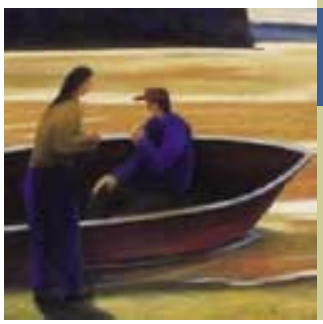

Northwest Washington

EMPLOYMENT LAW REPORT

ADELSTEIN, SHARPE & SERKA, LLP

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Breakfast Briefing
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Bellingham Golf & County Club
3729 Meridian Street

INSIDE THIS ISSUE:

SEATTLE IMPLEMENTS "SICK & SAFE TIME" LEAVE: A GLIMPSE INTO THE FUTURE

The Basics. Seattle is like having a crazy uncle within visiting range. After much back and forth, Settle is implementing its paid "sick and safe time" ordinance effective September 1, 2012. Let me address the obvious threshold question of why non-Seattle'onians need to care. The answer is two-fold. First, our employees who work in Seattle occasionally (more than 240 hours per year) are covered. We also need to be aware that Seattle often serves as a petri dish for regulations that eventually become state law. With that in mind, let's quickly review the principal features.

Tiers. The regulations divide employers into tiers based on full-time equivalents. Tier One includes employers with 5-49 FTE employees. Tier Two is everything between 50-249 FTE employees. Tier Three employees have 250 or more FTE employees. Seattle counts all employees when determining an employer's tier – even those who do not work in Seattle. FTE may include individuals who work less than 40 hours per week depending on how the company defines "full time" internally.

Accrual. Eligible Employees will begin accruing Seattle leave on September 1, 2012 at different rates depending on the tier. The Tiers One and Two employees accrue at least one hour of Seattle time for every 40 hours worked; in Tier Three, it's at least one hour for every 30 hours worked. We have to apply slightly different rules for exempt employees simply to make things as difficult as possible.

Use. Employees may use Seattle time beginning 180 calendar days after their employment commences subject to certain limits. It's important to note that leave and accrual are based on a calendar-year system. If you use a rolling 12-month calendar for Family and Medical Leave Act (FMLA) leave, an employee might run out of FMLA time but still have Seat-

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CAREFULLY COMTEMPLATING THE CONTRACTOR COMPENSATION CONDUNDRUM

I have always wanted to write that, but now that I have, I am strongly disappointed. We have noticed that the entire range of federal and state agencies have been more aggressive in pursuing back payments and fines, perhaps a sign of the economic times. The continually evolving area of "contractor" classification is often a flashpoint. The IRS's twenty-point test is effectively a remnant of the past and the much-adored "control" test. Washington's Dept. of Revenue instead has opted for the "economics reality" test in a case involving Fed Ex drivers.

1. the permanence of the working relationship between the parties;
2. the degree of skill the work entails;
3. the extent of the worker's investment in equipment or materials;
4. the worker's opportunity for profit or loss;
5. the degree of the alleged employer's control over the worker; and
6. whether the service rendered by the worker is an integral part of the alleged employer's business.

In a rare show of consistency, Labor & Industries and the Department of Labor employ very similar "reality" testing.

Getting the classification correct is critical for a number of significant, independent reasons including determining an individual's eligibility for employee benefits (think Microsoft and stock options), overtime eligibility, wage and hour regulations, discrimination laws, payroll taxes and third party liability issues. We advise that employers pay regular and ongoing attention to this issue given the fluctuating standards, and also individuals' changing rates with our organizations. We should also consider written agreements with our contractors to force us to think through the issues – if for no other reason.

