UPDATE

LABOR, EMPLOYMENT AND BENEFITS

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National Labor Relations Board Clarifies Supervisory Status

By Mark S. Filipini
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Recently, the National Labor Relations Board clarified – and arguably expanded – the statutory definition of "supervisor" under the National Labor Relations Act (NLRA). Because the NLRA's protections do not extend to supervisors, the Board's long-awaited decision in *Oakwood Healthcare, Inc.,* 348 NLRB No. 37 (September 29, 2006), could have a significant impact on private employers nationwide.

The NLRA defines a "supervisor" as an individual who possesses the authority to perform any one of twelve enumerated supervisory functions, so long as the supervisor exercises "independent judgment" while performing such functions. In 2001, the U.S. Supreme Court rejected the Board's interpretation of independent judgment and sent the Board back to the drawing table on the issue of supervisory status. *See NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706 (2001). In *Oakwood Healthcare,* the Board responded by clarifying the meaning of two of the listed supervisory functions - the authority to "assign" and "responsibly to direct" - as well as the meaning of "independent judgment." In doing so, the Board determined that certain charge nurses qualified as supervisors and, thus, could not participate in a representation election.

In interpreting the authority to "assign," the Board used the common dictionary definition, which is "to assign to a post or duty." The Board concluded that an employee acts as a supervisor when he or she assigns another employee to a particular place, time, or "overall task." The Board further explained that "[t]he assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as 'assign' within our construction." Although the

Board distinguished the supervisory function of assigning "overall tasks" from mere ad hoc instructions to perform a discrete task, the vocal dissent argued that the Board very likely expanded the category of employees who may qualify as supervisors with this task-based approach.

The second supervisory function analyzed by the Board, the authority "responsibly to direct," includes "those individuals who exercise basic supervision but lack the authority or opportunity to carry out any of the other statutory supervisory functions." Drawing on previous Board and U.S. Circuit Court of Appeals decisions, the Board determined that this catch-all phrase must include the concept of direct responsibility. In other words, if an employer is to prove

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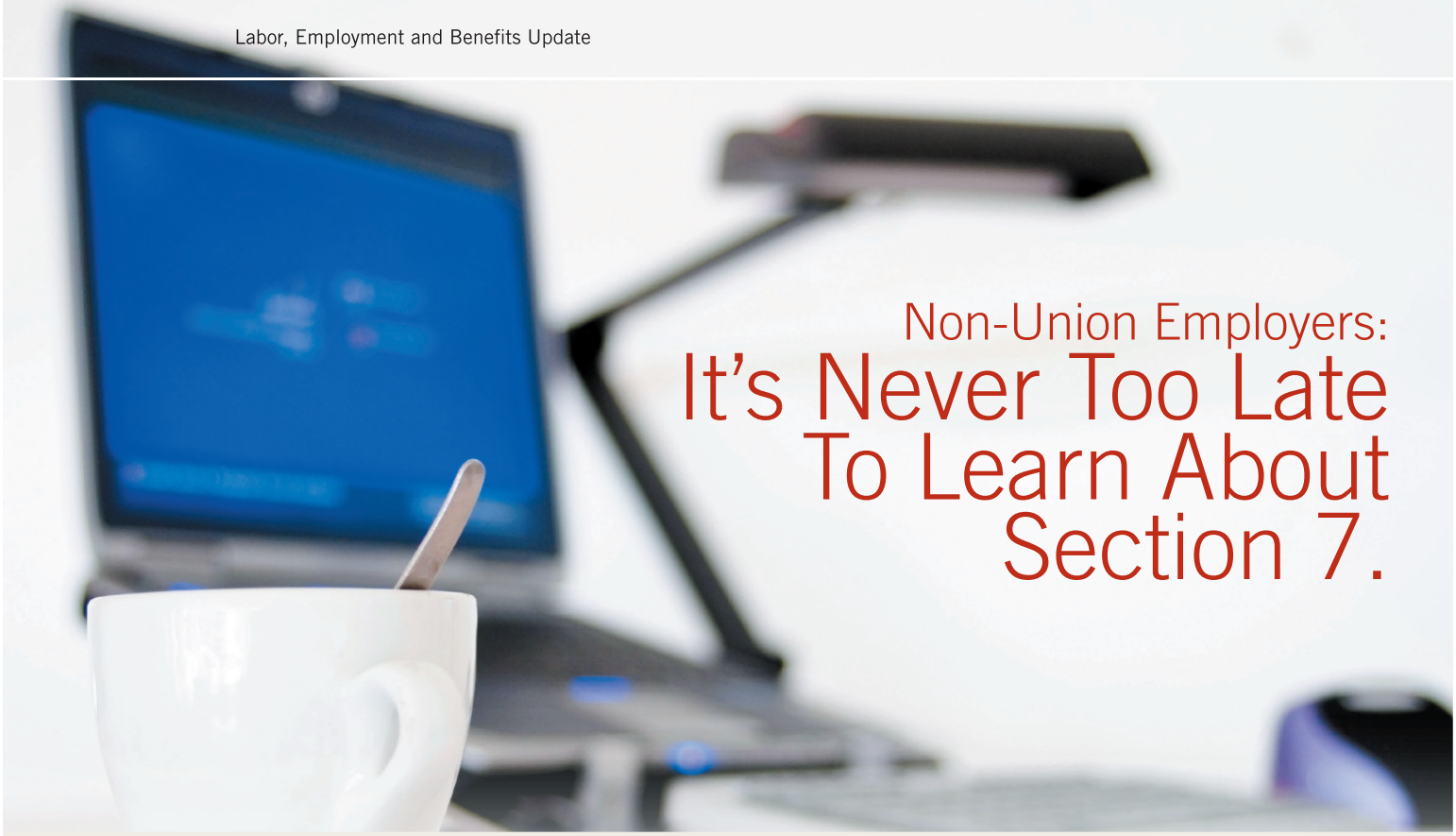

