GANFER & SHORE, LLP

# CLIENT EMPLOYMENT LAW ADVISORY

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## NEW YORK ADOPTS "DOMESTIC WORKERS BILL OF RIGHTS"

New York has adopted a new law known as the "Domestic Workers Bill of Rights." When this law goes into effect, on November 29, 2010, many protections under the New York State Human Rights Law, Labor Law, and Workers' Compensation Law will be extended to domestic workers. The most important provisions of the new law include:

- Domestic workers will be protected from harassment based on characteristics such as sex, race, religion, or national origin;
- Domestic workers will be entitled to receive overtime pay after 40 hours of work per week (44 hours if they live in);
- Domestic workers must be accorded one day of rest per week. The day of rest "should, whenever possible, coincide with the traditional day reserved by the domestic worker for religious worship." If the domestic worker works on the designated day of rest, he or she is entitled to be paid at the overtime rate;
- Domestic workers must be accorded three days of paid time off each year after one year of employment; and
- Eligibility for disability benefits under the Workers' Compensation Law is extended to domestic workers who work fewer than 40 hours per week.

A "domestic worker" is defined as any "person employed in a home or residence for the purpose of caring for a child, serving as a companion for a sick, convalescing or elderly person, housekeeping, or for any other domestic service purpose." Unlike other statutes that require an employer to have a certain minimum number of employees before the statute applies, many of the protections for domestic workers will now apply even if the worker is the employer's only employee. However, the definition of "domestic worker" excludes certain types of workers, such as:

- Workers who work on a casual basis;
- Workers who provide companionship services (*i.e.*, care for the elderly or infirm who cannot care for themselves) *and* who are employed by someone other than the family or household receiving such services; and
- Workers who are related through blood, marriage, or adoption to the employer or to the person for whom the worker is providing services under a program funded by a federal, state or local government.

We will discuss the requirements of this new law and its implications in greater detail in subsequent issues of the *Employment Law Advisory*.

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## "STRAY REMARKS" BY NON-DECISION-MAKERS MAY BE CONSIDERED IN AGE BIAS CASES, CALIFORNIA COURT HOLDS

In discrimination cases, most courts have excluded evidence of "stray remarks" that could be considered evidence of discriminatory intent from consideration, where the remarks were not made by someone involved in the decision-making process that led to the challenged employment decision. A recent decision by the Supreme Court of California, however, goes against this trend.

In **Reid v. Google, Inc., 235 P.3d 988 (Cal. Aug. 5, 2010)**, a 54-year-old manager was discharged after his Silicon Valley employer decided that he no longer was a "cultural fit" with his job. Plaintiff sued, alleging that his much younger superiors and other employees made derogatory age-related remarks to him, such as referring to him as "old man," "old guy," and "old fuddy-duddy"; told him that his knowledge was "ancient"; taunted him for being "slow," "fuzzy," "sluggish," and "lethargic"; and stated that he failed to "display a sense of urgency," that he "lacked energy," and that his opinions and ideas were "too old to matter." The remarks were not made by the people who decided to terminate plaintiff. The trial court characterized the ageist comments by *non-decision makers* as "stray remarks" that, under well-established principles, would not be considered in determining whether the *decision makers* bore a discriminatory animus toward plaintiff.

The California Supreme Court reversed the decision and rejected the traditional application of the "stray remarks doctrine," holding instead that stray remarks *may* be considered in the *totality of circumstances* when determining whether discrimination took place. In other words, said the court, a slur does not prove actionable discrimination by itself, but when combined with other evidence of pretext, an otherwise "stray remark" may create an "ensemble" sufficient to get the case to a jury.

## INVOLUNTARY TRANSFER MAY CONSTITUTE DISCRIMINATION, EVEN WHEN INTENDED FOR EMPLOYEE'S OWN BENEFIT

In a recent case arising under the federal Pregnancy Discrimination Act ("PDA"), an employee alleged that after she told her boss she was pregnant, the employer transferred her from her position as a welder to a less desirable, but equally paid, light-duty job in the tool room. The plaintiff's physician had certified that plaintiff's remaining on the welding job would be "no problem" and had released her to work without restrictions. Management nonetheless believed that pregnant women should not perform welders' duties, especially the lifting and pulling involved. The employer stated that because of plaintiff's "complications with previous pregnancies," she should not be around "the chemicals, the welding smoke, [and] climbing around on some of the jobs."

In **Spees v. James Marine, Inc., 2010 WL 3119969 (6th Cir. Aug. 10, 2010)**, a federal appeals court held that this transfer might have violated the PDA. The court noted that management, without providing an analysis of the welder position to plaintiff's physician for review or having any objective evidence, expressed concerns that welding fumes would create an unsafe condition for plaintiff during her pregnancy and transferred her on its own based on those concerns. A reasonable jury could find that the decision that plaintiff was unable to weld and to transfer her to light duty work constituted pregnancy-based discrimination. This case emphasizes that employers may not make decisions based on suspicion, assumption, or subjective information about an employee's physical condition, even if the decision is motivated by concern for the employee's best interest.

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**Please note that the cases presented in this Advisory are drawn from courts located throughout the United States. They may or may not apply to a given employer based upon regional interpretations of federal law as well as any applicable state or local laws. If you have any questions concerning labor or employment law, please contact Robert I. Gosseen, Esq., who heads this practice area at Ganfer & Shore, LLP, at (212) 922-9250, ext. 288, or your contact at the firm.**