PERKINSCOIE
COUNSEL TO GREAT COMPANIES

2017 Labor & Employment Workshop

Tuesday, June 13, 2017
Hyatt Regency Bellevue
900 Bellevue Way NE
Bellevue, WA 98004

2017 Labor & Employment Law Workshop Agenda
Tuesday, June 13, 2017

11:30 a.m.—12:00 p.m.	**Registration**
12:00 p.m.—1:00 p.m.	**Welcome and Introduction of Guest Speaker** Char Eberhardt, Perkins Coie **Lunch with Noah Purcell, Washington State Solicitor General** Noah recently argued in front of the U.S. District Court for the Western District of Washington and the U.S. Court of Appeals for the Ninth Circuit to successfully block portions of President Trump's executive order banning people from seven predominantly Muslim countries from entering the United States. *45 Minutes of General CLE Credit*
1:00 p.m.—1:05 p.m.	**Thank You and Overview of Afternoon** Cate DeJulio, Perkins Coie
1:05 p.m.—2:05 p.m.	**Spring Employment Law Update** Char Eberhardt, Perkins Coie Cate DeJulio, Perkins Coie *60 Minutes of General CLE Credit*
2:05 p.m.—2:20 p.m.	**Break**
2:20 p.m.—3:10 p.m.	**Arbitration Agreements and Executive Arbitration** Harry Schneider, Perkins Coie Ben Stafford, Perkins Coie *50 Minutes of General CLE Credit*
3:10 p.m.—4:20 p.m.	**The Hiring Process: Avoiding the Legal Hazards That Can Haunt Employers** Julie Lucht, Perkins Coie Chelsea Petersen, Perkins Coie *70 Minutes of General CLE Credit*
4:20 p.m.—4:30 p.m.	**Wrap-Up** Cate DeJulio, Perkins Coie

Presenters

NOAH PURCELL, SOLICITOR GENERAL

Washington State Attorney General's Office

In 2013 Attorney General Bob Ferguson appointed Seattle attorney Noah Purcell as the Solicitor General for the Washington State Attorney General's Office. Prior to joining the office, Noah worked as an attorney in Perkins Coie's Litigation and Appellate practices. His diverse litigation experience includes constitutional issues, antitrust claims, environmental law, preemption, campaign finance and administrative law. Noah served in the U.S. Department of Homeland Security's Office of General Counsel from 2009 to 2010, advising on security and immigration issues and working extensively on the federal government's challenge to Arizona's immigration law. After graduating magna cum laude from Harvard Law School, Noah worked as a law clerk for former U.S. Supreme Court Justice David Souter and U.S. Court of Appeals Judge David Tatel of the D.C. Circuit.

CHARLES (CHAR) EBERHARDT, PARTNER

Perkins Coie LLP

Char Eberhardt, a partner in the firm's Labor & Employment practice, has more than 25 years of experience in labor and employment law. He represents clients in employment class and collective action litigation, TRO and injunction litigation, complex labor arbitrations, unfair labor practice proceedings, and collective bargaining. Char also counsels clients concerning wage and hour law compliance, reductions in force, executive employment and non-competition agreements, employment issues related to mergers and acquisitions, employee privacy, subcontracting and work movement, employee separation, labor disputes, and EEO compliance.

CATHARINE (CATE) DEJULIO, ASSOCIATE

Perkins Coie LLP

Catharine DeJulio is a labor and employment attorney with a background in commercial, antitrust and securities litigation. Cate represents clients in federal and state court, in arbitrations and mediations, and on appeal. In addition to her litigation experience, Cate conducts internal investigations, represents clients in their responses to EEOC charges of discrimination and counsels clients on a range of employment issues.

HARRY H. SCHNEIDER, JR., PARTNER

Perkins Coie LLP

Harry Schneider practices litigation, trial practice and arbitration before state and federal courts and administrative bodies, with an emphasis on litigation involving professional liability, intellectual property, complex financial and commercial disputes, and fiduciary or estate and trust matters.

WILLIAM (BEN) STAFFORD, PARTNER

Perkins Coie LLP

Ben Stafford is a partner in the firm's Labor & Employment practice who focuses his practice on employment litigation and counseling. Ben has extensive experience defending complex wage-and-hour class action cases for clients including The Boeing Company, Comcast, OfficeMax, and Les Schwab.

Ben's experience extends to all aspects of such cases, including managing electronic discovery, defeating class certification, taking a case to trial, and appellate practice. Ben's other areas of experience include proactive defense of individual discrimination, harassment, retaliation, and wage and hour claims arising from federal and state laws

such as the Civil Rights Act, the Fair Labor Standards Act, the Americans with Disabilities Act, and the Washington Law Against Discrimination. Representative clients include The Boeing Company and Microsoft.

JULIE LUCHT, PARTNER

Perkins Coie LLP

Julie Lucht, a partner in the firm's Labor & Employment practice, focuses on employment litigation and counseling. She represents clients in all phases of litigation in defense of numerous types of employment discrimination and other employment-related claims. She counsels and defends clients in connection with issues and claims arising under WLAD, Title VII, ADEA, ADA, FMLA, GINA, FLSA, WARN, NLRA, USERRA and related statutory and common law employment claims, as well as drafting employee handbooks, separation and termination agreements, equal employment opportunity policies, sexual harassment policies, employee leave policies, reasonable accommodation policies and employment contracts. She has served as temporary in-house counsel for a FORTUNE 100 company, handling a range of employment matters.

CHELSEA DWYER PETERSEN, PARTNER

Perkins Coie LLP

Chelsea Dwyer Petersen is a partner who focuses her practice on employment litigation with an emphasis on complex class action cases. Chelsea's areas of experience include proactive defense of discrimination and wage-and-hour class action and collective action cases for clients such as Comcast, The Boeing Company, Amazon and OfficeMax. She has substantial experience in all phases of class cases, including early strategic assessment, defeat of class certification, supervision of large-scale electronic document review, oversight of expert witnesses and taking a case to trial. She also regularly defends employers against individual discrimination, harassment, retaliation and wage-and-hour claims raised to state and federal enforcement agencies and filed in state and federal court. Representative clients include Microsoft and Starbucks.

Contributors

Seattle Labor and Employment associates Tobias Piering, Cate DeJulio, Will Miller, Stephanie Holstein, and Lindsay McAleer contributed significantly to the success of this workshop.

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2017 Spring Employment Law Update

I. LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. Federal Developments

1. The Department of Labor

The next few years could see significant changes for the U.S. Department of Labor (DOL) under the Trump Administration. In March 2017, President Trump released his budget priorities for Fiscal Year 2018, entitled "America First: A Budget Blueprint to Make America Great Again." The proposal contains a $2.5 billion (21 percent) cut to the DOL's overall budget. The proposal seeks to, among other things, reduce funds for job training grants, eliminate certain Occupational Safety and Health Administration (OSHA) training grants, and close Job Corps centers that do not meet certain standards.

On April 27, 2017, Alexander Acosta was confirmed as Labor Secretary by the U.S. Senate after being appointed by President Trump. Secretary Acosta previously served as the United States Attorney for the Southern District of Florida. Secretary Acosta will oversee the DOL as it grapples with major President Obama-era policies that have been on hold since President Obama left office. Changes under Secretary Acosta's leadership are already underway. On June 7, 2017, the DOL withdrew its 2015 and 2016 informal guidance on joint employment and independent contractors. Other issues that may be revisited include a rule that would expand the number of workers eligible for overtime pay by modifying the overtime exemptions and another rule that created a fiduciary relationship between certain financial advisors and their customers, discussed below.

a. Overtime Exemptions

On May 18, 2016, the DOL published a new final rule that significantly revises existing overtime regulations by narrowing the scope of overtime "exemptions." Under the new rule, most workers who earn less than $47,476 a year (just over double the current threshold amount of $23,660) would have to be paid overtime unless they otherwise qualify as exempt under the Fair Labor Standards Act (FLSA). That threshold amount would automatically increase every three years, beginning in 2020.

One week before the new rule was slated to go into effect on December 1, 2016, a federal district court in Texas issued a nationwide injunction putting the new rule on hold. The decision was appealed to the Fifth Circuit by the DOL, which subsequently requested several extensions to the deadline for its brief. The DOL's rationale was that it needed to give the newly confirmed Secretary of Labor more time to decide whether the DOL should continue to challenge the injunction. The DOL's brief is currently due on June 20, 2017. Until then, the rule will remain suspended and the fate of the new rule will remain in limbo. During his confirmation hearings, Mr. Acosta hinted that he would be open to increasing the income limits for the exemptions, but to a lower amount.

b. Fiduciary Rule for Retirement Advisors

On April 8, 2016, the DOL published a new "Fiduciary Duty Rule," which, among other things, requires brokers of retirement accounts to act in their clients' best interest. On February 3, 2017, President Trump issued a memorandum directing the DOL to reevaluate the rule and, as a result, the DOL extended the start date for the phased implementation of the rule until June 9, 2017. Mr. Acosta subsequently stated that he will let the rule take effect on June 9, 2017, while the agency continues to evaluate it. Mr. Acosta has acknowledged, however, that DOL action is bound by the Administrative Procedure Act with respect to the rule, which requires due process and public comment before issuing or rescinding regulations.

c. Independent Contractor vs. Employee Update

Late last year, DOL released a new website called "What is 'misclassification'?"

The website asserts that "[m]isclassification affects everyone" and then lists eight "resources" for more information, including the following:

- Pay and Misclassification
- Health and Safety Concerns on the Job
- Unemployment Insurance and Misclassification
- Anti-Retaliation/Anti-Discrimination Rights for Workers
- Federal Taxes and Misclassification
- Health Care and Retirement Benefits—Information on Employer-Sponsored Benefit Plans
- Resources for State and Federal Governments
- Other Resources/Information

Included in the "Pay and Misclassification" section is a link to a "Myths About Misclassification" webpage, a video called "Know Your Rights Video: Employee vs. Independent Contractor" as well as a link to an infographic called "Get the Facts on Misclassification Under the FLSA [Fair Labor Standards Act]," among other resources.

Notably, the Myths About Misclassification webpage seems to suggest that the test for independent contractor status under the FLSA is a single factor test. For example, the website links to "Myth # 5: I am an independent contractor because I signed an independent contractor agreement" and states "you are an employee if, as a matter of economic reality, your work indicates that you are economically dependent on an employer . . . ." Although federal courts (and courts in Washington) do rely on the "economic realities" test, which analyzes whether an employee is "economically dependent" on the employer, the test is more nuanced than the DOL's website explains and includes six nonexclusive factors:

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 or 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.

Thus, it appears that the purpose of the website is to persuade contractors to challenge their status as contractors. Indeed, the DOL press release issued in conjunction with the unveiling of the website states that "[m]isclassifying employees as independent contractors is a huge problem for workers, employers who play by the rules and our economy." This could potentially result in an increase in complaints and legal actions related to alleged "misclassification."

2. National Labor Relations Board

Currently, the five-member National Labor Relations Board (NLRB or Board) only has three members. On January 26, 2017, President Trump appointed Philip Miscimarra (an Obama appointee and currently the only Republican on the Board) to be the Acting Chair. President Trump is expected to fill the two vacant Board seats with Republicans, giving Republicans a 3-2 majority over Democrats. Recent news reports suggest that President Trump may nominate Marvin Kaplan and William Emanuel. Mr. Kaplan is currently counsel to the commissioner of the Occupational Safety and Health Review Commission, and Mr. Emanuel is a shareholder at the law firm Littler Mendelson P.C., where he focuses on labor and employment issues. If President Trump's nominees are confirmed, the Board will have a Republican-appointed majority for the first time in almost a decade.

The current NLRB General Counsel, Richard F. Griffin Jr., was appointed by President Obama in 2013, and his term runs through October 31, 2017. At the expiration of his term, President Trump will almost certainly appoint a Republican to replace him. Over the next few years, the new General Counsel and Republican-majority Board will revisit some of the Obama Board's more controversial precedents. Some of the precedents that could be targeted are discussed below.

a. *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015)

In *Browning-Ferris*, a 3-2 decision issued August 2015, the Board revised its standard for determining joint-employer status to one that the Board believed would better effectuate the purposes of the National Labor Relations Act (NLRA) in the "current economic landscape." Under the *Browning-Ferris* test, two entities can qualify as "joint employers" if they share or codetermine matters governing the essential terms and conditions of employment such as wages, hours, work assignments, control over the number of workers, and scheduling. Under that test, the mere "right to control" workers, even if not invoked, can be enough to justify a finding of joint employment. This makes it much easier for an employer to be considered a joint employer of, for example, temporary workers employed by a staffing agency. The decision is currently on

appeal to the D.C. Circuit, but a Republican-controlled Board could look to narrow the scope of this test.

b. *Purple Communications, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014)

In *Purple Communications*, a 3-2 decision issued in December 2014, the Board ruled that employers who give employees access to their email systems must at least presumptively permit employee use of email for concerted activity on nonworking time. Notably, Acting Chair Miscimarra wrote a forceful dissent. As a result, a Republican-controlled Board could look to revisit this decision.

c. *In re Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011)

In *Specialty Healthcare*, the Board ruled that, when an employer argues that a petitioned-for bargaining unit should be expanded to cover other employees, the burden is on the employer to demonstrate that the excluded employees share an "overwhelming community of interest" with the proposed bargaining unit. The decision was affirmed by the Sixth Circuit and, in practice, allows unions to create so-called "micro units" for collective bargaining purposes. This decision could be modified or overturned by a Republican-controlled NLRB.

d. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)

In *Lutheran Heritage*, the Board established the standard that an employer's rule, policy, or handbook violates the NLRA if "employees would reasonably construe the language" to prohibit activity protected by the NLRA. On February 24, 2017, in *Cellco Partnership*, 365 NLRB No. 38 (Feb. 24, 2017), Acting Chair Miscimarra wrote a forceful dissent arguing that the "reasonably construe" standard adopted in *Lutheran Heritage* should be "overruled by the Board or repudiated by the courts." As a result, look for a Republican-controlled NLRB to adopt a stricter test for determining whether an employer's rule, policy, or handbook chills the exercise of an employee's rights under the NLRA.

