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Presenters

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I. INTRODUCTION

This has been an exciting year already in labor and employment law, with many interesting developments. These materials provide a snapshot of some of the most important changes since our last update in June 2017.

II. LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. Federal Developments

1. The Department of Labor

In the past year, we have already seen significant changes from the U.S. Department of Labor (DOL) under the Trump Administration. In March 2017, President Trump released his budget priorities for Fiscal Year 2018, which contained 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 his appointment by President Trump. Secretary Acosta has already sought to rescind or revise a number of policies from the Obama Administration, including the overtime exemption rule that was challenged in court, the 2011 tip pooling regulations , and the fiduciary rules for retirement advisors, as discussed further below.

a. Status of the DOL's Overtime Exemption Rules

On May 18, 2016, the DOL published a new final rule that significantly revised existing overtime regulations by narrowing the scope of overtime exemptions (the "Overtime Final Rule"). Under the Overtime Final 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 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.

Meanwhile, on July 26, 2017, the DOL published a Request for Information (RFI) regarding the Overtime Final Rule asking for public input on what changes the Department should propose. The RFI sought information on a variety of topics relating to what the appropriate salary threshold(s), if any, would be for the white-collar exemptions, including whether there should be

variations based on such factors as employer size, census division, or state. The comment period for the RFI closed on September 25, 2017 and the DOL is reviewing those submissions.

On August 31, 2017, U.S. District Court Judge Amos Mazzant granted summary judgment against the DOL in consolidated cases challenging the Overtime Final Rule. The court held that the DOL exceeded the authority delegated to it by Congress by increasing the minimum salary for the Executive, Administrative, and Professional exemptions under the FLSA to $913 per week, and concluded that it was invalid. *See Nevada v. U.S. Dep't of Labor*, No. 4:16-CV-731 (E.D. Tex. Aug. 31, 2017).

In reaching this conclusion, the court reasoned that Congress created an exemption to the FLSA's overtime regulations for "bona fide executive, administrative, and professional" employees and in doing so, defined the exemption according to job duties, *not* a minimum salary. In the court's words, "the Department does not have the authority to use a salary-level test that will effectively eliminate the duties test as prescribed by" the FLSA. *Id.* at 14. "Nor does the Department have the authority to categorically exclude those who perform 'bona fide executive, administrative, or professional capacity' duties based on salary level alone." *Id.*

Therefore, "[t]he updated salary-level test under the Final Rule does not give effect to Congress's unambiguous intent." *Id.* Further, the court noted that "[t]he Department estimates 4.2 million workers currently ineligible for overtime, and who fall below the minimum salary level, will automatically become eligible under the Final Rule without a change to their duties." *Id.* at 16.

Ultimately, the court held that "the Department's Final Rule is not 'based on a permissible construction' of [the FLSA]" because by "doubl[ing] the previous minimum salary level" the regulation "eliminates a consideration of whether an employee performs 'bona fide executive, administrative, or professional capacity' duties.'" *Id.* at 16-17. The court also struck down the regulation's mechanism for automatically updating the minimum salary threshold every three years. *Id.* at 17.

The court further concluded that although the DOL lacked authority to set $913 as the minimum salary for exempt status, the current minimum of $455 per week does not conflict with the statute, reasoning that:

> The Department sets the minimum salary level as a floor to "screen[] out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary." Further, the Department acknowledges that in using this method, "[a]ny new figure recommended should also be somewhere near the lower end of the range of prevailing salaries for these employees." The use of a minimum salary level in this manner is consistent with Congress's intent because salary serves as a defining characteristic when determining who, in good faith, performs actual executive, administrative, or professional capacity duties.

Id. at 14-15 (citation omitted). Thus, a minimum salary is permissible on the low end, but $913 was excessive.

As a final judgment, the summary judgment ruling mooted the appeal of the preliminary injunction that had been filed with the Fifth Circuit Court of Appeals. The DOL, however, had already indicated during the appeal process that it would be issuing a Request for Information (RFI) with the intent to issue new proposed regulations on the topic. The comment deadline for the regulations was September 25, 2017.

On October 30, 2017, the Department of Justice (DOJ), on behalf of the DOL, filed a notice to appeal the court's decision on summary judgment to the Fifth Circuit Court of Appeals. On November 3, 2017, the DOL filed a motion with the Fifth Circuit asking the appellate court to hold in abeyance the DOL's appeal of the district court decision and to wait on any ruling in the case while the DOL works on its own proposed overtime regulations.

b. DOL to Rescind 2011 Tip Pooling Regulation

For employers with tipped employees, a complicated issue is whether they must ensure that tipped employees retain all of their tips even if the company is not using the employees' tips to satisfy part of the minimum wage under the FLSA's "tip credit" provision, 29 U.S.C. § 203(m) (Section 3(m)). The provisions of Section 3(m) of the FLSA require, among other things, that tipped employees who are paid a tip credit rate retain all of their tips except for permissible tip pools.

In 2011, the DOL issued a regulation providing that tips are the property of employees and could not be distributed to other, nontipped workers or kept by the employer, even if the employer does not take a tip credit and pays tipped employees the full minimum wage. *See* Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832 (Apr. 5, 2011). The tip credit provision of the FLSA gives employers of tipped employees the option of paying a reduced hourly wage rate of $2.13 per hour so long as the employees receive enough tips to bring their hourly rate to the $7.25 federal minimum wage. If there are not enough tips, the employer must pay the difference; if there are more than enough tips, the employees get the excess. The 2011 regulations limit an employer's ability to use an employee's tips regardless of whether the employer takes a tip credit under Section 3(m) or instead pays the full FLSA minimum wage directly to the employee. *See* 29 C.F.R. §531.52. This interpretation prohibits, for example, the sharing of tips between front of the house employees and back of the house employees.

In September 2016, the Ninth Circuit Court of Appeals upheld the DOL's new regulation as consistent with Section 3(m) in *Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2016). Other courts across the country, however, have rejected the DOL's 2011 regulation and held that employers do not have an obligation to ensure tipped employees retain all of their tips if the company is not taking a tip credit. A circuit split has ensued, and two petitions for writ of certiorari are pending with the U.S. Supreme Court, Nos. 16-163 and 16-920.

The DOL announced its plan to change the FLSA regulations in its semi-annual Unified Regulatory Agenda in July, including its proposal to rescind the 2011 regulation. The agency said the change would only apply to employers that pay tipped employees the full minimum wage directly. It would not apply to employees receiving the tip credit rate, who make less than the minimum wage and earn tips to supplement their pay.