Non-Union Employers: It's Never Too Late To Learn About Section 7.

By Jennifer L. Mora

History in the labor law arena is full of examples of the National Labor Relations Board finding that an employer has violated the National Labor Relations Act, despite the fact that a union does not represent the workforce. Moreover, even if a union does represent the employees, it is not uncommon for employers and unions to be subject to different standards. In other words, certain employer conduct may be objectionable per se, whereas the same conduct by unions may be permissible unless other factors are present. A recent decision by the Board not only illustrates these inconsistent standards, but also serves as a reminder to non-union employers of their obligations under Section 7 of the National Labor Relations Act.

In the past, the Board recognized a distinction between union photographing and employer photographing of employees: union photographing was coercive, and therefore unlawful, absent a "legitimate explanation," whereas employers were required to provide a "legitimate justification" for the photographing to be lawful. Recently, however, the Board leveled the playing field and held that "a single standard must be applied in determining whether there is objectionable conduct where employees are photographed while engaged in Section 7 activity." *Randell Warehouse of Arizona, Inc.,* 374 NLRB No. 56 (July 26, 2006). As a result, the Board departed from its earlier decisions that held the employer and the union subject to different standards and now requires a "legitimate justification" by the employer or the union if either wish to photograph employees while exercising their Section 7 rights. Moreover, this "legitimate justification" must be communicated to the employees, unless the justification is obvious (violence, etc.).

Although the photographing in the case occurred during a union organizing campaign, its reasoning equally applies to employees with non-union workforces. Unfortunately, it is not unusual for non-union employers to ignore established Board precedent based on their assumption that Board law only applies to employers that have a unionized workforce. Nothing could be further from the truth. Section 7 of the National Labor Relations Act grants employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Moreover, Section 8(a)(1) of the Act makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." Although much of the language in Section 7 discusses collective bargaining, the reference to

"engag[ing] in other concerted activities for the purpose of . . . other mutual aid or protection" directly applies to employees in non-union environments. There is a plethora of Board and court cases that have recognized an employee's rights under Section 7 of the Act, even if the employee is not represented by a union.

