2015
Retail Industry Year in Review






HUNTON & WILLIAMS




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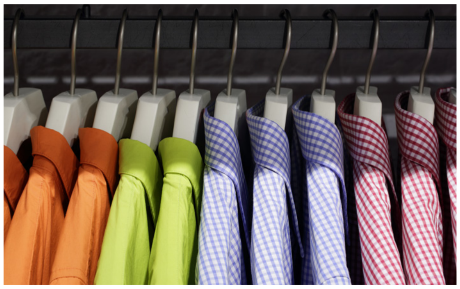


DEAR CLIENTS AND FRIENDS,

It has been a remarkable year for the retail industry. More than any other industry, retail is affected every day by new technologies, mobile, digital, and social media, changing consumer behaviors, and an interdependent global economy. Whether focusing on a bricks and mortar presence, online or mobile experience for consumers, retailers must remain flexible, creative and responsive to new trends, while protecting the security and privacy of their customers, and the well-being of their employees.

This evolving marketplace has given rise to numerous and unique legal challenges in the retail industry. As exhibited in the following pages of our *2015 Retail Industry Year in Review*, Hunton & Williams' team of retail-focused lawyers has handled a significant number of complex business and legal matters that reflect the assorted demands faced by retailers today.

Our team has been particularly busy representing retail clients in mergers and acquisitions, restructurings and consolidations as well as investigations before the Department of Justice (DOJ), Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC). In the area of consumer protection, our skilled lawyers, some of whom are former FTC and SEC counsel, have helped our clients navigate critical FTC and SEC frameworks in antitrust and consumer protection matters. Our labor and employment lawyers have guided clients extensively in adapting to new NLRB union election rules, and our privacy lawyers continue to win global recognition for their depth of expertise, particularly in the area of data breach that poses such a significant and unique challenge to retailers.

It is an exciting and innovative time for the retail industry, which gives rise to increasingly complex and novel legal issues calling for qualified and experienced legal counsel. Our retail-focused lawyers collaborate with one another across different practice areas to deliver practical, efficient breakthrough solutions. I am proud of our experience and success for retail industry clients, and I hope you enjoy and benefit from my colleagues' reports and analysis in the pages that follow.

Wally Martinez
Managing Partner

YEAR IN REVIEW: M&A IN THE RETAIL SECTOR

Steve Patterson and Gary E. Thompson

Steve, resident in Hunton & Williams' Washington office, and Gary, resident in the Richmond office, are partners and co-heads of the firm's corporate finance and mergers and acquisitions practice.

M&A in 2015: Shattering prior records… With the economy in a modest recovery and with cheap financing readily available, M&A activity was at an all-time high in 2015. Surpassing the prior record of $4.3 trillion in deals in 2007, 2015 saw M&A activity of $4.7 trillion worth of transactions, of which approximately half involved US companies. In fact, US deals alone exceeded $2 trillion for the first time ever.

Deals were also bigger. According to Dealogic, more than 60 transactions were valued at $10 billion or more. That is over 150 percent more than the prior record of 43 mergers exceeding that same price tag in 2006. In addition, in 2015 at least nine transactions were valued at more than $50 billion each.

The retail sector did more than its part to contribute to the M&A upswing. Convenience stores, pharmacies and consumer products saw a large volume of deal activity. Retailers also sought to ensure their omnichannel presence and reach millennial consumers through online acquisitions. We highlight a few of these retail transactions below.

Our 2016 outlook is optimistic, although there are headwinds created by global economies and potential volatility in credit markets. We expect 2016 to be another solid year for US M&A activity. With many mega mergers having closed or being well on their way, many smaller companies will find themselves feeling forced to acquire — or be acquired — in order to remain competitive. Larger companies will remain acquisitive in order to maintain scale and acquire new technologies and new lines of business, and may be active in selling, or spinning off, non-core businesses. Consequently, the M&A wave is expected to continue well into 2016 and perhaps beyond.

Important lessons from the Delaware Court of Chancery… In two separate areas, the Delaware courts issued rulings that set in motion lasting changes to the way companies approach and complete M&A transactions.

First, the Delaware Supreme Court affirmed the Court of Chancery's decision to hold a financial adviser liable for more than $75 million in damages for aiding and abetting breaches of fiduciary duty by a company's directors. The financial advisor was found to have had numerous conflicts of interest during an M&A sale process, which were material information not adequately disclosed to the board. The court found that the board's lack of oversight of the financial adviser resulted in the adviser's conducting a "flawed and conflict ridden" sale of the business. This ruling sent a clear message to corporate boards to exercise careful oversight of advisers in transactions.

Second, the Court of Chancery criticized numerous "disclosure only" settlements in several merger challenges, including Cobham PLC/Aeroflex, Roche/InterMune, Thoma Bravo/Riverbed Technology and Hewlett-Packard/Aruba Networks. Prior to these rulings, most public M&A transactions could expect at least one "strike suit." These settlements generally provided defendants with a broad release of claims in exchange for providing supplemental disclosures about the merger and agreeing to pay the plaintiffs' attorneys' fees. The court's rejection of disclosure-only settlements may add to deal parties' uncertainty as defendants frequently enter into disclosure-only settlements to avoid the nuisance costs associated with handling these lawsuits post-closing. But they also signal increased judicial scrutiny over the proliferation of lawsuits challenging M&A transactions, and we have begun to experience a reduction in the volume of merger strike suits.

Retail M&A 2015 Highlights

C-Store Consolidation

Several notable deals involving convenience stores resulted in acquisitions of more than 100 locations each. These transactions included acquisitions by Sunoco, TravelCenters, 7-Eleven and Couche-Tard.

Sunoco/Susser Holdings Corp. In July, Sunoco completed its $1.93 billion acquisition of Susser Holdings Corp. from wholly owned subsidiaries of Energy Transfer Partners. Susser's assets consisted primarily of nearly 700 Stripes-branded c-stores that sell motor fuel, merchandise and, at most locations, food in Texas, Oklahoma and New Mexico.

Pharmacy M&A

CVS Health/Target pharmacy. In December, CVS Health completed its $1.9 billion acquisition of Target's pharmacy and clinic businesses. CVS Health will operate Target's 1,672 pharmacies across 47 states, branded as CVS Pharmacy™, as well as Target's 79 clinic locations, which will be rebranded as Minute Clinic™.

Walgreens/Rite Aid. In October, Walgreens announced its $17.2 billion purchase of Rite Aid. The deal is currently under antitrust review by the Federal Trade Commission.

CVS Health/Omnicare Inc. In May, CVS Health acquired Omnicare for $12.7 billion. This acquisition is expected to allow CVS Health to expand its presence in the specialty pharmacy market and its ability to deliver prescriptions in assisted living facilities serving seniors.

Rite Aid Corp./Envision Pharmaceutical Services. In June, Rite Aid completed its $2 billion acquisition of Envision Pharmaceutical Services, the national pharmacy benefits manager known as EnvisionRx. The acquisition is expected to allow Rite Aid to expand its health and wellness offerings through its retail health care platform.

Other Retail Transactions

Belk/New York-based Private Equity Firm. A New York-based private equity firm agreed in September to acquire department store chain Belk, the nation's largest family-owned-and-operated department store chain, for $2.7 billion.

Stock Building Supply/BMC.* In December, Stock Building Supply Holdings, Inc. and Building Materials Holding Corporation completed their $1.5 billion merger of equals. The resulting company, BMC Stock Holdings, Inc. will continue as a leading building materials and solutions provider to professional contractors.

Delhaize/Ahold.* In June, Dutch grocer Ahold agreed to buy Belgian grocer Delhaize for $28 billion, which, if consummated, would create one of the biggest food retailers in the United States. The deal would combine four well-known supermarket banners on the East Coast: Ahold's Stop & Shop and Giant stores and Delhaize's Food Lion and Hannaford brands.

Liberty Interactive/Zulily. In August, Liberty Interactive agreed to buy Zulily, the flash-sales site for mothers, for $2.4 billion. The deal allows Liberty Interactive, which owns QVC, to enhance its e-commerce strategy and appeal to a younger customer demographic.

NRD Partners LP/Frisch's Restaurants Inc. In August, NRD Partners completed its purchase of Frisch's Restaurants for $175 million.

Levy Acquisition Corp./Del Taco Restaurants Inc. In June, Levy Acquisition Corp. completed its $500 million purchase of Del Taco. Del Taco competes in the space between Taco Bell and Chipotle.

Staples Inc./Office Depot Inc. In February, Staples announced its $6.3 billion acquisition of Office Depot. In December, the Federal Trade Commission filed suit to block the merger. The litigation is ongoing.

With many megamergers having closed or being well on their way, many smaller companies will find themselves feeling forced to acquire—or be acquired—in order to remain competitive.

Post Holdings Inc./MOM Brands Co. In May, Post Holdings combined its cereal and packaged foods business through its $1.15 billion acquisition of MOM Brands.

Consumer Goods Acquisitions

ABInBev/SABMiller.* In October, Anheuser-Busch InBev agreed to acquire SABMiller for $104 billion, creating the largest brewery in the United States. The Department of Justice Antitrust Division is investigating the deal. To help allay antitrust concerns, the companies agreed to sell SABMiller's 58 percent stake in MillerCoors to Molson Coors Brewing for $12 billion in cash, which would position Molson Coors as the number two company in the US beer market, with a 25 percent share.

