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In This Issue...

The Intricate Web of Plan Amendments Explained 1

Easy Cases Can Make Bad Law: Belaire-West Landscape and Discovery in California Wage and Hour Class Actions 6

EEOC Final Rule on ADEA Exemption 11

The White & Case LLP EXECUTIVE COMPENSATION, BENEFITS AND EMPLOYMENT LAW FOCUS is prepared for the general information of our clients and other interested persons. This memorandum is not, and does not attempt to be, comprehensive in nature.

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The Intricate Web of Plan Amendments Explained

Introduction

Employers who sponsor tax-qualified retirement plans have many responsibilities with respect to the administration and maintenance of such plans. Written plan documents, for example, must be kept up to date by means of the timely adoption of plan amendments, to reflect changes in the law or changes in the operation of the plan. Generally stated, plan amendments made for purposes of conforming plan provisions to changes in the law must respond to changes brought about by new legislation and the issuance of government regulations or other official pronouncements. New legislation affecting tax-qualified plans has been enacted periodically, either on a stand-alone basis or as part of some larger comprehensive tax legislation. Additionally, both the US Department of the Treasury (the "Treasury") and the US Department of Labor (the "DOL")[1] periodically issue regulations relating to tax-qualified plans, along with other official guidance (e.g., revenue rulings, general counsel memoranda, announcements and/or notices), all of which can necessitate changes in plan language.

Both newly enacted legislation and the issuance of new regulations or other official guidance typically contain specific deadlines for amending tax-qualified plans. Further, sponsors of individually designed plans may and generally do submit such plans to the Internal Revenue Service (the "IRS") for a favorable determination letter on a five-year cycle, a process which requires amendment and restatement of such plans. In addition, certain plan amendments (i.e, interim and discretionary amendments, described later in this article) must be made by deadlines other than those in connection with submissions for determination letters or regarding statutory and regulatory changes. Therefore, it is apparent that the issue of when and why to amend plans can become very confusing. The purpose of this article is to identify, and generally describe, the various categories of amendments that must be made to individually designed tax-qualified plans during and after the 2008 plan year, and to describe when such amendments must be made.[2]

1 Although not tax-specific, DOL regulations can impact tax-qualified plans because such plans are also subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA), an act which made extensive revisions to both the US labor laws and the US Internal Revenue Code. In practice, to avoid contradictory requirements, the Treasury and the DOL generally coordinate their efforts when issuing regulations impacting tax-qualified retirement plans.

2 Special amendment deadlines applicable to governmental plans and certain tax-exempt employers, along with amendment deadlines applicable to master and prototype or volume submitter plans, are not covered in this article.

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Categories of Plan Amendments

The three main categories of plan amendments that employers need to be aware of are generally described as follows:

I. Amendments Required by the Pension Protection Act of 2006

On August 17, 2006, the Pension Protection Act of 2006 (PPA) was enacted, containing a significant number of provisions that directly impact both the form and administration of tax-qualified plans.[3] Due to the extensive revisions that PPA made to both ERISA and the Code, all tax-qualified plans will eventually need to be amended to comply with the applicable provisions of PPA, many of which are already in effect and, thus, require plans to be currently compliant in operation. For single employer plans, the deadline for making amendments in response to PPA, as specified in PPA, is **on or before the last day of the plan year beginning on or after January 1, 2009.** Thus, for calendar year plans, the deadline for amending tax-qualified plans in response to PPA is **December 31, 2009.** For a July 1st to June 30th plan year, the deadline would be June 30, 2010.

II. Amendments Required by the IRS Determination Letter Submission Process, and the Annual "Cumulative List"

Although not explicitly required by law, virtually all tax-qualified plans are periodically submitted to the Internal Revenue Service (the "IRS") for a determination letter as to whether such plans meet, in form, the qualification requirements of the Code.[4] With respect to individually designed plans, IRS determination letter submissions are now made on a five-year cycle, depending upon the last digit of a sponsoring employer's employer identification number (EIN).[5] One of the requirements for making a determination letter submission to the IRS is that the plan must be amended and restated to take into account changes in the law, as enumerated in the applicable cumulative list (the "Cumulative List") published annually by the IRS. Determining the applicable Cumulative List to follow depends upon the plan's submission cycle.

