



**LABOR AND
EMPLOYMENT**

The NAMWOLF Labor & Employment PAC Presents:

Employment Law Think Tank: *The Sequel*

September 17, 2015



★ **ANNUAL MEETING** ★ SEPTEMBER 16-19, 2015 ★ Hollywood, California



EMPLOYMENT LAW THINK TANK: *THE SEQUEL*

“Employment Law Think Tank: The Sequel” was organized by the Labor & Employment PAC’s *Marketing, Branding & External Communications* Subcommittee. The Subcommittee would like to recognize our L&E PAC members and in-house counsel who volunteered for this event:

Moderators:

Kim Hensley (Nationwide)
Jeff Brockmann (US Bank)

Table Facilitators:

In-House Counsel

Kendall Mills (Allstate)	Shannon Alexander (NBC Universal)
Ursula Guzman (CoreLogic)	Vince Browne (Prudential)
Arianna Cabrera (Costa Farms)	Deborah Martin (San Diego Gas & Electric)
Jim Newman (CPS Security)	Samy Sadighi (Toyota Financial Services)
Karen Teragawa (Kaiser)	Rick Hammond (Wal-Mart)
Nestor Barrero (NBC Universal)	Lupe Valencia (Wells Fargo)
Bridget Hauler (NBC Universal)	Emily Aldrich (Wells Fargo)

Law Firm Members

Jen Branch (Andrews Lagasse Branch & Bell)	Jack Schaedel (Gonzalez Saggio & Harlan)
Sheryl Axelrod (The Axelrod Firm)	Kelly Charles-Collins (Hamilton Miller & Birthisel)
Vanessa Snyder (The Axelrod Firm)	Chad K. Lang (Liebler Gonzalez & Portuondo)
Andrew Brown (Brown Hutchinson)	Crystal Trotter (Martineau King)
Vanessa Negrete (Brown Law Group)	Susan Koval (Nemeth Law)
Denise Fields (Fields & Brown)	Linda H. Joseph, Esq. (Schroder Joseph & Associates)
Nicole Gardner (Gardner Skelton)	Carolina Bravo-Karimi (Wilson Turner Kosmo)
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HYPOTHETICAL #1

Contributed by: Carolina Bravo-Karimi - *Wilson Turner Kosmo*, www.wilsonturnerkosmo.com
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The Hound Production Company is currently producing *White Duck*, a psychological thriller depicting the rivalry between two tap dancers, and hired acclaimed choreographer Sammy Storm to choreograph the dance scenes. The contract states that Sammy is an independent contractor hired for the duration of filming the movie and will be paid a set project fee for each day worked. Sammy was responsible for recruiting and hiring dancers, scheduling rehearsals and attending staff meetings. Hound was to provide rehearsal space and purchase supplies. The Director would occasionally provide Sammy with artistic direction and assist Sammy in selecting music for the dance routines.

Natalia Portola is a summer choreography intern under Sammy on the *White Duck* set. She is earning college credit for the internship in connection with her course of study at the Los Angeles College of Performing Arts. The letter confirming her internship stated: "Your internship with Hound Production Company is unpaid. Please understand that this internship does not in any way guarantee future employment with Hound."

Immediately after Natalia started her internship, Sammy began to make sexually inappropriate comments to her, making Natalia feel extremely uncomfortable. Then, after Sammy tried to forcibly kiss Natalia, she complained to the HR Manager, who stated that there was nothing she could do because Natalia was an unpaid intern, not an employee.

The next day, Sammy decided to quit to work exclusively for "Dancing with Celebrities," and he demanded to be treated as an employee for all purposes, including being paid for all the overtime he had worked, as well as being included in the 401(k) plan and being entitled to medical benefits under the group medical plan. The HR Manager told Sammy he was not entitled to overtime or the 401(k) plan or medical benefits because he was an independent contractor. On his way home that afternoon, he was in a motorcycle accident and was hospitalized. As a result of Sammy's departure, Natalia was left to single-handedly choreograph all the dance routines and schedule and conduct rehearsals. She worked over 50 hours per week. Later that year, when *White Duck* hit the theaters, Natalia noticed that her choreography made it into the movie.

- 1) Did Hound properly classify Sammy as an independent contractor?
- 2) Should Natalia have been paid for her work as a choreography intern?
- 3) Is Sammy entitled to participate in the 401(k) plan and health insurance plan? What are the implications if he is or is not?
- 4) As an unpaid intern, can Natalia sue Sammy Storm and Hound Production Company for sexual harassment?