A summary contained on the Office of Management and Budget (OMB) website contained few details, stating only that the DOL's current regulations "limit an employer's ability to use an employee's tips regardless of whether the employer takes a tip credit under Section 3(m)" and indicating that the DOL's proposed rules "will propose to rescind the current restrictions on tip pooling by employers that pay tipped employees the full minimum wage directly." Office of Management and Budget,
https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=1235-AA21.

More recently, on October 24, 2017, the DOL sent a proposed rule to the OMB for review prior to issuing a formal proposed rule. This regulation likely will now permit tip sharing between back of the house and front of the house employees, so long as a tip credit is not taken under Section 203(m). If a tip credit is taken, however, then sharing of tips between tipped and nontipped employees would still be prohibited.

c. Fiduciary Rule for Retirement Advisors Delayed

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 client's 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 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.

However, in early August 2017, the DOL filed a court document as part of a lawsuit in the U.S. District Court for the District of Minnesota, proposing an 18-month delay to the rule's compliance deadline. This would change the final deadline for compliance from January 1, 2018, to July 1, 2019. The same document suggested the delay may include changes to the types of transactions that are not allowed under the fiduciary rule.

On November 1, 2017, the DOL filed a rule with the Office of Management and Budget for the official 18-month delay of its fiduciary rule. The rule, which must be approved by OMB, delays the fiduciary rule's January 1, 2018 effective date until July 1, 2019.

d. DOL to Issue Opinion Letters Again

On June 27, 2017, the DOL announced that it will reinstate its prior practice of issuing opinion letters to employers and employees on the application of the FLSA. The Obama Administration

chose not to issue opinion letters in favor of issuing broader "Administrator Interpretations." Opinion letters address specific, and often nuanced questions, on the application of the FLSA and its implementing regulations. They provide guidance to employers, who, under the FLSA can rely on the guidance in structuring operations and compensation. If an employer relies on an opinion letter, even if a court later decides the DOL opinion letter does not accurately apply the law, the employer may be able to avoid liability under the "good faith" defense established by the FLSA.

The DOL's release explained that "[r]einstating opinion letters will benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act and other statutes." Of note, the DOL under the Obama Administration had withdrawn for further consideration several opinion letters that had been prepared by the Bush Administration, but not mailed prior to inauguration. However, the DOL never took any further action on those opinion letters so it is possible that some of them may be reinstated. *See* News Release, U.S. Dep't of Labor, US Department of Labor Reinstates Wage and Hour Opinion Letters (June 27, 2017), https://www.dol.gov/newsroom/releases/whd/whd20170627.

Employers and employees can request opinion letters by submitting a request on the DOL website containing the following information:

- the specific statute and regulations with respect to which an opinion is sought;
- a description of any facts that might be relevant to the opinion sought (e.g., the nature of the employer's business, an employee's job duties or work schedule, the amount and structure of any compensation, etc.);
- an assurance that the opinion is sought neither:
  - by a party (or their representative) in a Wage and Hour investigation; nor
  - by a party (or their representative) to pending litigation concerning the issues contained in the opinion letter request;
- the requestor's email address (to which a receipt confirmation of the request may be sent);
- a telephone number should the Wage and Hour Division need to discuss the request with the requestor; and
- the requestor's signature, if submitted via mail.

An opinion letter can be requested through the DOL website: https://www.dol.gov/whd/opinion/.

2. National Labor Relations Board

a. Board Composition

For the first time since 2007, the National Labor Relations Board (the "Board") has a Republican majority. On September 25, 2017, the Senate confirmed William Emanuel, the second Trump nominee to the five-member Board. Member Emanuel succeeds outgoing Member Kent Y. Hirozawa, who served for three years. The Board now has a full complement of Members, and a 3-2 Republican leaning at least until Chairman Miscimarra's term ends in December.

On November 8, 2017, the Senate also confirmed management-side lawyer Peter Robb as general counsel of the Board. Mr. Robb follows former President Barack Obama's appointee Richard Griffin, who left office late last month following four years as general counsel. President Trump's recent appointments are expected to advance pro-business and pro-employer policies. In particular, Mr. Robb's replacement of the current General Counsel, Richard Griffin, may lead the Board to overturn its recent rulings taking a broad approach to employee rights under the National Labor Relations Act (NLRA). Notably, the Board General Counsel position comes with broader responsibilities than general counsel positions at other federal agencies. In particular, the Board's General Counsel is empowered with unreviewable prosecutorial discretion in determining which unfair labor practice charges are pursued as formal complaints. Accordingly, the General Counsel is in charge of choosing which cases are even considered by the Board and can therefore control the development of Board precedents. A General Counsel's term is four years from the date of commission.

With the new appointments, the current terms of the existing Board members are as follows:

- Philip Miscimarra, Chairman (Republican) – Term expires December 16, 2017
- Mark Pearce, Member (Democrat) – Term expires December 16, 2018
- Lauren McFerran, Member (Democrat) – Term expires December 15, 2019
- Marvin Kaplan, Member (Republican) – Term expires August 27, 2020
- William Emanuel, Member (Republican)– Term expires August 27, 2021

b. Rollback of Joint Employer Liability

On July 27, 2017, Representative Bradley Byrne (R-AL) introduced the "Save Local Business Act" (H.R. 3441), a bill that would reverse the Board's joint employer test as articulated in *Browning-Ferris* and further clarify the joint employer standard under the FLSA. In particular, the bill would amend the FLSA and the NLRA such that companies would be found to be joint employers of workers hired by another business if they directly and immediately exercise significant control over the terms and conditions of their employment.

In 2015, the NLRB's decision *Browning-Ferris Industries* redefined what constitutes a joint employer. Previously, businesses could meet the definition of an "employer" if they had "direct and immediate" control over another's work. Under *Browning-Ferris Industries*, a business owner who has "potential" or even "reserved control" over the practices of another business and its employees could be considered a "joint employer."

In particular, H.R. 3441 provides that an employer would be considered a joint employer only if it: "Directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment." In a fact sheet on the proposed legislation, the House Committee on Education and the Workforce argue that regulators and "activist judges" working during the previous Presidential administration have "discarded settled labor policy and blurred the lines of responsibility for decisions affecting the daily operations of local businesses across the country." If enacted, the "Save Local Business Act" would take a step back from regulations and administrative decisions finding joint employer status where an entity "indirectly" controlled or "potentially" impacted employees' daily responsibilities and regular work environment.