Employers whose EINs end in "3" or "8" are considered to be in Cycle C, which began on February 1, 2008 and ends on January 31, 2009.[6] Section 4 of IRS Revenue Procedure 2007-44 ("Rev. Proc. 2007-44"), issued on July 9, 2007,[7] clarifies that, with respect to Cycle C submissions, plans must be amended and restated to take into account those provisions applicable to such plans contained in the 2007 Cumulative List, which was released as IRS Notice 2007-94 on December 17, 2007.[8]

In general, in issuing determination letters, the IRS is not taking into account changes made to plan documents in response to PPA. Employers sponsoring individually designed plans have the option to amend such plans to include certain PPA provisions, other than those provisions becoming

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3 See the August 2006 special edition of the White & Case Executive Compensation, Benefits and Employment Law Focus.

4 Among the many reasons why a plan should be submitted to the IRS for a determination letter are that (i) corrections can be made within the extended remedial amendment period; (ii) once a determination letter is issued, reliance thereon may be available if the applicable conditions are satisfied and (iii) the plan may be eligible for correction of plan defects under the IRS Employer Plans Correction Resolution System (EPCRS) (see Revenue Procedure 2006-27 Section 4.03).

5 See *IRS Updates Determination Letter Procedures,* November 2007 edition of the White & Case Executive Compensation, Benefits and Employment Law Focus.

6 Employers whose EINs ended in "1" or "6" were considered to be in Cycle A, which began on February 1, 2006 and ended on January 31, 2007. Employers whose EINs ended in "2" or "7" were considered to be in Cycle B, which began on February 1, 2007 and ended on January 31, 2008. Cycles D and E, respectively, are considered to begin on February 1, 2009 and February 1, 2010, and end on January 31, 2010 and January 31, 2011, respectively.

7 See Internal Revenue Bulletin ("I.R.B.") 2007 – 28.

8 Similarly, plans subject to Cycle B submissions had to be amended and restated to take into account those provisions applicable to such plans contained in the 2006 Cumulative List, and, presumably, plans subject to Cycle D submissions will have to be amended and restated to take into account those provisions applicable to such plans contained in the 2008 Cumulative List.

effective in a calendar year after the calendar year in which the submission period begins; however, except with respect to terminating plans, plan sponsors may not rely on a Cycle A, Cycle B or Cycle C determination letter with respect to such PPA provisions, since the IRS has indicated that it will not rule on PPA provisions at this time.

The 2007 Cumulative List, used for Cycle C submissions, reflects law changes under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), the Pension Funding Equity Act of 2004, the American Jobs Creation Act of 2004 (JCWAA), the Gulf Opportunity Zone Act of 2005, the US Troop Readiness, Veterans' Care, Katrina Recovery and Iraq Accountability Appropriations Act of 2007, and various Treasury regulations. The 2007 list includes, among other things:

- Final Treasury regulations under Section 401(a) of the Code regarding permissible normal retirement ages.
- Section 401(a)(17) of the Code, as amended by Section 611(c) of EGTRRA, to increase the compensation limit to US$200,000 (as indexed for inflation).
- Section 401(a)(31) of the Code, as amended by Section 643(b) of EGTRRA, to allow employees' after-tax contributions to be rolled over under certain circumstances.
- Section 401(a)(31)(B) of the Code, as amended by Section 657(a) of EGTRRA (and as further amended by Section 411(t) of JCWAA), to provide for the automatic rollover of certain mandatory distributions (effective date March 28, 2005).
- Modifications to the definition of "eligible rollover distribution" to exclude hardship distributions, as required by EGTRRA.
- Sections 401(k)(2) and 401(k)(10) of the Code, as amended by Section 646(a)(1) of EGTRRA, to permit distributions of elective deferrals from a "401(k)" plan upon severance from employment.
- Revisions to the Treasury regulations relating to safe harbor hardship distributions of elective deferrals from "401(k)" plans, reducing the time that an employee is prohibited from making elective and employee contributions following a hardship distribution from one year to six months.
- Section 401(m)(9) of the Code, as amended by Section 666 of EGTRRA, to eliminate the multiple use test.
- Section 402A of the Code, as added by Section 617 of EGTRRA, to offer optional treatment of elective deferrals as "designated Roth contributions" to defined contribution plans, effective for taxable years beginning after December 31, 2005.
- Section 409(p) of the Code, as added Section 656 of EGTRRA, relating to restrictions on the allocation of employer securities in ESOPs maintained by S Corporations.
- Final Treasury regulations permitting some employees of tax-exempt organizations to be excluded when determining whether a "401(k)" plan meets the Section 410(b) minimum coverage requirements.
- Section 411(a) of the Code, as amended by Section 633 of EGTRRA (and as further amended by Section 411(o) of JCWAA), to provide for more rapid vesting of matching contributions.