HYPOTHETICAL #2

Contributed by: Vanessa M. Snyder - *The Axelrod Firm*, www.theaxelrodfirm.com

Roger, a decorated Army reservist, works full-time as a Bodyguard for Super Safe Security (“Super Safe”), which provides security services to celebrities and entertainment companies. Many of Super Safe’s employees are veterans and reservists. Roger began working for Super Safe seven years ago as an Entry-Level Security Guard and worked his way up to Senior Bodyguard. In August 2014, Roger was notified that he would be deployed for a second time to Afghanistan.

In September 2015, Roger contacted Super Safe about returning to his position. Super Safe offered him reinstatement as a Senior Bodyguard assigned to protect pop music star Tyler Quick. This is a prestigious assignment, as Ms. Quick is an international celebrity who is actually nice to her staff. Ms. Quick requires Senior Bodyguards with at least 5 years of experience, advanced training, and the highest civilian security clearance. In addition to her other commitments, Ms. Quick recently agreed to perform in a series of ads promoting her home state of Pennsylvania.

Roger informed the HR Director, Samantha, that he would gladly accept his reinstatement. He also asked to speak to Samantha, in confidence, about a personal matter. He indicated that when he returned to work he would identify as a woman, and would thus like to be referred to as “she” and by the name “Chrissy.” He stated that he would need to take medical leave as part of his transitioning.

Three weeks after reinstatement, Chrissy tells Samantha that her work locker, which is in a men’s locker room at Super Safe headquarters, has been repeatedly covered in graffiti and notes containing homophobic comments (Chrissy remains married to her wife of seven years, Kim, who is female), and that her uniforms were removed and damaged. Chrissy states that she has made repeated complaints to her supervisor about the situation and nothing has changed.

Additionally, Chrissy states that Ms. Quick’s manager, who is female, chastised her when she saw Chrissy exiting a women’s restroom. The next day, Chrissy was told by her supervisor at Super Safe that she was being transferred to provide building security for Video Archives, a storage company 25 miles outside Los Angeles that permits Entry-Level Security Guards.

- 1) You are counsel for Super Safe. Samantha calls you after her second conversation with Chrissy. How would you advise Samantha to proceed?
- 2) Samantha wants to approach Ms. Quick, Super Safe’s client, about Chrissy. What would you advise her to say?
- 3) What potential claims is Super Safe opening itself up to based on the above actions of its employees and management?



HYPOTHETICAL #3

Contributed by: Jennifer Branch - Andrews Lagasse Branch & Bell, www.albblaw.com

Ms. Black is an executive producer with Global Studios in Hollywood. While working with its accounting department, she discovered what she felt were questionable accounting practices related to the calculation of profits. Also, the studio appeared to approve payment of a higher percentage of profits for male actors and executives than it did for women. Ms. Black sent an email to a trusted confidante and fellow Global Studios executive, Ms. White, in which she explained her concerns and asked for advice on how to proceed. Ms. White never responded, so Ms. Black anonymously reported her concerns to the Securities and Exchange Commission via her work email account.

Shortly thereafter, the SEC contacted Global Studios' CEO, Mr. Red, and told him that it was investigating. Mr. Red was furious that someone had "blabbed" to the SEC about their internal procedures for calculating movie profits, which he viewed as the company's proprietary information. He immediately ordered an audit of all Global Studios' email accounts, which uncovered Ms. Black's emails to Ms. White and the SEC. Mr. Red also sent an email to everyone at the company, stating: "The SEC is investigating Global Studios based on a complaint from Ms. Black. To facilitate the investigation, retain any documents related to calculation of our profits. Please also be reminded that you are not to discuss Global Studios' policies or procedures for calculating profits with anyone. Lastly, be sure not to retaliate against Ms. Black for initiating this investigation."

Ms. Black was horrified when she saw the email disclosing her identity as the SEC complainant. Although she initially tried to carry-on as normal, colleagues began to ignore her and she was effectively cut out of meetings critical to the performance of her job. She was under so much stress that she became physically ill and began missing work. After two weeks, she was summoned to a meeting and told she was being terminated based on her poor attendance and her inability to communicate effectively and collaborate with co-workers. During the termination meeting, she was given a copy of the confidentiality agreement she previously signed and reminded that the agreement remained in effect even after her termination.