On October 5, 2017, H.R. 3441 cleared its first hurdle when it passed the House Committee on Education and the Workforce, passing by a margin with 23 "yea" votes and 17 "nay" votes. On November 7, the bill passed in the House. Eight Democrats joined with Republicans to pass the legislation in a 242-181 vote. Eleven House Democrats joined Republicans in voting for the bill. The bill faces an uncertain future in the Senate, where it would likely require support of at least eight Senate Democrats to overcome a filibuster.

3. Equal Employment Opportunity Commission

a. Composition of the Commission

Currently, the five-member Equal Employment Opportunity Commission ("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. Her appointment replaced Democrat Jenny Yang. Lipnic's appointment did not change the balance of power at the five-member bipartisan commission, as Yang indicated that she planned to remain a commissioner until July 1. At the time, Lipnic was the lone Republican on the 3-1 commission, with one vacant seat.

Soon, however, a Republican majority should emerge. Yang left the commission on July 1 and on June 29, the White House nominated Janet Dhillon to become a member of the Commission for a five-year term expiring on July 1, 2022. Dhillon was executive vice president of Burlington Stores, and has held executive and senior roles with J.C. Penney Company and U.S. Airways Group. In addition, on August 21, 2017, Trump nominated Daniel Gade, a veteran's and disability expert and former military officer, to sit on the Commission.

On September 18, 2017, the Senate Health, Education, Labor and Pensions Committee conducted confirmation hearings on both nominees and both are expected to be confirmed.

If confirmed, Dhillon will take over as chair from Victoria Lipnic, and Gade will fill a spot vacant since January. Both Dhillon and Gade would serve 5-year terms and shift the balance of the EEOC to the right.

b. EEOC Strategic Enforcement Plan and Current Trends

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.

Although there were early predictions that EEOC filings would decrease in 2017 with the Trump Administration, numbers were up by more than 50 filings in comparison to 2016. In fact, the month of September saw 88 filings alone, including 21 in the final 48 hours. Equal pay claims were no exception to this trend. The EEOC has committed to focusing on Equal Pay Act filings with 11 of this year's 184 merit filings involved equal pay claims, which nearly doubled last year's total.

c. New EEO-1 Report On Hold

On August 29, 2017, the Administrator of OMB's Office of Information and Regulatory Affairs suspended indefinitely the new EEO-1 reporting requirements that were to take effect in March 2018. The Administrator determined that the EEOC's delayed release of the data file specifications for the form denied the public an opportunity to comment on the new form. In an August 29, 2017 letter to the EEOC, the Office of OMB expressed concerns that some aspects of the information collection "lack practical utility, are unnecessarily burdensome and do not adequately address privacy and confidentiality issues." In response, Acting EEOC Chair Lipnic issued a statement affirming the EEOC's strong enforcement of equal pay laws and encouraging

employers to review their compensation programs to "ensure equal pay and close the wage gap. *See* "What You Should Know: Statement of Acting Chair Victoria A. Lipnic about OMB Decision on EEO-1 Pay Data Collection," *available at* https://www.eeoc.gov/eeoc/newsroom/wysk/eeo1-pay-data.cfm.

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 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 the changes to the EEO-1 Report, which would have required employers to annually report aggregate compensation data for all employees by gender, race, and ethnicity across pay bands. In light of OMB's action, covered employers do not have to report the wages and hours worked of their employees, but are still required to comply with the original EEO-1 form's reporting requirements concerning sex, race, and ethnicity.

B. State and Local Law Developments

1. The Healthy Starts Act

Washington's Healthy Starts Act (the Act) became effective on July 23, 2017. The Act supplements the protections already in place under the Americans with Disabilities Act and the Washington Law Against Discrimination. Under the Act, Washington employers with 15 or more employees are obligated to accommodate pregnant employees in a variety of ways, without regard to whether the pregnant employee has a disability. *See* RCW 43.10.005. The Act establishes two categories of accommodation.

The first category includes accommodations for which the employer may not claim undue hardship as a basis to refuse the accommodation and for which an employee need not provide medical documentation:

- "Providing more frequent, longer, or flexible restroom breaks";
- "Modifying a no food or drink policy";

- "Providing seating or allowing the employee to sit more frequently if her job requires her to stand"; and
- Limiting lifting to seventeen pounds and under.

The second category includes accommodations that an employer may refuse to provide if the employer can show that providing the accommodation would impose an undue hardship and for which an employer may request medical documentation:

- "Job restructuring, part-time or modified work schedules, reassignment to a vacant position, or acquiring or modifying equipment, devices, or an employee's work station";
- "Providing for a temporary transfer to a less strenuous or less hazardous position";
- "Scheduling flexibility for prenatal visits"; and
- "Any further pregnancy accommodation an employee may request, and to which an employer must give reasonable consideration in consultation with information provided on pregnancy accommodation by the department of labor and industries or the attending health care provider of the employee."

To demonstrate an undue hardship, an employer must show that an action would require "significant difficulty or expense."

The Act sets forth four acts that constitute an unfair practice by an employer:

- Failing or refusing to reasonably accommodate a pregnant employee, unless the employer can show that doing so would impose an undue hardship;
- Taking an adverse action that affects the terms, conditions, or privileges of employment against an employee who requests, declines, or uses an accommodation;
- Denying employment opportunities to an otherwise qualified employee based upon the employer's need to provide a pregnancy accommodation;
- Requiring an employee to take leave if another reasonable accommodation can be provided.

While expanding an employer's accommodations to accommodate pregnant employees, the Act does not require employers to create additional employment or discharge any employee, transfer any employee with more seniority, or promote an employee who is not qualified to perform the job, unless the employer does or would take such actions for other classes of employees who need accommodation.

The Act can be enforced by the attorney general or by a private civil action. A person who brings a civil cause of action may seek an injunction, recover actual damages, recover attorneys' fees and costs, and seek other remedies authorized by state or federal law.

2. Initiative 1433: Washington Minimum Wage and Paid Sick Leave

As described in a previous update, on November 8, 2016, Washington voters passed Initiative 1433, which provided for increases in the state minimum wage and, starting in January 2018, will require Washington employers to provide paid sick leave. This section both provides background on the Initiative and recent and impending changes.

a. State Minimum Wage

Initiative 1433 raised the state-wide minimum wage to $11 per hour in 2017. On January 1, 2018, the minimum wage will increase to $11.50. Thereafter, the minimum wage will increase annually to $12 in 2019 and $13.50 in 2020. Starting in 2021, the minimum wage will increase with inflation.

b. Paid Sick Leave

Second, beginning on January 1, 2018, employers are required to provide employees with paid sick leave:

- 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.