In addition, the 2007 Cumulative List includes changes made to Section 415 of the Code, along with other miscellaneous law changes.

> ***Practice Pointer:*** *As a rule of thumb, tax-qualified plans submitted to the IRS for a determination letter must be amended to include the applicable provisions contained in the annual Cumulative List issued in the year which is two years prior to the year which includes the last date on which such submission must be made (i.e., January 31). For example, plans being filed during Cycle C must be amended to reflect the applicable changes contained in the 2007 Cumulative List,* ***on or before January 31, 2009.***[9]

9 Since calendar year plans must also be amended in response to the applicable provisions of PPA on or before December 31, 2009 (see "Amendments Required by the Pension Protection Act of 2006, above), to avoid having to amend plans twice within a month's time, year-end PPA restatements should also include the applicable 2007 Cumulative List provisions.

III. Interim and Discretionary Amendments

In addition to amendments required by PPA and amendments required to be made in connection with IRS submissions, as contained in the applicable Cumulative List, tax-qualified plans are subject to the IRS's rules regarding "interim amendments" and "discretionary amendments." An interim or discretionary amendment may have an amendment deadline different from either of the two amendment deadlines previously described in this article.

Generally stated, an "interim amendment" is an amendment made in response to changes in the law (other than PPA) or regulations. As previously stated, such amendment deadline may differ from the PPA amendment deadline or the deadline for submitting a plan to the IRS for a determination letter. Plan sponsors generally must make interim amendments during, as opposed to at the end of, a plan's submission period, i.e., its applicable remedial amendment cycle. Such amendment deadline may either be (i) **on or before the end of the generally applicable "remedial amendment period"** as described below (e.g., changes made in response to EGTRRA) or (ii) the amendment deadline specified in the applicable legislation or regulation (e.g., amendments made to conform with final Treasury regulations under Section 415 of the Code, which, for calendar year plans, would have to be made on or before September 15, 2009[10]).

Generally stated, the "remedial amendment period" applicable to an interim amendment ends on the later of (i) the due date (including extensions) for filing the income tax return for the sponsoring employer's taxable year that includes the date on which the remedial amendment period begins or (ii) the last day of the plan year that includes the date on which the remedial amendment period begins. For this purpose, the remedial amendment period begins on the date on which the change becomes effective with respect to the plan or, in the case of a provision that is integral to a changed qualification requirement, the first day on which the plan is operated in accordance with the provision, as amended. A change in the qualification requirements means a statutory change or a change in the regulations or other official IRS guidance.

Conversely, a "discretionary amendment" is an amendment made in response to a provision in the law (including PPA) which is optional as opposed to mandatory (e.g., certain permissible distributions under a "401(k)" plan made in connection with Hurricane Katrina, as provided in the Gulf Zone Act of 2005). In general, a discretionary amendment must be adopted **on or before the end of the plan year in which the amendment is effective.** Notably, this same rule would apply in the case of a plan amendment made for reasons other than compliance with applicable law or newly issued regulations; for example, an elective plan amendment made solely to change the amount of an employer's discretionary contribution under a profit sharing or "401(k)" plan or to add a participating employer.

Notwithstanding the above, Section 5.07 of Rev. Proc. 2007-44 provides that the PPA amendment deadline—i.e., on or before the last day of the plan year beginning after January 1, 2009 (see "Amendments Required by the Pension Protection Act of 2006, above) applies even to interim amendments *and* discretionary amendments, reflecting either required or optional PPA provisions, as the case may be, that are made pursuant to PPA or regulations issued under PPA.

10 See *The IRS Performs Some Much-Needed Housekeeping by Issuing 415 Final Regulations,* October 2007 edition of the White & Case Executive Compensation, Benefits and Employment Law Focus.