The confidentiality agreement provided in relevant part: "Executive employees of Global Studios are prohibited from discussing any internal Global Studios policies and procedures, including but not limited to profit calculation models, story-lines, characters, plots and internal marketing practices, without prior authorization of the Law Department. The unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment."

- 1) Did Global take an adverse action against Ms. Black by identifying her as the complainant and does Ms. Black have a valid claim for retaliation based thereon?
- 2) Did Global retaliate against Ms. Black by terminating her employment because of her disclosure to the SEC? What if Global had valid reasons for the termination, other than Ms. Black's disclosure to the SEC?
- 3) Was Global Studios' confidentiality provision in violation of SEC rules? If so, how should it be changed?
- 4) What other types of claims might Ms. Black be able to bring against Global Studios?



1) Did Hound properly classify Sammy Storm as an independent contractor?

Individuals who are independent contractors are not considered “employees” for state or federal wage and hour purposes and are, consequently, not subject to the minimum wage, overtime pay, or other protections of these laws.

At the federal level, the U.S. Department of Labor (DOL) defines “independent contractor” narrowly under the Fair Labor Standards Act (FLSA) and focuses on the “economic realities” test, which looks at whether workers are economically dependent on the employer or in business for themselves, rather than the “control test,” which focuses on the degree to which a business controls an individual’s work.

According to the DOL, employers should look to the following six factors in conducting an economic realities test: (1) the extent to which the work performed is an integral part of the employer’s business; (2) the worker’s opportunity for profit or loss depending on his/her managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer. The DOL further noted that each factor should be examined and analyzed in relation to one another, and no single factor is determinative. Specifically, the DOL stated the “control” factor should not be given undue weight.

On the other hand, the Internal Revenue Service as well as the California courts and administrative agencies generally apply common-law principles to determine independent contractor status. The most important factor is whether the business had the right to direct and control the manner and means of performing the work. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 350, 769 P.2d 399 (1989); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1101-1103 (9th Cir. 2014).

In *Beaumont-Jaques v. Farmers Group Inc.*, 217 Cal.App.4th 1138, 159 Cal. Rptr. 3d 102 (2013), the court held that a company can set objective and minimum standards for an independent contractor without losing independent contractor status. Although the independent contractor agreement asked the worker to meet minimum performance standards, the agreement did not specify how the employee should meet these standards. The court called it a “classic example of setting of results while leaving the means to [the worker].” *Id.* at 1146.

In *Arnold v. Mutual Omaha Insurance Co.*, 202 Cal. App. 4th 580, 135 Cal. Rptr. 3d 213 (2011), a salesperson filed a lawsuit against Mutual, alleging that she should have been classified as an employee, not an independent contractor. The appellate court applied the “right of control” test and found that Mutual exercised little control over the plaintiff and that they were properly classified as independent contractors. The court found the following factors persuasive: (1) Arnold signed a contract with Mutual explicitly stating she was an independent contractor; (2) Arnold used her own judgment in how to do her work, such as determining who to solicit for applications, and the time, place and manner in which she would solicit; (3) Arnold’s appointment with Mutual was non-exclusive; (4) no one at Mutual supervised Arnold’s work or evaluated her performance; (5) training by Mutual was voluntary for agents; (6) office space was available to Mutual agents on an optional basis; and (7) Arnold’s payment was based on her results, not the amount of time she spent working on Mutual’s behalf.

In *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 230 Cal.App.4th 718, 179 Cal. Rptr. 3d 69 (2014), review granted (Jan. 28, 2015), two delivery drivers challenged their independent contractor status and sought overtime wages. The court of appeal held that any claims brought under the Wage Order should not use the common law right of control test but should instead look at the Wage Order definition of “employ” and “employer.” In this case the applicable wage order was Wage Order 9 (Transportation), which defines “employ” as “to engage, suffer, or permit to work,” and defines “employer” as any person “who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of another person.” This test is much easier for a worker to meet. The lower court basically allowed the drivers to argue that they met the



test for employment so long as the company knew the drivers were providing services or negotiated the rates paid to drivers. (This case is now pending on the California Supreme Court’s docket.)

Here, no single factor will determine the outcome of Sammy Storm’s misclassification inquiry. Rather, Sammy’s situation must be examined in light of all the circumstances. Pursuant to the DOL guidance and California law, factors that weigh in favor of him qualifying as an independent contractor include: (1) his contract stating that he is an independent contractor; (2) his ability to recruit and hire dancers, and schedule rehearsals; (3) the brief duration of his employment with the Company; (4) the special skill Sammy possessed to choreograph; and (5) his work on “Dancing with Celebrities.”