3. Equal Employment Opportunity Commission

a. Future Composition

The Equal Employment Opportunity Commission (EEOC) could also be affected by the Trump Administration. On May 23, 2017, President Trump released his proposed budget, entitled "A New Foundation For American Greatness." The budget proposes a merger between the EEOC and the Office of Federal Contract Compliance Programs (OFCCP). The OFCCP has a similar mission to the EEOC but only has jurisdiction over federal contractors. The OFCCP's budget would decrease by $17 million (16 percent) under President Trump's proposed budget while the EEOC's budget would essentially remain flat. The proposal also contemplates an 11 percent reduction of full-time EEOC employees, going from 2,188 in 2016 to 1,939 in 2018.

Currently, the five-member EEOC only has four commissioners. The Acting Chair, Victoria A. Lipnic, a Republican, was originally nominated to the EEOC by President Obama, and was selected to be Acting Chair by President Trump in January 2017. The remaining three commissioners are currently Democrats. The term of one of the three Democrats will expire in July 2017, allowing Trump to appoint two Republican commissioners and create a Republican-majority EEOC.

b. EEOC Strategic Enforcement Plan

In October 2016, the EEOC approved an updated Strategic Enforcement Plan for Fiscal Years 2017-2021. The Strategic Enforcement Plan identifies six areas of priority for enforcement:

- Eliminating barriers in recruitment and hiring;
- Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination;
- Addressing selected emerging and developing issues;
- Ensuring equal pay protections for all workers;
- Preserving access to the legal system; and
- Preventing systemic harassment.

In addition, the Strategic Enforcement Plan specifically addresses two emerging issues. The first relates to the "complex employment relationships and structures in the 21st century workplace," focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the so-called "gig" economy. The second emerging issue is backlash discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, as events in the United States and abroad have increased the likelihood of discrimination against these communities. It remains to be seen how the Trump Administration might seek to modify those enforcement priorities.

c. New EEO-1 Report

The EEO-1 Report, also known as the Employer Information Report, is a compliance survey that must be submitted to the EEOC by certain employers. The survey requires company employment data to be categorized by race/ethnicity, gender, and job category. All companies that meet the following criteria are required to file the EEO-1 report annually:

- Employers subject to Title VII with 100 or more employees;

- Employers subject to Title VII with fewer than 100 employees if the company is owned by or corporately affiliated with another company and the entire enterprise employs a total of 100 or more employees; or

- Federal government prime contractors or first-tier subcontractors subject to Executive Order 11246 with 50 or more employees and a prime contract or first-tier subcontract amounting to $50,000 or more.

In September 2016, under President Obama, the EEOC announced changes to the EEO-1 Report, which will require employers to annually report aggregate compensation data for all employees by gender, race, and ethnicity across pay bands. These changes are set to go into effect in March 2018 and signal that the EEOC will seek to actively find and remedy discriminatory pay practices. The Trump Administration could seek to undo these changes, but doing so will take a majority vote of the EEOC commissioners, which is not likely to happen until new Republican commissioners are appointed. Acting Chair Lipnic has stated that she wants to reevaluate the costs and benefits of the new EEO-1 Report.

As a result, employers should consider preparing for the new EEO-1 Report by conducting an internal audit to identify potential pay disparities that cannot be explained by legitimate factors such as education level, seniority, and/or performance. All such audits should be performed by a law firm (who will retain the appropriate experts) in order to ensure that the results of the audit are protected by the attorney-client privilege and will not be disclosed in any subsequent pay equity litigation between employees and the employer.

d. New EEOC Guidance on National Origin Discrimination

In November 2016, the EEOC issued updated enforcement guidance on national origin discrimination to replace its compliance manual section on that subject. The enforcement guidance sets forth the EEOC's interpretation of federal anti-discrimination laws and regulations and explains how those laws and regulations should be applied in the workplace. The EEOC also issued two short resource documents to accompany the new guidance: a question-and-answer publication and a fact sheet for small businesses that highlights the guidance's major points in plain language. Both publications are available on the EEOC's website.

National origin discrimination makes up approximately ten percent of private sector charges filed with the EEOC. The new enforcement guidance discusses Title VII's prohibition on national origin discrimination as applied to a variety of employment situations and discusses best practices for employers in order to prevent such discrimination. Specifically, the guidance addresses human trafficking and intersectional discrimination (i.e., when an employer discriminates based on a combination of protected characteristics that are inseparable).

(i) Human Trafficking

When force, fraud, or coercion is used to compel labor or exploit workers, traffickers and employers may not only be violating federal and/or state criminal laws, but also Title VII. In particular, Title VII applies in human trafficking cases if an employer's conduct is directed at an individual and/or group of individuals based on a protected category, such as national origin.

(ii) Intersectional Discrimination

Title VII prohibits "intersectional" discrimination, which occurs when an employee is discriminated against because of the combination of two or more protected bases (e.g., national origin and race). Since some characteristics, such as race, color, and national origin, often fuse inextricably, Title VII prohibits employment discrimination based on any of the named characteristics, whether individually or in combination. Because intersectional discrimination targets a specific subgroup of individuals, Title VII prohibits, for example, discrimination against Asian women even if the employer has not otherwise discriminated against Asian men or non-Asian women.

4. Executive Orders

a. Executive Order 13768 - Enhancing Public Safety in the Interior of the United States

On January 25, 2017, President Trump signed Executive Order 13768, entitled "Enhancing Public Safety in the Interior of the United States," which directs U.S. Immigration and Customs Enforcement (ICE) to hire 10,000 additional immigration officers. As a practical matter, this means that employers need to prepare themselves for more frequent audits and inspections by ICE by ensuring that their employment records are accurate and up-to-date. Conducting an internal I-9 audit is one of the best ways to do that.

Employers should be aware that, on November 14, 2016, ICE issued a new edition of the Form I-9 that must be used by employers going forward. Employers do not need to go back, however, and update I-9s for employees who were hired before that date. A Spanish-language version of the new form is available, but it is only authorized for use in Puerto Rico.

Employers should also be aware of the option to use E-Verify. E-Verify is an online system maintained by ICE that compares information from an employee's Form I-9 to data from the Department of Homeland Security and Social Security Administration to confirm employment eligibility. The information required to use the E-Verify system is contained on the I-9. While use of this system is currently voluntary, it is a good idea for employers to become familiar with the system because President Trump's proposed budget would invest $15 million to begin implementing mandatory nationwide use of the E-Verify system. The service is currently free of charge to employers.

b. Executive Orders 13769 and 13780 - Protecting The Nation From Foreign Terrorist Entry Into The United States

On January 27, 2017, President Trump issued the first "travel ban" executive order. One week later, a federal judge in the Western District of Washington issued a nationwide temporary restraining order (TRO) enjoining it. That TRO was subsequently affirmed by the Ninth Circuit. On March 6, 2017, President Trump reissued a new executive order, Executive Order 13780, which, among other things, prevented foreign nationals from six countries (Sudan, Syria, Iran,

Libya, Somalia, and Yemen) who are outside of the United States and who do not already have a valid visa, from reentering the United States. The enforcement of key provisions of this second Executive Order was also enjoined by a federal district court, a decision that was later affirmed by the Fourth Circuit. A federal district court in Hawaii also ruled enjoined enforcement of the Executive Order. The Ninth Circuit heard oral argument in mid-May, but has yet to rule. The federal government has petitioned the Supreme Court for review of these decisions and requested stays of the lower courts' rulings. Responses by the challengers were due on June 12, 2017. While this Executive Order does not affect foreign nationals who already have valid work visas and is therefore unlikely to directly affect current employees, employers should stay abreast of developments in this area.

5. Health Insurance Portability and Accountability Act of 1996 Enforcement

In the first three months of 2017, Health Insurance Portability and Accountability Act of 1996 (HIPAA) privacy and security settlements and penalties against employers totaled over $11 million with no sign of letting up.

On April 3, 2017, the U.S. Department of Health and Human Services (HHS) announced yet another HIPAA privacy and security settlement involving Protected Health Information (PHI) on a stolen laptop. This case is a useful reminder that stolen mobile devices (laptops, tablets, smartphones, flash drives, etc.) are at the heart of many HIPAA settlements, and the failure of a Covered Entity (CE) or a Business Associate (BA) to address the security of such devices in its risk analysis and policies and procedures can lead to liability.

In a recent settlement, the CE was a provider of wireless monitoring for patients with certain heart conditions. The PHI on the laptop was not encrypted, and the device was stolen from the car of one of the CE's workforce members. HHS determined that the CE did not have an accurate and thorough risk analysis in place to identify potential risks and vulnerabilities, did not require encryption of PHI, and did not have final policies and procedures in place to control the movement of hardware and electronic media containing PHI into and out of the CE's facilities.

In addition to payment of $2.5 million, the CE agreed to a Corrective Action Plan (CAP) that will be in place for two years and will require, among other things, a risk analysis within 90 days of the settlement, revisions to the CE's security policies and procedures with particular attention to device and media controls, and revisions to the CE's HIPAA privacy and security training program. One of the more notable provisions of the CAP is the requirement that the CE certify that all portable media devices are encrypted, even though encryption of electronic PHI is an addressable, but not a required, safeguard under the HIPAA regulations. This suggests that compliance with the HIPAA regulations may often be less expensive and less onerous than the potential consequences of noncompliance.

6. Federal Paid Family Leave Proposal and Prospects

The country may be headed toward nationwide paid family leave. On February 7, 2017, Senator Kirsten Gillibrand introduced a bill entitled the Family and Medical Insurance Leave Act (FAMILY Act). If passed, the FAMILY Act would create a nationwide insurance fund that would provide workers up to 66% of their wages for three months to help care for a new child, a family medical emergency, or a serious personal injury. While President Trump has not supported the FAMILY Act, he does support paid family leave. On May 23, 2017, in his proposed budget, President Trump announced that he would support the creation of a program in which states would be required to provide six weeks of paid family leave to new mothers and fathers, including adoptive parents. It is unclear whether either of these initiatives will garner adequate support in Congress.

B. State and Local Law Developments

With the gridlock in Washington, D.C., in recent years, state and local governments have started enacting more local legislation to regulate the employer/employee relationship.

1. Initiative 1433

On November 8, 2016, Washington voters passed Initiative 1433, which had two primary components.

a. State Minimum Wage

First, Initiative 1433 raised the state-wide minimum wage to $11 per hour in 2017. The minimum wage will increase annually over the next four years to $11.50 in 2018, $12 in 2019, and $13.50 in 2020. Starting in 2021, the minimum wage will increase with inflation.

b. Paid Sick Leave

Second, beginning in 2018, employers are required to provide employees with paid sick leave in accordance with the following:

- Paid sick leave accrues at a minimum rate of one hour of paid sick leave for every 40 hours worked as an employee.
- An employee is entitled to use accrued paid sick leave beginning on the 90th calendar day after the start of employment.
- Unused paid sick leave of 40 hours or less must be carried over to the following year.
- Employers are allowed to provide employees with more generous carryover and accrual policies.

The measure requires employers to allow employees to use paid sick leave in the following circumstances:

- To care for themselves or a family member.
- When the employee's work or the employee's child's school or place of care has been closed by order of a public official for any health-related reason.
- For absences that qualify for leave under the state's Domestic Violence Leave Act.

Employers can also allow employees to use paid sick leave for additional purposes. Employers are not required to provide financial or other reimbursement for accrued and unused paid sick leave upon the employee's termination or resignation.

The Department of Labor and Industries is currently engaged in the rulemaking process for Initiative 1433. Ultimately, administrative rules will include procedures for notifying employees and reporting regarding sick leave, and protecting employees from retaliation for the lawful use of sick leave.

Several trade associations filed a lawsuit in Kittitas County Superior Court earlier this year arguing that Initiative 1433 is unconstitutional because it violates the Washington Constitution's "single subject" rule, fails to give voters adequate notice of its contents, and fundamentally amends a number of state statutes pertaining to employee leave without specifically setting forth the statutes that were amended. The trade associations filed for summary judgment and, on May 1, 2017, the superior court ruled that they failed to establish beyond a reasonable doubt that the statute was unconstitutional. The trade unions have indicated that they will not appeal the superior court's decision.

It is important to remember that Seattle, SeaTac, Tacoma, and Spokane have their own paid sick leave ordinances. The local ordinances apply if they are more favorable to the employee. Below is a chart summarizing some important differences between Initiative 1433 and the local ordinances.[1] Keep in mind that the table does not cover many of the ordinances' additional provisions, such as the notice employers must provide to employees, whether employers must certify that they are in compliance with the ordinances on an annual basis, the date on which employees begin to accrue leave, and the reasons employees may use accrued leave. Consult with an employment lawyer if you have questions regarding the application of one or more of these ordinances to your business.

	Seattle	**SeaTac**	**Tacoma**	**Spokane**	**I-1433**
Effective date	Sept. 1, 2012	Jan. 1, 2014	Feb. 1, 2016	Jan. 1, 2017	Jan. 1, 2018

[1] This chart originally appeared in the *Washington Employment Law Letter*'s March 2017 issue and is reprinted with permission.

	Seattle	SeaTac	Tacoma	Spokane	I-1433
Employers and employees affected	Employers with more than four full-time-equivalent (FTE) employees who work in Seattle	SeaTac employers in the hospitality and transportation industries	Employers with one or more employees who work in Tacoma more than 80 hours per calendar year	Spokane employers with one or more employees who work in Spokane more than 240 hours per year	All
Exempt employees	Federal, state, and non-city government employees and work-study students		Work-study students	Government employees, seasonal workers, work-study students, domestic workers and construction workers	As defined by the Washington Minimum Wage Act
Leave accrual	5 to 249 FTE employees: one hour for every 40 hours worked 250+ FTE employees: One hour for every 30 hours worked	One hour for every 40 hours worked	One hour for every 40 hours worked	One hour for every 30 hours worked	One hour for every 40 hours worked
Amount of leave employees may use per year	5 to 49 FTE employees: 40 hours per benefit year 50 to 249 FTE employees: 56 hours per benefit year 250 or more FTE employees: 72 hours per benefit year or 108 paid time off (PTO) hours		40 hours per calendar year	Fewer than 10 employees: 24 hours per year 10 or more employees: 40 hours per year	Not yet defined, but 40 hours per year is under consideration in the rule development process

	Seattle	SeaTac	Tacoma	Spokane	I-1433
Amount of leave that may be carried over to next year	5 to 49 FTE employees: 40 hours per benefit year 50 to 249 FTE employees: 56 hours per benefit year 250 or more FTE employees: 72 hours per benefit year or 108 PTO hours	Employees compensated for unused time at the end of the calendar year	24 hours per year	Fewer than 10 employees: 24 hours per year 10 or more employees: 40 hours per year	40 hours per year
More info available at:	www.seattle.gov	www.ci.seatac.wa.us	http://www.cityoftacoma.org	https://my.spokanecity.org	www.lni.wa.gov

2. Seattle Minimum Wage Ordinance

Seattle's Minimum Wage Ordinance went into effect on April 1, 2015. The Minimum Wage Ordinance sets wages in Seattle and will gradually increase to $15 per hour. As of January 1, 2017, large employers (i.e., those with 501 or more employees) must pay a minimum of $13.50 per hour if they pay toward the employee's medical benefits. Large employers who do not pay toward an employee's medical benefits must pay a minimum of $15 per hour. As of January 1, 2017, small employers (i.e., those with 500 or fewer employees) must pay a minimum of $11 per hour if they pay toward the employee's medical benefits or the employee earns $2 per hour in tips. If neither of those two contingencies apply, small employers must pay employees a minimum of $13 per hour.