Recently, the IRS posted on its website a list of recent guidance that may require interim or discretionary amendments.[11] The list is meant to be a supplement to, and does not in any way supersede, the 2007 Cumulative List. Items of note appearing on the list include the following:

- Notice 2007-69, 2007-35 I.R.B. 468, provides temporary relief, until the first day of the first plan year that begins after June 30, 2008, for certain pension plans under which the definition of normal retirement age may be required to be changed to comply with final regulations on distributions from a pension plan upon attainment of normal retirement age.
- Announcement 2007-59, 2007-25 I.R.B. 1448, provides that a plan will not fail to satisfy the requirements of a "401(k)" safe harbor plan because of a mid-year change to implement a designated Roth contribution program.
- Rev. Rul. 2008-7, 2008-7 I.R.B. 419, addresses (i) the application of the backloading provisions of Sections 411(b)(1)(A), (B), and (C) of the Code to defined benefit cash balance plans and (ii) the use of a "greater of" formula in the instance of a conversion of a defined benefit pension plan to a cash balance plan, including limited Code Section 7805(b) relief.
- Section 6613 of the US Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007 amends Section 420(c)(3)(A) of the Code regarding minimum cost requirements for transfers of excess pension assets to retiree health accounts.

Conclusion

Changes in law regarding tax-qualified plans are occurring with increasing frequency, and each such change generally requires an amendment to such plans. With the arrival of the staggered IRS determination letter submission cycle, the issuance of annual Cumulative Lists and the concept of interim and discretionary amendments, it is readily apparent that determining deadlines for amending tax-qualified plans is no simple, one-step matter. As always, White & Case would be happy to assist you in keeping your plan timely amended or to review your plan document to determine whether and when any plan amendments need to be made.

11 At http://www.irs.gov/retirement/article/0,,id=180548,00.html.

Easy Cases Can Make Bad Law—Belaire-West Landscape and Discovery in California Wage and Hour Class Actions

With the explosion in recent years of broad-based wage and hour litigation targeting employers of all types and sizes, the ability of plaintiffs to obtain pre-certification discovery as to the identity of putative class members has taken a particular importance. The right to discovery of names, addresses and telephone numbers of putative class members has been addressed in several recent California cases.

We are all familiar with the adage that "hard cases make bad law." In the cases regarding the right to discovery of contact information for putative class members, however, the opposite is true. An easy case—*Belaire-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554 (2007)—has made bad law because the Court of Appeal opinion omits an important fact that has caused cases following it in both the appellate and trial courts to expand the discovery that should be permitted in wage and hour class action litigation.

This article addresses the cases leading up to *Belaire-West*, the *Belaire-West* decision and an unpublished decision issued by the same panel on the same day and cases decided subsequent to *Belaire-West*.

A. Cases Leading Up to *Belaire-West*

One of the key cases in the area of discovery in wage and hour class actions is *Parris v. Superior Court*, 109 Cal. App. 4th 285 (2003). In *Parris*, plaintiffs filed a lawsuit purporting to represent a class of non-exempt department managers, customer service pros and customer service representatives employed by Lowe's in any of its home improvement centers in California, alleging violations of California's wage and hour laws. Plaintiffs moved the trial court for an order permitting them to communicate with potential class members and for approval of a proposed notice to send to potential class members, providing them with information about the case and the contact information of the lawyers. Plaintiffs also sought an order compelling names and addresses of potential class members who were to be recipients of the proposed notice. The trial court denied both motions without explanation and plaintiffs filed a petition for writ of mandate.

The Second District Court of Appeal began its analysis by addressing the issue of plaintiffs' right to communicate with potential class members and held that judicial approval was not necessary prior to pre-certification communications. Then, the Court addressed whether plaintiffs should be allowed discovery of the names and addresses of potential class members to facilitate such communication. The Court found that "in addition to applying the normal rules governing discovery motions, the trial court must also expressly identify any potential abuses of the class action procedure that may be created if the discovery is permitted and weigh the danger of such abuses against the rights of the parties under the circumstances." *Id*. at 301. Because the trial court did not balance these interests, the court remanded the case, directing the trial court to "prepare 'a carefully crafted order demonstrating [its] weighing of any abuses or potential abuses against the rights of the parties, including potential class members and the integrity of the litigation process.'" *Id*. In remanding the case, the Court left open the issue of whether, and under what circumstances, plaintiffs could obtain putative class members' contact information.