However, factors weighing against his status as an independent contractor include: (1) Hound provided the rehearsal space as well as necessary supplies; (2) Sammy was expected to attend staff meetings; (3) the Director provided artistic direction and assisted in music selection; and (4) Sammy’s choreography work was integral to Hound’s business.

Overall, under the FLSA and California law, a court would likely find that Sammy was not an independent contractor because Hound had the right to direct and control the manner and means that Sammy performed his work. Consequently, Hound would owe Sammy any unpaid overtime.

2) Should Natalia have been paid for her work as a choreography intern?

Yes. Pursuant to the Fair Labor Standards Act (FLSA), Natalia should have been paid minimum wage and overtime for the services she provided because she did not qualify as a “trainee.” Generally the FLSA requires that no employee should work without compensation and that employees covered by the Act should at least receive minimum wages. The Department of Labor (DOL) provides a narrow exception to the definition of employees for “trainees” and has recognized that if an intern qualifies as a “trainee,” employers are not required to pay them minimum wage or overtime.

The DOL and the California Division of Labor Standards Enforcement (DLSE) have set forth six mandatory requirements for someone to be considered an unpaid trainee. The six-part test is as follows: (1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment; (2) the internship experience is for the benefit of the intern; (3) the intern does not displace regular employees, but works under close supervision of existing staff; (4) the employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded; (5) the intern is not necessarily entitled to a job at the conclusion of the internship; and (6) the employer and the intern understand that the intern is not entitled to wages during the time spent in the internship. See U.S. DOL, Wage and Hour Division, Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act; April 7, 2010 Opinion Letter, DLSE; see also *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947) (holding that there can be no violation of FLSA when employers meet the above criteria for hiring unpaid interns).

However, in *Glatt, et al. v. Fox Searchlight Pictures, Inc., et al.*, 24 Wage & Hour Cas. 2d (BNA) 1665, 2015 U.S. App. LEXIS 11435 (2d Cir.2015) and *Wang, et al., v. Hearst Corp.*, 24 Wage & Hour Cas. 2d (BNA) 1700, 2015 U.S. App. LEXIS 11516 (2d Cir.2015), the Second Circuit adopted a new “primary beneficiary” test, which focuses on whether an intern or an employer is the “primary beneficiary” of the relationship, and identified seven nonexclusive factors relevant to the classification of unpaid interns. In so doing, the court rejected a strict application of the DOL’s six-factor test and confirmed that “courts may consider relevant evidence beyond [their own] specified factors[.]” *Glatt* at *17. Perhaps most important, the Second Circuit rejected the use of the DOL’s requirement that there be no benefit to the company.

The Court articulated the following seven factors to aid in determining whether an intern is an employee



HYPOTHETICAL #1 ANSWER KEY (continued)

under the FLSA: (1) the extent to which the intern and the employer clearly understand that there is no expectation of compensation; (2) the extent to which the internship provides training that would be similar to that which would be given in an educational environment; (3) the extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit; (4) the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic year; (5) the extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; (6) the extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and (7) the extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Here, under both the DOL/DLSE and Second Circuit framework, although Natalia received academic credit for her internship, and she understood that she would not be paid and would not receive a job following the internship, she should have been paid as an employee, at least from the point she took over for choreographer Sammy when he quit. Hound Production Company derived great advantage by including her free choreography in *White Duck*, and overall, it appears that Hound derived a greater benefit from the internship than Natalia. Accordingly, Hound should have paid Natalia minimum wage and overtime for the duration of her internship after Sammy quit.

3) Is Sammy entitled to participate in the 401(k) plan and health insurance plan? What are the implications if he is or is not?

He may be eligible, depending on the terms of the applicable plan document. The federal Employee Retirement Income Security Act of 1974 ("ERISA") generally applies to retirement and health plans of most non-governmental employers and preempts most state law. Under ERISA, absent fraud, the terms of the written plan document generally control. *Cigna v. Amara*, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011).

Many plans have a clause that excludes misclassified service providers, even if they are later reclassified as employees. These types of clauses were commonly added to ERISA plans following a case against Microsoft Corporation in which Microsoft's independent contractors claimed to be employees who were eligible for its employee benefit plans, in spite of having signed waivers to the contrary. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir.1996). If the plan document does not have this type of clause (or if the plan document has a failsafe clause that automatically picks him up in order to meet ERISA's nondiscrimination or other requirements), then he could be entitled to benefits under the terms of the plans.