Time Warner/Charter/Bright House. In May, Charter Communications announced its $67 billion takeover of Time Warner Cable and Bright House Networks. The deal would combine the fourth- (Time Warner), seventh- (Charter) and tenth- (Bright House) largest multichannel video programming distributors in the country to create the third-largest provider. The deal is currently under regulatory review by the Federal Communications Commission and the Department of Justice Antitrust Division.

Electrolux/GE Appliances.* In December, General Electric terminated its agreement to sell its appliances business to Electrolux for $3.3 billion. The Department of Justice Antitrust Division sued to block the deal in federal court, arguing that it would reduce competition and raise prices. GE received a $175 million termination fee that was part of the transaction agreement.

Reynolds/Lorillard. In June, Reynolds American Inc. completed its $27.4 billion acquisition of rival Lorillard Inc. In related transactions, Reynolds subsidiaries have sold the Kool, Winston, Salem, Maverick and blu eCigs brands, among other assets and liabilities, to ITG Brands for just over $7 billion.

Coty Inc./P&G beauty business. In July, Coty Inc. announced its $13 billion acquisition of Procter & Gamble's beauty brands, adding such items as CoverGirl makeup and Clairol hair dyes. The parties expect to close the deal in the second half of 2016.

The WhiteWave Foods Co./Vega. In the third quarter, WhiteWave Foods closed its $550 million acquisition of Vega, combining two leading companies in plant-based nutrition products.

Capmark Financial Group Inc./Orchard Brands Corp. In May, Capmark Financial Group announced its $410 million cash purchase of Orchard Brands Corporation, a national, multibrand company with 13 catalog and e-commerce brands serving the boomer and senior demographics.

H.J. Heinz Co./Kraft Foods Group Inc.* In July, Heinz and Kraft completed their $28 billion merger. The deal creates the fifth-largest food and beverage company in the world.

The J.M. Smucker Co./Big Heart Pet Brands Corp. In March, Smucker completed its $6 billion acquisition of Big Heart Pet Brands, a leading producer of branded pet food and snacks in the United States.

** Indicates Hunton & Williams served as counsel to one or more transaction parties, or represented one or more parties in related merger litigation.*

YEAR IN REVIEW: ANTITRUST ENFORCEMENT IN THE RETAIL SECTOR

Amanda L. Wait and Brian C. Hauser

Amanda, a former Federal Trade Commission attorney, is a partner and Brian is an associate on the competition team in Hunton & Williams' Washington office.

2015 was a record year for mergers and acquisitions activity, with over $4.7 trillion in transactions announced. This record volume has kept US antitrust authorities fully engaged.

Federal antitrust agencies reviewing more M&A transactions… Increased M&A activity in 2015 kept US antitrust agencies busy. The number of transactions reported under the Hart-Scott-Rodino Act increased by 25 percent from FY 2013 to FY 2014, and the upward trend appeared to continue, although official statistics are not yet available.

The antitrust cops are on the beat… Implementing their "litigation readiness" focus, the US antitrust agencies brought many merger challenges in 2015. Combined, the Department of Justice (DOJ) and Federal Trade Commission (FTC) sued to block over 25 mergers, including Staples/Office Depot, Sysco/US Foods, Electrolux/General Electric appliances business, Dollar Tree/Family Dollar and more.

But merger challenges have not increased significantly as a percentage of reported transactions… Despite the perception that the Obama administration has more vigorously enforced the antitrust laws than prior administrations, as a percentage of reported transactions the number of significant merger investigations (defined as investigations in which a "Second Request" is issued) and the number of challenges have held fairly constant between administrations, even accounting for the significant number of private equity transactions (which produce disproportionately fewer antitrust issues) in the final years of the Bush administration.

	Under President Bush (FY01-FY08)	Under President Obama (FY09-FY14)	Change (Bush v. Obama)
Reported Transactions	13,375 (avg. 1,672/year)	7,750 (avg. 1,292/year)	-380/year
Second Requests	388 (2.9%)	282 (3.6%)	+0.7
Challenges	270 (2.0%)	174 (2.2%)	+0.2

Perhaps driving the public perception of more vigorous antitrust enforcement is the revival of the "megamerger." The FTC and DOJ reported that in FY 2014 approximately one-third of reported transactions were valued at more than $500 million, up from approximately one-fourth of reported transactions in FY 2012. Challenges to mega-mergers like Pfizer/Hospira and others are more likely to receive national press coverage than smaller transactions.

Merger review taking longer, costing more… The federal antitrust agencies are taking longer to close merger investigations by clearing the transaction, entering a consent decree or suing to block the deal. Recent studies suggest that the average time for significant merger reviews is ten months — up from approximately eight months in 2014 and seven months in earlier years. This delay results in significant business uncertainty and costs for merging parties and other stakeholders, including customers, suppliers and others.

Third parties continue to be pulled into merger challenges… Two merger challenges in 2015 — the FTC's challenge of Sysco/US Foods and the DOJ's challenge of the proposed acquisition of General Electric's appliances business by Electrolux — highlight the role of third parties. In both matters, third-party customers, suppliers and competitors received document and data subpoenas in connection with the agencies' initial investigations and then received additional document, data and deposition discovery requests and subpoenas to appear as trial witnesses. Notably, involvement was not dictated by the third party's views on the merger — third parties were involved with the case whether their views of the merger were positive, neutral or negative simply because of the third parties' roles in the industry at issue. Companies in industries ripe for consolidation must be cognizant of this fact and should consider engaging antitrust counsel early if contacted in connection with a third-party merger.

Hunton & Williams represented three third parties in Electrolux/GE and are representing multiple third parties in Staples/Office Depot. During these representations, we negotiated reduced scopes of our clients' responses to extensive document and data requests, resulting in significant cost savings and resource efficiencies for our clients. We also engaged in motions practice to secure confidential treatment of our clients' sensitive business information, including obtaining sealed treatment for all our clients' confidential business documents that were identified as potential trial exhibits in Electrolux/GE.

2015 Retail Antitrust Highlights

Electrolux/GE Appliances: Transaction Abandoned by GE During Trial

In late 2014, Electrolux announced that it had reached an agreement to acquire GE's appliances business for $3.3 billion. On July 1, 2015, the DOJ filed suit to block the merger, alleging that the merger, if consummated, would result in anticompetitive effects in the market for the sale of cooking appliances to professional (i.e., contractors and home builders) and retail customers. The trial began on November 9, 2015. After over three weeks of testimony from competitors, retail distributors and customers, and on the last day of the merging parties' case, GE elected to abandon the merger and take the $175 million breakup fee from Electrolux specified in the merger agreement. On January 15, 2016, GE announced that it had agreed to sell its appliances business to Haier, a Chinese appliances manufacturer, for $5.4 billion.

Staples/Office Depot: FTC Challenge Pending

On February 4, 2015, Staples and Office Depot announced that they had reached an agreement under which Staples would acquire Office Depot for $6.3 billion. This transaction is the latest in a string of mergers among office supply vendors that would combine the prior "big three" office supply superstores — Staples, Office Depot and OfficeMax — under common ownership. The proposed merger mirrors the attempted 1996 merger of Staples and Office Depot that the FTC successfully challenged.

Despite media reports of a proposed settlement, on December 7, 2015, the FTC filed a complaint seeking a preliminary injunction in federal district court. The complaint alleged that the consolidation of Staples and Office Depot (which also now owns OfficeMax) would result in anticompetitive effects in the market for the sale of consumable office supplies to commercial customers. These allegations differ from those in the 1996 challenge, which alleged anticompetitive effects in the market for the sale of consumable office supplies to retail customers. The merging parties likely are counting on changed market dynamics since 1996, including the emergence of online retailers and changes in consumer purchasing behavior, to provide countervailing competition that would allow the merger to be completed this time.

The hearing on the preliminary injunction is set to begin on March 21, 2016, in front of the same judge who presided over the Electrolux/GE trial. If the FTC loses its preliminary injunction motion, it may elect to have an administrative trial in its in-house court. Although the outcome of the preliminary injunction hearing is uncertain, we do know that we will learn a great deal more about the FTC's internal review of retail industry mergers as the litigation proceeds (and will post our findings to the Hunton Retail Blog). In addition to the FTC's investigation, the Canadian Competition Bureau has sued to block the merger, and the European Commission has recently extended its deadline for its merger investigation from February 10, 2016, to March 2, 2016.

Dollar Tree/Family Dollar: Deal Completed After Agreement on Divestiture Package

In July 2014, Dollar Tree agreed to acquire Family Dollar for $9.2 billion — a consolidation of two of the country's largest dollar store chains. During the bidding process, Dollar Tree outbid the larger Dollar General and convinced Family Dollar's shareholders that any deal with Dollar General would result in massive divestitures in order to receive regulatory approval. Despite purportedly having fewer antitrust issues, the FTC investigated the transaction for nearly an entire year before coming to an agreement with Dollar Tree on a divestiture package on July 2, 2015, which allowed the deal to close. Under the divestiture agreement, Dollar Tree was required to sell 330 stores in various markets across 35 states to a private equity firm.

Walgreens/Rite Aid: Deal to Watch

On October 27, 2015, Walgreens, the second-largest drugstore chain in the United States, agreed to acquire Rite Aid, the third-largest drugstore chain, for $17.2 billion. If the deal is completed without divestitures, it will create the country's largest drugstore chain with a combined total of approximately 12,800 locations. This deal continues the trend of consolidation among drugstores and pharmacy benefit managers — other deals included Walgreens's acquisition of Duane Reade, CVS's acquisition of Target's pharmacy business and CVS's acquisition of pharmacy benefit manager Caremark. The FTC likely will carefully consider several key issues during its investigation, including the effects of the deal on retail pharmacy customers and on the bargaining power of the combined entity in negotiating with insurers.