One area in which an employer may find itself in hot water with the Board pertains to an employer's policies or handbooks that contain confidentiality provisions. Last year, in *Cintas Corp.,* 344 NLRB No. 118 (June 30, 2005), the Board analyzed an "honor" policy, which stated that "[w]e recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters." Employees, also referred to as "partners," could be disciplined for "violating a confidence or unauthorized release of confidential information." According to the Board, the policy was unlawful because "it could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees."

Employers must also be cautious of policies and handbooks that regulate an employees' conduct in the workplace. Before 2004, the Board's analysis of the legality of the existence or enforcement of such policies was much stricter. However, in *Lutheran Heritage Village,* 343 NLRB No. 75 (2004), the Board changed its approach. In that case, the Board analyzed a policy that prohibited "abusive and profane language," "harassment," and "verbal, mental and physical abuse." As in the past, the Board determined whether the policy "reasonably tend[ed] to chill employees in the exercise of their Section 7 rights." If the policy "explicitly" restricts any activities that are protected by Section 7, the policy is per se unlawful. If not, the question is whether (1) employees would reasonably view the language as prohibiting Section 7 activity; (2) the policy was implemented in response to union activity; or (3) the policy was applied to restrict an employee from exercising his or her Section 7 rights. Recognizing that employers have the right to maintain a civil and decent working environment, the Board agreed that the policy against "abusive and profane language" and "verbal, mental and physical abuse" was not unlawful on its face. Moreover, there was nothing to suggest that the policy was implemented in response to union activity or that it had been applied to protected activity. And, the Board did not believe that an employee could reasonably interpret the policy as preventing them from engaging in any Section 7 activity. As a result, the Board held that policy was lawful.

Board decisions have also found other types of employment policies and handbook provisions unlawful, including policies that restrict an employee's ability to engage in Section 7 rights while on the employer's property, policies that govern an employee's use of his or her computer and e-mail, handbook provisions that prohibit employees from discussing their wages with other employees, and handbook provisions that encourage a "union-free" workplace.

The bottom line is that employers should not assume that they are out of reach of the National Labor Relations Board merely because a union does not represent its employees for purposes of collective bargaining. Rather, employers should pay close attention to the various types of policies and rules that govern their employees' work environment and monitor the manner in which those policies and rules are applied to their employees. ■

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By Mark S. Filipini

Update on Successorship

In our December 2005 article entitled Labor Law Basics for Acquisitions, we explained that an asset purchaser is required to recognize and bargain with a union representing the seller's employees if the purchaser is deemed a "successor" employer. While the ultimate resolution of the successorship issue depends on a multi-factor analysis, the purchaser's initial hiring decisions are of paramount importance. As a general rule of thumb, if a majority of the purchaser's workforce is composed of the seller's represented employees, then the purchaser is likely to be deemed a successor employer. Moreover, while the purchaser is generally under no obligation to hire the seller's employees, it may not refuse to hire them solely because of their union status or in order to avoid successor liability.

This summer, the National Labor Relations Board clarified the applicable standard to determine whether a purchaser unlawfully refused to hire a seller's unionized employees. In *Planned Building Services,* 347 NLRB No. 64 (July 31, 2006), the Board applied its traditional burden shifting framework from refusal-to-hire cases in other contexts. Thus, the Board's General Counsel has the initial burden to prove that the purchaser failed to hire the predecessor's employees based on antiunion animus. Such animus can include a desire to avoid successorship obligations. The burden then shifts to the purchaser to prove that it would not have hired the seller's employees in any event. The Board explained that "the employer is free to show, for example, that it did not hire particular employees because they were not qualified for the available jobs," or because "it had fewer unit jobs than there were unit employees of the predecessor." However, as a practical matter, it may be difficult for a purchaser who makes no substantial changes in operations to demonstrate that the seller's employees were not presumptively qualified for the new positions.