And, for purposes of the Affordable Care Act, a misclassified worker could result in substantial penalties for larger employers (i.e., those with at least 50 full time equivalent employees). This is true even if only a small percentage of full time employees are misclassified. For example, if an employer does not offer minimum essential health care coverage to at least 95% of its full-time employees and even one employee receives a premium tax credit, the employer could face a penalty of up to \$2,000/year/employee (after the first 30 employees). So, for an employer with 1000 full-time employees, if at least 51 are misclassified (or otherwise excluded), and only one receives a premium tax credit, the penalty could be as much as \$1,940,000 (970 x \$2,000) for 12 months of exclusion. See IRC Sections 4980H(a) and (b).

4) As an unpaid intern, can Natalia sue Sammy Storm and Hound Production Company for sexual harassment?

Yes, under California law. In 2014, Assembly Bill 1443 expanded the California Fair Employment and Housing Act to cover individuals in the workplace who are not paid and to protect them against workplace



HYPOTHETICAL #1 ANSWER KEY
(continued)

sexual harassment. California, along with Oregon, Illinois, and New York City are the only jurisdictions that explicitly ban sexual harassment and discrimination in the workplace directed toward unpaid interns. As such, Natalia, as an unpaid intern, can sue both Sammy Storm and Hound Production Company for sexual harassment.

Unpaid interns do not receive the same protection under federal law. Whether an unpaid intern is protected from discrimination by Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act, or the Genetic Information Nondiscrimination Act, turns on the question of whether the intern receives “significant remuneration” in some form, according to a December 8, 2011 Equal Employment Opportunity Commission (EEOC) informal discussion letter. “Significant remuneration” includes a pension, group life insurance, workers’ compensation, and access to professional certifications. See EEOC, Compliance Manual, Section 2: Threshold Issues, at part 2-III.A.1.c (discussing coverage for volunteers) (hereinafter Threshold Issues Guidance).

However, an intern who receives only some small benefit that is an “inconsequential incident of an otherwise gratuitous relationship” will not be an employee, and therefore will not be protected by EEO laws. Threshold Issues Guidance [quoting *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 222 (4th Cir.1993)]. Benefits that courts have not deemed to be significant include academic credit, practical experience, and scholarly research. See *Jacob-Mua v. Veneman*, 289 F.3d 517, 521 (8th Cir.2002) (student researcher is not an employee by virtue of obtaining research during her internship that was valuable for her dissertation) (abrogated on other grounds by *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir.2011) (en banc)).

Nonetheless, even where no significant remuneration exists, unpaid interns may be considered employees if the volunteer work is required for regular employment, or regularly leads to paid employment with the same employment institution. Threshold Issues Guidance [citing *Charlton v. Paramus Bd. Of Educ.*, 25 F.3d 194, 198 n.4 (3d Cir.1994)]. Similarly, an applicant to, or a participant in, a training or apprenticeship program is protected against discrimination with respect to admission to, or participation in, the training or apprenticeship program, regardless of whether the individual is an employee. 42 U.S.C. A. 2000e-2(d) (Title VII).



HYPOTHETICAL #2 ANSWER KEY

Contributed by: Vanessa M. Snyder - *The Axelrod Firm*, www.theaxelrodfirm.com

1) You are counsel for Super Safe. Samantha calls you after her second conversation with Chrissy. How would you advise Samantha to proceed?

First, Samantha should be advised that she did the right thing by reaching out to counsel, as the laws concerning bullying and transgender issues are still developing and likely to change in the coming years. Accordingly, it is imperative that HR Managers stay educated about recent developments in the law in order to: 1) protect the welfare of employees; and 2) minimize the company's exposure to liability.

Second, counsel should advise Samantha that several steps should be taken to alleviate Chrissy's concerns. In terms of immediate steps, Chrissy should be assigned to a locker in the women's locker room, which corresponds with the gender with which she identifies. Her other complaints should be investigated. If substantiated, Chrissy should be reassigned to Ms. Quick as a Senior Bodyguard or to another, equivalent Senior Bodyguard position. Chrissy should also be assured that she is eligible for the company-sponsored insurance (if applicable).

Lastly, counsel may want to suggest that it is time for Super Safe to evaluate its employment policies, procedures, and training.

2) Samantha wants to approach Ms. Quick, Super Safe's client, about Chrissy. How would you advise her to do so?