Anticipating such scrutiny, Walgreens agreed to divest up to 1,000 locations or locations, generating up to $100 million in revenue in order to receive regulatory approval. If Walgreens is not able to obtain regulatory approval for the merger, it will have to pay Rite Aid a $325 million reverse breakup fee. The parties expect that the transaction will close in the second half of 2016. In the meantime, the FTC's review of this transaction is likely to reach several third parties and provide retailers with key insights into how the FTC views changes in bargaining power during its review of mergers. We will post developments to the Hunton Retail Blog as they unfold.

SEC ADOPTS CEO PAY RATIO RULES: WHAT RETAILERS SHOULD BE DOING TO PREPARE

Scott H. Kimpel

Scott, who formerly served on the Executive Staff of the SEC as Counsel to Commissioner Troy A. Paredes, is a partner in the corporate finance and mergers and acquisitions practice in Hunton & Williams' Washington office.

On August 5, 2015, the Securities and Exchange Commission (SEC) adopted final disclosure rules under the controversial "CEO pay ratio" provision of the Dodd-Frank Act. The first disclosures for affected public companies will generally be required to be made in 2018. Nevertheless, given the size and diversity of their workforces, publicly traded retailers should begin making compliance plans right away.

... affected retailers should use the next two years to begin putting in place appropriate systems and controls to collect worker compensation data across all consolidated subsidiaries and geographies.

The SEC's rules are derived from Section 953(b) of the Dodd-Frank Act, which requires the SEC to amend Item 402 of Regulation S-K to provide for the disclosure of (A) the median of the annual total compensation of all employees of an issuer, except the issuer's CEO; (B) the annual total compensation of the issuer's CEO; and (C) the ratio between (A) and (B). The SEC's final rules require this disclosure for all public companies other than emerging growth companies, smaller reporting companies, foreign private issuers, US-Canadian multijurisdictional filers and registered investment companies. To find the median employee, affected public companies are required to calculate the annual total compensation of "all employees" other than the CEO, which includes all worldwide full-time, part-time, temporary and seasonal workers employed by the company and its consolidated subsidiaries. Independent contractors and leased workers are generally excluded from the calculation.

The final rules make a few accommodations in an effort to ease the compliance burden:

- A company may make a cost-of-living adjustment to the compensation of employees who reside in a jurisdiction different from that of the CEO, but in doing so must make a host of explanatory disclosures.
- A company may use the same median employee for three consecutive years unless there has been a change in its employee population or employee compensation arrangements that it reasonably believes would result in a significant change to its pay ratio disclosure.
- A company is permitted to select a measurement date within the last three months of its last completed fiscal year in order to determine the employee population for purposes of identifying the median employee.
- A company may exclude non-US employees from the determination of its median employee when those non-US employees are employed

in a jurisdiction with data privacy laws that make the company unable to comply with the final rule without violating those laws. To do so, the company would be required to obtain an opinion of legal counsel on the inability of the company to obtain or process the information necessary for compliance with the rule without violating the jurisdiction's laws or regulations governing data privacy.

- As a kind of de minimis exemption, a company may also exclude up to five percent of its total employees who are non-US employees, including any non-US employees excluded using the data privacy exemption. If a company excludes any non-US employee in a particular jurisdiction, it must exclude all non-US employees in that jurisdiction.

The pay-ratio disclosure will be required to be made in registration statements, proxy and information statements, and annual reports that are required to include executive compensation information under Item 402 of Regulation S-K. Conversely, companies would not be required to disclose the pay ratio in reports that do not require executive compensation information, such as Form 8-K and Form 10-Q.

The first reporting period under the final rule is a public company's first full fiscal year beginning on or after January 1, 2017. For most affected companies, the first disclosure will therefore be made in proxy statements and annual reports filed in 2018.

Under the final rules, public companies may present additional ratios or other information to supplement the required ratio. The final rules state, however, that registrants choosing to provide such additional information must do so in a way that it is "clearly identified, not misleading, and not presented with greater prominence than the required ratio."

It remains to be seen how mainstream investors will use the new disclosures in making investment decisions. For publicly traded retailers with multiple

payroll systems or that operate in jurisdictions outside the United States, one of the main compliance challenges is developing a unified system to compile the data necessary to make the pay-ratio calculations. Thus, affected retailers should use the next two years to begin putting in place appropriate systems and controls to collect worker compensation data across all consolidated subsidiaries and geographies. If a retailer intends to rely on the data privacy exemption for non-US employees, it should begin analyzing local law in those countries that may prohibit cross-border sharing of personal information and then begin taking steps to secure necessary legal opinions from local counsel. Retailers that make use of large numbers of seasonal or temporary workers should also begin to consider which measurement date in the three-month window should be selected. Finally, retailers should begin to consider how the disclosure will be presented and what explanatory narrative will accompany it.

REPORT FROM THE FIELD — THE NLRB'S "AMBUSH" ELECTION RULES: THEIR UNIQUE IMPACT ON RETAIL EMPLOYERS

Robert T. Quackenboss

Bob is a partner on the labor and employment team in Hunton & Williams' Washington and New York offices.

The National Labor Relations Board's (NLRB or Board) long-anticipated "ambush" election rules became effective on April 14, 2015, substantially changing the way union elections are conducted. The rules shortened the duration of elections from approximately 40 days to theoretically as few as 11 days. The new rules also accelerate the time within which an employer must disclose employee contact information and make critical strategic decisions about its legal positions, including issues such as the scope of the proposed bargaining unit. The employer's ability to seek pre-election rulings on most legal challenges has been virtually eliminated, requiring that the parties "vote first, vote fast, and ask questions later." In sum, employers now have as little as two weeks to accomplish everything that they used to accomplish in five or more.

The retail industry faces some singular challenges in adapting to the new rules, particularly due to the unique nature of its workforce and scheduling patterns. Following are some of our observations based upon the retail industry election campaigns Hunton & Williams has handled since the implementation of the new rules.

The retail industry faces some singular challenges in adapting to the new rules, particularly due to the unique nature of its workforce and scheduling patterns.

Campaigning with a Part-Time Workforce

One of the most significant challenges for retailers is managing the newly compressed campaign time frame in light of the heavy part-time contingent of the modern retail workforce. Economic reality has required that more and more retailers rely on large numbers of part-time employees, some of whom work only one or two afternoons or evenings per week. This creates significant challenges in getting all of the employer's campaign messages to every voter in a period of a couple of weeks. Given the infrequency with which some part-time employees report to work, many of them will not be present for key meetings unless the employer slows its pace to make sure every voter receives the same message and the same level of focus and attention. Slowing the pace and repeating meetings to accommodate part-time employees was a practical solution under the old rules, when the campaign lasted perhaps five weeks, for example. But it is not a practical solution when one has only a couple of weeks to "cycle" through all messages and campaign events. Instead, retailers now must use a blend of creative scheduling strategies, dual-track campaign calendars and increased managerial staffing to ensure that part-time employees receive the same messages and attention without sacrificing the accelerated pacing of the campaign.

Absence of "Shift" Information

The new rules also fail to contemplate at least one other reality of retail scheduling — the extreme fluctuation of employees' schedules. Many of today's retailers schedule employees “as available” or as needed rather than requiring either party to commit to a rigid weekly or daily schedule. This practice accommodates both the employees’ desire for flexibility (to hold a second job, for instance) and also the employer’s need to adjust staffing based on weekly and seasonal fluctuations in traffic and sales. But the new rules require that the employer disclose to the union the particular “shift” worked by each member of the bargaining unit. Most retailers will immediately recognize the impossibility of designating standard “shifts” for its fluctuating workforce. How, then, do retailers comply with the requirement to disclose each employee’s “shift”? Some unions have argued that, where fixed “shift” information is not available, compliance requires employers to provide detailed weekly schedules showing the actual hours for which employees are scheduled. Board agents who are showing flexibility in the face of the new rules may agree to a disclosure that shifts are “variable” in the retail environment. A related challenge is the new rules’ requirement that the employer disclose each employee’s work “location”. Unlike the sprawling campus of an aircraft engine manufacturer, a retail store does not often have more than one location to put someone to work — you are either in the store or you are not.

Unique Challenges in Locating Employee Contact Information

The new rules have imposed a substantially higher burden on the employer’s duty to disclose all available contact information for employees, including available home and cellular telephone numbers and email addresses. Further, the Board has emphasized that all available sources and repositories of such information must be searched, and has ordered re-run elections in cases where employers have not done so. Because of the nature of their business model, retailers are more likely to have multiple repositories of employee contact information. In addition to information maintained within the corporate headquarters or human resources

database, retailers may have different or more current information located at the local store in which the employee works, in a regional office or among the business notes of an employee’s immediate supervisor. Retailers also should consider whether they have separate contact information for employees who have also interacted with the company as a customer, perhaps entering an alternative email or cell phone number in the course of a purchase.

Increased Burden on Local Managers

Finally, retail employers should act early to address the increased burden that the new campaign rules will place on the store management team. Store managers frequently have taken the lead in delivering the employer’s campaign messages, which has always been an exhausting and challenging duty fraught with the risks of drawing unfair labor practice charges if they misstep. At the same time, they are responsible for managing the business of the employer and ensuring that customer service remains strong. But now these duties must be accomplished in substantially less time, increasing the chance of burnout, mistake or decline in business standards. The burden is further multiplied if the petition is filed during a peak sales period such as Black Friday weekend. To address this, retail employers should quickly identify alternative resources to support the store management team. Alternatives may include importing managers from neighboring stores to "run the business" while the home team campaigns, or by engaging third-party campaign communicators to alleviate some of the messaging burden. Reliance on the home management team alone for employer advocacy is no longer a practical option for retailers under the NLRB's new rules.