The Board also reiterated the risks should it determine that a purchaser purposefully refused to hire the seller's employees. While a successor is generally free to set initial terms and conditions of employment and negotiate its own collective bargaining agreement, it may lose this important right if the Board finds that it based its hiring decisions on antiunion animus. The purchaser may also owe backpay and benefits both to individuals it discriminatorily refused to hire and to workers it hired but compensated on terms lower than those contained in the seller's collective bargaining agreement.

The *Planned Building Services* decision does not require an asset purchaser to categorically hire all of the seller's unionized employees. However, it does remind prudent employers to ensure that antiunion animus does not motivate their hiring decisions in the successorship context. ■

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"Benign Neglect" Defense of Third Party Harassment Fails in Ninth Circuit

By Jennifer L. Mora

Recent Ninth Circuit Court of Appeals decisions consistently underscore that employers cannot ignore their employees when faced with a complaint of harassment by a non-employee. Rather, if an employee complains about harassment by customers, vendors, or other individuals who have reason to interact with the employee because of his or her employment, the employer must immediately investigate the complaint and implement corrective measures that are designed to end the harassment.

On September 13, 2006, the Ninth Circuit issued a decision that should serve as a reminder to employers that they can be liable to their employees for harassment by non-employees. In *Freitag v. Ayers,* No. 03-16702 (9th Cir. 2006), a female corrections officer at California's Pelican Bay prison sued the California Department of Corrections ("CDC") for a sexually hostile work environment alleging that male inmates engaged in self-gratifying sexual behavior and shouted sexual and offensive profanities, which were directed at her and other female officers. She also alleged that the CDC retaliated against and ultimately terminated her because of her repeated complaints about the problem. The jury awarded the former employee a little over $600,000 in damages.

The CDC argued to the Ninth Circuit that it could not be liable to the former employee under Title VII for a hostile work environment that was created and caused by inmate misconduct. The Ninth Circuit disagreed. In doing so, it cited to prior decisions by the Ninth Circuit and other courts, which have consistently recognized that employers may be liable for third-party harassment inflicted on their employees. The Court stated that, "employers are liable for harassing conduct by non-employees 'where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct'." According to the Court, the theory is based on the employer's "negligence and ratification" of the conduct, rather than the conduct itself. Because there was substantial evidence to support the former employee's claim that the CDC did not take immediate or corrective measures to end the harassment, the Ninth Circuit upheld the jury's verdict. However, it remanded the case back to the lower court for different reasons.

Freitag is not the first Ninth Circuit decision to analyze hostile work environment claims involving non-employees. Last year, in *Galdamez v. Potter,* 415 F.3d 1015 (9th Cir. 2005), the Court was faced with a similar issue. In that case, Galdamez, who was born in Honduras, worked for the United States Postal Service in Oregon and was eventually promoted to the postmaster position. After she made certain operational changes to the post office, she was faced with considerable resistance from postal workers and customers in the community. Eventually, the issue became a matter of public controversy, with a petition drive, a "town hall" meeting, and references to her national origin in the newspaper. During the "town hall" meeting, members of the community sought to remove Galdamez from her position as the postmaster. Although Galdamez asked her superiors to attend the meeting in her defense, they refused. In fact, her superiors provided unfavorable comments about Galdamez and the quality of her work in local newspapers. Galdamez eventually faced discipline for what her supervisors characterized as rude behavior and engaging in conduct that was inconsistent with positive customer relations. The Ninth Circuit remanded her case back to the trial court after the trial court refused to instruct the jury that the Postal Service could be liable to her for the harassment that she experienced by members of the community.

The Ninth Circuit's consistent position in these cases establishes a definitive course of action for employers in the case of third party harassment. The approach to an employee's complaint of harassment by a non-employee should be identical to the approach used in response to complaints of harassment by a manager, supervisor, or co-worker. Failing to address these complaints potentially exposes employers to Title VII liability. ■

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PROMPT ACTION DEFEATS RACIAL HARASSMENT CLAIM

Employers who are defending against hostile work environment claims based on race, sex, or other protected characteristics are often faced with the task of proving to the court or the jury that upon receiving an employee's complaint of alleged harassment, it promptly took appropriate action to end the harassment. Such was the situation in *Green v. Franklin Nat'l Bank of Minneapolis,* No. 05-2513 (8th Cir. August 23, 2006).