Initiative 1433 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 Washington Department of Labor and Industries is currently engaged in the rulemaking process for Initiative 1433. Ultimately, administrative rules will include procedures for notification to employees and reporting regarding sick leave, and protecting employees from retaliation for the lawful use of sick leave. On September 1, 2017, the period for public comment on employer requirements and employee rights ended, and public hearings on enforcement of the new law occurred on November 8 and 9, 2017.

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.

Online webinars will be held throughout November for employers who want more information on the paid sick leave laws. Sign up is available through www.lni.wa.gov/main/workshopstraining/registration.asp.

3. Tacoma's Paid Sick Leave

In order to conform Tacoma's Municipal Code with the requirements of Initiative 1433, amendments to Chapter 18.10 of Tacoma's Municipal Code were adopted in September 2017 and will take effect on January 1, 2018.

Background

In 2015, Tacoma was the third city in Washington to enact a paid leave ordinance at the municipal level, which went into effect February 1, 2016. The following November, however, Washington voters approved Initiative 1433, which includes a similar requirement for paid sick leave at the statewide level.

On September 26, 2017, Tacoma's City Council passed Ordinance No. 28453 (the Ordinance), which amended the Tacoma Municipal Code to bring it in line with the more generous requirements of Initiative 1433, both of which will take effect January 1, 2018. Although the Ordinance still only applies to employees, whether full-time, part time, or temporary, who are reasonably expected to work more than 80 hours within the city limits of Tacoma within a single benefit year, employees who fail to meet this threshold will still be covered by the state statute.

Major Changes

There are several major changes to the Ordinance of which employers need to be aware. First, although covered employees will still accrue a minimum of one hour of paid sick leave for every 40 hours worked, there will no longer be a cap on accrual of 24 hours per year. This means that a fulltime employee will potentially be able to accrue more than twice as much paid sick leave in a year. Second, employees will now be entitled to carry over 40 hours of paid sick leave to the

following benefit year. Previously, employees were only allowed to carry over 24 hours. Third, employees will now be entitled to use accrued paid sick leave just 90 days after commencing employment. Before, employees had to wait 180 days before they could start using accrued leave. Fourth, when an employee separates from an employer but is later rehired by the same employer, previously accrued unused paid sick leave will now be reinstated if the employee is rehired within 12 months. Previously, the window for reclaiming unused benefits was six months. Fifth, employers will only be able to request verification that an employee's use of paid sick leave is for an authorized purpose if the absence exceeds three days. Previously, employers could require verification for any length of absence.

Reasons for Which Paid Sick Leave Can Be Used

The Ordinance closely mirrors state law with respect to the reasons for which paid sick leave can be used, although there are some differences. As amended, the Ordinance will allow employees to use paid sick leave in the following situations:

- An absence resulting from an employee's mental or physical illness, injury, or health condition; to accommodate medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or preventive medical care.

- To allow the employee to care for a family member with a mental or physical illness, injury, or health condition; care for a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or care for a family member who needs preventive medical care.

- When the employee's place of business has been closed by order of a public official for any health-related reason or to allow the employee to care for a child whose school or place of care has been closed by order of a public official.

- To enable the employee to seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or the employee's family members, including, but not limited to, preparing for or participating in any civil or criminal legal proceeding related to or derived from domestic violence, sexual assault, or stalking.

- To enable the employee to obtain, or assist a family member in obtaining, services from a domestic violence shelter, rape crisis center, or other social services program for relief from domestic violence, sexual assault, or stalking.

- To enable the employee to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members from future domestic violence, sexual assault, or stalking.

- To enable the employee to take leave for bereavement for the death of a family member.

There Is One Change Not Based on State Law

The Ordinance includes one minor substantive change not addressed by Initiative 1433 (or current administrative rules interpreting the Ordinance): employers must update employees, electronically or in writing, regarding the amount of accrued paid sick leave they have available at least *once per month*. Previously, the Ordinance required this information to be made available to employees, but did not specify a minimum frequency.

Some Things Will Remain the Same

Under the Ordinance, employers can still offer their employees paid sick leave policies that are more generous than those required by the Ordinance (or state law for that matter). Also, with respect to employees who are exempt from state and federal minimum hourly wage requirements, employees will not accrue sick leave for hours worked beyond 40 hours in a single week.

Takeaways for Employers

Starting January 1, 2018, employers in Tacoma must comply with the Ordinance. Under the Ordinance, employees will accrue 40 hours of leave per year and be able to carryover 40 hours to the following year. Employees can start using accrued leave just 90 days after starting work. Notably, employers are now restricted from seeking verification that an employee's use of paid sick leave is for an authorized purpose, unless the absence exceeds three days. Employers should start updating their leave policies now to ensure compliance starting next year.

4. 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. Beginning on January 1, 2018, large employers (*i.e.*, those with 501 or more employees) must pay a minimum of $15.00 per hour if they pay toward the employee's medical benefits. Large employers who do not pay toward an employee's medical benefits will be required to pay a minimum of $15.45 per hour. As of January 1, 2018, small employers (*i.e.*, those with 500 or fewer employees) must pay a minimum of $11.50 per hour if they pay $2.50 per hour toward the employee's medical benefits or if the employee earns $2.50 per hour in tips. If neither of those two contingencies applies, small employers must pay employees a minimum of $14.00 per hour.

It is important to remember that the 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.

5. Seattle's Secure Scheduling Ordinance

Seattle's Secure Scheduling Ordinance (the Ordinance) went into effect on July 1, 2017. The Ordinance is currently in its "soft launch" phase, which will continue through December 31, 2017. In this time, the Office of Labor Standards has announced that it will focus on education and support for employers. The Office 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.

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 with 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 Secure Scheduling 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 periods 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. 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.

III. CASE LAW DEVELOPMENTS

A. Supreme Court

1. Trio of Cases Addressing Class Action Waivers in Individual Arbitration Agreements

As we previewed in our June 2017 update, three consolidated cases are pending before the U.S. Supreme Court that address whether the National Labor Relations Act ("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). In October 2017, the Court heard oral argument for this trio of cases.

Section 7 of the NLRA provides that "[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 prohibit 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).

The three cases involve 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 Corp.*, 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 (FAA) 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 FAA 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).