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COLLECTIVE ACTIVITY: IT'S NOT JUST FOR UNIONS ANYMORE

Unions. The Woobies. Wildcat Strike. The Lollipop Guild from the Wizard of Oz. We all have similar images of unions, and may also be under the impression that the National Labor Relations Act is simply the law that protects individuals' ability to organize, negotiate and strike. If that is the case, we would only be partially correct.

a. **General Scope.** Under the NLRA, all employees have the right to self-organization; to form, join or assist labor organizations; to bargain collectively; and engage in other concerted activities for the purpose of "other mutual aid or protection." These rights are commonly referred to as "Section 7 Rights." The language of Section 7 of the NLRA makes clear that these rights exist regardless of whether employees are in a union or not.

b. **Employer Restrictions.** Employers may not interfere with, restrain or coerce employees with respect to their Section 7 rights. Additionally, the NLRA prohibits employers from discriminating against employees for exercising their Section 7 rights. These provisions can combine to create liability for uninformed employers. Employer policies that are "likely to have a chilling effect on Section 7 rights" may be viewed as an unfair labor practice, even absent evidence of enforcement.

c. **Possible Trouble Spots. Employee Activities.** It is the broad interpretation of what employee actions are considered "concerted activities" that gives non-union employers the most trouble with NLRA claims. For a concerted activity to be protected, it generally must center on a controversy involving the terms and conditions of employment. Therefore, if employees take action as a group to complain about company policies, their actions may be protected.

   For example, a federal court upheld an NLRB decision that the employer violated the NLRA when it terminated six non-union workers who walked off the job to protest their supervisor's behavior. The court held that a supervisor's conduct that impairs the terms or conditions of employment for the workers he supervises is a legitimate subject for concerted activity.

d. **Wage Discussions.** At least one federal court has determined that it is unlawful to fire an employee who violated a confidentiality agreement which discussing his or her compensation. The court in fact upheld the NLRB's decision ordering the employer to rescind its policy prohibiting disclosure of "any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters" because employees could reasonably construe the rule's unqualified prohibition of the release of "any information" to unlawfully restrict discussion of wages!

e. **Social Media Policies.** Similarly, the NLRB aggressively reads social media policies. For example, an ambulance service fired an employee for violating its social media policy because the employee posted negative comments about her manager on Facebook. The NLRB concluded that the social media policy was overly broad and interfered with the employee's NLRA rights to engage in concerted activities.

f. **E-Mail Use.** The NLRB found a violation when an employer disciplined some employees for sending e-mails to co-workers that reported on what had happened at a meeting of disgruntled workers, but had not taken similar action against employees who routinely sent other forms of personal e-mails.

g. **Conduct Rules.** A union has successfully challenged a rule prohibiting employees from making false, vicious, profane or malicious statements toward or concerning their employer's business or its employees. The NLRB concluded that this rule was likely to interfere with, restrain or coerce employees in the exercise of guaranteed rights under the NLRA even though it had nothing to do with union activity.

h. **Confidentiality Policies.** Many employers consider the wages paid to employees as confidential, proprietary information that should not be shared by an employee with a co-employee. Many employers likewise prefer that their employees maintain confidentiality as to disciplinary matters. To maintain the confidentiality of these issues, many employers institute confidentiality policies. While acceptable in the abstract, if not carefully drafted, confidentiality policies can be facially violative of the NLRA because employees' Section 7 rights encompass the right to effectively "communicate with one another regarding self-organization at the jobsite," including by discussing the terms and conditions of their employment.

i. **Solicitation.** The NLRB has "consistently held that there is 'no statutory right…to use an employer's equipment or media,' as long as the restrictions are nondiscriminatory." The NLRB also has rules regarding use of company bulletin boards for organizational purposes. In short, the NLRB consistently has held that employees have no right to post union literature on bulletin boards, unless the employer has allowed its employees to post other non-work related items. The NLRB has some hard and fast rules on employee solicitation and distribution in the workplace. In general, it is lawful for an employer to prohibit solicitation about unions when employees are on their working time, but unlawful to do so when employees are on non-working time, even in working areas. Rules regulating distribution of union literature are treated differently. Because of concerns about safety and littering, distribution may be prohibited at all times (*i.e.*, during both working and non-working time) in all working areas, but must be permitted in non-working areas during the employees' non-working time. However, all these rules must be applied in a non-discriminatory manner; the employer may not prohibit union-related solicitation and distribution while allowing employees to engage in that activity for other non-business purposes.