Samantha should tell Ms. Quick about the problems it is having integrating and fully including a transgender worker on her security team and that her manager has been accused of treating such a worker poorly. That kind of behavior by Ms. Quick's manager could expose Ms. Quick to liability. Ms. Quick could have other transgender contractors or employees that could face these problems.

Furthermore, government contracts, particularly local and state, may impose stricter non-discrimination policies, which will require contractors not to discriminate. Ms. Quick may be breaching her Pennsylvania tourism commercial contract if she or her manager requested that an individual be terminated/transferred based on her sex.

Chrissy should be permitted to use the facilities of the gender with which she identifies without any questions being asked.

3) What potential claims is Super Safe opening itself up to based on the above actions of its employees and management?

a. Title VII Sex Discrimination

Federal Courts have held that transgender employees are not a protected class under Title VII, but are protected from sex discrimination under the Act. See e.g. *Schroer v. Billington*, 577 F. Supp.2d 293, 308 (D.D.C.2008) ("In refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination."); and *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir.2004) ("It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.").

Accordingly, Super Safe could be opening itself up to a potential Title VII claim if it discriminates, retaliates, or takes any adverse action against Chrissy based on her sex.

b. Bullying

Chrissy could bring a claim for bullying against Super Safe. California recently enacted the country's first



HYPOTHETICAL #2 ANSWER KEY (continued)

law specifically aimed at preventing workplace bullying and California employers are now required to educate managers on category-neutral “abusive conduct.” Bullied employees across the country also may file suit for harassment, retaliation, intentional infliction of emotional distress, and even assault. Additionally, the Healthy Workplace Act has been introduced in at least 25 states, and, if adopted, would create a cause of action against both a workplace bully and the employer.

Although legislation against bullying has not been adopted nationwide, bullied employees may allege claims based on federal laws such as: Title VII of the Civil Rights Act, which prohibits discrimination based on race, color, religion, sex, and national origin; The Americans with Disabilities Act, which prohibits discrimination based on disabilities; The Age Discrimination in Employment Act, which protects individuals over the age of 40; and The Uniformed Services Employment and Reemployment Rights Act (“USERRA”), which prohibits discrimination based on military service (see more on USERRA below).

Significantly, with these types of claims, the employee must demonstrate a connection between the harassment and their status in a protected class. An employee may also bring a claim for hostile work environment, which requires allegations that the harassment was: 1) unwelcome; 2) based on the employee’s status as a member of a protected class; 3) attributable to the employer; and 4) severe and pervasive.

c. USERRA. Under the Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights Act (“USERRA”) provides military reservists (non-career members of the uniformed service) with job protections if they voluntarily or involuntarily leave employment positions for military service or disaster relief. Under USERRA, generally, a reservist must be restored to the job and benefits they would have attained if they had not been absent due to their military service. Here, Super Safe has granted Chrissy reinstatement, as required under USERRA. It is important, however, that she be reinstated at the level she would have been at if she had not been deployed. If Super Safe places Chrissy in an Entry-Level position, Super Safe is potentially exposing itself to a USERRA claim.

Also, while not explicit in the hypothetical, under USERRA, reservists who are deployed may elect to continue employer-based health insurance for themselves and their dependents for up to 24 months. Even if the reservist does not elect coverage during their service, they have a right to reinstatement of such benefits upon reemployment without any otherwise applicable waiting periods.

Chrissy should be immediately provided with the same insurance benefits she was offered prior to her deployment.



1. Did Global take an adverse action against Ms. Black by identifying her as the SEC complainant and does Ms. Black have a valid claim for retaliation based on the disclosure?

Yes. Ms. Black would have a valid claim for retaliation based on Mr. Red's disclosure of her identity as the whistleblower under section 806 of the Sarbanes-Oxley Act (SOX), which "creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity." 18 U.S.C § 1514A. The statute states in relevant part:

No public company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of [certain protected whistleblowing activity]¹. *Id.*

To prevail on a retaliation claim under SOX, the employee must prove, by a preponderance of the evidence, that (1) he/she engaged in protected whistleblowing activity, (2) the employer knew that he/she engaged in the protected activity, (3) he/she suffered an 'adverse action' and (4) the protected activity was a 'contributing factor' in the 'adverse action.' *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008.)