In a very unusual move, the DOJ reversed its own position on the issue earlier this year. The DOJ had previously sided with the NLRB in favor of the workers' position, but in June, the administration indicated that it had "reconsidered the issue" and now supports employers' ability to prohibit class action employment disputes in arbitration agreements.

It is anticipated that Justice Gorsuch will be the deciding vote in these cases and will likely favor the enforceability of the arbitration agreements.

2. *Janus v. American Federation of State, County and Municipal Employees Council 31, et al.*

In *Janus v. American Federation of State, County and Municipal Employees Council 31, et al.*, the Supreme Court will examine whether public-sector unions may require employees who are not members to pay fees for collective bargaining. 851 F.3d 746 (7th Cir. 2017), *cert. granted*, ___ S. Ct. ___, 2017 WL 2483128.

An Illinois law requires government employees who choose not to join a union to nevertheless pay the union "fair share" fees, which are "a proportionate share of the costs of collective bargaining and contract administration." *Id.* at 747. The plaintiff, Mark Janus, is an employee of the state of Illinois who sued the union that represents him, the American Federation of State, County and Municipal Employees, saying he should not be forced to pay the fees to support the union's work. *Id.*

Janus's argument was rejected by the United States Court of Appeals for the Seventh Circuit because the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education* "stands in the way of his claim" and the Seventh Circuit lacked the power to overrule that decision. *Id.* at 749. In *Abood*, the Supreme Court upheld a Michigan law that required public-sector employees who did not join the union to nevertheless pay fees to it for collective bargaining activities because they benefited from the union's collective bargaining agreement with the employer. 431 U.S. 209, 231-32 (1977). But the Court clarified that nonmember employees cannot be required to pay for the political activities of the union because such compulsory contributions would violate the constitutional free speech rights of those employees who disagreed with the political views of the union. *Id.* at 235.

The Court has questioned its holding in *Abood* twice in the past five years in *Harris v. Quinn*, 134 S. Ct. 2618, 2632–34 (2014), and *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310–11 (2012). And last term, the Court considered whether to overrule *Abood* in *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016), and heard oral argument in the case. But the death of Justice Antonin Scalia resulted in a 4-to-4 deadlock.

In his petition for review to the Supreme Court, Janus argues that the justices have the power to overrule *Abood* and should do so because the compulsory fees violate the First Amendment. According to Janus, labor negotiations between unions and the government are inherently political matters, and his fees are supporting speech that is intended to affect the government's policies, even when he disagrees with it.

With Justice Neil Gorsuch now on the bench, the Supreme Court will decide the issue once and for all. Given that Justice Gorsuch has consistently voted with the more conservative justices on the Court, he is likely to provide a fifth vote against the union. If nonmember employees are not required to pay the fees in the future, many of them probably won't, which would affect the financial health of public-sector unions.

3. *Encino Motorcars, LLC v. Navarro*

In *Encino Motorcars, LLC v. Navarro*, the Supreme Court will examine for a second time whether "service advisors" at car dealerships are exempt from the over-time pay requirements of the FLSA. 845 F.3d 925 (9th Cir. 2017), *cert. granted*, ___ S. Ct. ___, 2017 WL 2021593.

Encino Motorcars, LLC is an automobile dealership that sells and services new and used Mercedes-Benz automobiles and employs Hector Navarro and his four fellow plaintiffs who, as service advisors,

> greet Mercedes-Benz owners as they arrive in the service area of the dealership; listen to customers' concerns about their cars; evaluate the repair and maintenance needs of the cars; suggest services to be performed to remedy the customers' concerns; suggest supplemental services beyond those that will remedy the customers' concerns; write up estimates; and, often, follow up with the customer while the repair work is underway to suggest further repairs and maintenance.

Id. at 927. The plaintiffs allege that Encino Motorcars violated the FLSA by failing to pay them overtime wages and considering them exempt under 29 U.S.C. § 213(b)(10)(A), which exempts from overtime compensation "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." *Id.*

In 2015, the United States Court of Appeals for the Ninth Circuit first heard this case and concluded that service advisors are not covered by the exemption. *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1277 (9th Cir. 2015). But the Supreme Court overruled the Ninth Circuit in 2016, ruling that the Circuit should not have deferred to a DOL regulation because the DOL had not provided a sufficient explanation for its decision to reverse course from its earlier position treating service advisors as exempt. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124–27 (2016). The case was sent back to the Ninth Circuit to interpret the FLSA "without placing controlling weight on" the DOL's regulation. *Id.* at 2127. In a dissenting opinion, Justices Thomas and Alito also criticized the Ninth Circuit for relying on the principle that when interpreting FLSA exemptions, they must be "narrowly construe[d]" against the employers seeking to assert them. *Id.* at 2131 (Thomas, J. dissenting).

In 2017, interpreting Section 213(b)(10)(A) "in the first instance," the Ninth Circuit once again ruled that service advisors are not exempt from overtime according to both "the most natural reading of the statute" and its legislative history that "confirms that Congress intended to exempt only salesmen selling cars, partsmen servicing cars, and mechanics servicing cars" and did not intend to exempt service advisors. *Navarro*, 845 F.3d at 929. In reaching its decision, the Ninth Circuit again relied on the "narrow construction" principle. *Id.* at 935.

The Supreme Court will review that decision this term, which will resolve a circuit split on the issue and provide needed certainty to employers. With Justice Gorsuch on the bench, the justices may also have the votes needed to address the validity and scope of the "narrow construction" principle, which often plagues employers.

B. Other Federal Decisions

1. District Court Holds that the Side Effects of Prescribed Narcotics Require Accommodation Under the WLAD

In *Stewart v. Snohomish County PUD No. 1*, C16-0020-JCC, __F. Supp. 3d __, 2017 WL 2665105 (W.D. Wash. June 21, 2017), the district court for the Western District of Washington considered whether an employer failed to accommodate a former employee who had been fired for violating the company's drug-use policy.

The plaintiff, Cynthia Stewart, worked as a customer service representative for her employer for more than 20 years and suffered from chronic and debilitating migraines for most of that time. Prior to 2013, her supervisors and coworkers informally accommodated her condition by covering for her when she needed time off.

In 2013, Ms. Stewart's new supervisor became frustrated that she was missing work due to her migraines and told her that she needed to be at work more consistently and communicate when she would be gone. In 2014, Ms. Stewart applied and was granted intermittent leave under the Family Medical Leave Act (FMLA) to go to doctor's appointments to receive migraine treatment. One of Ms. Stewart's migraine treatments, a narcotic injection, caused various side effects, such as droopy eyes, slurred speech, and sleepiness.