In *Green*, the employee alleged that a co-worker harassed her and used racial slurs to describe her. The Eighth Circuit agreed with the employee and held that a jury could find that the harasser's continued use of racial slurs toward the plaintiff was severe or pervasive, which, among other things, is required to succeed on a hostile work environment claim. Regardless, the court dismissed the plaintiff's hostile work environment claim because the employer terminated the harasser within one month of learning of the harassment. The court distinguished the employee's situation from cases in which the employer "waited much longer than one month to terminate the [harasser]." Because the employer successfully demonstrated that it took prompt remedial action in response to the employee's complaints of harassment, it could not be liable to the employee for her hostile work environment claim.

Employers must ensure that they have formal policies in place that are known to employees and clearly explain the method for raising concerns about harassment in the workplace. Immediately upon receiving a complaint of harassment, the employer must investigate the allegations and promptly take any necessary action to end the harassment, which, depending on the individual facts of the case, may involve a written warning, a suspension, or even termination. The more time it takes the employer to investigate and correct the harassment, the more likely a court or jury will be to reject the employer's defense to the hostile work environment claim. ■

National Labor Relations Board Clarifies Supervisory Status

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supervisory status pursuant to this prong, the employer must hold a supervisor accountable for the performance and work product of the employee(s) he or she directs. The dissent in *Oakwood Healthcare* argued that this definition sweeps in low-level supervisors who previously would have been protected by the NLRA.

In addition to performing supervisory functions, a supervisor also must exercise "independent judgment" when performing those functions. Reiterating the U.S. Supreme Court's decision in *Kentucky River,* the Board noted that the use of independent judgment depends on the degree of discretion used by the supervisor, not whether the supervisor used professional, technical, or other types of expertise. For an exercise of discretion to qualify as independent judgment, the supervisor's actions or recommendations must be free from others' control. Thus, a supervisor does not use independent judgment if his or her actions are dictated by detailed instructions from the employer. However, if those instructions allow for discretionary choices, independent judgment is quite possible.

Finally, the Board considered whether employees who perform supervisory functions only part of the time qualify as supervisors. The Board suggested that an employee qualifies as a supervisor depending on "whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions." However, the Board also noted that in previous cases it had determined that employees may qualify as supervisors even when they spent as little as 10 or 15 percent of their time performing supervisory functions. Thus, employees who spend only a minority of their time supervising still may fall under the statutory definition for purposes of exclusion from the NLRA.

Although the Board's decision in *Oakwood Healthcare* probably does not represent the sweeping change that many union advocates had predicted, the Board likely has expanded the scope of supervisory status. This is particularly true given the Board's reminder that employees need not spend a majority of their workday performing supervisory functions to qualify as a supervisor. Employers in industries that are currently organizing or have the potential to organize should consider whether more employees may qualify as statutory supervisors properly excluded from collective bargaining units and organizing efforts. Employers in industries that have already organized might take a second look at existing units to determine whether they include supervisors who may be excluded. Moreover, since both unionized and non-unionized employees (but not supervisors) enjoy the core protections of Section 7 of the NLRA – including the right to engage in concerted activities for the purpose of mutual aid or protection – the aftermath of *Oakwood Healthcare* should be of interest to all private sector employers. ■

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Employers Should Beware Of Broad Employee Indemnification

By Steve Peltin

Many companies indemnify employees against claims arising out of employment. Those indemnification obligations routinely arise under articles of incorporation or by-laws, or may be part of executive employment agreements. As one company recently learned to its dismay, the wording of documents creating such indemnity obligations must be precise.

The Origins of the Dispute

International Airport Centers (IAC) placed an indemnity provision in its employment agreement with Chicago-area executive Jacob Citrin. The language seemed innocuous, promising that IAC would indemnify Citrin for damages incurred if he were sued based on acts performed in connection with IAC's business. The clause specified that IAC would pay costs incurred to defend such a suit "in advance of the final disposition of such action…upon receipt of an undertaking by [Citrin] to repay such amount plus reasonable interest in the event that it shall ultimately be determined that [Citrin] was not entitled to be indemnified."