It is important to remember that the Seattle Minimum Wage Ordinance also imposes a variety of other requirements on employers. Employers must provide employees with notice of their rights under the Minimum Wage Ordinance. The notice must be in English, Spanish, and any other language that is commonly spoken by employees in the workplace. An employer cannot retaliate against an employee for requesting to be paid the minimum wage, filing a complaint with the Seattle Office of Labor Standards concerning a potential minimum wage violation, or telling a person about a potential violation or about their rights. Employers must keep payroll records demonstrating compliance for a period of three years.

3. Seattle's Secure Scheduling Ordinance

The Seattle City Council unanimously passed the Secure Scheduling Ordinance on September 19, 2016. It is set to go into effect July 1, 2017. The Seattle Office of Labor Standards, the city agency charged with enforcing the ordinance, recently published new

administrative guidance interpreting the ordinance, which is available on its website. The ordinance imposes new requirements on certain employers in the retail and food services industries for their hourly, non-exempt employees who work in the city at least 50 percent of the time. A similar law went into effect in San Francisco last year. Seattle is the second major U.S. city to pass such an ordinance. The ordinance applies to employers in the retail and food services industries (defined broadly to include restaurants, food trucks, bars, and caterers) with 500 or more employees in the company worldwide or, for franchises, within the franchise network. In addition to the 500-employee requirement, full-service restaurants (that is, restaurants where patrons order and are served while seated) are covered by the ordinance only if they have 40 or more physical locations.

The new requirements cannot be waived by employees except through collective bargaining between an employer and employees represented by a union. Employers must display a poster describing employee rights under the ordinance in a conspicuous and accessible place at all affected workplaces. The new requirements include:

- *Right to Request Input into Work Schedules*. Employees may request not to be scheduled for certain shifts or shifts at certain locations, and they have the right to identify preferences for the hours and location of work. Employers must engage in an interactive process regarding such requests. If requests are due to "major life events" (including issues with an employee's transportation or housing, serious health condition, child care responsibilities, enrollment in training or education programs, or a second job), the employer must grant the request unless the employer has a bona fide business reason for denying it. All denials must be in writing.

- *Right to Rest Between Work Shifts*. Employers must provide employees at least ten hours off between shifts unless employee consent is obtained. If an employee consents, the employer must pay the employee one and one-half times the employee's regular rate of pay for hours worked that are less than ten hours apart.

- *Advance Notice of Work Schedule*. Employers must provide employees with written work schedules at least 14 days before the first day of the work schedule. Employees may decline to work any hours not included in the schedule.

- *Compensation for Work Schedule Changes*. If, without providing 14 days' notice, an employer adds hours to an employee's schedule or changes the employee's shift with no loss of hours, the employer must pay the employee one additional hour of pay, in addition to wages earned. If the employer cancels some or all of an employee's hours without proper notice, the employer must pay the employee half the employee's regular hourly rate for all hours lost. There are certain exceptions to these two rules.

- *Compensation for On-Call Shifts*. An employer must pay an employee one-half the employee's regular hourly rate for any scheduled hours the employee does not work after the employer scheduled the employee for an on-call shift for which the employee does

not need to report to work. "On-call shift" is defined expansively and includes any time that the employer requires the employee to be available to work, regardless of whether the employee is located on or off the employer's premises.

- *Access to Hours for Existing Employees*. When hours become available, employers must offer additional hours of work to existing employees before hiring new employees and must post written notice of newly available hours for at least three consecutive days before hiring new employees.

- *Good Faith Estimate of Work Schedule*. Employers must provide new employees with a good faith estimate of their future work schedules and provide updates annually or sooner if the employer expects that there will be a significant change to the estimate.

The ordinance imposes new recordkeeping requirements mandating that employers keep written documentation demonstrating compliance with the ordinance for a period of three years. An employer's failure to keep proper records creates a rebuttable presumption that the employer violated the ordinance for the period and for each employee for whom records were not properly retained.

The ordinance provides for steep financial penalties for violators, including treble damages for unpaid compensation. In addition to treble damages, employers who retaliate against employees for exercising their rights under the ordinance are liable for a mandatory penalty payable to the aggrieved party of up to $5,000. Additionally, the Seattle Office of Labor Standards can assess the costs of enforcing the ordinance against employers, including, but not limited to, attorneys' fees. The Office of Labor Standards has announced that it plans a "soft launch" of the ordinance from July 1, 2017 through December 31, 2017, with a focus on education and support for employers. During this initial six-month period, the Office of Labor Standards will investigate all complaints and obtain full remedies for employees, but will not impose penalties or fines on employers for violations that occur in 2017, unless a violation is especially egregious.

In addition to the enforcement authority granted to the Office of Labor Standards, the ordinance creates a private right of action that allows employees to bring their own lawsuits against employers for alleged violations of the ordinance.

4. "Ban the Box" Laws

Seattle's Fair Chance Employment Ordinance, which went into effect November 1, 2013, restricts how employers can use conviction and arrest records during the hiring process and course of employment within city limits. With certain exceptions, the ordinance prohibits categorical exclusions in job ads (e.g., it does not allow statements like, "felons need not apply"), limits criminal history questions on job applications and criminal background checks until after an employer conducts an initial screening to eliminate unqualified applicants, requires employers to have a legitimate business reason to deny a job based on a conviction record, and requires an opportunity for an applicant or employee to explain or correct criminal history information.

Twenty-seven states have adopted similar "ban the box" laws, and now Washington is considering its own ban-the-box legislation. Senate Bill 5312 would, with certain exceptions, prohibit employers from asking applicants about their criminal history during the initial application process. Employers could still ask about criminal history later in the application process. The law would be enforced by the Washington Attorney General's Office and would carry significant penalties for employers who violate the law: up to a $1,000 fine for each violation.

Interestingly, Washington used to have an administrative regulation, published by the Washington Human Rights Commission (WHRC), which prohibited employers from discriminating against persons who had been convicted of a crime. That rule was invalidated by the courts in 1993 because the WHRC had exceeded its statutory authority when it enacted the regulation. *See Gugin v. Sonico, Inc*., 68 Wn. App. 826, 827 (1993). Nevertheless, the WHRC has issued additional regulations, still in effect, which interpret the Washington Law Against Discrimination as precluding preemployment inquiries concerning convictions and imprisonment that either do not reasonably relate to job duties or did not occur within the last ten years because such inquiries tend to discriminate against certain racial and ethnic minority groups.

5. Union Organizing Activities

In recent years, union membership has declined precipitously. In fact, according to the Bureau of Labor Statistics, union membership today is about half the rate it was in 1983, the earliest year for which strictly comparable data are available. As a result, many employers here in Washington, especially those who are part of the booming technology industry, have never had to deal with unions or union representatives. While those overall trends are unlikely to be reversed anytime soon, it is possible that we could see shifts that will affect Washington employers in the near future.

a. Seattle Attempts to Allow For-Hire Drivers to Organize

In January 2016, the Seattle City Council unanimously passed Ordinance 124968, which provides a mechanism through which for-hire drivers, who are typically treated as independent contractors (rather than employees), can collectively bargain with the companies that hire, contract with, and/or partner with them. This ordinance was the first of its kind in the nation. Pursuant to the procedures set forth in the ordinance, Teamsters Local 117 gave notice to twelve "driver coordinators" (i.e., for-hire companies such as Uber, Lyft, and taxi companies) whose drivers it sought to represent in collective bargaining. The driver coordinators had until April 3, 2017 to provide the names, contact information, and license numbers of their drivers to the union so that the union could solicit their interest in collective representation. The U.S. Chamber of Commerce filed a lawsuit in federal district court seeking to enjoin enforcement of the ordinance, arguing that it violates federal antitrust law and is preempted by the NLRA. Finding that the Chamber of Commerce had a substantial likelihood of success on the merits of its antitrust claims, the district court granted a preliminary injunction enjoining disclosure of driver information until the lawsuit is fully resolved. Regardless of the ultimate outcome of that litigation, it shows an increased interest in union membership in Washington.

b. Tech Economy Organizing

While efforts to organize for-hire drivers present unique issues that do not directly concern most Washington employers, other areas of the country have seen an increase in union activity for employees who support the tech economy. In particular, California, long a harbinger of things to come for the rest of the country, has seen increased union activity in Silicon Valley. In addition to championing greater employee and workplace protections via ballot measures and city ordinances in Santa Clara County, California, several unions have set their eyes on the employees of the private companies that provide services to Silicon Valley's high-tech campuses. These include bus drivers, security guards, and cafeteria and janitorial workers who provide contract services to Silicon Valley's largest high-tech companies. Recently, the Service Employees International Union announced that it had obtained the right to represent some 3,000 private security guards who are employed by those service providers but who work in and around the campuses of major high-tech companies. The Teamsters union already represents many of the drivers who operate the buses and shuttles that serve those companies.

Although it is not unusual for a nonunion employer to obtain services from union-represented providers, some of the recent Silicon Valley union activity targets workers who work inside the high-tech campuses and have daily interaction with the high-tech companies' own employees. That gives union activists and organizers an inside track to organizing the employees of the high-tech companies themselves. It also gives rise to potential joint employer issues between the service provider and the companies they serve.

If your service provider recently became unionized, it may make sense to update your understanding of how unions are currently organizing. Moreover, unions may attempt to capitalize on this momentum to organize service providers in other industries. If your company has a desire to remain union-free, you should consider a thoughtful and comprehensive union awareness and prevention plan. There are many things that you as an employer may lawfully do in advance of a union organizing campaign to make it less likely that employees will be interested in union representation. A thoughtful approach to this will also place you in a better position to respond to a campaign should one occur.

What you should and should not do as an employer when responding to union activities is complex and, at least in some cases, totally counter-intuitive. You should consult a labor lawyer to make sure you stay on the lawful side of the line.

6. Drug Testing Update - New OSHA Rule

Although the Washington Department of Labor and Industries, rather than OSHA, administers Washington's occupational safety and health regulatory program, it is important to remain abreast of rules and regulations published by OSHA, especially if your company has employees working in other states. On December 1, 2016, a new OSHA rule went into effect requiring employers to implement "reasonable" reporting procedures for work-related injuries and illnesses and expressly prohibiting employers from retaliating against employees reporting work-related injuries or illnesses. OSHA issued guidance in conjunction with the new rule explaining

that drug testing of an employee who reports a workplace accident can be a form of impermissible retaliation for reporting the accident if the employer does not have a reasonable basis for believing that drug use by the reporting employee could have contributed to the injury or illness. Thus, drug testing an employee whose injury could not possibly have been caused by drug use could qualify as retaliation. For example, drug testing an employee for reporting a repetitive strain injury would likely not be objectively reasonable because drug use could not have contributed to the injury. The rule does not prohibit drug testing otherwise permissible under state or federal law.

II. CASE LAW DEVELOPMENTS

A. Supreme Court

1. EEOC Subpoenas

In *McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017), the Supreme Court held that courts of appeals should review a district court's decision to enforce or quash an EEOC subpoena for abuse of discretion, rather than *de novo*.

Background on EEOC subpoenas

Under Title VII, the EEOC has a "broad right of access to relevant evidence" and may obtain evidence by issuing a subpoena for a witness's testimony or production of evidence, and may seek enforcement of that subpoena in a district court.[2]

A district court will enforce an EEOC subpoena so long as the charge is "valid" and the material requested is relevant to that charge. In this analysis, the district court does not "test the strength of the underlying complaint." An employer may persuade the district court that the subpoena should not be enforced by establishing that it is "too indefinite, has been issued for an illegitimate purpose, or is unduly burdensome."

Facts of McLane

The genesis of this case was a Title VII suit filed by a woman named Damiana Ochoa. She worked doing what McLane Co., her employer, considered a physically demanding job. McLane required new employees and those returning from medical leave to take a physical evaluation. Ochoa failed the test three times after attempting to return to work following maternity leave. She filed a charge with the EEOC, alleging that she had been fired because of her gender. The EEOC investigated, and McLane cooperated to a degree, providing the EEOC with anonymized information regarding the employees who had been asked to take the evaluation, including gender, role, score, and the reason they were asked to take the test. McLane refused to provide what the parties called "pedigree information": employees' names, Social Security numbers, last known addresses, and telephone numbers. The EEOC subsequently expanded the scope of its

[2] 42 U.S.C. § 2000e–9 grants the EEOC the same authority given to the NLRB to conduct investigations.

investigation to examine McLane's nationwide operations and whether the company had discriminated on the basis of age.

The EEOC sought enforcement of its subpoenas in both the gender and age discrimination charges in order to require McLane to provide it with the "pedigree information." The district court judge declined to enforce the subpoenas to the extent they sought pedigree information and the Ninth Circuit reversed following a *de novo* review, though it questioned why the circuit's precedent required *de novo* review when other circuits reviewed under the abuse of discretion standard.

The Supreme Court's Decision

After considering both the "history of appellate practice" and whether "one judicial actor is better positioned than another to decide the issue in question," the Supreme Court concluded that both factors led to the conclusion that a district court's decision to enforce or quash a subpoena should be reviewed for abuse of discretion. The Ninth Circuit was an outlier in requiring *de novo* review, and the Court determined that district courts were "better suited" to make the necessary "fact-intensive, close calls." Accordingly, the Supreme Court remanded the case to the Ninth Circuit for consideration under the abuse of discretion standard.

2. Class Action Waivers in Individual Arbitration Agreements

Three consolidated cases set to be heard by the Supreme Court in October 2017 concern whether the NLRA prohibits employers from requiring employees to enter into individual arbitration agreements that waive an employee's right to bring a collective action. These cases are *NLRB v. Murphy Oil USA* (No. 16-307), *Epic Systems Corp. v. Lewis* (No. 16-285), and *Ernst & Young LLP v. Morris* (No. 16-300).