Conclusion

While the NLRB's new "ambush" election rules create challenges for all employers, and across all industries, retailers have unique challenges in adjusting their approach to campaign defense. For retailers, adjustments should focus on the unique stress that the compressed campaign time frame places on its management staff, customer service and the integration of its part-time workforce into the pace of the campaign messaging. Hunton & Williams will continue to report on developments and Board decisions as more retail elections are conducted in 2016 under the new rules.

THE YEAR IN CONSUMER PROTECTION

Phyllis H. Marcus and Emma Lewis

Phyllis, former FTC chief of staff of the Bureau of Consumer Protection's Division of Advertising Practices, is counsel and Emma is an associate on the competition team in Hunton & Williams' Washington office.

2015 saw the Federal Trade Commission (FTC or Commission) expand its influence in the retail space, both strengthening existing regulations and moving into new areas. Our retail clients should be aware that the FTC has taken, and will continue to take, consumer protection in the retail industry very seriously.

The FTC Dips a Toe in the Water of Retail Tracking

In April, the Commission filed its first complaint against a retail tracking company. Nomi Technologies' technology allows a retailer to track a customer as he or she moves through a store. In its action, the FTC alleged that, while Nomi effectively permitted consumers to opt out online, it had been misleading consumers since 2012 about the ability also to opt out in-store.

Nomi's tracking technology used a unique identifier from a consumer's mobile device to track the individual's movement throughout the store and, according to the complaint, to aggregate data on how many consumers passed by a store without going in, the length of an individual's stay and even whether a customer had visited another branch of a chain store.

Under the terms of Nomi's settlement[1] with the FTC, the company is prohibited from misrepresenting to consumers their options for opting out and controlling whether their information is collected, used or shared. Notably, there is no prohibition against tracking consumers or using the information collected. FTC Commissioner Ohlhausen's dissent[2] notes that, as a third-party contractor collecting no PII, Nomi had no obligation to offer consumers an opt-out yet chose to do so anyway. The Commissioner maintained that

1 https://www.ftc.gov/news-events/press-releases/2015/04/retail-tracking-firm-settles-ftc-charges-it-misled-consumers
2 https://www.ftc.gov/public-statements/2015/04/dissenting-statement-commissioner-maureen-k-ohlhausen-matter-nomi

the FTC should not have applied liability to "a young company that attempted to go above and beyond its legal obligation to protect consumers but, in so doing, erred without benefiting itself" or harming consumers.

It's Not Easy Being Green

With manufacturers and consumers increasingly interested in environmentally friendly products, the FTC spent the year going after claims from biodegradability to natural materials to even "flushability."

In several cases, retailers avoided penalties, as the Commission actions focused on the manufacturers. The Commission settled in May with Nice-Pak Products for an alleged failure to substantiate that their product was safe to flush, and decided in October against ECM Biofilms[3] for an unqualified biodegradability claim, announcing that a product must break down within the reasonably short period of five years in order to qualify as biodegradable.

However, retailers did not escape unharmed from the FTC's spotlight on green claims — the Commission's Nice-Pak press release[4] after its settlement with Nice-Pak mentioned in its subheading that the wipes products were sold under the Costco, CVS and Target private labels and carried Nice-Pak's environmental seal; the release also mentioned BJ's Wholesale Club as an affected retailer. Simply selling a product with dubious green claims may lead to a mention in an FTC release and tie the retailer to an unwanted consumer protection conflict.

Some retailers were even hit with civil penalties, after misleading customers into buying rayon textiles labeled as made of "bamboo." In December, four retailers[5] — Bed Bath & Beyond, Nordstrom, J.C. Penney and Backcountry.com — were required by court order to pay a total of $1.3 million in civil penalties for continuing to misrepresent rayon products as environmentally friendly bamboo, even after receiving warning letters from the FTC in 2010 and a synopsis of previously litigated cases involving the same allegations. The retailers' fabrics were made of bamboo that had been chemically processed into rayon, and labeling and advertising them as made of a natural, environmentally-friendly material violated consumer protection law. Our retail clients should be especially careful about labeling and advertising products as "green," taking time to commit to heart the FTC's Green Guides.[6]

Zero Stars for Deceptive Online Consumer Reviews

As third-party review sites become ever more popular and influential, it might be tempting to induce customers to post a positive review of your store online. However, this year, several overzealous companies ran afoul of the FTC's endorsement guides in their search for a five-star review.

3 https://www.ftc.gov/news-events/press-releases/2015/10/ftc-concludes-ecm-biofilms-made-false-misleading-unsubstantiated
4 https://www.ftc.gov/news-events/press-releases/2015/05/wet-wipe-manufacturer-agrees-substantiate-flushability
5 https://www.ftc.gov/news-events/press-releases/2015/12/nordstrom-bed-bath-beyond-backcountrycom-jc-penney-pay-penalties
6 https://www.ftc.gov/news-events/press-releases/2012/10/ftc-issues-revised-green-guides

Our retail clients should be aware that the FTC has taken, and will continue to take, consumer protection in the retail industry very seriously.

Throughout the year and across industries, the FTC went after companies for compensating a reviewer for their seemingly objective opinions. Roca Labs,[7] a weight-loss supplement marketer; Machinima, Inc.,[8] an online entertainment network; and AmeriFreight,[9] an automobile shipment broker, all allegedly rewarded consumers to endorse their products or services online, either by paying them to endorse the company or giving them a discount to do so without disclosing their affiliations or inducements. Machinima and AmeriFreight, which both settled with the FTC, are barred from misrepresenting that the endorser is an independent consumer in the future.

Roca Labs went even further — in addition to giving customers a discount for posting a testimonial, their "Terms and Conditions" also barred the purchaser from sharing any negative review of the product. The matter currently is in litigation.

Though positive consumer testimonials and high ratings are important to retailers, it is equally important not to cross the line in pursuit of a good online review. Our retailer clients ought to remember to prominently disclose any material connection between an endorser and the retailer to avoid violating consumer protection law.

Important to Know for 2016

The FTC also was busy in 2015 outside the retail space. Going forward, our clients may need to know about some big changes in the consumer protection area that could affect them in the future.

- POM Wonderful and Scientific Substantiation: The DC Circuit ruled in January[10] that, in order to substantiate disease claims in a deceptive advertising case, a marketer must have competent and reliable scientific evidence that includes at least one randomized, well-controlled human clinical study. The FTC's continued focus on deceptive health claims may affect retailers that sell such products.
- Native Advertising Guidance: The FTC has long taken an interest in "native advertising" — ads that in their tone and format appear similar to news articles. In the waning days of December, the FTC issued long-awaited Business Guidance on Native Advertising,[11] along with a new Enforcement Policy Statement on Deceptively Formatted Ads.[12] These documents explain how the FTC will apply to native advertising the basic advertising principle that an ad's format (and not just its content) can be misleading and will provide specific examples for advertisers (including retailers) and publishers alike when treading into digital advertising formats.

[7] https://www.ftc.gov/news-events/press-releases/2015/09/ftc-sues-marketers-who-used-gag-clauses-monetary-threats-lawsuits
[8] https://www.ftc.gov/news-events/press-releases/2015/09/xbox-one-promoter-settles-ftc-charges-it-deceived-consumers
[9] https://www.ftc.gov/news-events/press-releases/2015/02/ftc-stops-automobile-shipment-broker-misrepresenting-online
[10] https://www.ftc.gov/news-events/press-releases/2015/01/statement-ftc-chairwoman-edith-ramirez-appellate-ruling-pom
[11] https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses
[12] https://www.ftc.gov/public-statements/2015/12/commission-enforcement-policy-statement-deceptively-formatted

RECENT FLURRY OF "PRICE ANCHORING" CLASS ACTIONS AGAINST RETAILERS

A. Todd Brown, Sr. and Emma C. Merritt

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Over the past two years, a flood of class action lawsuits has faced major discount and outlet retailers who use "price anchoring" in their advertising. "Price anchoring" is a marketing strategy whereby an item's advertisement compares a "sale" price with an "original" or "retail" price. In these recent lawsuits, plaintiffs allege that the "original" prices advertised do not reflect true prices, thus misleading consumers to believe they are receiving a bargain when they purchase items at the "sale" prices.

Outlet malls — a huge growth sector in the apparel and consumer item industry — have been particularly vulnerable to these lawsuits. In January 2014, four members of Congress wrote to the Federal Trade Commission (FTC) asking the agency to investigate outlet store pricing, saying they were concerned that the growing popularity of outlet malls "may have fueled some deceptive marketing practices." Since then, a growing number of retailers have been hit with consumer class actions over "phantom" discounts in their outlet stores, including the following sued in 2015: Kenneth Cole Productions, Inc.; Columbia Sportswear Co.; Kate Spade & Company; Guess, Inc.; and Saks Incorporated.

Plaintiffs in these actions allege that the items offered at retailers' outlet stores are of a lesser quality than items sold in the retailers' main line retail stores, and that such items were never meant to be sold for higher prices in any other retail setting. These plaintiffs allege that any comparison of retail pricing to outlet pricing is false and deceptive.