In *Best Buy v. Superior Court*, 137 Cal. App. 4th 772 (2006), a lawyer brought an action in pro per, on behalf of a class, alleging that Best Buy charged an illegal "restocking fee" for returned merchandise. Because a lawyer cannot serve as both class representative and class counsel, the trial court issued an order to show cause why the case should not be dismissed. Plaintiff responded by moving to compel Best Buy to send a notice to all customers who were charged a restocking fee during the class period, for the purpose of discovering a new class representative. The trial court granted plaintiff's motion and ordered Best Buy to send the notice. Best Buy filed a petition for writ of mandate arguing

that the proposed notice constituted an improper solicitation, that even if a new plaintiff was found, the lawyer would control the litigation, the order violated judicial ethics and sending the letter would violate the customers' privacy rights. The Fourth District Court of Appeal rejected all of these arguments. The Court did, however, find that the privacy rights of the customers must be protected. To protect the customers' privacy, the Court ordered that the letter should not facilitate direct contact with the lawyer; instead, the lawyer would only be given the identity of those individuals who affirmatively request that it be done (an "opt in" procedure). *Id*.

In *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007), plaintiffs filed a consumer class action on behalf of all persons who purchased the same model of an allegedly defective DVD player. During discovery, plaintiffs sought the names and contact information of approximately 700 to 800 consumers who had filed complaints with the manufacturer regarding the DVD player, for the purpose of facilitating communication with potential class members. Pioneer refused to provide the information, asserting a right to privacy on behalf of the consumers. Plaintiffs moved to compel the information. The trial court granted the motion and ordered that, prior to the disclosure of the contact information, Pioneer must send a letter to all putative class members notifying them of their right to object to disclosure of their contact information. Pioneer petitioned for a writ of mandate. The appellate court issued the writ, ordering an "opt in" procedure similar to that adopted in *Best Buy*, such that an affirmative letter of consent from the consumer would be required for a waiver of the consumer's right to privacy. Plaintiffs obtained review by the Supreme Court.

In analyzing whether the contact information should be provided to plaintiffs, the Supreme Court evaluated the consumers' right to privacy as measured against the plaintiffs' right to discovery. The Supreme Court found that, although consumers did have a right to privacy in their contact information, it is a limited privacy interest because the information is not particularly sensitive and the consumers had themselves disclosed their identity by virtue of having sent complaints to Pioneer. It also found that discovery of the information was important to ensure fairness to the litigants. The Court explained that if the information was not disclosed, "Pioneer would possess a significant advantage if it could retain for its own exclusive use and benefit the contact information of those customers who complained regarding the product. Were plaintiff also able to contact these customers and learn of their experiences, he could improve his chances of marshalling a successful class action against Pioneer, thus perhaps benefiting some, if not all, those customers." *Id*. at 374. Thus, after balancing privacy versus the need for discovery, the Court held that the consumers' privacy interest would be adequately protected by sending them a notice of their right to object to the disclosure of the information. Like *Best Buy*, the *Pioneer* court found that a consumer's right to privacy is an important consideration that courts must address when deciding whether plaintiffs are entitled to the discovery of contact information of putative class members. The *Pioneer* court, however, expanded plaintiffs' discovery rights by allowing an "opt out" procedure rather than the "opt in" procedure of *Best Buy*.

In *First American Title Insurance Co. v. Superior Court*, 146 Cal. App. 4th 1564 (2007), plaintiff brought a class action on behalf of purchasers of a title insurance policy from First American Title Company ("First American") for property located in California, alleging that First American was involved in an illegal reinsurance kickback scheme. During discovery, plaintiff requested the names and addresses of approximately 38,000 individuals who had received refunds pursuant to a settlement that First American had entered into in response to an investigation by the Colorado Division of Insurance into First American's insurance practices. Prior to serving this discovery, however, plaintiff discovered that he may not have been affected by the alleged title insurance scheme. Thus, plaintiff contended that he needed the sought-after contact information to help "identify a suitable class representative and also lead to potential witnesses to First American's improper rebatings, 'kickback' and/or payment practices." *Id*. at 1570. First American refused to produce the information and plaintiff moved to

compel. First American opposed the motion on the grounds that plaintiff had no standing, and never had standing, and therefore could not use the discovery process to enlist its help in finding a new plaintiff to sue it. Plaintiff admitted that he may not have had standing to sue on behalf of certain members of the class, but argued that he could be a representative "for a class consisting of First American policyholders who have otherwise been harmed by wrongful practices." *Id.* at 1572. The trial court granted the motion to compel and First American filed a petition for writ of mandate.