Under Section 7 of the NLRA "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Under Section 8, it "shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." *Id.* § 158(a)(1). The Board has taken the position that this provision prohibits employers from entering into employment contracts with employees that bar class actions or other collective actions. *See, e.g.*, *In re D. R. Horton, Inc.*, 357 NLRB 2277, 2278 (2012), *enforcement granted in part, reversed in part*, 737 F.3d 344 (5th Cir. 2013)..

The three cases concern contracts that required individual arbitration and prohibited employees from bringing collective actions. This is a question that has split the federal appeals courts. In *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1015 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809, 196 L. Ed. 2d 595 (2017), the Fifth Circuit concluded that the NLRA does not prohibit arbitration agreements that bar workers from pursuing collective action. In *Lewis v. Epic Systems Corporation*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809, 196 L. Ed. 2d 595 (2017), the Seventh Circuit held that the language of Section 7 unambiguously protects

collective remedies and that the Federal Arbitration Act does not override this ban. The Ninth Circuit, in a 2-1 decision, sided with the Seventh Circuit, finding that agreements barring employees from pursuing certain collective actions violated the NLRA and that the Federal Arbitration Act did not override the NLRA's protections in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809, 196 L. Ed. 2d 595 (2017). Just a few weeks ago, the Sixth Circuit came down on the side of the Seventh and Ninth Circuits in *National Labor Relations Board v. Alternative Entertainment, Inc.*, No. 16-1385, 2017 WL 2297620 (6th Cir. May 26, 2017).

Many speculate that Justice Gorsuch could be the deciding vote in this trio of cases and that he is likely to favor the enforceability of the arbitration agreements.

3. Petition to Watch: *E.I. DuPont De Nemours and Co. v. Smiley*

The Third Circuit, in *Smiley v. E.I. Dupont De Nemours & Co.*, 839 F.3d 325 (3d Cir. 2016), held that Dupont's practice of paying workers for meal breaks, which they were not required to do, did not offset the requirement to pay workers for time spent donning and doffing their gear before and after their scheduled shifts under the FLSA. The district court had dismissed the case, finding that the paid meal break time exceeded the unpaid time for which the employees sought additional compensation. The Third Circuit found that because the FLSA did not authorize Dupont's "offsetting" practice, it was prohibited. In its petition for Supreme Court review, Dupont argued that the FLSA's silence on this practice should not be considered a prohibition, and that the Seventh and Eleventh Circuits have held that compensation for bona fide breaks could be used as offsets for compensable work time.

B. Other Federal Decisions

1. The Ninth Circuit Holds that Employers Can Base an Employee's Pay on that Employee's Prior Salary Information

In *Rizo v. Yovino*, 854 F.3d 1161, 1163 (9th Cir. 2017), the Ninth Circuit addressed whether "prior salary" information, by itself, can justify a pay differential between men and women under the Equal Pay Act. In *Rizo*, plaintiff, an employee of the public schools in Fresno County, sued the county after discovering that she was paid less than her male counterparts for the same work. The county admitted that plaintiff was paid less but argued that this result was lawful because the pay differential was "based on any other factor other than sex," an affirmative defense to a claim under the Equal Pay Act. The factor used by the county was prior salary. Plaintiff argued that prior salary alone cannot be a "factor other than sex" for purposes of an affirmative defense to the Equal Pay Act because when an employer sets pay by considering only its employees' prior salaries, it perpetuates existing pay disparities and thus undermines the purpose of the Equal Pay Act. The Ninth Circuit disagreed and ruled in favor of the county.

The Ninth Circuit's decision further contributed to a circuit split on the issue in which the Tenth and Eleventh Circuits have held that salary history cannot be the exclusive basis for determining compensation, while the Seventh and Eighth Circuits have held otherwise. The plaintiff

petitioned the Ninth Circuit for a panel rehearing and a rehearing en banc. In addition to the parties' filings on this issue, many briefs of amici curiae are before the court.

2. The Ninth Circuit Holds that Female Employee's Hostile Work Environment Claim Was Not Preempted by the LMRA

In *Matson v. United Parcel Service, Inc.*, 840 F.3d 1126, 1132 (9th Cir. 2016), the Ninth Circuit addressed whether a female employee's hostile work environment claim was preempted by Section 301 of the Labor Management Relations Act (LMRA). Plaintiff, who worked for the United Parcel Service (UPS) in Washington, alleged that she was subjected to unfair and demeaning treatment by UPS because of her gender. Among other examples, she alleged that her supervisors routinely favored male employees when assigning what she called "extra work"—that is, package deliveries not previously assigned to a particular route. This "extra work" allowed UPS employees to stay on the clock longer, thereby increasing their pay. Plaintiff filed numerous grievances through her union seeking redress for these practices but was not satisfied with the result, and thereafter filed an employment discrimination and retaliation complaint with the Washington State Human Rights Commission. UPS subsequently fired plaintiff for "proven dishonesty," relying on the results of an investigation into whether she had falsified delivery records. Plaintiff then filed suit against UPS, asserting a variety of claims, including: (1) race and gender discrimination; (2) a race- and gender-based hostile work environment; and (3) discrimination and retaliatory termination based on Matson's opposition to unlawful labor practices.

At trial, the jury found for UPS on Matson's discrimination and retaliation claims. The jury returned a verdict for Matson, however, on her hostile work environment claim. After trial, the district court granted UPS's motion for judgment as a matter of law on the ground that Section 301 preempted plaintiff's hostile work environment claim because the definition of "extra work" was "a very muddy area" and therefore the meaning of "extra work" required interpretation of plaintiff's collective bargaining agreement.

The Ninth Circuit reversed and reinstated the jury's verdict. First, the Ninth Circuit noted that plaintiff's allegation that UPS systematically assigned men extra work to which they were not entitled by seniority was only one element of the allegedly hostile work environment; plaintiff also alleged that the workplace was characterized by intimidation and derision having nothing to do with work assignments. Second, the adjudication of plaintiff's claim did not require "interpretation" of the phrase "extra work" in the collective bargaining agreement; that is, plaintiff's contention was not that UPS created a hostile work environment by violating her contractual seniority rights under the collective bargaining agreement. Rather, her position was that UPS's failure to assign her work despite her seniority was *evidence* of UPS's hostility toward her because of her gender.

This case will make it harder for employers to successfully argue that Section 301 preempts an employee's hostile work environment claims. While preemption could be present if interpretation of a collective bargaining agreement is required in order to adjudicate the dispute, the term "interpretation" is construed narrowly.

3. The Ninth Circuit Holds that Whistleblowers Are Protected by Section 21F of the Securities Exchange Act Even if They Do Not Report Misconduct to the SEC

In *Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045, 1046 (9th Cir. 2017), the Ninth Circuit addressed whether, in using the term "whistleblower" in the Dodd-Frank Act (DFA), Congress intended to limit anti-retaliation protections in the DFA to those who come within the DFA's formal definition of "whistleblower," which would include only those who disclose information to the Securities and Exchange Commission (SEC).

Plaintiff was employed as a Vice President by defendant from 2010 to 2014. According to plaintiff, he made several reports to senior management regarding possible securities law violations by the company, soon after which the company fired him. Plaintiff was not able to report his concerns to the SEC before he was terminated. Plaintiff sued defendant, alleging violations of various state and federal laws, including Section 21F of the Securities Exchange Act. That section, entitled "Securities Whistleblower Incentives and Protection," includes the anti-retaliation protections created by the DFA. Defendant sought to dismiss plaintiff's DFA claim because plaintiff only reported the possible violations internally and not to the SEC and, according to defendant, he was therefore not a "whistleblower" entitled to the DFA's protections. The district court denied defendant's motion.

Recognizing the existence of a circuit split on the issue, the Ninth Circuit affirmed the district court's decision, concluding that Section 21F should be read to provide protections to those who report internally as well as to those who report to the SEC. That interpretation, the court noted, was also consistent with the SEC's regulation on the subject which it believed was entitled to deference.

4. The Ninth Circuit Holds That "Hugging and Kissing" in the Workplace Can Create a Hostile Work Environment

In *Zetwick v. County of Yolo*, 850 F.3d 436, 438 (9th Cir. 2017), plaintiff, a county correctional officer, alleged that defendant, the county sheriff, created a sexually hostile work environment in violation of Title VII and the California Fair Employment and Housing Act by, among other things, greeting her with unwelcome hugs on more than one hundred occasions, and a kiss at least once, during a 12–year period. Plaintiff also contended that she saw defendant hug and kiss several dozen other female employees, but never saw him hug male employees. Rather, she observed that defendant gave male employees handshakes.

Defendant moved for summary judgment, arguing that such conduct was not objectively severe or pervasive enough to establish a hostile work environment, but merely innocuous, socially acceptable conduct. The district court granted the motion, reasoning that courts do not consider hugs and kisses on the cheek to be outside the realm of common workplace behavior and, regardless, under the circumstances, the conduct was not severe and pervasiveness enough.

The Ninth Circuit reversed. As a threshold matter, it rejected the district court's black letter rule that such behavior cannot create a hostile work environment. Further, it found that the district court applied the wrong legal standard, i.e., the district court found that defendant's behavior was not "severe *and* pervasive," rather than "severe *or* pervasive," which is the correct standard. The Ninth Circuit found that the district court failed to look at the totality of the circumstances to determine whether a reasonable person would find that hugs, in the kind, number, frequency, and persistence described by plaintiff, created a hostile environment. In particular, the district court completely overlooked legal recognition of the potentially greater impact of harassment from a *supervisor*, indeed, in this case, the highest ranking officer in the department.

5. The Ninth Circuit Denies a Flight Attendant's Efforts to Present a Claim Under the Washington Family Care Act

The Washington Family Care Act (WFCA) allows workers to use paid leave to which they are already entitled under employer policies or collective bargaining agreements to care for sick family members. It does not create a separate entitlement to leave. In *Alaska Airlines Inc. v. Schurke*, 846 F.3d 1081 (9th Cir. 2017), a flight attendant asked her employer if she could use accrued paid leave time to care for her ill son. Although she had some accrued leave time, that time had already been scheduled for use at a later time. As a result, Alaska Airlines denied her request and took the position that she could not use that leave time to care for her son.

The flight attendant filed a complaint with the Washington State Department of Labor and Industries, which concluded that Alaska Airlines had violated the WFCA by denying her use of prescheduled vacation time in order to care for her ill son. Alaska Airlines responded by filing a federal lawsuit for a declaratory judgment, claiming that the flight attendant must pursue her complaint through the mechanisms provided for in the Railway Labor Act (RLA) for minor disputes.

The RLA provides the exclusive mechanism for resolving most employment disputes in the air and rail industries. "Minor" disputes are generally addressed through a grievance and arbitration process. The Ninth Circuit determined that, under the circumstances, the flight attendant's right to use leave would require an analysis of the terms of her collective bargaining agreement. Thus, the RLA preempted the state law remedies she sought and use of the state grievance process was inappropriate.

6. The Seventh Circuit Holds that Discrimination on the Basis of Sexual Orientation Is a Form of Sex Discrimination

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers subject to the Act to discriminate on the basis of a person's "race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a). The Seventh Circuit, en banc, issued a landmark ruling holding that "discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 341 (7th Cir. 2017).

The plaintiff in the case, Kimberly Hively, is openly lesbian and a part-time, adjunct professor at Ivy Tech Community College. She applied, unsuccessfully, for at least six full-time positions in a span of five years, and in 2014 her contract was not renewed. She filed a pro se charge with the EEOC alleging that she believed she had been discriminated against because of her sexual orientation in violation of Title VII. After receiving a right-to-sue letter, Hively filed a pro se action in district court. The district court judge relied on earlier Seventh Circuit decisions and dismissed the case on the theory that sexual orientation is not a protected class. The Seventh Circuit panel felt bound to adhere to earlier Seventh Circuit decisions and affirmed, after which a majority of judges in regular active service voted to rehear the case en banc.

The en banc Seventh Circuit considered the backdrop of Supreme Court decisions regarding discrimination on the basis of sexual orientation and concluded that the logic of the decisions and "common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex" lead to the conclusion that discrimination on the basis of sexual orientation is sex discrimination under Title VII.

Ivy Tech has stated that it will not petition the Supreme Court for review, but this decision's effects will certainly be felt for some time to come, whether by generating a lasting circuit split on the question or prompting other courts of appeals to likewise revisit this issue.

Both the Eleventh and Second Circuits have recently addressed whether discrimination on the basis of sexual orientation is actionable under Title VII. In *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017), the Eleventh Circuit panel held that it was bound by prior precedent holding that Title VII did not prohibit discharge on the basis of sexual orientation "unless and until it is overruled by this court en banc or by the Supreme Court." On March 31, 2017, the plaintiff petitioned for rehearing en banc and the court has yet to issue a decision on the petition. In *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 199 (2d Cir. 2017), the Second Circuit panel was also bound by precedent to rule that discrimination "because of . . . sex" under Title VII does not prohibit discrimination on the basis of sexual orientation. The Second Circuit did hold, however, that the plaintiff's gender stereotyping claim survived a motion to dismiss. The plaintiff has filed a petition for an en banc hearing, which the Second Circuit has yet to rule on.

C. A New Class Action Trend: Notice of Rights Under COBRA

With the recent filing of a class action complaint in the U.S. District Court for the Southern District of Florida, Wal-Mart Stores, Inc. became the latest large company accused of failing to provide adequate notices as required by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). Companies should consider reviewing COBRA's notice requirements to ensure that their COBRA notices and procedures are in compliance.

In addition to class action concerns, there are also monetary penalties that can be assessed by the two federal agencies that have jurisdiction over COBRA—the U.S. Department of Labor (DOL), which fines $110 per person per day for COBRA notice and disclosure failures, and the Internal Revenue Service (IRS), which enforces a $100 per person excise tax for general COBRA

compliance failures. Note that for COBRA notice failures, both the fines and excise tax penalties may be imposed.

COBRA requires companies with 20 or more employees that sponsor a group health plan to provide both a general notice within 90 days of starting coverage and a continuation coverage election notice within 14 days of learning that a qualifying event occurred. The general notice must inform covered employees and spouses of their COBRA rights, either separately or as part of the plan's Summary Plan Description (SPD). Caution should be exercised when relying on the SPD because of the DOL's timing and method of delivery requirements.