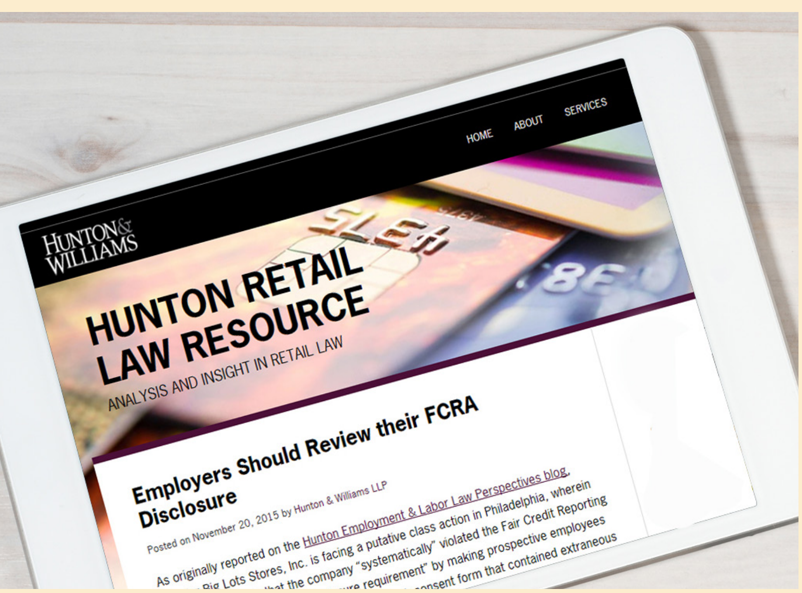
In 2015 lawsuits over sale-pricing practices significantly expanded to include non-outlet stores, including recent suits against DSW Inc.; Macy's, Inc.; Bloomingdales, Inc.; Sears Roebuck & Co.; Burlington Coat Factory; The TJX Companies, Inc. (owner of the T.J. Maxx and Marshalls brands); Jos. A Bank Clothiers; and J.C. Penney Corp. In these cases, plaintiffs allege that the retailers offer "discount" prices referencing fabricated, inflated and false "original" or "compare at" prices, for which the goods have never actually been offered. Plaintiffs in these cases allege that consumers rely on the represented difference between the higher "original" price and the price paid and, as a result, suffer an injury of potential savings.

Retailers should consider ways to minimize their risk exposure, such as avoiding price comparisons on labels.

Various courts — primarily federal and state courts in California, as well as other federal districts applying California law — have allowed these lawsuits to survive early motions to dismiss, despite the difficulties associated with determining the nature of the injuries. Relying on California's consumer protection laws and the FTC's guides against deceptive pricing, those courts have ruled that plaintiffs adequately alleged that amounts they paid exceeded the value of what they received when retailers allegedly misrepresented comparison prices. Under California law, retailers may not reference a "former" price in a product advertisement unless it was the "prevailing market price" of the item within the preceding three months. In May 2015, in a case against J.C. Penney, a federal judge concluded that "prevailing market rate" refers only to the price at which the same items were previously sold, not the price at which competing retailers sold similar items, even when the items were exclusively sold by one retailer. J.C. Penney subsequently settled the lawsuit for $50 million.

Such cases remain on the rise, and we will likely start seeing more cases like them. Retailers should consider ways to minimize their risk exposure, such as avoiding price comparisons on labels. Phyllis Marcus, former FTC chief of staff of the Bureau of Consumer Protection's Division of Advertising Practices and counsel in Hunton & Williams' competition practice, recommends that retailers not indicate that there was a retail price if an item has not been sold at retail. If outlet stores are going to advertise a price comparison, Marcus adds, they should sell goods at outlet that are also sold at ordinary stores, so there is no dispute that it is an accurate price comparison.

Finally, retailers who use "price anchoring" practices should consult with an attorney for advertising advice. Hunton & Williams' experienced retail and consumer protection lawyers are well equipped to advise clients on the best pricing and sales strategies in light of these lawsuits.



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THE EVOLVING LANDSCAPE OF CLASS ACTION AND COLLECTIVE ACTION WAIVERS IN ARBITRATION AGREEMENTS FOR RETAILERS

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Retailers should be aware that there has been a lot of recent activity regarding the enforceability of class and representative action waivers, stemming largely from California's unwillingness to conform to US Supreme Court decisions regarding such provisions. Year 2015 further highlighted this conflict between the courts. Most notably, the US Supreme Court confirmed that arbitration agreements containing class action waivers are enforceable, while California's Ninth Circuit agreed with the California Supreme Court that waivers of representative actions under the California Private Attorneys General Act (PAGA) are not. Retailers should therefore be on notice they may not always get what they were expecting when they include a class and/or representative action waiver in their arbitration agreements.

US Supreme Courts Rules Class Action Waivers Are Generally Enforceable

In the landmark case *AT&T Mobility LLC v. Concepcion*, the US Supreme Court ruled that the Federal Arbitration Act (FAA) preempts California state law invalidating class action waivers in arbitration agreements. The Court emphasized, among other things, that arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. 563 U.S. 333, 344 (2011). The Court reaffirmed the enforceability of class action waivers in its recent December 14, 2015 decision in *DirecTV, Inc. v. Imburgia*, where it held that satellite television consumers must individually arbitrate their disputes with DirecTV, Inc. 577 U.S. ___, 135 S. Ct. 1547 (2015).

In *DirecTV*, the arbitration provision provided that arbitration would not occur if the "law of your state" prohibited class action waivers. The trial court denied *DirecTV's* post-*Concepcion* motion to arbitrate, and the California Court of Appeals affirmed on the grounds that the law of California, despite the ruling in *Concepcion*, remains that class action waivers are unenforceable.

The California Supreme Court declined to review this decision. However, the US Supreme Court granted DirecTV's petition for review and reversed the appellate court's decision. The Court took issue with the state court's interpretation of the "law of your state" language to include invalid state law and what it viewed to be an end run around *Concepcion* and the FAA policy favoring arbitration. In light of the *DirecTV* decision, the general consensus is that class action waivers are generally enforceable.

Retailers, particularly those with a unionized workforce, should note, however, that the National Labor Relations Board (NLRB) continues to find these provisions unenforceable, despite the Supreme Court's favoring of class action waivers and the Fifth Circuit's express rejection of the NLRB's position in *D.R. Horton, Inc. v. NLRB*, and in *Murphy Oil USA, Inc. v. NLRB*.

Retailers should be on notice they may not always get what they were expecting when they include a class and/or representative action waiver in their arbitration agreements.

Given the NLRB's patent disregard of federal court guidance, it will likely take more time and additional court intervention before the NLRB revisits its position. In the meantime, retailers with arbitration agreements will need to be resolute in the face of an NLRB challenge and prepare for the possibility of a protracted fight against the NLRB to enforce what should, under US Supreme Court and Fifth Circuit precedence, be enforceable provisions.

California PAGA Waivers Are Not Enforceable

California has a unique provision — PAGA — under which "an 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations." In *Iskanian v. CLS Transportation Los Angeles, LLC*, the California Supreme Court likened PAGA actions to a type of *qui tam* action and held that an agreement by employees to waive their right to bring a PAGA representative action is unenforceable. According to the Court, even though it is an individual employee bring a PAGA claim, the claim "lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship, (but rather) a dispute between an employer and the state."

Despite *Iskanian*, employers continued to argue in the California federal courts that the FAA preempted the invalidation of PAGA action waivers. However, the Ninth Circuit put these arguments to rest when it followed the ruling in *Iskanian* in *Sakkab v. Luxottica Retail North America, Inc.* While Luxottica has petitioned for rehearing en banc, chances of en banc review are slim, as are the chances of the en banc panel overturning the three-judge panel's decision. And, were the en banc court to affirm the *Sakkab* holding, it is unclear whether the US Supreme Court will weigh in on this issue. It had the opportunity to do so in other cases but refused review of the Iskanian decision and two other California cases invalidating PAGA action waivers — *Apple Am. Grp. LLC v. Salazar* and *CarMax Auto Superstores Calif., LLC v. Areso.*

The consolation to employers seems to be that, in the event of an unenforceable PAGA action waiver (coupled with a class action waiver), courts have been willing to send the rest of the claims to arbitration on individual basis, while staying PAGA claims in court pending arbitration of related claims. Accordingly, employers can proceed with the arbitration they contracted for without having to fight two battles at the same time (in arbitration and in court) and face the risk of inconsistent decisions. Furthermore, in the event the employer succeeds in arbitration as to the individual's underlying claims, that individual would no longer be "aggrieved" and presumably would no longer be able to pursue a PAGA action on behalf of himself/herself and other aggrieved individuals in court.

Conclusion

The general takeaway is that arbitration agreements provide employers with options, and when drafted and rolled out correctly, the ability to prevent an employee from pursing claims on a class action basis. California PAGA representative actions, however, appear to be a different story, and it is likely that employees who have signed arbitration agreements with class action waivers will bring more PAGA claims to retain the ability to proceed on behalf of others. Accordingly, employers who issue arbitration agreements with class action waivers in California should anticipate the possibility and expense of fighting litigation on two fronts: arbitration and in the courts.