Ms. Stewart's employer maintained a "Fitness for Duty" policy that prohibited employees from working under the influence of drugs or alcohol. Management-level employees were trained to observe signs of impairment and fill out a "Reasonable Suspicion Checklist" with behaviors that might indicate impairment. If a manager observed any of the behaviors on the checklist, he or she could refer the employee for drug and alcohol testing. The policy made no exceptions for employees taking prescription medications to treat disabilities.

After receiving an injection from her doctor to treat a migraine in October 2014, Ms. Stewart returned to work. When she returned, her supervisor believed that she was impaired and went through the Reasonable Suspicion Checklist along with another supervisor. They referred her for drug testing because she appeared drowsy and had droopy eyes.

Ms. Stewart tested positive for a narcotic drug. The supervisors concluded that Ms. Stewart was impaired at work even though she submitted a note from her doctor explaining the side effects of the medication and that she was not actually impaired. After some back and forth with her doctor, the employer allowed Ms. Stewart to return to work in 2015. Once again, another supervisor concluded that she appeared to be impaired after she received a migraine treatment and she tested positive for the same narcotic. Pursuant to the employer's drug policy, Ms. Stewart was fired.

Ms. Stewart sued her employer, alleging that it failed to reasonably accommodate her disability, failed to afford her protected medical leave, and impermissibly fired her because of her disability.

Side Effects from Employee's Migraine Treatment Were Part of Her Disability

Under the Washington Law Against Discrimination (WLAD), courts have recognized that symptoms of an employee's disability may be considered part of the disability and trigger the interactive process. Ms. Stewart's alleged impairment, however, resulted not from her disability (migraines), but from the treatment for her migraines. Nevertheless, the judge concluded the symptoms resulting from Ms. Stewart's migraine medication should be considered part of her disability under the law. The judge reasoned that without the injections, she would have been unable to work for protracted periods of time, and "[i]n this way, the side effects of the medication have become part of her underlying disability." *Id.* at *9. Thus, "treatment-related symptoms should be viewed as an extension of a person's disability." *Id.*

The Employer Failed to Accommodate Employee's Treatment Side Effects

The court went on to find that because the employer failed to show that Ms. Stewart's disability prevented her from performing the essential functions of job, it had a duty to reasonably accommodate Ms. Stewart's migraines and the resulting side-effects of her migraine medication. The employer was also on notice of these conditions because she and her doctor had provided ample documentation as part of her FMLA leave requests.

The court ultimately held the employer failed to reasonably accommodate Ms. Stewart because it did not consider available measures to accommodate her medical condition. The court reasoned that the employer instead "chose to address [Ms. Stewart's] medication symptoms through a disciplinary process, rather than an interactive one aimed at finding a reasonable accommodation that would allow [her] to work and seek treatment for her disability." *Id.* at *10. Simply put, "it could have treated her as an employee with a medical condition, rather than a drug abuser." *Id.* at *11.

The court also rejected the employer's argument that Ms. Stewart failed to initiate the interactive process, noting that "while it should not always be incumbent on the employer to steer the accommodation discussion, given the facts in this case, [the employer] should have done more." *Id*. According to the court, alternative accommodations were "not difficult to conjure," including permitting Ms. Stewart to stay at home the rest of the day after receiving an injection or sending her home if she returned to work and seemed as if she was unable to perform the essential functions of her position. *Id.*

After trial, Ms. Stewart received a damages award of over $1.8 million, including $10,000 in emotional damages, an amount that does not account for attorneys' fees and litigation costs.

The case was appealed to the Ninth Circuit on July 16, 2017.

Key Takeaways

Although employers can lawfully implement and enforce drug-testing policies, you should be cautious about how such policies are enforced against employees with disabilities. Employees have a protected right to use prescribed controlled substances and be at work unless their use creates an undue risk of harm or presents a safety issue. Even then, if the employee's prescribed drug is used to treat her disability, you should ensure that it engages in the interactive process with the employee, and, if warranted, provide reasonable accommodations. Ultimately, if your established drug policy does not address how or when to engage in the interactive process for employees with disabilities taking prescriptions drugs, you may face liability to failing to accommodate that employee.

2. Ninth Circuit Says Washington School District Can Prohibit Coach's After-Game Prayers

In *Kennedy v. Bremerton School District*, 869 F.3d 813 (9th Cir. 2017), the Ninth Circuit Court of Appeals considered the line between the constitutional prohibition against the establishment of religion and a public employee's First Amendment right to free speech. In particular, the court held that the coach spoke as a public employee rather than as a private citizen, and thus was unlikely to succeed on the merits of his First Amendment retaliation claim against the district, as required to support his request for a preliminary injunction. Consequently, the public school district had the right to prohibit the coach from praying at midfield after the end of a game.

The plaintiff, Joseph Kennedy, was employed as a football coach at Bremerton High School in Washington from 2008 to 2015. His contract provided that the school "entrusted" him "to be a coach, mentor and role model for the student athletes." *Id.* at 815-16. Kennedy, a practicing Christian, alleged that his religious beliefs require him to "give thanks through prayer at the end of each game for the players' accomplishments and the opportunity to be a part of their lives through football." *Id.* at 816. His practice was to kneel on the 50-yard line and pray for approximately 30 seconds after the game ended.

When Kennedy first began praying after games, he did so alone. A few games into his first season, however, some of the players asked to join him, and he told them they could do what they wanted. Over time, the prayer group grew to include the majority of the team, and team members occasionally invited players on the opposing team to join. Kennedy's participation also grew from offering his own silent prayer to delivering a message with religious content. Attendees, students, and coaches from both teams were invited to participate.

In September 2015, the Bremerton School District learned that Kennedy was leading locker-room prayers and praying on the field. After a district investigation into whether Kennedy was complying with the school board's policy on "religious-related activities and practices," the district sent him a letter. The letter pointed out that Kennedy's activities were "problematic" under the First Amendment's Establishment Clause while acknowledging that he meant well and had not actively encouraged or required participation. The district informed Kennedy that he could continue to give secular inspirational talks and that while students could engage in religious activity, school staff could not take any action that could be perceived as endorsement of the activity. The district emphasized in the letter that Kennedy was "free to engage in religious activity, including prayer," so long as it did not interfere with his job responsibilities and wasn't conducted in conjunction with student religious activity. *Id.* at 817.