In addition to the timing and method of delivery requirements, there are content requirements for the general and qualifying event notices. The DOL has made model general and qualifying event notices available on its website, and though employers should tailor the models to meet their individual needs, the DOL considers companies that use the model notice to be compliant.

D. Washington Supreme Court Decisions

1. Washington Supreme Court Addresses Scope of Employer's Liability for Acts of Employees "Borrowed" From Outside Agencies

In *Wilcox v. Basehore*, 187 Wn.2d 772 (2017), the Washington Supreme Court revisited what is known as the "borrowed servant" doctrine, which governs a worker who is not an employee but functions as one for an employer.

Dean Wilcox was injured while performing work on the cleanup of the U.S. Department of Energy's Hanford nuclear site. Wilcox was an employee of a key contractor in the cleanup, Washington Closure Hanford LLC (WCH). The contractor had its own employees and also hired temporary workers through various partners to accomplish specific short-term tasks. One of those temporary workers was Steven Basehore. His job, among others, was to develop "work packages" for specific segments of a job, a task that required him to identify hazards in the particular task to be accomplished. While working on the task covered by Basehore's work package, Wilcox fell through an open catwalk to a concrete floor 50 feet below, sustaining severe injuries.

Wilcox filed a negligence suit against Basehore, Basehore's employer Bartlett Services, Inc., and a third company, ELR Consulting, Inc., which had acted as an intermediary between WCH and Bartlett. Basehore was dismissed from the lawsuit, and Wilcox proceeded to trial against Bartlett and ELR. With regard to the borrowed servant doctrine, the jury found that Basehore was under WCH's exclusive control regarding his allegedly negligent conduct. The result was that Wilcox's sole remedy was workers' compensation benefits under RCW 51.04.010. The court of appeals affirmed.

There were two key issues on appeal. The first was whether the borrowed servant doctrine applied when the servant was loaned through an intermediary such as ELR. The second was

whether contractual language characterizing a borrowed servant as an independent contractor affected the borrowed servant analysis.

The Washington Supreme Court reviewed the borrowed servant doctrine before turning to the specific questions. The general rule is that when a "general employer" loans an employee to another company, known as the "special" employer, the special employer assumes vicarious liability for "activities over which [it] exercises complete control." The inquiry into control is task-specific, not topic-specific, and the special employer need not exercise control over all aspects of a borrowed employee's work.

Turning to the two specific issues, the supreme court held that the analysis is not affected by the use of an intermediary such as ELR, noting that to find otherwise would arbitrarily limit the scope of the borrowed servant inquiry. The supreme court also concluded that the parties' contract would not affect the application of the doctrine.

Employers that use workers from outside agencies should remember that they may be liable for the acts of those workers, or injuries to those workers, if they exercise exclusive control over a specific task. Neither the use of intermediaries or contractual terms characterizing the borrowed employee as an independent contractor will affect this analysis.

2. Washington Supreme Court Addresses Scope of Liability Under Wage Rebate Act

Under Washington's Wage Rebate Act (WRA), an employee can recover double damages, costs, and attorney's fees from an employer or officer, vice principal or agent of an employer, who willfully withholds wages. RCW 49.52.050(2); RCW 49.52.070. In *Allen v. Dameron*, 187 Wn.2d 692 (2017), the Washington Supreme Court addressed two questions regarding the WRA that had been certified to it by a judge for the United States District Court for the Western District of Washington.

The plaintiff in the district court case, Michael Allen, was serving as interim chief financial officer for Advanced Interactive Systems Inc. (AIS). After AIS repeatedly defaulted on its loans, the lender seized control of AIS's U.S. bank accounts. The defendants were members of AIS's board who, along with the other board members, asked the lender to release funds necessary for AIS to meet its payroll obligations, making the board responsible for authorizing all payments. AIS's existing funds were insufficient to meet their financial obligations, and the lender declined their request for additional funding.

Following the board's decision, Allen sent a termination letter to all employees except those necessary to prepare the chapter 7 bankruptcy filing. Allen was determined by the board to be a necessary employee to retain. At the next board meeting, the board decided that when AIS filed for bankruptcy, the company's remaining funds would be used to pay employees, taxes, and insurance. The board then paid approximately $34,000 in insurance premiums and $8,000 in payroll advances for the employees who had been retained. The board then authorized the filing of the bankruptcy petition, adopted a resolution to use AIS's remaining assets for employees'

wages, and filed for bankruptcy. The remaining assets were insufficient to cover payroll expenses, and Allen did not receive any payment from that amount.

Allen subsequently filed a lawsuit, alleging that the defendants, including two board members, had willfully withheld wages in violation of the WRA. The case was filed in the United States District Court for the Western District of Washington. In the course of considering the parties' arguments on summary judgment, the district court certified two questions to the Washington Supreme Court.

The first certified question was:

> Is an officer, vice principal, or agent of an employer liable for a deprivation of wages under RCW 49.52.050 when his or her employment with the employer (and his or her ability to control the payment decision) was terminated before the wages became due and owing?

The Washington Supreme Court answered affirmatively: filing for bankruptcy does not cut off potential liability under the WRA. Because filing for chapter 7 bankruptcy usually terminates all employees, rendering the regular pay periods and paydays irrelevant, the withholding of wages when the company files for bankruptcy is the relevant time period for the WRA inquiry.

The second certified question was:

> Does an officer, vice principal, or agent's participation in the decision to file the Chapter 7 bankruptcy petition that effectively terminated his or her employment and ability to control payment decisions alter the analysis? If so, how?

The Washington Supreme Court answered that an officer's participation in the decision to file the chapter 7 bankruptcy petition makes it more likely that the officer will be held liable under the WRA. It shows willfulness, the second of two elements required to prove a WRA violation, in the view of the court. The reasoning holds even if the decision effectively terminated the officer's employment and therefore the officer's ability to control payment decisions. The court emphasized that the defendants had full control over the decision to pay wages until they filed for bankruptcy, and that putting the payment of wages beyond their control by filing for bankruptcy shows willfulness.

In answering the second question, the court revisited its rulings on willfulness, noting that it had previously rejected a "financial inability to pay" exception, finding that a failure to pay was willful even when the corporation lacked sufficient funds to pay wages. Its rationale for ruling that officers should still be held personally liable when a corporation lacks sufficient funds is that the officers control how a corporation's money is used.

3. Washington Supreme Court to Address Whether Employers Are Strictly Liable Under Washington's Meal Break Statute

In *Brady v. Autozone Stores, Inc.*, No. 2:13-cv-01862-RAJ, 2016 WL 7733094 (W.D. Wash. Sept. 6, 2016), the U.S. District Court for the Western District of Washington certified two questions to the Washington Supreme Court. The supreme court has not yet answered the questions, but employers should keep abreast of developments.

The certified questions stem from a putative class action filed by Michael Brady claiming that Autozone failed to provide a first meal break to him and the class he sought to represent, and failed to provide a second meal break to employees after they had worked five hours beyond the end of their first meal break.

The district court denied plaintiff's motion to certify a class because of the individual assessment and unique facts associated with each potential violation of the meal break statute, and the Ninth Circuit declined to accept review of the order on class certification.

The plaintiff then moved to certify two questions to the Washington Supreme Court. The district court noted that the Washington Supreme Court has not decided whether employers are strictly liable under the meal break statute, WAC 296-126-092. Accordingly, the district court certified two questions:

1) Is an employer strictly liable under WAC 296-126-092?

2) If an employer is not strictly liable under WAC 296-126-092, does the employee carry the burden to prove that his employer did not permit the employee an opportunity to take a meaningful break as required by WAC 296-126-092?

Employers should keep an eye out for this decision. In the unlikely event that the Washington Supreme Court answers the first question in the affirmative, employers may want to consider implementing additional measures to ensure that employees take breaks as required.

E. Washington Appellate Decisions

In *Hill et al. v. Garda CL Northwest, Inc.*, 198 Wn. App. 326 (2017), Division One of the Washington Court of Appeals reviewed a number of decisions by the trial court in a meal period and rest break class case, and made notable rulings with respect to class certification, an employer's obligation to promote rest breaks, and the availability of double damages and prejudgment interest.

The Facts

Plaintiffs in this case were employees of Garda, an armored truck company that transports currency and other valuables. Each route was driven by a two-person crew: a driver and a messenger. The routes driven by each team varied and some could take up to ten hours.

Company policies, which were consistent across branches in seven cities, required the drivers and messengers to be alert at all times. In addition, each branch had a separate drivers' association, which negotiated collective bargaining agreements (CBAs) on behalf of that branch's employees. Many employees in each branch signed acknowledgements of their branch's CBA. The CBAs all included a provision that employees would not have an off-duty meal period. Rather than taking an official meal period, employees were allowed to take breaks and buy food as needed.

History of the Case

Three Garda employees filed suit on behalf of a class alleging that they were not provided with legally sufficient rest breaks or meal periods in violations of the Washington Industrial Welfare Act (Chapter 49.12 RCW) and the Minimum Wage Act (Chapter 49.46 RCW).

The trial court certified a class of nearly 500 current and former Garda employees. Garda moved unsuccessfully for summary judgment on two theories. The first was that plaintiffs' claims were preempted by section 301 of the Labor Management Relations Act (LMRA), or alternatively, that plaintiffs had waived their right to meal breaks through their CBAs. After the trial court denied the motion, Garda amended its answer to add the affirmative defense that the Federal Aviation Administration Authorization Act of 1994 (FAAAA) preempted their claims, and moved for summary judgment on this basis, which was again denied. Garda then moved, unsuccessfully, to deny certification of the class.

Plaintiffs moved for summary judgment on liability and entitlement to double damages. The trial court granted the motion on liability, but not as to double damages. The case proceeded to consecutive bench trials on the issue of damages and double damages. The trial court found for the plaintiffs. Garda raised a number of issues on appeal, each of which is discussed below.

Class Certification

The Washington Court of Appeals first addressed Garda's challenges to the trial court's decision to certify the class and refusal to decertify the class. The court began by noting that review of a trial court's decision is for an abuse of discretion, that it would review class decisions "liberally," and that it would err on the side of certification.

Garda challenged the trial court's rulings under Civil Rule (CR) 23(b), which requires that the court find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The trial court found that the "single common and overriding issue presented is whether Drivers and Messengers are allowed legally sufficient rest or meal breaks." The court found this analysis sufficient to conclude that the trial court did not err in determining that the predominance requirement of CR 23(b) was met. This ruling raises the possibility that common questions alone, without analysis regarding whether there are common answers, is sufficient to meet the "predominance" requirement for class certification. The court also found that the trial court did

not err in its superiority determination because the trial court estimated the value of each individual's claim and concluded that the action would be manageable as a class action. With respect to the order regarding decertification of the class, the court held that a trial court need not make new findings supporting its decision to deny a motion to decertify.

Preemption

The court then turned to Garda's arguments that plaintiffs' claims were preempted by the FAAAA and section 301 of the LMRA.

Under the FAAAA, a state cannot enact or enforce any law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Garda argued that Washington regulations setting forth meal and rest break requirements were preempted by the FAAAA because it could not comply with the regulations without significantly changing its pricing, routes, and services. The court rejected this argument, noting that Garda could have applied for a variance from Washington's Department of Labor and Industries, which grants such variances for "good cause."

The court also concluded that section 301 of the LMRA did not preempt plaintiffs' claims, noting that meal breaks under Washington law are nonnegotiable for most private employees, including plaintiffs, and are a right that exist independently from any CBA.

Summary Judgment

Garda next argued that the trial court had erred in granting plaintiffs' motions for summary judgment on liability. The court of appeals again upheld the trial court's ruling. With respect to meal periods, the court held that because plaintiffs could not waive meal breaks through their CBAs, the CBAs were not evidence that plaintiffs voluntarily waived that right. With respect to rest breaks, the court noted that employers must "affirmatively promote meaningful break time," and that Garda's corporate witness conceded that Garda required employees to be vigilant even during breaks due to the nature of their jobs. Garda publications used at all the branches in Washington reinforced this point. Although there was evidence that employees routinely flouted some of Garda's break policies without repercussions, that was insufficient for there to be a disputed fact regarding whether Garda had promoted opportunities for meaningful breaks.

Double Damages

Garda also argued that the trial court had erred by allowing plaintiffs to recover double damages under RCW 49.52.070, which allows employees to recover double damages for willfully withheld wages. The court concluded that violating the meal period requirement is a wage violation. It determined, however, that Garda did not willfully violate the requirement because there was a bona fide dispute over whether it was required to provide plaintiffs with meal periods.

Prejudgment Interest

Garda also argued that the trial court erred by awarding both double damages and prejudgment interest. The court agreed, reasoning that double damages are punitive in nature and that when a plaintiff sues under a punitive statute, the court will not grant interest on the compensatory or punitive portions of the statute.

Attorneys' Fees

Finally, Garda argued that the trial court abused its discretion by granting plaintiffs' request for a 1.5 lodestar multiplier to the attorneys' fees award. The court of appeals held that the trial court had not abused its discretion by using a multiplier because it had considered only relevant factors and determined that the contingency basis and unsettled nature of the law justified it.

F. Attorney General Enforcement Actions

On March 23, 2017, the Washington State Attorney General's Office filed a lawsuit against Electroimpact, Inc., a Mukilteo-based aerospace company, alleging that, among other things, it refused to hire Muslim applicants and subjected employees to a hostile work environment. The complaint alleged a variety of discriminatory conduct perpetrated by the founder and president of Electroimpact. In particular, it alleged that the founder required applicants to submit "recent pictures of [themselves]" with their applications, which he used to screen out applicants who he perceived to be Muslim. It also alleged the existence of a hostile work environment, based partially on the fact that Electroimpact maintained a listserv on which employees discussed and shared "jokes" that were demeaning to Muslims and those perceived to be Muslim. Ultimately, Electroimpact entered into a Consent Decree with the Attorney General's Office in which, although it denied the allegations, it agreed to create a settlement fund of $485,000 for employees who were discriminated against.

G. NLRB Decisions

1. *Local 58, Int'l Bhd. of Elec. Workers (Ibew), AFL-CIO (Paramount Indus., Inc.)*, 365 NLRB No. 30 (Feb. 10, 2017)

In *Local 58*, the union adopted a policy requiring members to appear in person at the union hall and to show picture identification or, if the member feels that appearing in person would be an "undue hardship," to contact the union to make "other arrangements" to verify his or her identity. The NLRB ruled that, on its face, the challenged policy communicated the union's intention to make resignation more difficult for members than it had been, and it imposed a significant burden on union members who wish to exercise the right to resign. As a result, the NLRB reversed the administrative law judge and found that the policy violated Section 8(b)(1)(A) of the NLRA.