DEBITS, CREDITS AND BROKEN WINDOWS: SEC COMPLETES A BUSY YEAR IN ACCOUNTING, AUDITING AND DISCLOSURE ENFORCEMENT

Scott H. Kimpel

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A long string of enforcement actions involving accounting and auditing practices at public companies in 2015 shows that accounting enforcement at the Securities and Exchange Commission (SEC) is alive and well. In the aftermath of the 2008 financial crisis, the emphasis of the SEC's enforcement efforts had shifted to pursuing high-profile crisis-related cases such as those involving complex or structured financial products and the activities of broker-dealers, asset managers and other financial intermediaries that are alleged to have contributed to the crisis. While the SEC has not focused on these kinds of cases to the exclusion of all others over the past several years, the pipeline of financial crisis cases has begun to run dry. We therefore expect the SEC to refocus its enforcement efforts on more traditional areas, including financial reporting and related disclosure cases. Publicly traded retailers should take note of these developments.

In one case that is representative of those brought during the past year, the SEC charged a public company and three of its executives (the Chief Financial Officer, the Director of Accounting and the Vice President of Finance) for fraudulent manipulation of the company's financial results to manage EBITDA in an effort to meet analyst expectations. According to the SEC, the scheme involved fabricating revenues when they fell short of analyst expectations, using a dormant customer account, reducing the reporting of expenses and using a "cushion" accrual account to manipulate financial results. The company and its Vice President of Finance consented to an order to cease and desist from violating the antifraud, reporting, books-and-records and internal control provisions of the federal securities laws. The company agreed to pay a $15 million penalty. The Vice President paid a $150,000 penalty and agreed to be barred from serving as an officer or director of a public company for five years and from public company accounting for five years. The remaining executives are litigating the case, and the SEC has charged them with violating or aiding and abetting the violation of the antifraud, lying-to-auditors, books-and-records and reporting provisions of the federal securities laws.

In another representative case, the SEC charged a public company, its CEO, two former CFOs and the chair of the company's audit committee with a series of accounting and disclosure violations. The violations outlined in the SEC's orders settling administrative proceedings against the company and these individuals

include the failure to disclose related-party transactions with a major customer; failure to implement sufficient policies to identify and disclose related-party transactions; failure to disclose bankruptcies related to two executive officers; improper accounting for advertising, sponsorship and promotional costs that had the effect of overstating revenue; understating rent expense by failing to disclose an aircraft lease agreement; failure to fully disclose executive perks, including jet use, meals, apparel, professional services, personal medical expenses, company cars and golf club memberships; failing to retain manual signature pages for SEC filings for five years under Rule 302 of Regulation S-T; and failing to implement internal accounting controls for perks and other areas where it committed accounting and disclosure violations. The SEC's investigation also discovered that the company conducted unregistered securities offerings when it entered into various transactions with third parties in an effort to pay down outstanding trade payables.

To settle the charges, the company agreed to pay a $700,000 penalty and took the unusual step of agreeing to hire an independent consultant to supervise its financial reporting, internal controls and disclosure. The SEC's order emphasized that the company was unprepared for the SEC's public company reporting requirements at the time it went public, and that its senior management lacked public company or accounting experience. The four individuals also settled the SEC's charges, with three of them paying monetary penalties and two (each CPAs) agreeing to be suspended from practicing as an accountant on behalf of any SEC-regulated entities, with a right to reapply later. SEC charges against board members are rare, but the SEC determined to pursue the company's audit committee chair because of his direct involvement in certain of the unlawful practices and his signing SEC filings that he knew or reasonably should have known were materially false and misleading.

During 2015, the SEC also brought a series of enforcement cases against several audit firms, including two prominent firms with offices nationwide. Although each of the cases involved unrelated companies, a common thread among the sanctioned firms was ignoring audit flags and issuing a false and misleading unqualified audit opinion about the financial statements of the client company. In these cases, the SEC has charged audit firms and their individual partners with failing to comply with professional standards and thus violating various federal laws and SEC rules concerning the plan, design and conduct of the audit. In one subset of cases, the SEC alleged that auditor misconduct included performing deficient audits of public companies, jeopardizing the independence of other audits, and falsifying and backdating audit

These cases serve to remind us that the SEC is not hesitant to pursue officers, directors and auditors for wrongdoing. And they show that the enforcement staff will not hesitate to pursue cases of any size. For retailers, the message should be loud and clear: accounting and auditing enforcement at the SEC is alive and well.

documents. The SEC also charged firms and their individual partners with causing audit clients to file inaccurate financial statements with the agency. The SEC has targeted not only the line audit engagement partner but, depending on the facts, also the audit-concurring review partner, a firm's regional technical director, its national director of accounting and its national SEC practice director.

To settle the cases, without admitting or denying wrongdoing, the audit partners typically agree to pay civil monetary penalties and be suspended from practicing public company accounting before the SEC for varying periods of time. As sanctions to the audit firms in these cases, the SEC typically seeks disgorgement of audit fees, civil monetary penalties and compliance with various undertakings related to quality controls. These undertakings can include a review of the sufficiency and adequacy of the firm's internal audit quality controls, retention of an independent monitor, certifications by a firm's chief executive officer and chief compliance officer, and new mandatory audit and fraud-detection training for all audit professionals assigned to public company engagements.

These cases suggest that the SEC's Financial Reporting and Audit Task Force (Task Force), which was launched in 2013, continues to gain traction. In addition to identifying securities law violations in the preparation of financial statements and the disclosure of financial information, the SEC has also indicated that the Task Force is identifying and exploring areas susceptible to fraudulent financial reporting. According to the SEC, these efforts include an ongoing review of financial statement restatements and revisions, an analysis of performance trends by industry and the use of technology-based tools.

While the cases here did not always involve large-dollar amounts in absolute terms, they illustrate the litany of potential financial reporting, disclosure and auditing violations within the SEC's charging arsenal when it investigates accounting cases. These cases serve to remind us that the SEC is not hesitant to pursue officers, directors and auditors for wrongdoing. And they show that the enforcement staff will not hesitate to pursue cases of any size. For retailers, the message should be loud and clear: accounting and auditing enforcement at the SEC is alive and well.

THE NLRB'S *BROWNING-FERRIS* DECISION AND ITS POTENTIAL IMPACT ON THE RETAIL INDUSTRY

Ronald Meisburg

Ronald is a former National Labor Relations Board Member and General Counsel and is special counsel to the labor and employment practice in Hunton & Williams' Washington office.

On August 27, 2015, the National Labor Relations Board (Board) issued a decision that rewrites and drastically expands the definition of who is a "joint employer" under the National Labor Relations Act. The decision, *Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery*, 362 NLRB No. 186 (2015), promises to cut across industry lines and could create a host of labor relations problems for employers and other entities, including those in the investment community.

Before *Browning-Ferris*, the Board used a straightforward test to determine whether a joint employer relationship existed between two separate entities. The test focused on whether the putative joint employer *exercised direct* control over the essential terms and conditions of employment terms of individuals employed by the other entity. Essential terms and conditions include things such as wages, benefits, hours of work, job conditions, hiring, firing, discipline, supervision, scheduling, dictating the number of workers to be supplied, assigning work, and determining the manner and method of work performance. They do not include routine direction, such as, for example, where a contractor's employees are to report for work or where they may park their vehicles.

Importantly, joint employer status was *not* created simply by indirect control or the unexercised retention of such power. In other words, under the Board's former test, joint employer status could be avoided if active, direct control over another entity's essential terms and conditions of employment were avoided. This bright line allowed businesses to plan for and arrange their affairs with other businesses, with full knowledge of the legal consequences and the status of their relationship for purposes of the National Labor Relations Act.

Under the test announced by the Board in *Browning-Ferris*, however, an entity will be found to be a joint employer even if it *exercises only indirect* control over the essential terms and conditions of certain workers' employment, *or retains the power to exercise* control, even if that power has not been exercised. Exercise of *indirect* control over any one of the essential terms and conditions of employment (not necessarily all or even a substantial number of them) opens the door under *Browning-Ferris* for a joint employer finding. Even more alarmingly, under the new test an entity who *possesses (but never exercises)* the ability to control such terms and conditions will also be found to a joint employer. In other words, an entity that merely has the potential to influence the factors described above, but which never does in practice, will now be found a joint employer.

In making this ruling, the Board in *Browning-Ferris* expressly overruled decades of prior precedent. Further, the Board indicated that going forward it would decide these joint employer statuses on a "case by case" basis, thus destroying the bright-line test formerly employed, and building in uncertainty in business planning until, over a substantial period of time, a clearer picture emerges of how and why two entities will be deemed a joint employer.

Retail firms should assess, and if necessary take steps to remediate, the potential liabilities they may now share if found to be a legal joint employer of the employees of those assets.

The Board's new joint employer standard could work unprecedented changes in the way business is conducted in the United States. The extension of the standard to entities that merely possess authority to control employment terms of other entities has limitless potential application. As the dissenting Board members aptly noted, the new test will impact "user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor and contractor-consumer business relationships" alike. Indeed, the Board has already targeted the franchisor-franchisee relationship — it is currently pursuing dozens of charges of illegal labor practices against McDonald's Corporation based on the actions of a number of its franchisees across the country.

We believe the Board's new test can present significant challenges for the retail industry. The retail industry, like others, is filled with all types of essential business relationships that assist in providing products or services to the public. In the retail industry some of these involve business relationships with other companies to provide, for example, warehousing, transportation, logistics, order fulfilment, in-store food service, security services, janitorial services, information technology and other services, on a regular, ongoing basis. Further, some sectors of the retail industry rely heavily on franchisor-franchisee and lessor-lessee relationships, which can also present joint employer issues, as the current NLRB cases against McDonald's demonstrate. All of these types of relationships have the potential for "indirect" control and/or the "retained" ability to control essential terms and conditions of a third-party business service provider's, or franchisee's or lessee's, employees.