The Second District Court of Appeal, using the Parris balancing test, found that allowing a plaintiff who never had standing to use discovery to find an appropriate class representative would be an abuse of the class action procedures that outweighed any right plaintiff had to discovery. Thus, the court issued the writ of mandate. In issuing this decision, the Second District Court of Appeal recognized the danger of allowing discovery of contact information of putative class members when maintenance of the case as a class action was defective for lack of a proper class representative.

B. The Belaire-West Case

Then, in *Belaire-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554 (2007), former employees brought a putative class action against Belaire-West, alleging wage and hour violations. During pre-certification discovery, plaintiffs served interrogatories requesting the names, last known addresses and last known telephone numbers of all putative members of the class. Belaire-West refused to produce the information and plaintiffs moved to compel. The trial court granted the motion and ordered Belaire-West to send a notice to all putative class members, informing them of their right to object to the disclosure of their contact information. Belaire-West filed a petition for a writ of mandate on the grounds that the notice sent to the putative class members should require that they affirmatively "opt in" to the disclosure of their contact information. Following *Pioneer*, which was issued while the *Belaire-West* petition was pending, the Second District Court of Appeal held that although employees may have a greater expectation of privacy in their personal information than consumers, the "opt out" notice adequately protected their privacy. *Id.* at 562. The Court thus approved the "opt out" procedure in the context of wage and hour litigation.

Critically, however, the Court of Appeal's opinion does not mention the fact that the case involved employees in only one job position, that of landscaper. Although the Court of Appeal's opinion in *Belaire-West* does not specify the group of employees of which plaintiffs sought discovery, the trial court's file discloses that the notice approved was for contact information of employees with the position of landscapers. Realizing that the discovery only involved employees in one particular job position makes the decision easy to understand and, based on *Pioneer* and other prior cases, should have been a relatively easy decision for the Court to reach. Omitting that key fact, however, leaves the opinion subject to expansion by later decisions, in either the appellate courts or trial courts, beyond what may have been intended when the Court of Appeal approved the "opt out" notice procedure for use in that case.

Swissport Corp. v. Superior Court, No. B194691, 2007 WL 1040987, at *1 (Cal. App. 2 Dist. April 9, 2007), is an unpublished decision issued concurrently with *Belaire-West* and heard by the same Division 7 panel in the Second District. The *Swissport* plaintiff filed a putative class action, alleging that Swissport failed to provide required meal and rest breaks to him and similarly situated employees. In his original complaint, plaintiff defined the class as all non-exempt employees of defendant employed by its California airport locations at any time between July 25, 2001 and July 25, 2005. In his first amended complaint, he redefined the class as "All Ramp Employees (i.e., cleaners and baggage handlers) of Defendant employed at Defendant's California airport locations who were employed at any of these locations at any time between July 25, 2001 and July 25, 2005." *Id.* During pre-certification discovery, plaintiff sought the names and contact information of all employees of defendant who worked as aircraft cleaners at Los Angeles International Airport ("LAX"). After a motion to compel, the trial court ordered disclosure of the contact information subject to

the employees' right to object to the disclosure following their notification of this right. Plaintiff then sought the contact information of all baggage handlers employed by Swissport who worked at LAX. Swissport refused to disclose the information and plaintiff filed a second motion to compel, which the trial court granted.

Swissport then filed a petition for writ of mandate, arguing that the individuals whose contact information was sought for disclosure were not possibly members of the class because the class representative, who was an aircraft cabin cleaner, could not represent a class of baggage handlers. Swissport argued that the baggage handlers were a distinct group of employees with "different job functions, a distinct supervisory chain and employment experiences unknown to plaintiffs." *Id.* at *3. Because they were a distinct group, Swissport argued these employees had a heightened privacy interest which shifted the balance away from permitting discovery. Plaintiff, on the other hand, contended that baggage handlers were part of his class definition and baggage handlers and aircraft cleaners were covered by the same employment rules, followed the same time-keeping system and utilized identical timesheets.