2. *T-Mobile USA Inc. & Commc'ns Workers of Am., Local 7011, AFL-CIO*, 365 NLRB No. 15 (Jan. 23, 2017)

In *T-Mobile USA Inc.*, T-Mobile moved an employee to a new cubicle and ultimately terminated him after the employee began taking outward steps to show union support. The NLRB found that, even assuming the General Counsel had met his initial burden to show that the employee's union activity was a motivating factor in the actions, T-Mobile had met its rebuttal burden to prove that both actions would have been taken absent the employee's protected activity because there was evidence showing that the employee had hung up on customers during calls.

The NLRB modified the administrative law judge's order, however, to require rescission of an unlawful rule prohibiting employees from discussing the union while working but not prohibiting them from talking about other nonwork-related topics. Notably, the "rule" was not written down or published, but had been verbally communicated to a single employee. Acting Chair Miscimarra dissented, arguing that the NLRB has repeatedly held that a statement made to a single employee—even though it violates the NLRA—is not the promulgation of a "rule" for the entire workplace.

Confidential Arbitration Agreements for High-Profile Clients and Senior Executives

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Arbitration agreements are commonplace today. It is difficult to obtain a credit card, sign up for cellular phone service, or purchase goods online without agreeing to arbitrate all disputes that arise from such transactions. Consumer advocates bemoan this development whereby citizens are required to abandon their right to go to court in favor of a system of "private justice." Mandatory arbitration, they argue, deprives plaintiffs alleging common injury from pursuing their claims through more efficient class action lawsuits, prevents victims from sharing information obtained in discovery, and insulates defendants from the preclusive effects of prior adjudications of similar claims. Arbitration advocates, on the other hand, applaud the confidentiality, speed, and lower cost of arbitrating, rather than litigating, disputes. Both positions have merit, and neither traditional litigation nor arbitration is inherently superior for every situation.

There is one particular type of dispute, however, in which a well-drafted confidential arbitration agreement is preferred and serves to protect the interests of both parties: claims brought by personal service employees against high-profile clients or executives at the very apex of large businesses that are accompanied by threats to disclose confidential information of a sensational nature unless the claims are quickly resolved. Such clients are uniquely vulnerable to extortionate demands. Such claimants have unique access to personal and private information that can be abused. And both parties have a common interest in avoiding public disclosure of such information that, truthful or not, has the capacity to derail careers and foreclose future employment. For the claimant, unauthorized disclosure of such private information can have a chilling effect on any future employment. Use of a confidential arbitration agreement preserves privacy; allows legitimate claims to be either settled or litigated fairly based on the merits, rather than the threat of public embarrassment; and protects both the client and the claimant from the unwelcome effects of having to "go public" in order to obtain justice.

The Problem

High-profile and celebrity clients are subject to intense media scrutiny. Major sports figures, prominent actors, high-net-worth individuals, and the most senior executives of large corporations all too often are targeted by reporters and photographers seeking insight into their private lives. Privacy has become a casualty of fame and fortune.

Recognizing the problem, many such individuals use strict confidentiality and nondisclosure agreements for those who provide personal services to them and their families. Such agreements allow unfettered access to their private lives without risking public disclosure of personal information. Those

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confidentiality agreements may provide for liquidated damages, injunctive relief, and attorney fee shifting for the prevailing party. But even the most heavily lawyered and tightly drafted confidentiality agreements are of no use when a dispute arises if the claim can be litigated in a public forum. Courts are increasingly skeptical of efforts to seal files, particularly when sealing serves to protect only the employer's unilateral interests. Few courts will insulate public filings from public scrutiny simply because one or both parties would prefer disputed matters private when state constitutional provisions require the "open administration of justice."

For individuals of means, public disclosure of information that the employer had every reason to believe would remain private and confidential can be a powerful incentive to settle a meritless claim for a substantial sum. The mere filing of a complaint recounting private details that are considered to be sensational in the hands of the media creates the potential for staggering damage to one's public reputation and future career prospects. In most instances, allegations and statements made during the course of litigation are protected by a qualified privilege, leaving the target without a remedy even if the plaintiff is unable to prove the allegations.

For any large retail or consumer-oriented company, the filing of such a complaint against a senior company official poses an additional threat: the loss of millions of dollars in revenue from consumers who hear nothing more than provocative allegations of misconduct and misbehavior. Long before the merits are ever decided, the damage is done. Allegations alone may well alienate millions of otherwise loyal customers. Stock prices may plummet. Investors may reduce their holdings. After months of costly litigation, even a complete vindication in the courts may receive only scant press coverage and, in any event, cannot replace lost revenues or reclaim the company's reputation. For the individual defendant, the consequences can be even more calamitous. Endorsements may be canceled, opportunities may disappear, and invitations to participate in public events may be withdrawn or not extended.

At some point, threatening totally frivolous claims in return for compensation implicates criminal liability for extortion. But the availability of civil remedies for such conduct is remarkably vague and ill-defined. Overworked prosecutors are rarely interested in investigating such threats, particularly where the threatened disclosure is not patently false or inherently disprovable.

In many cases, threatened public disclosure of private information may motivate a defendant to consider paying extortionate settlement demands as the most effective and efficient way to avoid ruinous collateral consequences. Having the merits of the allegations decided takes a backseat to avoiding assertion of the claim under any circumstance. Indeed, even tangential involvement of a company's most senior executive may itself compel settlement of an unmeritorious claim simply to avoid the burden, distraction, and disruption occasioned by litigation in open court. Although courts have been quick to recognize the inherent intrusion caused by so-called "apex" depositions and have adopted various methods to protect senior corporate executives from the threat of unnecessary or protracted depositions, those measures provide only limited protections. When a senior executive is directly implicated in the underlying claims, it is virtually impossible to curtail discovery under the apex precedents.

Confidential arbitration agreements are an answer to these problems. Requiring private resolution of such disputes removes the threat of public embarrassment and unwelcome intrusion into the private lives of the parties and allows the claim to be resolved on its merits rather than by capitulation.

Arbitration Agreements

Arbitration has been used as a recognized and reliable method to efficiently resolve disputes between employees and employers for decades. In the labor context, arbitration agreements are almost universally present in collective bargaining agreements between employers and unions. Nonunion employers, too, increasingly elect arbitration as the preferred means of resolving other employee claims efficiently and without the burden (to both sides) of extraordinarily expensive pretrial discovery and

Illustration by Chad Crowe

lengthy delays in obtaining a hearing or trial date in state or federal courts.

In November 2015, the *New York Times* published a lengthy three-part series on arbitration agreements, "Beware the Fine Print." The articles chronicled the increasing use of arbitration agreements in form contracts, credit card applications, stock broker agreements, e-commerce "terms of use," and an ever-expanding array of service agreements. The *Times* articles cast a dark shadow over arbitration, characterizing it as a tool of oppression in the hands of untrustworthy employers and big business, highlighting company-paid arbitrators who favor corporate defendants, and citing egregious examples of perceived injustice and unfairness that resulted in a handful of notorious cases.

The series ignored altogether the potential benefits of arbitration to both parties. Arbitration, fairly administered, is typically much faster, more efficient, and less expensive than the alternative. Arbitrators can more closely monitor and control discovery to allow essential fact gathering while avoiding abuse of the discovery process to bury a defendant in sweeping electronic discovery of millions of records or, by contrast, to overwhelm an underfinanced plaintiff with burdensome discovery requests.

Neither traditional litigation nor arbitration is inherently superior for every situation.

Indeed, arbitration is more employee-friendly than many observers believe. Arbitration typically costs far less than litigation, allows cases to be brought that otherwise could not be affordable to the claimants, moves faster to resolution than does traditional litigation, and provides employees with access to justice in a more approachable forum.

Speed can be a driving factor for an employee who has been fired and seeks a monetary award. Arbitration of employment discrimination cases generally takes less than half the time it takes to litigate them. *See* Richard A. Bales, *A Normative Consideration of Employment Arbitration at Gilmer's Quinceanera*, 81 Tul. L. Rev. 331 (2006).

And the defendant employer is often not the only party interested in protecting the confidentiality of the proceeding. The public nature of litigation can damage the reputation of employees as well as employers. The mere history of having filed a lawsuit against a prior employer is likely to reduce the individual's employment prospects going forward, particularly in the personal service profession, where employers have a legitimate interest in protecting their privacy but also a genuine need to share their private information with those who work most closely with them, in many instances 24 hours a day. Litigation creates a public record of accusations informed by access to private lives, and neither party benefits from that.

Claimants in employment arbitrations also receive special due process protections. In the mid-1990s, the Task Force on Alternative Dispute Resolution in Employment drafted a Due Process Protocol to provide procedural guarantees in employment arbitration. These included: (1) a jointly selected arbitrator familiar with the law; (2) simple, adequate discovery; (3) cost sharing to ensure arbitrator neutrality; (4) the right to representation by a person of the employee's choice; (5) remedies equal to those provided by law; (6) a written opinion and award with reasons; and (7) limited judicial review, concentrating on the law. *See* Task Force on Alternative Dispute Resolution in Employment, A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (1995).

It is hardly a coincidence that arbitration has long been *the* defining feature of collective bargaining agreements. Unions have long insisted on such arbitral forums, not because they were perceived to be unfair, but precisely for the opposite reason: They were perceived to be far *more fair* and predictable than hostile state courts that were often thought to be controlled or influenced by corporate interests. That concern remains undiminished with elected state court judges forced to run for reelection every two or four years with the attendant fundraising campaigns.

State courts have long expressed strong hostility toward arbitration agreements, even when contained in collective bargaining agreements. The U.S. Supreme Court famously and emphatically resolved that dispute in the three cases known collectively as the *Steelworkers Trilogy*, which mandated that disputes arising under collective bargaining agreements with arbitration agreements were to be arbitrated, not litigated. Congress, too, weighed into the debate in no uncertain terms by adopting the Federal Arbitration Act in 1925, Pub. L. No. 68-401, 43 Stat. 883 (codified at 9 U.S.C. § 1 *et seq.*), which required deference to arbitration agreements in almost any context. In addition, many states have overcome judicial hostility toward arbitration with the adoption of similar statutes requiring deference to arbitration agreements.

Drafting Appropriate Arbitration Agreements

Appropriately drafted, confidential arbitration agreements provide critical protection for high-profile and celebrity clients, high-net-worth individuals, senior-level corporate executives,

and those who work directly with them. Personal assistants, drivers, executive protection personnel, household staff, and others can be required to sign arbitration agreements as a condition of their employment. Several components are essential in arbitration agreements to avoid a public lawsuit over enforceability.

First, the agreement must be supported by consideration. Like any contract, arbitration agreements must be supported by consideration to be enforceable. In many states, the offer of employment can provide sufficient consideration. Where an employment agreement is already in place that does not include an arbitration clause, conditioning a raise, a one-time bonus, a promotion, or increased responsibility may suffice.

Second, the agreement must be fair. Onerous or one-sided agreements are likely to be met with skepticism if enforceability is challenged.

Third, the agreement should allow for both parties to engage in appropriate discovery that is controlled and supervised by the assigned arbitrator. Limiting the volume of written discovery requests and the number of depositions that may be taken will control the scope and extent of discovery without denying either party the opportunity to gather evidence. So long as they are fair to both sides and reasonably calculated to allow either side the opportunity to discover potentially relevant evidence, such provisions are likely to be upheld and enforced. Limiting the time that can be taken to depose a principal can be addressed, for example, by requiring the arbitrator's approval before a deposition can be taken for more than a couple of hours.

Fourth, the agreement should explicitly permit the filing of prehearing summary judgment motions and authorize the arbitrator to hear and resolve such motions by adopting judicially recognized standards. Absent such a specific provision, arbitrators may not otherwise have authority to entertain such motions or the power to avoid unnecessary hearings where the material facts are not in dispute.

Fifth, the agreement should provide for fee shifting on non-statutory employment claims. For many statutory claims arising under state antidiscrimination laws, attorney fees may be recoverable only by prevailing plaintiffs. Attempting to contract around such provisions to allow for recovery of attorney fees on such claims by prevailing *defendants* is likely to be held an unenforceable violation of public policy. But the same is not true with respect to non-statutory tort claims. Provisions allowing fee shifting for common-law claims should be included in the arbitration agreement.

Sixth, the agreement should explicitly provide for confidentiality and privacy regarding the arbitration itself, the award, and all proceedings that take place prior to the hearing. Arbitration is not automatically confidential. Standard rules bind the arbitrator, but not necessarily the parties, to keep the matter confidential. Rule 25 of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, for example, provides that the "arbitrator and the AAA shall maintain the privacy of the hearings" and empowers the arbitrator to exclude anyone who is not "essential" to the proceedings. Likewise, JAMS Comprehensive Arbitration Rule 26 provides that "the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing," and further that "[t]he Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information." Explicitly and comprehensively providing for the confidentiality of the entire proceeding and all related papers and filings is essential.

The American Arbitration Association has suggested that the following language be included in the arbitration agreement to preserve confidentiality:

> Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

Seventh, the arbitration clause should be expansive and comprehensive in order to provide for confidential arbitration of "any and all disputes or controversies" arising from or relating to the employment relationship, including the enforcement of the employer's confidentiality agreement. It is essential to ensure a confidential forum for the resolution of any disputes pertaining to the scope and effect of the confidentiality clause itself.

Eighth, the agreement should explicitly provide that if any provision is deemed unenforceable, the balance of the agreement remains effective and binding on the parties.

A Critical Component

No employer is immune from employee claims arising in the workplace. For those employers who are uniquely vulnerable when an employee's claim threatens to result in public disclosure of private and personal information, an agreement to arbitrate any such claims in a confidential and private proceeding can make all the difference. Such an agreement can remove powerful leverage that otherwise might require an unmeritorious claim to be settled for nuisance value simply to avoid embarrassment or humiliation. Such an agreement also benefits the employee from publicity that might otherwise inhibit future employment prospects with high-profile employers. An appropriately drafted arbitration agreement can even the playing field and minimize the employee's ability to leverage the threat of publicity into an unwarranted recovery, while preserving the employee's opportunity to recover on legitimate claims. ■

I. INTRODUCTION

Hiring decisions are increasingly important for employers that not only want top-notch employees but also want to avoid legal problems later. While employers are not generally required to hire an applicant who is not qualified for a position, decisions about the beginning of an employment relationship often come under attack on the basis of various federal, state, local, and case laws that affect the employment relationship in Washington. Reasonable and consistent employment practices can help prevent and defend against all types of challenges. Managers and supervisors with a role in hiring decisions should be trained to implement the basic practices that will minimize the risk of litigation and potential liability. Also, devoting time and attention to the hiring process increases the likelihood of hiring employees who are well-suited for particular jobs. In sum, good hiring policies—like those outlined below—are the first step to good employee relations.