When interpreting SOX's anti-retaliation provision, courts draw on Title VII of the 1964 Civil Rights Act, which generally prohibits employers from retaliating against employees who report employment discrimination. In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), the Supreme Court considered whether certain conduct constitutes an "adverse action" sufficient to support a Title VII retaliation claim. *Id.* at 60. The court held the "adverse action must be materially adverse which in context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Id.* at 67-68. Subsequently, the court in *Allen v. Admin. Review Bd.* concluded that the *Burlington* material-adversity standard applied to SOX's anti-retaliation provision. *Allen, supra*, 514 F.3d at 476.

To support her retaliation claim, Ms. Black must show Global Studios' disclosure of her identity as the whistleblower was an adverse action such that it would dissuade a reasonable person from engaging in protected conduct. Given the ostracism faced by Ms. Black and her exclusion from key production meetings that ultimately prevented her from performing her job as an executive producer, a reasonable person would be dissuaded from making a protected report. See *Halliburton Inc. v. Admin. Review Bd.*, 771 F.3d 254 (5th Cir.2014).

Halliburton dealt with a very similar factual situation. There, the court recognized it is inevitable that such a disclosure would result in ostracism. The court further noted: "When it is the boss that identifies one of his employees as the whistleblower who has brought an official investigation upon the department, *** the boss could be read as sending a warning, granting his implied imprimatur on differential treatment of the employee, or otherwise expressing a sort of discontent from on high. *** [M]oreover [i]n an environment where insufficient collaboration constitutes deficient performance, the employer's disclosure of the whistleblower's identity and thus targeted creation of an environment in which the whistleblower is ostracized is not merely a matter of social concern, but is, in effect, a potential deprivation of opportunities for future advancement. We, like other courts that have addressed similar circumstances, agree *** that, in a workplace environment *** where collaboration is an important part of the job, the employer's targeted disclosure to the whistleblower's colleagues that the whistleblower had

¹Protected activity is defined in 15 USCS § 78u-6(h)(1)(A)i-iii of the Securities Exchange Act as:

- (i) in providing information to the Commission in accordance with this section;
- (ii) in initiating, testifying in or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
- (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934, section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.



HYPOTHETICAL #3 ANSWER KEY (continued)

reported them to the authorities for alleged wrongdoing and has caused them to become the subject of an official investigation, thus creating an environment of ostracism, well might dissuade a reasonable employee from whistleblowing. See *Moghan v. Napolitano*, 613 F.3d 1162, 1166 (D.C. Cir. 2010) (supervisor's posting of employee's equal employment opportunity complaint to the office intranet, which the employee's colleagues could and did access, could 'chill a reasonable employee from further protected activity'); *Franklin v. Local 2 of the Sheet Metal Workers Int'l Ass'n*, 565 F.3d 508, 520 (8th Cir. 2009) (union's public posting of legal bills associated with employees' lawsuit could dissuade a reasonable employee from making a charge of discrimination); *Booth v. Pasco Cnty.*, 829 F. Supp. 2d 1180, 1201-02 (M.D. Fla.2011) (union's public posting of announcement that named employees had sued it could dissuade a reasonable worker from making a charge of discrimination because 'no one volunteers for the role of social pariah')." *Halliburton*, 771 F.3d at 262.

Thus, Global will likely be found liable for retaliating against Ms. Black by disclosing her name to her colleagues as the whistleblower.

2. Did Global retaliate against Ms. Black by terminating her employment because of her disclosure to the SEC? What if Global had valid reasons for the termination, other than Ms. Black's disclosure to the SEC?

Ms. Black will likely argue she was terminated in retaliation for whistleblowing. As indicated above, to prevail on a retaliation claim under SOX, the employee must prove, by a preponderance of the evidence, that (1) he/she engaged in protected whistleblowing activity, (2) the employer knew that he/she engaged in the protected activity, (3) he/she suffered an 'adverse action' and (4) the protected activity was a 'contributing factor' in the 'adverse action.' *Allen*, 514 F.3d at 476.

Here, Global Studios will likely argue that it had legitimate, non-retaliatory reasons for terminating Ms. Black's employment, namely her unsatisfactory attendance record and her inability to communicate effectively and collaborate with co-workers. It will argue the whistleblowing activity was not a contributing factor in its termination decision and it had no retaliatory motive for the termination.

A "contributing factor" is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen*, 514 F.3d at 476 n.3 (citation omitted, emphasis added). The Federal Circuit has explained that "a whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the [employer] in order to establish that his [protected conduct] was a contributing factor to the personnel action." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir.1993). *Kewley v. HHS*, 153 F.3d 1357, 1362 (Fed.Cir.1998). "Regardless of the official's motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing." *Halliburton*, 771 F.3d at 263. (Citation omitted.)