The appellate court found that it could not "definitely resolve the class certification question at this pre-certification stage, based on the limited evidence and arguments before us, we cannot say that it is impossible as a matter of law for a putative class representative who is a cabin cleaner to establish the existence of an ascertainable class and a well-defined community of interest among the class members for a class that extends beyond cabin cleaners to other ramp employees, baggage handlers." *Id*. Further, "Plaintiff's discovery of evidence of common employment practices and a potentially identical meal break violation against the other class of ramp employees is sufficient to permit discovery into the scope and existence of those violations; the baggage handlers may be appropriate members of the class and may also be percipient witnesses to Swissport's meal and break policies." *Id.* Thus, the Court held that there was no heightened privacy interest and denied the petition for writ.

Because it involved two categories of employees, the *Swissport* case was slightly more complicated and difficult than the *Belaire-West* case. The *Swissport* decision hinted at the potential for plaintiffs to abuse the class action procedure to obtain unwarranted discovery, but avoided fully addressing the issue by finding that employees in two similar job positions may be part of a certifiable class. The Court of Appeal chose to publish only *Belaire-West*, not *Swissport*, however.

C. Cases Following *Belaire-West*

In addition to these cases, the Court of Appeal issued two relevant decisions in January 2008. In the first, *Puerto v. Superior Court*, 158 Cal. App. 4th 1242 (2008), heard by the same Division 7 panel as *Belaire-West* and *Swissport*, eight employees filed suit against Wild Oats, not on a class basis, alleging wage and hour violations. During discovery, each plaintiff served form interrogatories on Wild Oats that included a request that Wild Oats state the name, address and telephone number of each potential witness. Wild Oats responded by identifying as witnesses many or all of the people who were employees during the time plaintiffs were employed by it, between 2,600 and 3,000 individuals and providing their names and positions. Wild Oats, however, refused to disclose the contact information of these people and plaintiffs filed a motion to compel. The trial court granted the motion and instructed the parties to send a letter to all individuals identified by Wild Oats notifying them that if they wanted their contact information disclosed they would need to affirmatively consent to the disclosure. *Id*. at 1247.

Plaintiffs then filed a petition for writ of mandate. In evaluating whether the "opt in" notice was appropriate, the appellate court balanced the employees' expectation of privacy against the need for the information. The Court found that the employees had a legitimate expectation of privacy as to their contact information, but that interest was limited because the identification of witnesses is a routine part of the discovery process. Thus, when balancing the interests, the Court found that the right to discovery outweighed the limited privacy interest. The Court held that the privacy interest

of the employees could be adequately protected by a protective order and, therefore, the use of an opt in letter exceeded the protections necessary to safeguard the employees' privacy interests. *Id.* at 1259.

In *CashCall, Inc. v. Superior Court*, 159 Cal. App. 4th 273 (2008), plaintiffs filed a class action alleging that CashCall violated the class members' privacy by secretly monitoring telephone conversations between the class members and CashCall employees. During discovery, plaintiffs realized that all of the named plaintiffs were not class members, because they were not persons whose calls were monitored. Plaintiffs filed a motion for an order compelling CashCall to identify all class members, approximately 551 persons, without first formally requesting discovery of this information. In the motion, plaintiffs stated that they sought the information for the purpose of finding a class representative whose calls were actually monitored. CashCall opposed the motion, arguing that without an appropriate class representative, plaintiffs did not have standing to obtain the discovery. The trial court, finding that the discovery was necessary to protect individuals who may not have known that their conversations were recorded, granted the motion.

CashCall petitioned for a writ of mandate, arguing that allowing the disclosure of the information without a proper plaintiff would be an abuse of class action procedures because it would in effect require CashCall to give plaintiffs' lawyers, without actual clients, standing to continue the class action. The Fourth District Court of Appeal recognized that in certain circumstances, pre-certification discovery could result in abuse of the class action procedures, but the abuse was not present in the case because the lawyers had obtained clients who were actual customers of CashCall and who had suspected that their calls had been monitored. Thus, the court denied the writ.

Perhaps more importantly, trial courts are now handling issues relating to this type of discovery in wage and hour litigation. Plaintiffs' counsel now routinely seek names and contact information for all members of putative classes. Following *Belaire-West*, trial courts are now regularly allowing such discovery without considering if the putative class is certifiable. Thus, trial courts are ordering employers to produce contact information for all members of a putative class, even where the class is not confined to one or two job positions.