For a few weeks, Kennedy complied with the letter, making motivational speeches that did not address religion and praying on the 50-yard line only after everyone had left the stadium. He subsequently sent a letter to the district requesting a religious accommodation under Title VII of the Civil Rights Act of 1964 to allow him to continue to pray on the 50-yard line immediately following the game. The letter also informed the district that he would resume his practice of praying on the 50-yard line immediately following the game.

Kennedy resumed the practice and was joined by players and others on the field. The district then notified Kennedy that he had violated its directive and would be placed on paid administrative leave. Like all Bremerton assistant coaches, Kennedy had a one-year contract that expired following the 2015 season and he did not apply for the 2016 season.

In 2016, Kennedy filed a complaint in the U.S. District Court for the Western District of Washington, alleging that his rights under the First Amendment and Title VII had been violated. Kennedy asked the court for a preliminary injunction and argued that he would succeed on the merits of his claim that the district retaliated against him for exercising his First Amendment right to free speech. The district court concluded that he could not demonstrate a likelihood of success on the merits and denied the preliminary injunction. Kennedy appealed to the 9th Circuit.

The Ninth Circuit affirmed the district court's position and laid out the framework for analyzing First Amendment retaliation claims by public employees:

(1) Whether the employee spoke on a matter of public concern;

(2) Whether the employee spoke as a private citizen or public employee;

(3) Whether the employee's protected speech was a substantial or motivating factor in the adverse employment action;

(4) Whether the state had an adequate justification for treating the employee differently than other members of the general public; and

(5) Whether the state would have taken the adverse employment action even absent the protected speech.

Id. at 822. Kennedy and the district disputed only the second factor—whether Kennedy spoke as a private citizen or public employee—and the fourth factor—whether the district's conduct was adequately justified by its need to avoid an Establishment Clause violation. The Ninth Circuit found the second factor dispositive.

The Ninth Circuit outlined the test for determining whether an employee's speech was spoken as a public employee or a private citizen. The first step is to make a factual determination regarding the scope and content of the employee's job responsibilities. The second step is determining the ultimate constitutional significance of those facts. *Id.* at 823-24.

The Ninth Circuit concluded that Kennedy had spoken as a public employee and not as a private citizen. The court identified two key factors in its analysis. First, the speech involved "kneeling and praying on the fifty-yard line *immediately* after games *while in view of the students and parents*." *Id.* at 825. Second, the speech was "*directed* at least in part to the students and surrounding spectators; it [was] not solely speech directed to God." *Id.*

The court then concluded that Kennedy's job "entailed both teaching and serving as a role model and moral exemplar" and that when "acting in an official capacity in the presence of students and spectators, Kennedy was also responsible for communicating the District's perspective on appropriate behavior through the example set by his own conduct." *Id.* at 827.

The Ninth Circuit then analyzed the constitutional significance of those job duties. The court noted that Kennedy "easily" met the three conditions set out in a previous U.S. Supreme Court ruling: A teacher "necessarily" acts as a teacher when "(1) at school or a school function, (2) in the general presence of students, (3) in a capacity one might reasonably view as official." *Id.* Moreover, the court noted, Kennedy's speech "owes its existence" to his position, meaning that he spoke as a public employee rather than a citizen: "Kennedy was fulfilling his professional responsibility to communicate demonstratively to students and spectators" but took advantage of that role to press his religious views. *Id.* at 827-28.

Ultimately, the court concluded that because Kennedy's "demonstrative speech fell within the scope of his typical job responsibilities, he spoke as a public employee, and the District was permitted to order Kennedy not to speak in the manner that he did." *Id.* at 828.

This case once again demonstrates the careful balance public employers must achieve between avoiding Establishment Clause violations and respecting an employee's First Amendment right to free speech.

3. Ninth Circuit Holds that ADEA Applies to Small Public Employer

In *Guido v. Mount Lemmon Fire District*, 859 F.3d 1168 (9th Cir. 2017), the Ninth Circuit Court of Appeals considered whether the Age Discrimination in Employment Act (ADEA) applies to a small public employer with less than 20 employees. In the private sector, the ADEA protects against age discrimination by employers with more than 20 employees. The court held that the public fire district, as a subdivision of the State of Arizona, was an "employer" within the meaning of the ADEA and that the 20-employee threshold does not apply to public-sector employees.

The plaintiffs were two firefighter captains for the Mount Lemmon Fire District in Arizona. When they were fired in 2009, the 46-year-old and 54-year-old plaintiffs were the district's two oldest full-time employees. They filed age discrimination charges with the EEOC. The EEOC found in favor of the plaintiffs and they filed a lawsuit against the district violations of the ADEA. The district obtained a dismissal on the basis that it had fewer than 20 employees and that the ADEA therefore did not apply. The plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit first noted that the ADEA's structures apply only to an "employer" as defined in the statute, 29 U.S.C. § 630(b):

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . . The term also

> means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Guido, 859 F.3d at 1170.

The district court, relying on decisions from other appellate courts, had adopted the position that the 20-worker minimum in the first sentence of the definition should also apply to public employers listed in the second sentence. Accordingly, the court dismissed the case.

The Ninth Circuit, however, took a different view, reasoning that the plain meaning of the ADEA included both employers in commerce with 20 or more employees and state agencies, but that the 20-employee minimum did not apply to state agencies. While other circuit courts had found the statutory definition ambiguous and had therefore looked at Congressional intent to interpret it, the Ninth Circuit found that the language was clear and required no such inquiry.

By way of analogy, the court posited someone saying: "The password can be an even number. The password can also be an odd number greater than one hundred." *Id.* at 1171. In this example, the limiting language of one sentence in the password definition clearly does not apply to the other. This is also true with respect to the ADEA definition, which does not impose the 20-worker limit on state entities.

In opposing the district's position, the EEOC also pointed out that when Congress amended Title VII of the Civil Rights Act of 1964, it clearly stated that a 20-employee minimum would apply to government employers. *Id.* at 1172. Thus, had Congress intended to include this limitation when it amended the ADEA, it presumably would have used the same language as it had for Title VII. The court found this observation persuasive, but that there was no need to examine congressional intent because the plain language of the statute was clear.

Acknowledging that its interpretation of the ADEA definition had been rejected by other circuit courts, the Ninth Circuit noted that the other courts had been mistaken in finding a need to interpret what the statute intended. *Id.* at 1174-75. When statutory language is clear, it should be taken at face value without "interpretation." *Id.*

The Ninth Circuit reinstated the ADEA claims and remanded the case back to the trial court. On October 19, 2017, the district filed a petition for certiorari with the U.S. Supreme Court.