This line of authority has become a wake-up call . We need to review our policies and procedures to ensure that our language is not interpreted to discourage employees from exercising the NLRA rights and also consider putting a **general NLRA disclaimer** in our handbooks. Washington employers are also wise to evaluate work rule violations and disciplinary actions carefully when an employee expresses disapproval with management policies and procedures.

If your company does not have a rule regarding solicitation and distribution in the workplace, the time to implement one is before a union appears on the scene. Once organizing begins, it is much more difficult to promulgate new rules and to make other changes without risking an unfair labor practice charge.

The Constant Challenge of Lunch/Break Deductions

We all know that Washington law requires that we provide non-exempt employees the opportunity for work-free breaks during the work day.

A. Meal Periods. Employers need not pay non-exempt employees for meal periods if thirty minutes or longer, if employee is relieved of all duties, and if employee is free to leave his or her work station. Some difficulty arises when employees are not permitted to leave during meal breaks or when it is not practical for employees to leave and return to work within the time allotted. The DOL regulations do not require employers to allow their employees to leave, but if they are required to remain on the premises, they must be completely relieved of performing any work duties during their breaks. It does not matter if these duties are active or inactive, and this can include being on call.

1. If more than 5 hours are worked in a shift:

   - Workers must be allowed at least a 30 minute meal period.
   - Workers must be at least two hours into the shift before the meal time can start.
   - The meal time cannot start more than five hours after the beginning of the shift.

B. Rest Periods. Employers must pay non-exempt employees for rest periods that last twenty minutes or less. Like meal periods, employers need not pay for rest periods over twenty minutes if employee is engaged in personal activities.

- Workers must be allowed a paid rest break of at least 10 minutes for each 4 hours worked. The rest period must be allowed no later than the end of the third hour of the shift.
- Businesses may allow workers to take several "mini" breaks in each 4 hours of working time. If these mini breaks total 10 minutes this substitutes for a scheduled rest break.
- Examples of mini breaks are personal phone calls, eating a snack, personal conversations, smoke breaks, and whenever there is no work to do for a few minutes during a work shift.

C. Schedules. There are no regulations regarding when and how workers are scheduled. A business has the right to change a worker's schedule at any time, with or without notice. Businesses are not required to give weekends or holidays off.

D. Case Development. A case involving armored car drivers explored the consequences if the employer does not truly and completely relieve its employees of all responsibilities during the statutory breaks. For missed breaks the answer is easy. If the employee doesn't get a break, the employer has actually received more work from him than is legally permissible, and he is therefore entitled to be paid for that extra work. Meal breaks, however, are different because the law permits them to be unpaid if the employee is relieved of work responsibilities. Because of this difference, employers have argued that if an employee works during what would otherwise be an unpaid meal break, all they need to do is to pay for the missed break – not pay for the time worked *and* give the employee another 30 minutes of unpaid time to eat. Indeed, "straight eight-hour" shifts, in which an employee is at work for only eight hours, doesn't have an unpaid meal break, and eats on paid time, are common in some industries. The court nonetheless ruled that such breaks are required.

An Employee's Inalienable right to listen to Religious Radio?

An employer may enforce a neutral workplace conduct rule even if its enforcement means that a particular employee does not get to listen to her preferred religious radio station. An employee typically cannot show that listening to a religious radio station in itself is a bona fide religious belief or requirement and, even if it were, the company's offer to permit the employee to wear a headset or play the music quietly more than fulfills any hypothetical accommodation requirement. The courts have used the same logic to uphold workplace requirements that prohibit controversial clothing, posters, buttons, etc. This is not a close issue.