Belaire-West and *Swissport* compelled disclosure of the contact information of the employees in the putative class following a notice procedure providing the employees with the right to "opt out." Significantly, these cases approved the disclosure for narrow classes. In *Belaire-West*, the class was a group of landscapers. In *Swissport*, the notice only went to employees working in two specific positions, airline cleaners and baggage handlers. Unfortunately, the *Belaire-West* opinion does not say that and the *Swissport* case is unpublished.

In all of the reported cases where the court compelled the disclosure of the contact information, there was an ascertainable or at least fairly circumscribed class. Although the courts did not specifically focus on this aspect, these cases support the position that courts should not compel disclosure of the identity and contact information of *all* employees merely because plaintiffs have filed a class action. *First American* demonstrated the importance of evaluating whether plaintiffs should be allowed discovery of contact information and provided an example of when allowing such discovery would be an abuse of the class action procedure. In *Swissport*, the court briefly considered whether it would be appropriate to allow discovery of contact information if the class was inappropriate. Although the *Swissport* court ultimately allowed the discovery, the fact that it considered whether discovery of contact information of employees working in a position other than that of the named plaintiff was proper, demonstrates that the court recognized the potential abuse that may occur when plaintiffs define a putative class which includes employees in job positions other than their own.

Unfortunately, no published decision has addressed the potential abuse of the class action procedure to obtain the contact information of putative class members who may not be appropriate members of the class. The *Belaire-West* decision has provided

courts with authority to allow plaintiffs discovery of contact information of *all* putative class members in wage and hour cases, regardless of how many employees may be involved, whether plaintiffs' claims are typical of those employees, or whether sufficient commonality exists among the employees to justify their inclusion in the class. Allowing such broad-based discovery not only creates an unnecessary invasion of the employees' right to privacy, but also carries a significant cost to the employer defending the class action. If ordered to provide employee contact information, employers are faced with the daunting task of scouring records to identify the employees, locating their contact information and administering a mass mailing for the purpose of providing the employees with the opportunity to object to the disclosure of their contact information. For employers of tens of thousands of employees, the time and cost of this process can be significant and is currently borne by employers. The benefit of this process, however, is borne by plaintiffs' counsel. Armed with access to as many as all of an employer's workforce, plaintiffs' counsel has the opportunity to contact and solicit grievances from employees—potentially resulting in additional lawsuits against the employer. The straightforward, easy decision in *Belaire-West* has opened Pandora's box. The bad law it has created has given courts authority to freely grant discovery of employee contact information without doing the careful analysis laid down by the *Parris* court—resulting in what the *Parris* court sought to avoid—abuse of the class action procedure.

EEOC Final Rule on ADEA Exemption

On December 26, 2007, the United States Equal Employment Opportunity Commission (EEOC) issued a final rule that exempts the coordination of retiree health benefit plans with Medicare or comparable state, health benefit programs from "the prohibitions of the [federal Age Discrimination in Employment Act of 1967 (ADEA)]."

The ADEA generally protects individuals who are 40 years of age or older from employment discrimination based on age. In 2000, in *Erie County Retirees Association v. County of Erie,* the United States Court of Appeals for the Third Circuit held that an employer violated the ADEA if it reduced the health benefits of retired employees when those employees became eligible for Medicare, unless the employer could show that it met the exception under the ADEA because either (i) "the benefits available to Medicare-eligible retirees were equivalent to the benefits provided to retirees not yet eligible for Medicare" or (ii) "the employer was expending the same costs for both groups of retirees." The EEOC became concerned that, as a result of the *Erie County* decision, employers would eliminate or reduce all retiree health benefits provided to retirees not yet eligible for Medicare or similar state health benefit programs. To avoid these potential unintended consequences of *Erie,* the EEOC proposed a rule in 2003 that would create a limited exemption under the ADEA to allow retiree health benefit plans to coordinate with Medicare or comparable state health benefit programs. In *American Association of Retired Persons v. EEOC* (June 4, 2007), the Third Circuit Court of Appeals upheld the proposed EEOC rule because, among other things, it has the "necessary and proper purpose of encouraging employers to provide the greatest possible health benefits for all retirees." The EEOC rule became effective upon publication on December 26, 2007.

As always, White & Case would be happy to assist or advise you with respect to any questions you may have about your retiree health benefit plans.

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