decide the issue of whether Gray's private home office constituted his single site of employment for WARN Act purposes. To date, this issue appears to have never been directly decided in any published opinion by any federal court.

The lack of clear guidance for employers in this area is likely to become a more important issue as the number of telecommuters continues to grow.[11] Indeed, whether employees' home offices are deemed individual single sites of employment may be outcome determinative of an employer's obligation to provide notice and/or backpay under the WARN Act. For example, assume a covered employer employs 150 employees at its regular site of employment and intends to conduct a "mass layoff" of 52 employees who work there. Under this scenario, the WARN Act would be implicated and the employer would likely be required to provide either 60 days' advance notice to the affected employees or backpay. Now, however, assume six of the 52 employees scheduled for layoff regularly telecommute to work from their private homes. Under the *Meson* and *Harbert* cases, an argument exists that these six employees' private home offices should constitute six separate single sites of employment. If so, the employer's planned reduction in force at its regular site of employment would now be reduced from 52 to 46 affected employees and, therefore, the employer's WARN Act notice and/or backpay obligations would not be triggered.

Conclusion

To comply with and avoid liability under the WARN Act, employers should diligently engage in a WARN Act analysis prior to conducting a reduction in force. Such analysis should include consideration (with the assistance of counsel) of the argument that telecommuters' home offices may be deemed "single sites of employment" for purposes for calculating the number of employees involved in a "plant closing" and/or "mass layoff." Employers also should bear in mind that, although the DOL has provided little guidance on the issues raised in this article concerning the treatment of telecommuters under the WARN Act, it has nevertheless clearly stressed that the WARN Act is intended to be construed as a broadly remedial statute meant to ensure that employees are provided advance notice of an impending "plant closing" or "mass layoff." Thus, where an ambiguity exists as to whether WARN Act notice should be provided, employers should generally err on the side of providing employees with notice.

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1 *See* World at Work, *Telework Trendlines* for 2006: 2007 *Survey Brief* (2007).

2 *Telecommuting*, University of Oregon, (2008), available at http://hr.uoregon.edu/policy/telecommuting.html.

3 *See, e.g., Jim Abrams, House promotes telecommuting for civil servants*, Associated Press, June 3, 2008.

4 The Equal Employment Opportunity Commission also has noted the benefits of telecommuting for employers and employees generally and has specifically noted that allowing individuals with disabilities to telecommute to work can be a "reasonable accommodation" under the Americans with Disabilities Act. Work At Home/Telework as a *Reasonable Accommodation*, The U.S. Equal Employment Opportunity Commission (2005), available at http://www.eeoc.gov/facts/telework.html.

5 *See, e.g., Telecommuting Has Mostly Positive Consequences For Employees And Employers, Say Researchers*, Nov. 19, 2007, available at http://www.apa.org/releases/telecommuting.html; *Telecommuting Still On The Rise*, Processor, Vol. 26, Issue 5, at 18, also available at http://www.processor.com/Editorial/article.asp?article=articles/p2605/32p05/32p05.asp&guid=.

6 Presumptive Democratic presidential candidate Senator Barack Obama has expressed support for proposed legislation called the FOREWARN Act that would create a major overhaul of the WARN Act. Specifically, the proposed legislation would require employers to give 90 days' notice before a plant closing or mass layoff of 25 or more employees constituting one third of the employees at a single site of employment. The proposed legislation also would penalize noncompliant employers by doubling their liability for back pay. The full text of bill of H.R. 3663: FOREWARN Act of 2007 is available at http://www.govtrack.us/congress/billtext.xpd?bill=h110-3662.

7 In addition, nearly twenty states, including most recently New Jersey, have adopted their own versions of the WARN Act, which may impose additional notice requirements and penalties on employers for noncompliance. *See, e.g.*, Lawrence J. Baer and Philip F. Repash, *New Jersey Plant Closing Law Imposes New Potential Severance Pay Obligations on Employers, Employer Update*, Spring 2008, available at http://www.weil.com/files/upload/employer_update_spring_08.pdf.

8 In the union context, WARN Act notice also must be given to the chief elected officer of union-represented employees affected by a "mass layoff" or "plant closing." *See* 20 C.F.R. § 639.6(a).

9 One year prior to the *Harbert* decision, in *Kephart v. Data Sys. Int'l, Inc.*, 243 F. Supp.2d 1205 (D. Kan. 2003), a federal district court within the Tenth Circuit applied 20 C.F.R. § 639.3(i)(6) to employees who were alleged to have telecommuted to work. The court found that a material issue of fact existed as to whether the employees' home office or employer's offices were single sites of employment for WARN Act purposes. In light of the recent Fourth Circuit *Meson* decision, in tandem with the Tenth Circuit's statements in *Harbert*, it is unclear whether courts would still apply 20 C.F.R. § 639.3(i)(6) to employees who telecommute from a fixed place of work, such as a private home office.

10 Even assuming 20 C.F.R. § 639.3(i)(6) does apply to employees who regularly

telecommute from private home offices, it would appear that such employees' private home offices may be deemed individual single sites of employment for WARN Act purposes. *See, e.g., Bader v. N. Line Layers, Inc.*, 503 F.3d 813, 822 (9th Cir. 2007) (holding that construction workers failed to demonstrate that, under any of the factors set forth in 20 C.F.R. § 639.3(i)(6), employer's headquarters—not the workers' multiple remote construction sites–was "single site of employment" for WARN Act purposes).

11 Additionally, because the WARN Act was enacted, in part, to prepare communities for the economic disruption of a reduction in force, courts have considered the impact such reductions in force would have on a community in analyzing where a single site of employment should be deemed located. *See Wiltz v. M/G Transport Servs., Inc.*, 128 F.3d 957, 963 (6th Cir. 1997) (stating presumption that "absence of community impact cuts against a finding of 'single site' [of employment]" at an employer's headquarters); *Teamsters Local Union 413 et al. v. Drivers, Inc.*, 101 F.3d 1107, 1110 (6th Cir. 1996) (geographic proximity provides the touchstone in determining what constitutes a "single site" . . . . Where the workers are geographically separated . . . the impact on the community is reduced."); *Frymire v. Ampex Corp*., 61 F.3d 757, 766 (10th Cir. 1995) (interpreting 20 C.F.R. § 639.3(i) as creating a presumption against single site status for work locations that are not geographically proximate to each other); *see also Meson v. Gatx Tech. Services Co. et al.*, 507 F.3d 803, 811 (4th Cir. 2007) (noting that "minimal impact on [Plaintiff's] community also militates against a finding that the WARN Act's purposes would be served by applying it [to Plaintiff]"). Thus, the geographic proximity of telecommuters' private home offices relative to the employer's physical office location may impact where the telecommuters' single sites of employment are deemed located.

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