The effects of such a joint employer finding can be profound. A company being deemed a joint employer of its labor provider contractor's employees means that the company could be required to bargain with the union that represents the labor provider employees, and could be required to sign any collective bargaining agreement that was arrived at. This also means that the company could acquire not only legal obligations under the National Labor Relations Act, but also contractual obligations under a collective bargaining agreement. Beyond this, there is the distinct likelihood that other government agencies, as well as aggressive plaintiff's counsel, will seek to expand legal obligations and liability under other federal, state and local employment statutes.

Retail firms should assess, and if necessary take steps to remediate, the potential liabilities they may now share if found to be a legal joint employer of the employees of those assets. This would include review of pertinent agreements and practices in an effort to minimize, to the extent consistent with the applicable business model, joint employer status.

2015: THE YEAR IN PRIVACY AND CYBERSECURITY

Aaron P. Simpson

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The meteoric increase in the number and complexity of privacy and cybersecurity issues facing retailers continued unabated in 2015. Retailers continue to find themselves under a bright privacy and cybersecurity spotlight. The key developments in 2015 did nothing to dim that spotlight and we expect a continued focus on retailers from litigants and regulators, arising from privacy and cybersecurity issues in 2016 and beyond.

Key Privacy and Cybersecurity Developments in the United States

Third Circuit Upheld the FTC's Authority to Regulate Companies' Data Security Practices in *Wyndham* Case

In August, the US Court of Appeals for the Third Circuit issued an important decision[1] in *Federal Trade Commission v. Wyndham Worldwide Corporation*, affirming[2] a district court holding that the FTC has the authority to bring enforcement actions against companies arising from data security issues. This decision serves to cement the Commission's role as a cybersecurity enforcer in the United States.

Seventh Circuit Ruled Data Breach Class's Allegations Against Neiman Marcus Satisfied Article III Standing

In July, the US Court of Appeals for the Seventh Circuit reversed a previous decision[3] that dismissed a putative data breach class action against Neiman Marcus for lack of Article III standing in *Remijas et al. v. Neiman Marcus Group*. The Seventh Circuit's analysis of imminent injury distinguished the Supreme Court's opinion in *Clapper v. Amnesty Int'l.* The Seventh Circuit stated that standing could be established when the "substantial risk" of future harm causes a party to take reasonable steps to mitigate those imminent damages. The court found that although 9,200 customers had been reimbursed for actual fraudulent charges, redress for future fraudulent charges or future identity theft remained uncertain. It also held that there was an "objectively reasonable likelihood" that identity theft would occur. This decision is an important indicator that data breach class action litigants and plaintiffs' lawyers

[1] https://www.huntonprivacyblog.com/2015/08/24/third-circuit-upholds-ftcs-authority-regulate-companies-data-security-practices/
[2] https://epic.org/amicus/ftc/wyndham/Mem-Op-14-3514.pdf
[3] https://www.huntonprivacyblog.com/files/2015/07/14-3122-2015-07-20.pdf

The meteoric increase in the number and complexity of privacy and cybersecurity issues facing retailers continued unabated in 2015. Retailers continue to find themselves under a bright privacy and cybersecurity spotlight.

are having more success in bringing data breach class actions (or at least withstanding standing challenges) in the United States, even where harm has not been proven for all or even most of the class members.

FTC Dismissed Complaint Against LabMD for Failure to Show Current or Future Substantial Consumer Injury

In November, an administrative law judge dismissed[4] the FTC's complaint against LabMD Inc. (LabMD) for failing to show that LabMD's allegedly unreasonable data security practices caused, or were likely to cause, substantial consumer injury. The administrative law judge ultimately dismissed the entire complaint, finding that LabMD's alleged unreasonable data security did not cause, and was not likely to cause, substantial consumer injury. In making this decision, the judge emphasized that there was a possibility of harm, but not the requisite probability or likelihood of harm.

Settlements Reached Between Target Corporation and Payment Card Issuers Arising From Breach

Arising from Target's security breach in late 2014, the retailer was sued by payment card issuers seeking additional redress for fraud losses and other costs incurred as a result of the breach. In August, Target reached a settlement with Visa to pay 75 percent of its issuers up to $67 million for fraud losses and card reissuance costs that resulted from the breach. In December, Target reached a settlement with MasterCard to pay up to $39.4 million to MasterCard issuers for their losses and costs stemming from the breach. This number has preliminarily been approved by the district court and is more than double the initial $19 million settlement originally agreed to between Target and MasterCard that was rejected by issuers in May.

Expansion of US State Breach Notification Laws

In 2015, a number of states strengthened their data breach notification laws. Notable examples include Connecticut,[5] Nevada[6] and Washington.[7] These amendments include tighter time frames for reporting data breaches, expanded lists of cognizable data elements, new regulator reporting requirements and a requirement to provide identity theft protection services.

[4] https://www.huntonprivacyblog.com/files/2015/11/Docket-9357-LabMD-Initial-Decison-electronic-version-pursuant-to-FTC-Rule-3-51c21.pdf

[5] https://www.huntonprivacyblog.com/files/2015/07/2015PA-00142-R00SB-00949-PA.pdf

[6] https://www.huntonprivacyblog.com/files/2015/06/AB179_EN.pdf

[7] https://www.huntonprivacyblog.com/files/2015/03/WA1078-S.E.pdf

Key Privacy and Cybersecurity Developments in the European Union

Court of Justice Declared the Commission's US-EU Safe Harbor Framework Invalid in *Schrems v. Facebook*

In October, the Court of Justice of the European Union (the CJEU) issued its landmark judgment in the Schrems v. Facebook[8] case, declaring that the US-EU Safe Harbor Framework is invalid. The CJEU held that the national data protection authorities (DPAs) have the power to investigate and suspend international data transfers even where the European Commission has adopted a decision finding that a third country affords an adequate level of data protection. The decision stems from Austrian law student Max Schrems' claim that the Irish Data Protection Commissioner erred by holding that the Safe Harbor Framework precluded the agency from stopping data transfers from Ireland to the United States by Facebook, which was participating in the Safe Harbor. Schrems' case was prompted by Edward Snowden's revelations about US national security authorities' accessing European citizens' personal data that had been transferred to the United States.

Informal Agreement Reached on EU General Data Protection Regulation (GDPR)

In December, after three years of drafting and negotiations, the European Parliament and Council of the European Union reached an informal agreement on the final draft[9] of the EU General Data Protection Regulation (the Regulation). The Regulation replaces the EU Data Protection Directive, which was enacted in 1995, and will significantly change EU data protection laws. Once officially adopted by the European Parliament and the Council of the European Union, it will apply in EU Member States after a period of two years. Among many important changes, companies may be sanctioned for violations of the Regulation by fines of up to four percent of annual worldwide turnover.

8 http://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=84927

9 http://www.emeeting.europarl.europa.eu/committees/agenda/201512/LIBE/LIBE%282015%291217_1/sitt-1739884

DAIMLER'S SIGNIFICANT CONTINUED IMPACT ON PERSONAL JURISDICTION

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Two years have passed since the United States Supreme Court issued its landmark decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), redefining the circumstances in which a corporate defendant can be subject to general personal jurisdiction within the bounds of due process. The impact of the decision has been significant, with largely positive implications for retail product manufacturers.

When a defendant is subject to general personal jurisdiction in a particular forum, it can be sued in that forum for any matter, including matters wholly unrelated to its contacts there. The breadth of the jurisdictional reach is such that general personal jurisdiction is often called "all purpose" jurisdiction. Under longstanding United States Supreme Court precedent articulated in *International Shoe Co. v. Washington*, general jurisdiction can be exercised constitutionally over defendants that have "minimum contacts" with the forum — that is, defendants who are engaged in a substantial, continuous and systematic course of business there. Lower courts have traditionally interpreted this standard to mean that most national or multinational corporate defendants are subject to general jurisdiction in every state where they conduct meaningful business operations. Not anymore.

In the January 2014 *Daimler* opinion, the Supreme Court expanded on its decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), and articulated a standard that significantly limits the types of contacts sufficient to constitutionally subject a defendant to general jurisdiction in a particular forum. Under *Daimler,* a plaintiff must demonstrate that the defendant's contacts with the forum are so continuous and systematic as to render it "essentially at home" there. In most instances, a company is "essentially at home" *only* in the state where it is incorporated and the state where it operates its principal place of business. Although the Supreme Court recognized the possibility that a corporation's contacts in a forum other than its state of incorporation or principal place of business may be so substantial as to render the corporation at home in that state, the Court noted that such a case would be "exceptional."

Since the opinion was issued, the risk of a company becoming subject to general jurisdiction outside its "home" states has substantially decreased. The majority of courts applying *Daimler* have interpreted it broadly — and thus the scope of general personal jurisdiction narrowly — very rarely finding the "exceptional" circumstances necessary to subject a defendant to general personal jurisdiction elsewhere. Courts analyzing whether "exceptional" circumstances exist in a particular case frequently compare a defendant's in-state contacts with its contacts in other states. If the contacts are similar, the circumstances

are generally not exceptional. This analysis has proven favorable for retail product manufacturers whose product sales in the forum, although substantial, are nonetheless comparable to product sales in other states. *See, e.g., Allstate Ins. Co. v. Electrolux Home Products, Inc.*, No. 1:14 CV 329, 2014 WL 3615382 (N.D. Ohio July 18, 2014); *Campbell v. Fast Retailing USA, Inc.*, No. 14-6752, 2015 U.S. Dist. LEXIS 170986 (E.D. Pa. Dec. 22, 2015).