II. THROUGHOUT THE HIRING PROCESS

A. Maintaining Documentation

The beginning of the hiring process is the best time to begin maintaining proper documentation. Consider the following guidelines when creating, keeping, and retaining documentation throughout the hiring process:

- **Applicant Group.** If an employer's hiring decision is challenged, it is important to be able to identify those persons who were considered to be applicants for the position in question. Defining the group of applicants considered at the same time for the same position is an important first step in demonstrating comparability of treatment and consistent use of selection criteria.

  Defining the applicant group, however, may not be as simple as it sounds. For example, individuals may attempt to apply for work by submitting an application or résumé or calling or visiting the office without prior notice or solicitation. Although individuals may consider themselves applicants based on such actions, employers ultimately define applicant status by the establishment of hiring systems. An employer need not consider unsolicited applications and has no legal obligation to communicate with individuals about whether they are considered applicants (although some employers choose to do so). Employers should establish a system for handling résumés or applications and/or retaining them for future use and administer the system in a consistent, nondiscriminatory manner.

- **Records Retention.** Employers should retain hiring records for one to two years. Hiring records may include advertisements, social media or website posts, employment applications, résumés, interview documentation, records showing all aspects of candidate screening, and records showing hiring-related compensation decisions.

  Following the interview, the interviewer should document all points covered during the interview and complete a written evaluation of the applicant. Documentation of

the interview should specifically reflect, when applicable, that the employment-at-will status of all employees was discussed during the interview.

Employers should document all information obtained while conducting background checks and screens, including reference checks, criminal background checks, credit checks, aptitude testing, drug testing, and social media review. Also, individuals conducting background checks should document what efforts were made to obtain other, unavailable information.

- **Stray Notes.** Individuals engaged in the various stages of the hiring process should avoid making any discriminatory notes on applications, résumés, interview paperwork, screening documents, and other hiring documentation. A stray derogatory remark can easily come back to haunt the employer as evidence of bias or unlawful discrimination during the hiring process.

B. Providing Accommodations

Employers should ensure that job postings and online application systems are accessible to applicants with disabilities. It is also important to indicate in job announcements that reasonable accommodations will be provided to applicants with disabilities. Employers should also confirm that interview locations are physically accessible and allow applicants the opportunity to request a reasonable accommodation for interviews ahead of time.

III. RECRUITING PHASE

A. Avoiding Discriminatory Decisions

In general, an employer may hire whomever it desires, as long as the decision is not discriminatory on the basis of protected characteristics, according to the Washington State Law Against Discrimination (WLAD), Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Pregnancy Discrimination Act, and the Genetic Information Nondiscrimination Act. Protected characteristics in Washington include race, color, national origin, religion, creed, marital status, pregnancy, military or veteran status, sexual orientation, sex, gender identity, age, disability, use of a service animal, genetic information, HIV/AIDS status, and Hepatitis C status. To protect against the occurrence of discrimination, employers should consider the following guidelines:

- **Hiring Systems.** Ensure that hiring systems are not set up in such a way that they discriminate by eliminating certain groups of persons from employment consideration on the basis of a protected characteristic. Example: an employer's determination that certain positions should be filled only by women (or men) or a decision that persons over a certain age are not able to perform a particular job.

***EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).**

The U.S. Supreme Court held that to show unlawful discrimination, a plaintiff need only show that her need for the employer to accommodate her religious beliefs was a "motivating factor" in its decision not to hire her. The employer had a particular "Look Policy" for its salespersons. The plaintiff, who wore a hijab in connection with her religion, scored well during her interview. The interviewer sought the advice of her manager because the interviewer was concerned that the applicant's headscarf conflicted with the "Look Policy." The district manager informed the interviewer that the headscarf would violate the "Look Policy" and instructed her not to hire the applicant. The Court concluded that policies must "give way to the need for an accommodation" of an applicant's religious practices.

- **Decision Makers.** Ensure that individuals who administer the hiring process do not discriminate. Example: an individual interviewer may decide not to hire women because the interviewer feels that women could not meet the necessary physical requirements or the preferences of customers.

***Franett-Fergus v. Omak School Dist. 19*, No. 2:15-CV-0242-TOR, 2016 WL 3645181 (E.D. Wash. June 30, 2016).**

The Eastern District of Washington held that no reasonable jury could conclude that the employer intentionally discriminated against the plaintiff because of her race or any other protected trait. The plaintiff was a Caucasian, Christian, American woman who argued that she was discriminated against when the employer hired a different woman. The plaintiff assumed that the successful candidate was a different race, religion, and national origin based on her skin tone and head covering. But the court relied on the decision maker's testimony that she did not make any assumptions about the successful candidate's race, religion or national origin during the interview and that she concluded the successful candidate would be a "better fit" for the position. The decision maker relied on what she learned from references, her observations during the interviews, and the differences in the candidates' abilities. The employer had properly retained documentation of the hiring process to support its decision.

- **Selection Criteria.** Ensure that neutral selection criteria do not have a discriminatory impact because they disproportionately exclude persons from certain groups. Example: education and height/weight requirements.

  Most often it is a facially neutral selection procedure that has an adverse impact on the employment opportunities of persons of a particular group. If a neutral selection procedure is found to have an adverse impact, an employer must demonstrate that the procedure is justified by business necessity, which usually means demonstrating a relationship between the selection criterion and performance on the job. Contact the Equal Employment Opportunity Commission (EEOC) and the Washington State Human Rights Commission for guidelines on employee selection.

Nevertheless, a facially discriminatory employment practice may be permissible if the protected characteristic is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the business. Example: accepting only male applicants to model male clothing.

***Teamsters Local Union No. 117 v. Washington Department of Corrections*, 789 F.3d 979 (9th Cir. 2015).**

The U.S. Court of Appeals for the Ninth Circuit held that the Washington state corrections department did not engage in unlawful sex discrimination under Title VII by designating 110 close-contact jobs in its women's prisons as available to female guards only. The court concluded that sex is a BFOQ for the guard positions at issue. Although it is rare for a job to qualify as a BFOQ, the court recognized that the prison environment is a unique context where sex-based classifications are justified due to prisoner security concerns.

B. Creating Appropriate Recruiting Materials

Recruiting materials should be created so as to assist an employer with the goal of selecting individuals on the basis of their ability or potential to perform successfully, rather than on the basis of impermissible considerations.

- **Advertising.** Ads, website and social media posts, and other solicitation forms should be carefully reviewed before publication to avoid wording that constitutes evidence of bias based on protected characteristics. Strive for gender-neutral references (e.g., "sales representative" rather than "salesman") and age-neutral references (e.g., avoid requests for "recent college graduates" or a maximum experience limit).

  Generally, an employer is not required to state that it is an equal opportunity employer or that women and minorities are encouraged to apply. But most employers include such language in their advertisements. Employers that are federal contractors or subcontractors subject to review by the U.S. Department of Labor's Office of Federal Contract Compliance Programs are required to take affirmative employment actions to include workplace participation of specified groups.

  An employer that does not formally advertise its openings does not per se violate federal or state laws against discrimination. However, the exclusive use of referrals from existing employees to fill job openings may be considered discriminatory if the existing workforce does not reflect the composition of the relevant labor market.

- **Employment Applications.** The questions asked on an employment application should be carefully considered and job-related. The inclusion of questions unrelated to the job for which a person is applying could form the basis of a discrimination claim, even if the information elicited is not in itself discriminatory, because reliance on such information may adversely impact certain groups.

The EEOC has suggested that an employer consider the following questions in deciding whether to include a particular question on an employment application: (1) Does this question tend to have a disproportionate effect in screening out members of a protected group? (2) Is this information necessary to judge an individual's competence for performance of this particular job? (3) Are there alternate, nondiscriminatory ways to secure the necessary information?

Issues can arise with respect to a number of questions on employment applications, including the following potential problem areas:

- *Age and Date of Birth* – Both the ADEA and WLAD prohibit discrimination based on age against applicants for employment who are 40 years of age or older. Even though permitted under Washington law, questions concerning an applicant's date of birth are generally unnecessary because they are irrelevant in most hiring decisions. It is permissible to ask applicants whether their age is at least 18 (or 21) years.

- *Race, Religion, and National Origin* – Generally, questions about race, religion, or national origin should not be asked. Requiring job applicants to furnish a photograph is also viewed as impermissible, and inquiries about an applicant's membership in organizations should be limited to exclude organizations in which membership reflects the applicant's race, religion, or national origin.

  Questions about the impact of an applicant's religious beliefs on work schedules and other policies should also be avoided. If an employer has a legitimate business reason for certain policies, the employer can simply identify these job requirements in advertisements. When the employer becomes aware of religious beliefs that conflict with these job requirements, the employer may determine whether a reasonable accommodation that eliminates the conflict is possible without undue hardship.

- *Physical Traits and Disabilities* – Questions and requirements concerning height and weight have been found to violate the law because they may disqualify disproportionate numbers of women, Asian-Americans, Hispanics, or—depending on the requirement—other groups. Height or weight requirements should not be imposed unless the standards are directly related to job performance and the employer can establish that substantially all individuals who fail to meet the requirement would be unable to perform the job with reasonable safety and efficiency.

  Both the WLAD and the ADA also limit covered employers from asking whether an applicant has a disability or requesting information concerning the nature or severity of a known disability. Employers may ask applicants about their ability to perform job-related functions and may request applicants to describe or demonstrate how, with or without reasonable accommodations, the applicants will be able to perform job-related functions.

- *Education* – When the performance of a job requires a particular level of education, applicants may be questioned about educational background, schools attended, degrees earned, and vocational training received. The focus of such inquiries should be on the specific knowledge and skills necessary for the performance of the particular job, rather than on educational attainment per se. If a job does not require a particular level of education, it is potentially discriminatory to ask questions about, and screen applicants based upon, educational background. Unnecessary educational requirements have been found to screen out minority applicants, a greater proportion of whom may have obtained lesser levels of education.

- *Sex, Marital Status, and Family Status* – In general, questions relating to these matters should not be asked, as they normally are not job-related. For example, questions about an applicant's family plans, the likelihood of pregnancy, or child care arrangements are improper in most cases and should be avoided, as such questions have historically been directed only to female applicants and suggest stereotypical concerns about women's roles. The WLAD also expressly prohibits marital status discrimination. Additionally, covered employers may not refuse to hire an employee's spouse based on the marital relationship unless the specific employment situation would create a conflict of interest.

- *Criminal Record* – Saving criminal record questions for the screening phase is advisable. Washington does not currently have a law that prohibits criminal record questions, but Seattle's Fair Chance Employment Ordinance forbids criminal record questions during the initial hiring phase. Similar federal legislation is currently under consideration. Questions concerning arrests—as opposed to convictions—may also be improper because an arrest is not an indication of guilt, and members of minority groups may be disproportionately affected by such questions.

- *Citizenship* – Employers are obliged under federal law to verify that newly hired employees are legally authorized to work in the United States. However, citizenship is not the proper subject for pre-employment inquiries, and the Immigration and Reform Control Act prohibits discrimination on the basis of citizenship status. Applicants should be advised that, if hired, they will be required to present documentation confirming their identity and legal work status.

- *Drugs and Tobacco Use* – It is permissible in Washington to ask applicants whether they currently use illegal drugs and whether they agree to be bound by the employer's drug and, where applicable, tobacco use policies. The application form also affords the employer an opportunity to obtain the applicant's consent to submit to drug testing. Caution should be used in framing questions about drug use, since recovering or past drug users and alcoholics are generally protected by prohibitions on disability discrimination. The WLAD has been interpreted in at least one case to include alcoholism as a disability.

- *Other Problem Areas* – Employer inquiries and use of information regarding credit ratings and credit references have been found to disproportionately disqualify racial minorities and female applicants. Similarly, questions concerning whether an applicant owns a home have been determined to be discriminatory, since proportionately fewer minority individuals own their own homes. While questions about military experience or training are permissible, inquiries concerning the type of discharge received by an applicant are generally improper, because members of minority groups have historically received a higher proportion of other-than-honorable discharges.

***Easterly v. Clark County*, 194 Wn. App. 1029 (2016), *review denied*, 187 Wn.2d 1010 (2017).**

The Washington Court of Appeals held that unresolved material questions of fact existed as to whether the plaintiff's race was a substantial factor motivating the employer's decision. The plaintiff applied to work as a custody officer with the sheriff's office. When he reached the background investigation phase, prior to the interview phase, the investigator reviewed at least one document in the plaintiff's application file that identified his race. The investigator also discovered that the plaintiff failed to disclose prior arrests and convictions. After his interview, the plaintiff was denied the position due to the incomplete disclosures. The court concluded that the plaintiff offered sufficient evidence to defeat summary judgment based on the investigator's knowledge of his race and the fact that white applicants received different treatment during the process.

C. Increasing Workplace Diversity

Employers benefit from diverse workforces in many ways. A diverse group of employees helps ensure a wide spectrum of ideas, backgrounds, and skill sets. Diversity also increases profitability and helps all employees feel more engaged. To improve diversity levels, employers should consider taking the following steps:

- **Prioritize.** An employer committed to increasing workplace diversity should have a diversity statement and prioritize hiring people of different genders, races, nationalities, religious backgrounds, physical abilities, etc.

- **Assess.** An employer should measure current diversity levels and assess whether they resemble the community in which the employer operates. The employer can then develop a hiring strategy that addresses its particular needs.

- **Review.** An employer should review its hiring policies, practices, and materials with a diversity lens to ensure that they are free of hidden bias and do not unintentionally discourage or eliminate certain groups of applicants.

- **Broaden.** An employer can attract a broader pool of applicants by recruiting over a broader geographic area and posting openings in targeted locations, such as job

boards designed for people with disabilities. Asking current employees for referrals and offering rewards for successful referrals is another way to access more applicants.

- **Attract.** Employers should not overlook opportunities to be more attractive to more applicants by providing flexibility in work schedules, offering unique benefits that appeal to a broader range of people, and respecting and catering to a variety of career goals.

- **Collaborate.** An employer can enlist the help of various organizations that work with diverse communities and can assist with connecting employers with qualified minority applicants, people with disabilities, and individuals with different backgrounds.