Here, Ms. Black was absent because of the stress she experienced after her identity was disclosed. She was unable to communicate effectively and collaborate with co-workers when they ignored her, ostracized her, and refused to work with her because she was identified by the CEO as the whistleblower. Thus, Ms. Black's whistleblowing was certainly a "contributing factor" in the termination decision. Mr. Red's tongue-in-cheek indication that people should not retaliate will not save Global Studios. As indicated above, that indication will likely be seen as an implied imprimatur of retaliation. *Id.*

3. Is Global Studios' confidentiality provision in violation of SEC rules? If so, how should it be changed?

Yes. On April 1, 2015, the Securities and Exchange Commission announced its first enforcement action against a Houston technology company, KBR Inc., for including "improperly restrictive language in



HYPOTHETICAL #3 ANSWER KEY (continued)

confidentiality agreements.” *In re KBR, Inc.*, Exchange Act Release No. 74619 (April 1, 2015). KBR required employees interviewed during an internal investigation of potential legal violations or unethical conduct to sign a confidentiality statement acknowledging they were “prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department,” and that “the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.” In a settled administrative proceeding, the SEC found that the company violated SEC Rule 21F-17, promulgated under whistleblower provisions of the Dodd-Frank Act. That rule provides in pertinent part that “[n]o person may take any action to impede an individual from communicating directly with the SEC about a possible securities law violation, including enforcing or threatening to enforce a confidentiality provision.” KBR’s confidentiality provision was found to violate SEC Rule 21-17F in that the “language undermines the purpose of 21F and Rule 21F-17(a) which is to encourage individuals to report to the Commission.”

Here, Global Studios’ confidentiality provision impermissibly prevents employees from reporting suspicious activities or violations to the SEC or any other outside agency, which is a direct violation of the spirit and intent of Rule 21F-17. It also violates many state statutes.²

Companies should review their confidentiality provisions to expressly provide that nothing in the agreement “prohibits employees from reporting possible violations of federal law or regulation to any governmental agency or entity,” and to state that any employee making such a report does not need to seek prior authorization from, or notify, the company.

4. What other types of claims might Ms. Black be able to bring against Global Studios?

Ms. Black potentially could assert claims of gender discrimination and retaliation under Title VII of the 1964 Civil Rights Act or the state equivalent. Title VII generally prohibits employers from discriminating against employees on the basis of gender. Title VII also prohibits retaliation against individuals who raise complaints of gender discrimination.

Ms. Black also could assert a workers’ compensation injury claim based on the severe emotional distress she experienced when she was identified as the whistleblower. In the workers’ compensation arena, she also could assert a retaliation claim³ and argue she was terminated in retaliation for suffering a work-related injury or filing a workers compensation claim.

Ms. Black might assert a claim for violation of the National Labor Relations Act (NLRA) based on Global’s email audit. According to the National Labor Relations Board (NLRB), employees have a right, protected by Section 7 of the NLRA, to use an employer’s email system during non-working time to engage in protected concerted activity. Concerted activity generally requires two or more employees acting together to improve wages or working conditions, but the action of a single employee may be

²For example, California Labor Code section 1102.5, subdivision (a) provides as follows: “An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee’s job duties.” Cal Labor Code § 1102.5, subd. (a).

³In California, retaliation claims in the workers’ compensation arena are brought under Labor Code Section 132a, which provides penalties if an employer “discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a [workers’ compensation] claim.” (Cal Labor Code Sec. 132(a).)



HYPOTHETICAL #3 ANSWER KEY (continued)

considered concerted if he or she involves co-workers before acting, or acts on behalf of others. *Purple Communications, Inc.* N.L.R.B. No. 21-CA-095151 (Dec. 11, 2014.) Here, Ms. Black wrote to Ms. White that the studio appeared to approve payment of a higher percentage of profits for male actors and executives than it did for women . Even though Ms. White never responded, Ms. Black was engaging in protected concerted activity in her email to Ms. White by raising issues about pay differentials between men and women. (For example, in a similar case, the NLRB found an employee engaged in a classic form of protected concerted activity by arranging a meeting between employer and employees to discuss a rumor of pay disparity between new and existing employees. *Manufacturing Services, Inc.*, 295 N.L.R.B. 254 (June 15, 1989), reported in full, 1990 U.S. App. Lexis 8516.