LNI and the Inebriated Employee

In general, drunken workers injuring themselves are still covered by industrial insurance. An exception exists where "the claimant has become so intoxicated he abandons his employment." The point at which this occurs is a question of fact. In Flavorland Industries v. Schumacher, an employee was a manager at a meat packing plant. His duties required him to socialize with local livestock sellers, "a tradition among cattle people." The business provided a charge account to pay for dinner and drinks at these meetings. In early 1976, the employee got hammered at a meeting. He then left, did a hit-and-run on a pickup truck, and later crashed his company car and died. His widow sought and obtained a pension under Washington's industrial insurance statute. On the employer's appeal to Superior Court, the trial court left for the jury the issue of whether the worker had become so wasted as to have "abandoned his employment." The trial court's instruction to

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Adelstein, Sharpe & Serka attorneys have provided legal counsel to businesses and individuals for more than 30 years. Since the firm's founding in 1974, it has been known for its record of achieving positive results for its clients both in and out of the courtroom. Through individual attention and personal service, each attorney assists clients in making effective and strategic decisions and keeps them informed about what to expect through every step of the legal process.

Whether you work with Steve Adelstein, Phil Sharpe, Phil Serka, Jeff Fairchild, Mitch Faber, or Ivan Stoner, you can be certain that Adelstein, Sharpe & Serka can meet your legal needs today and into the future.

LNI and the Inebriated Employee—Cont'd

the jury was as follows:

> A worker otherwise acting in the course of his employment deviates and departs therefrom during such time as he engages in a course of action which is entered into for his own purposes and which is neither incident to his employment nor in furtherance of his employer's interests.

The jury found that the worker was still in the course of his employment when he died. The jury's decision was ultimately upheld.

The BIIA continues to apply a Flavorland-type factual analysis to determine whether an employee is so loaded that he has "abandoned his employment."

> It is not enough to prove that the worker had a high blood alcohol level at the time of the accident, rather the workers' continued ability to perform his job must be considered. In each of these cases the workers' tolerance for alcohol; demeanor, behavior, and speech; and their ability to perform work duties were considered in determining whether employment was abandoned.

In sum, an employee who has had a snootful is usually entitled to benefits, unless it can be shown that they are so far gone that they have abandoned their employment. This will typically be a question of fact. The Flavorland case suggests that an employer will have a more difficult time proving that the employee abandoned employment if drinking is part of the employee's job duties. We need to carefully consider this issue as we draft and review our substance abuse policies.

Seattle Implements "Sick and Safe Time" Leave: A Glimpse into the Future— Cont'd

tle Leave available and vice versa.

Purpose. Employees may utilize Seattle leave for their own health or needs of their eligible family members including preventive care. Employees may use "safe leave" for the reasons ranging from school closures to needs arising from domestic violence.

Documentation. The employer may only require documentation if the employee is absent three or more days and, if the employer does not offer insurance coverage, the employer must pay half the cost of obtaining the needed documents. The employer must notify the employee of their rights; their balance of Seattle Leave with each payroll check; and the employer must keep records recording how much time their employee spends in Seattle. The employer must separately maintain records regarding an employee's Seattle time. Seattle absences, of course, do not count against a no-fault absence policy.

Hmmm. If you have employees who spend occasional time in Seattle, there are a couple of action items. We need to check to see the extent to which existing policies cover the Seattle requirements, and make adjustments to wording if nothing else. The targeted employers also need to make sure that proper notices

But Then There is LNI— Cont'd

The question becomes, if we have correctly classified certain workers as "contractors," can we still find ourselves in a world of hurt. To quote Bob the Builder, because this is Washington, ***YES WE CAN***. LNI may require employers to cover "contractors" for workers' compensation purposes if the individuals meet that agency's ***slightly*** different test.

1. who controls the performance of the services;
2. where and what kind of services are provided;
3. whether the service provider is customarily engaged in a business and, if so, what kind of business;
4. the service provider's federal tax filings;
5. the service provider's business registrations and tax status under state law; and
6. the service provider's maintenance of financial books and records.

For the "contractor" classification, we need to be not merely sure, but really quite sincerely sure which is yet another reference to the Wizard of Oz as I am sure that you recognize.