Despite recognizing the limits outlined in *Daimler*, a small minority of trial courts have applied a consent-based theory to find that a corporation is nonetheless subject to general personal jurisdiction in forums outside its state of incorporation or principal place of business. These courts generally reason that if a defendant corporation has registered to do business in a state and appointed an agent for service of process there, the corporation has impliedly consented to general jurisdiction in that state, and, thus, the exercise of jurisdiction does not violate due process. To date, very few of these post-*Daimler* decisions have been analyzed at the appellate court level. Decisions in 2016 should continue to shed light on the viability of this theory after *Daimler*.

Also to watch for in 2016 is the California Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, No. S221038, which will analyze whether Bristol-Myers is subject to personal jurisdiction in California for out-of-state plaintiffs' claims related to its drug Plavix®.In July 2014, the court of appeal held that, in light of *Daimler*, Bristol-Myers's extensive contacts with California were insufficient to subject it to *general* jurisdiction in the state. Nonetheless, the court found that the exercise of *specific* jurisdiction over the out-of-state plaintiffs' claims was proper because (1) a "substantial connection" existed between Bristol-Myers's contacts with California and the nonresidents' claimed injuries from Plavix and (2) those injuries were the same as those claimed by the California plaintiffs also in the case. Should the California Supreme Court uphold the lower court's decision, *Daimler*'s impact could be significantly reduced in mass product liability cases in California, and in any jurisdictions that may follow its lead.

In sum, retail product manufacturers should remain cognizant of *Daimler*'s impact and explore the potential for a motion to dismiss on personal jurisdiction grounds for any new cases brought against them in forums outside their "home" state(s) that do not arise from their contacts there. Because personal jurisdiction is a defense that can be waived, it must be one of the first strategy considerations in any new case. Even if a defendant corporation conducts substantial business operations in the forum at issue, and even if it has traditionally been subject to general jurisdiction there, a careful re-examination of the issue after *Daimler* and an assessment of the potential strategic value of challenging the status quo is warranted.

FIVE EMPLOYMENT LAW DEVELOPMENTS IN CALIFORNIA EVERY RETAILER SHOULD BE AWARE OF, AND TWO TO WATCH THIS YEAR

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For retailers doing business in California, it likely will not come as a surprise that nearly a quarter of corporate counsel surveyed last year identified California as a jurisdiction where they expected to face litigation in the next year. California is the most populous state in the nation and the eighth-largest economy in the world, but the Golden State also has some of the most vexing and employee-friendly laws in the country, with new ones popping up every year. And this past year was no different. Below are the five developments in California employment law that every retailer should be aware of and a couple to be on the lookout for in 2016.

1. The California Fair Pay Act – SB 358

While federal and most states' laws already prohibit employers from paying women less than men who work in the "same establishment" and who perform "equal work," California's new Fair Pay Act (which went into effect January 1, 2016), substantially broadens these protections. Hailed as one of the toughest equal pay laws in the country, the California Fair Pay Act prohibits an employer from paying employees less than those of the opposite sex for "substantially similar work," even if their titles are different or they work at different sites. Pay rates must be justifiable based on factors other than sex, such as merit or seniority, and those factors need to be demonstrably job-related and reasonable, not due to discrimination. Under the new law, a female cashier in one location now can challenge a male cashier's higher wages at a store owned by the same retailer but located miles away. For retailers who set pay rates on a store or market level this will create new challenges in making sure wage rates are consistent across job categories. It also likely means more lawsuits in a jurisdiction that already has its fair share of litigation burdens for employers.

2. San Francisco's Retail Workers Bill of Rights

San Francisco is known for creating employee-friendly laws that provide San Francisco employees with compensation, benefits, and rights above and beyond those provided by state or federal law. San Francisco further solidified this reputation with the enactment of two ordinances known as the Retail Workers Bill of Rights (RWBR). Effective July 3, 2015, the RWBR extensively regulates the scheduling and compensation practices of large "formula" retailers, which San Francisco expansively defines to cover not only traditional retailers, but also restaurants, financial services businesses, movie exhibitors, and other businesses. Approximately 1,250 "formula retail" establishments are projected to be affected by the RWBR, which requires, among other things,

- **14-Day Advance Schedules** – Employers must provide employees with two weeks' notice of work schedules.
- **Predictability Pay** – If an employee's schedule is changed with less than seven days' notice, the employer must pay the employee a premium of between one and four hours of wages.

- **Part-Time Employees** – Part-time employees must be treated the same as full-time employees at their same level with respect to their starting hourly wage, access to paid and unpaid time off, and eligibility for promotions. And, employers must offer extra work hours to current qualified part-time employees in writing before hiring new or temporary employees to perform the work.

In addition to the RWBR, the San Francisco Office of Labor Standards Enforcement also is finalizing proposed rulemaking to the ordinance. The rulemaking is pending and final rules are expected to issue in late January or February 2016.

As the City of San Francisco often is at the forefront of employment law trends, it should not be surprising that other states and cities are following with their own fair scheduling legislation. Similar legislation already is pending in multiple states (CA, CT, IL, IN, MA, MD, ME, MI, NY, and OR, among others) and cities (Albuquerque, Milwaukee, New York City, Santa Clara, and Washington, D.C., among others). Retailers should expect to see similar legislation crop up in other places.

3. More Rights for California Workers to Time Off

In 2015 California created more scheduling headaches for retailers by giving employees in California stores additional rights to take more time off, including paid time off.

- **Paid Sick Leave Law** – The Healthy Workplaces, Healthy Families Act took effect on July 1, 2015. This law requires most employers to provide at least 24 hours (three days) of paid sick leave to employees each year. Employees can use the paid sick leave for their own existing health condition or preventative care, or for that of the employee's family member(s).
- **School and Childcare Leave** – California employees also have the right to take up to 40 hours of unpaid time off from work for school or child-care activities, and now can also use that time off to find a school or child-care provider or to address school or child-care emergencies under the expanded protections of SB 579.

For retailers, the myriad of different rights that California employees have to take time off from work create significant scheduling headaches and make it a real challenge to lawfully enforce an attendance policy. Strong policies and procedures and regular training for those charged with these tasks on the management side are a must in balancing the needs of the business with compliance with California law.

4. Minimum Wage Increases

On January 1, 2016, California's minimum wage increased from $9.00 to $10.00. In addition to increasing labor costs, this change has ripple effects that many employers miss. For one, an increase in the state minimum wage can make a once-exempt position, nonexempt and subject to overtime requirements. For instance, to qualify as an exempt administrative employee, the employee must earn at least two times the state minimum wage for full-time employment. This means that when California's minimum wage increased from $9.00 to $10.00, the minimum annual salary required to qualify for the administrative exemption also increased from $37,440 to $41,600. Every time the minimum wage goes up, retailers need to make sure they review the salaries of their exempt employees to ensure they do not lose their exemptions.

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5. Employers' Right to Cure Certain PAGA Violations – AB 1506

In a bright spot in last year's legislative session, California employers got some welcomed relief from lawsuits based on technical violations under California's Private Attorney General Act. PAGA allows an "aggrieved employee" to bring suit on behalf of him- or herself and other current and former employees to collect civil penalties for California Labor Code violations. In recent years, California employers have been assaulted by PAGA lawsuits alleging technical violations of the California wage statement law, which requires that nine categories of information be displayed on every wage statement issued to California employees. In October, employers gained an opportunity to "cure" wage statement violations involving omission of two of the nine categories: the pay period start and end date and the name and address of the legal entity that is the individual's employer. To cure the violation, the employer must issue compliant wage statements to all employees for each pay period going back three years. Although the process of curing a violation is burdensome, it is a welcome alternative to the significant settlements employers have paid out in the last few years due to these types of technical violations.

Looking Forward: Supreme Court Decisions Likely to Impact California Retailers

1. Suitable Seating

The California Supreme Court has agreed to decide an issue that has plagued California employers and especially California retail employers for years: the issue of "suitable seating." Wage Orders issued by the California Division of Labor Standards Enforcement provide, among other things, that "all working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." California employers have been plagued by class-action lawsuits alleging violations of this "suitable seating" requirement, the meaning of which is largely unclear. The Supreme Court has agreed to take up this issue and, whatever the outcome, employers should have some welcomed clarity on how to comply with these requirements in the first quarter of this year.

2. One Day of Rest in Seven

The California Supreme Court will also weigh in on California's requirement that employees be given one day of rest in seven. Plaintiffs have often brought class actions claiming that California retailers have violated California labor law by permitting employees to work seven days in a row, even if that decision was a voluntary one by the employee. In 2016, the California Supreme Court is expected to bring some much-needed clarity to these issues, deciding issues that will impact when the rule applies, how it should be calculated and whether an employer can permit employees to work seven days in a row if they so choose. The court's decision could have a significant impact on how employers set employee schedules or permit employees to swap shifts. And it could lead many employers into wage-hour class actions based upon their past practices if they are not consistent with the court's ultimate interpretation of the law.

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Our retail industry lawyers represent businesses at every step, from factory floor, to retail outlet, to online store. Our extensive list of international, national and regional clients includes many well-known restaurant chains, malls, home-improvement centers, supermarkets, and media and entertainment companies, as well as manufacturers and retailers of apparel, baby products, cosmetics, electronics, fine jewelry, luxury goods, toys and other merchandise. Our retail team is composed of more than 100 lawyers who represent retailers in the Fortune 500® and virtually every retail sector.

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