- **Train.** Providing diversity training helps to create a more inclusive environment, which can help with retention efforts. Diversity training helps employees understand the benefits of a more diverse workforce, helping to create a more welcoming environment.

- **Foster Diversity at All Levels.** It is important to diversify the workforce at all levels, not just during hiring. A workplace that is diverse at all levels helps with retention and fosters an inclusive environment. To diversify at all levels, make sure that there is equal access to trainings and career development opportunities, ensure that promotion practices are not biased, and create mentorship programs and affinity groups.

IV. INTERVIEWING PHASE

A. Asking Appropriate Questions

Interviewers, like recruiters, should be educated both on general employment law principles and on techniques for conducting an appropriate and effective interview. Interviewers should be provided with clear guidelines as to what they should and should not discuss during an interview. Questions that may not properly be asked on employment applications are also unacceptable during a job interview. See the discussion above regarding potential issues with questions on employment applications for guidance on interview questions. It is advisable to provide interviewers with a list of standard questions to ask of each applicant. There are many subtly inappropriate interview questions that can present issues with respect to protected traits.

***Scrivener v. Clark College*, 181 Wn.2d 439 (2014) (en banc).**

The Washington Supreme Court held that the plaintiff could show pretext for a hiring decision by presenting sufficient evidence that discrimination was a substantially motivating factor in the employer's decision not to hire her. The plaintiff was a 55-year-old woman who applied for a tenure-track position, but the college hired two applicants under the age of 40. To rebut the college's proffered reasons for not hiring her, the plaintiff put forth evidence that the college president made public statements about the need for younger faculty and that during her interview he mocked her with a reference to a television show associated with younger people and indicated he wanted candidates to display youthfulness. The court held that this was sufficient evidence to prevent summary judgment.

B. Avoiding Promises

Interviewers should be instructed to avoid overselling what an employer does or committing the employer to specific terms of employment or treatment of employees—i.e., they should know precisely what they can and cannot promise applicants. If an applicant accepts a position because of an interviewer's oral or written representations, the interviewer's statements could be asserted as the basis of an express or implied contract under Washington law. Because employment in Washington is terminable "at will," an interviewer should not promise permanent employment or employment that will last as long as the job is satisfactorily performed, unless the employer wants to be bound by such a commitment. Similarly, an interviewer should not represent that an employee will be discharged only for just cause, unless such a statement comports with the employer's policies. In fact, where an employer intends the relationship to be terminable at will, it is a good idea for both the employment application and the interviewer to advise applicants that employees are employed at will and are subject to discharge with or without cause.

V. SCREENING PHASE

A. Conducting Background Investigations

An employer is not required to conduct a thorough background investigation on every prospective employee. Nevertheless, background checks are useful, both to avoid claims of negligent hiring and to select the most qualified candidates. The following guidelines may be useful in considering background investigations:

- **Negligent Hiring.** The importance of thorough background checks is underlined by the increasing recognition of the concept of "negligent hiring." Under a negligent hiring theory, an employer may be held liable to any third party who is injured by an employee who is placed in a particularly sensitive position without a thorough background check having been conducted. The employer's lability is based on the principle that the employer knew, or in the exercise of reasonable care should have known, that the employee selected was unfit for the particular job. Such claims have been recognized in Washington. Examples of such claims include cases involving (1) a hospital's failure to discover that a nurse had been discharged by a prior employer

because of her unsafe handling of patients—filed by a patient allegedly injured by this nurse; (2) a company's failure to discover an employee's prior record of sex crimes—filed by a customer allegedly molested by the employee; (3) an apartment owner's failure to discover prior burglary convictions of a maintenance employee who had a passkey to all apartments—filed by a tenant allegedly burglarized by the employee; and (4) the hiring of an employee by a security firm that handled large sums of money without doing a thorough investigation of the employee's job history—filed by a client from whom the employee allegedly stole a substantial sum of money.

***Evans v. Tacoma School District No. 10*, 195 Wn. App. 25, *review denied*, 186 Wn.2d 1028 (2016).**

The Washington Court of Appeals held that a school district may owe a duty to a student's parents for negligent hiring, retention, supervision, and training of a security guard. The security guard allegedly engaged in a sexual relationship with a minor student. The student's mother brought claims against the school district, and the court concluded that a parent could be a foreseeable victim because, if the security guard engaged in sexual conduct with the student, that conduct might harm the parent's relationship with the student. The case was remanded for further proceedings.

- **Scope.** Carefully review all information provided by a candidate. Pay special attention to "gaps" between jobs and the failure of the candidate to answer certain questions. Contact personal references provided by the candidate. If necessary, consider conducting reference, criminal background, and credit checks. Be sure to obtain any appropriate consent and release forms. Do not perform background checks on only some candidates due to their protected characteristics.

- **Consumer Reporting Agencies.** If an employer hires a third party to conduct a background check or to obtain information from outside agencies, such as credit and criminal background reporting agencies, the reports are subject to the federal and Washington Fair Credit Reporting Acts (FCRA). These acts require the following:

    - The candidate must be notified in a separate, stand-alone form about the scope of the investigation and that the employer might use the information for decision making. The candidate should be informed of his or her right to a description of the nature and scope of the investigation.

    - The candidate must give written permission.

    - Do not unlawfully discriminate against the candidate or otherwise misuse the information in violation of federal or state laws.

    - When not hiring a candidate based on background information received from a consumer reporting agency, give the candidate a pre-adverse action notice, a copy of the report, and a summary of rights under the FCRA. Give the candidate an

opportunity to explain any negative information. Also provide the candidate with a post-adverse action notice that he or she was not hired because of the information in the report, along with information about the reporting agency and the candidate's rights.

B. Checking References

Employers are free to seek information from candidates about prior employment experiences, and verification of this information through reference checks is normally an important part of the screening process. Since many employers strictly limit the information they are willing to share regarding former employees, it may be difficult to obtain as much information as the selecting employer would like. However, conducting and documenting a careful reference check may assist an employer not only in selecting the best candidate for the position but also in avoiding liability for failure to conduct an appropriate check. Even if the former employers decline to release requested information, the prospective employer can demonstrate that, at the very least, an effort was made to obtain it.

The person responsible for conducting the reference check should be cautious to avoid inquiries that could not properly be made directly to the candidate, i.e., questions regarding the candidate's race, religion, or other protected status. Since employers are also barred from discriminating based on employees' exercise of their protected rights, the reference checker should not ask whether the candidate has filed discrimination charges or otherwise complained of discriminatory treatment.

C. Performing Criminal Background Checks

Generally, criminal background checks may be performed to review (1) arrests in the past 10 years—including the status of the charges—where the arrest involves behavior that will negatively impact job performance, or (2) convictions in the past 10 years that relate to prospective job duties.

In cases involving particularly sensitive jobs, criminal background checks *must* be undertaken for certain positions that involve regular, unsupervised access to children under 16 years of age, persons with developmental disabilities, or vulnerable adults under specific circumstances. The background check should be designed to identify candidates who have been convicted of offenses against children or other specified crimes or who have been disciplined by professional boards for such conduct.

If an employer hires a third party to conduct the criminal background check, see the guidelines above with respect to consumer reporting agencies.

D. Obtaining Credit Reports

According to the Washington FCRA, employers cannot obtain a consumer credit report on a candidate unless (1) the information in the report is substantially job-related and the employer's reasons for obtaining such information are disclosed to the candidate in writing, or (2) it is required by law.

Employers cannot take adverse action against a candidate for filing bankruptcy or being associated with someone who has. Employers should prevent unauthorized access to or disclosure of credit report information. In obtaining credit reports, see the guidelines above with respect to consumer reporting agencies.

E. Requiring Drug Tests

Washington employers may prohibit the use of illegal drugs (including marijuana, given that marijuana remains illegal under federal law) and alcohol in the workplace and may test for illegal drugs to the extent that such a test is otherwise lawful. In private, nonunion employment, there are generally no restrictions on drug testing of candidates. Employers in certain industries, notably transportation, may be obliged by law to conduct tests for employee drug use. Public employers considering drug testing must be prepared to address constitutional challenges arising under both federal and state constitutions.

Since private employers are in the main free to test candidates for evidence of current use of illegal drugs, refusal to submit to such testing is a valid basis for disqualification of a candidate. Consent to a drug test may be obtained as part of the application form. Other legal problems associated with drug testing can be reduced by establishing and adhering to a written policy regarding drug testing, not singling out candidates for drug testing based on protected characteristics, and using qualified laboratories with a documented chain of custody for collecting specimens.

F. Requiring Medical Examinations

Under the ADA, employers are prohibited from requiring medical examinations prior to extending an offer of employment. Post-offer medical examinations are permitted if such examinations are required of all new employees in the same job classification. A job offer may be conditioned on the results of a medical examination. But if the candidate is denied employment, the employer must show that the reason was job-related and consistent with business necessity.

***Clipse v. Commercial Driver Services, Inc.*, 189 Wn. App. 776 (2015), *review denied*, 185 Wn.2d 1017 (2016).**

The Washington Court of Appeals held that a commercial driving school was liable under the WLAD for not hiring the plaintiff for a driving instructor position. The plaintiff was taking a prescribed narcotic, methadone, for chronic pain for a torn rotator cuff. He showed that he could safely drive while on his medication, and the examining physician provided a one-year medical examiner's certificate qualifying him to drive a commercial vehicle. The employer refused to hire him, told him to get "cleaned up," and expressed concern that he might "relapse." The court concluded that the plaintiff provided sufficient evidence to sustain a jury verdict that the employer discriminated against him where the employer failed to accommodate him and did not hire him because of his perceived disability. The employer's "no tolerance" drug policy was irrelevant because it applied to controlled substances, not prescription medications.

G. Using Aptitude Tests

Various tests are used by employers in the hiring process, including aptitude, achievement, and general ability tests. Such tests may be valid guides to assess ability, experience, and motivation. Before deciding to use tests to select employees, however, employers should consider whether the tests can be used within legal guidelines (i.e., are they job-related?) and which tests should be used (i.e., which tests will be most reliable in measuring the necessary traits?).

Although the use of tests to measure candidate qualifications can be a valid employment practice, tests may also form the basis of a discrimination claim. If members of any protected group disproportionately score lower on a test used to screen candidates, that test may be found to be unlawfully discriminatory unless it can be demonstrably validated. If an employer cannot demonstrate that such a test is an accurate predictor of job performance and/or potential, its use may be deemed a pretext for unlawful discrimination.

Before instituting a testing procedure, employers should make certain that a test is necessary. Then the employer should decide what type of test is called for. The test that is most easily justified or validated is one that directly measures the candidate's ability to perform an essential function of the job in question, such as a typing test for a prospective typist or a test of an individual's ability to operate a specific hand tool used on the job. Employers should periodically review the results of any pre-employment test to determine whether its use is disproportionately excluding candidates in any protected class. Also, test results should be considered only in conjunction with other information regarding candidates.

H. Social Media

Employers that want to use social media in the hiring process should be aware of the potential risks and rewards of the practice. Many employers (although not as many as in years past) use social media to get a more complete picture of a candidate than an interview reveals. Social media screening is one way to enhance background checks to determine whether a candidate should be hired. Employers can learn valuable information on a candidate's social media pages that employers lawfully may consider, such as racist rants (weighs against hiring) or volunteer work (weighs in favor of hiring). But employers can also discover information about protected characteristics, such as a candidate's race, approximate age, religion, and medical or family issues, which cannot be considered in the hiring process.

Employers may find it helpful to consider the following guidelines when reviewing candidates' social media pages:

- **Who.** It is best for an HR professional to review candidates' social media pages, rather than direct supervisors. HR professionals are more likely to know what can and cannot be considered in the decision-making process.

- **What.** Focus on the candidate's own posts rather than posts made by others about the candidate.

- **When.** Review social media late in the process, after a candidate has been interviewed and his or her membership in protected groups is likely already known.

- **How.** Refrain from selectively reviewing only one candidate's social media pages on the basis of protected characteristics. Print out any content that is used to make a hiring decision, including the reason for rejection. Review only public content, and never ask for passwords to social media accounts, because doing so violates Washington law. RCW 49.44.200.

Consider providing a candidate the opportunity to respond to worrisome social media content, especially given the prevalence of imposter accounts.

VI. SETTING COMPENSATION

Determining salary for a new hire is an important step in the hiring process. It can set the tone for the entire employment relationship. In discussing compensation, it may be helpful to keep these guidelines in mind:

- **Compensation Package.** Understand how salary fits into the overall compensation package, including benefits, perks, and bonuses.

- **Pay History.** Consider excluding reliance on the candidate's previous salary plus 10%, although this tactic is not unlawful in Washington. Not only does this tactic lack strategic thought, it could perpetuate the previous employer's possibly inadequate compensation and be disproportionately detrimental to women candidates. Indeed, the State of Massachusetts, the City of Philadelphia, and the City of New York now prohibit inquiries about a candidate's salary history during the hiring process to address the gender pay gap.

- **Lowball Offers.** Making a lowball offer could destroy trust before the employment relationship has even begun. Such a tactic also assumes that the candidate is either poorly informed or unlikely to negotiate. Not only does this approach increase the risk of losing a top performer, it also disproportionately affects women candidates. Many women are not inclined to negotiate for themselves, so lowball offers can contribute to the gender pay gap.

- **Other Factors.** In addition to the salary range, an employer may consider numerous factors, including the market's supply of talent, performance expectations, industry stability, turnover rates, and how highly regarded the employer is in the job-seekers' market. Document what factors are used in determining salary.

- **Unlawful Pay Discrepancies.** Remember that protections afforded by the Lilly Ledbetter Fair Pay Act, the Equal Pay Act, Title VII, the ADEA, and the ADA prohibit discriminatory pay or compensation decisions. These protections include compensation decisions that occur at the time of hire. Creating and using objective, measurable, and fair pay criteria will help ensure compliance.

***Rizo v. Yovino*, 854 F.3d 1161 (9th Cir. 2017).**

The U.S. Court of Appeals for the Ninth Circuit held that pay differentials between female and male employees based on the employer's use of prior salaries to determine starting salary was not a per se violation of the Equal Pay Act. The plaintiff was a female employee who said she was paid less than her male counterparts. The employer said the that difference was based on a factor other than sex (which is an affirmative defense under the Equal Pay Act), namely previous salaries. The court concluded that prior salary can constitute a factor other than sex if the employer shows that the use of prior salary is reasonable. The case was remanded for further proceedings.