Some months later, Citrin quit his job and opened a competing business in direct violation of the same employment agreement. According to IAC, Citrin compounded his misconduct by using a "secure-erase" program to permanently delete important corporate data from his laptop, data that was not available to IAC from any other source.

The Lawsuits

IAC sued Citrin in federal court in Chicago for violation of the Computer Fraud and Abuse Act, breach of contract, breach of fiduciary duties and misappropriation of trade secrets. Although the trial court rejected IAC's claims, the Court of Appeals for the Seventh Circuit reversed and permitted IAC's suit to proceed. *International Airport Centers v. Citrin,* 440 F.3d 418 (7th Cir. 2006).

Citrin's lawyers then zeroed in on the indemnification language in the employment agreement. They asked IAC to advance funds to cover Citrin's attorney fees and other expenses needed to defend against IAC's suit, an amount that already had reached $1.3 million. Not surprisingly, IAC refused.

Citrin sued IAC in Delaware, where IAC was chartered, for breach of the indemnification clause and to compel IAC to advance his defense costs. Upset with Citrin's forum shopping, IAC asked the federal court in Chicago to enjoin Citrin from proceeding with the Delaware suit. The issue made its way back to the Court of Appeals, which determined that the Delaware suit was permissible and not a collateral attack on the Court's earlier ruling. The Court reasoned that the issue of entitlement to advancement of funds under the employment agreement was independent of the merits of IAC's suit against Citrin, and it required IAC to defend against the attorney fees request in Delaware. *International Airport Centers v. Citrin,* 455 F.3d 749 (7th Cir. 2006).

IAC's fortunes did not improve in Delaware. Not only did the Delaware court require IAC to advance the requested funds, it also awarded interest on that money. *Citrin v. International Airport Centers,* 2006 WL 2576977 (Del.Ch.)(September 7, 2006).

Presumably the action now has returned to the Chicago federal court, where IAC can litigate its claims against Citrin. If IAC prevails in that lawsuit, it can force Citrin to repay the costs that it advanced; in the meantime, IAC must fund Citrin's defense.

Avoiding IAC's Headaches

As the Delaware court found, the clause at issue required the company to advance defense costs, even though Citrin is being sued by IAC. IAC could have used language excusing it from advancing defense costs for claims brought by IAC.

Each company should examine its indemnity undertakings, whether arising from articles of incorporation, by-laws or employment agreements, to ensure that they do not require the advancing of fees and expenses to defend employees against claims brought by the company itself. The company similarly should make certain that indemnification language does not oblige it to advance defense costs to directors who are sued by the company. ■

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PRESTON GATES TEAM CONTINUES TO

grow

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Suzanne joins the group as a partner in the Seattle office, focusing on advice, counseling, representation and litigation in sophisticated areas of employment law. She serves as a neutral investigator and as a mediator for employment–related issues, and is also an adjunct professor at Seattle University School of Law, teaching the Employment Survey course.

Jennifer L. Mora

Jennifer Mora has joined the group as an associate in the Seattle office. Jennifer's practice includes both labor and employment counseling and litigation, as well as employee benefits. Prior to joining Preston Gates, Jennifer was an associate at the Seattle office of Jackson Lewis.

Karrie Johnson Diaz

Karrie Johnson Diaz has joined the group as an associate in the Seattle office. Her practice focuses on all aspects of benefits law, including counseling and litigation, as well as benefits issues in merger and acquisition transactions. Prior to joining Preston Gates, Karrie was an associate at Houston's Baker Botts LLP.

This summer, Preston Gates added three new members to our Labor, Employment & Benefits team.

HOW TO REACH US

If you would like more information about these or other employment and labor issues, or have a suggestion for a future article, please contact the authors, or contact Update Editor Jennifer L. Mora at jmora@prestongates.com.

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