4. Ninth Circuit Holds that Underwriters Are Not Exempt "Administrative" Employees Under the FLSA

In *McKeen-Chaplin v. Provident Sav. Bank, FSB*, 862 F.3d 847 (9th Cir. 2017), the Ninth Circuit held that mortgage loan underwriters who work for lending banks do not fit the administrative exemption of the FLSA and are therefore entitled to overtime pay.

The underwriters' employer, Provident Savings Bank, provides loans to customers who purchase homes or refinance existing homes. The bank then sells those loans on the secondary market. The role of the mortgage underwriters is to decide whether the customer's application, documentation, and creditworthiness satisfy the bank's criteria—the "guidelines"—for the particular type of loan being sought. *Id.* at 849. The underwriters can add other conditions to be satisfied before the load is approved, and they can suggest a "counteroffer" when the customer does not qualify for the desired load but may qualify for a different loan. They can also request that the bank make an exception in an individual case by approving a loan that doesn't satisfy the guidelines. They do not, however, deal directly with the customer, they do not handle the sales on the secondary market, and they have no role in setting the bank's loan guidelines.

There are three requirements an employee must meet to qualify for the administrative exemption under the FLSA—namely the employee:

> (1) be compensated not less than $455 per week; (2) perform as her primary duty "office or non-manual work related to the management or general business operations of the employer or the employer's customers;" and (3) have as her primary duty "the exercise of discretion and independent judgment with respect to matters of significance."

Id. at 851 (citing 29 C.F.R. § 541.200(a)).

As with other overtime exemptions, the administrative exemption is narrowly construed, with the employer having the burden of proving that the exemption applies by meeting all three criteria. Of the three requirements, the first is most straightforward. The second and third present a much more difficult question for courts to analyze.

According the regulations interpreting the FLSA, "work related to the management or general business operations" of the employer—the second of the three requirements of the administrative exemption—means that "an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." *Id.* at 851.

That distinction is commonly referred to as the "administrative production dichotomy." *Id.* Its purpose, according to the DOL, is to distinguish between "work related to the goods and services which constitute the business' marketplace offerings and work which contributes to 'running the business itself.'" *Id.* If the employees engage in running the business itself or determining its overall course or policies, they would meet this requirement, but those whose work is the day-to-day carrying out of the business's affairs do not.

Applying this distinction, the Ninth Circuit concluded that the mortgage underwriters fell clearly on the "production" side of the line and were thus nonexempt. *Id.* at 855. The court relied on the fact that the underwriters did not decide whether the bank should take on a risk. Rather, their role was limited to assessing whether a particular loan satisfied the guidelines established by the

bank. Their role in assessing a loan's riskiness was quite different from assessing or determining the loan guidelines themselves or the bank's other business policies. Because the underwriters did not meet the second requirement, the court found it unnecessary to consider the argument that they also failed to meet the third requirement.

Because the underwriters were not exempt under the FLSA, the bank will be liable for overtime compensation that should have been paid to them for all hours they worked in excess of 40 hours per week, applied retroactivity to two or three years before the lawsuit was originally filed, plus prejudgment interest and attorneys' fees. Determining the precise number of hours worked may be difficult, however, because the employees may lack clear records of their time worked.

In the last eight years, two other federal courts of appeal have disagreed over the answer to this question, with the Second Circuit finding that underwriters do not fit the exemption and the Sixth Circuit finding that they do. On September 11, 2017, the bank filed a petition for certiorari with the U.S. Supreme Court asking that it take up the question to clear up this confusion. Numerous business and banking organizations have filed amici briefs supporting the request.

5. Ninth Circuit Requests that Washington Supreme Court Decide Complex Pay Question Involving "Piecework"

Under Washington's Minimum Wage Act, if employees are paid on a "piecework" system (such as a fixed amount per item produced or mileage driven), an employee's total weekly earnings must be equal to or higher than what the employees would have earned if they were paid minimum wage for all hours worked. By contrast, if employees are paid on an hourly basis, they must be paid at least the minimum wage for all hours worked. In *Hill v. Xerox Business Services, LLC*, 868 F.3d 758 (9th Cir. 2017), the Ninth Circuit considered whether a complex and unusual pay program for call center employees complied with this law.

The employer, Xerox Business Services (Xerox), operates a call center located in Seattle, which handles customer calls for third parties, such as phone companies and hotels. The employees were paid under what the company calls the "Achievement Based Compensation (ABC) Plan." The plan has three components: ABC Pay, Additional Pay, and Subsidy Pay.

ABC Pay is an incentive-based program that rewards employees for efficiency in dealing with customer issues by tracking "production minutes," which is time spent on incoming calls, on hold during an incoming call, and completing after-call work related to an incoming call. Production minutes are paid a certain number of centers per minute based on two factors: supervisory evaluations of the employees and the employees' efficiency in resolving customers' issues. Total weekly "ABC Pay" is determined by multiplying the total production minutes by the employees' per-minute rate. Other time spent on work tasks is tracked, but employees do not receive additional pay unless the time is spent on tasks covered by "Additional Pay."

"Additional Pay" compensates employees for certain defined tasks such as training, meeting, coaching, and system downtime—some of the tasks not covered by ABC Pay. Those defined tasks are paid at a standard hourly rate based on Washington's minimum wage. Time spent on

other tasks does not qualify for Additional Pay. "Subsidy Pay" is used to supplement an employee's weekly earnings when ABC Pay and Additional Pay are not enough to equal what the employee would have earned had she been paid minimum wage for all hours worked.

A call center employee brought a statewide class action against Xerox seeking unpaid wages under the Washington Minimum Wage Act (MWA) and the Washington Consumer Protection Act, arguing that ABC Pay was an hourly pay system, not a piece rate system. The federal district court in Seattle agreed, but asked the Ninth Circuit to decide the issue before proceeding further.

The Ninth Circuit panel noted that the issue is a matter of Washington State law, but that there is no case law on the question for the federal court to interpret. Therefore, because the question to be resolved was a matter of state law, the Ninth Circuit asked the Washington Supreme Court to provide a definitive answer. The question that the court has certified for the Washington Supreme Court to decide is whether the employer's compensation plan, which included as a metric an employee's "production minutes," qualifies as a piecework plan under the MWA (WAC 296-126-021). If the Washington Supreme Court accepts review, its decision will control. If the court declines review, it will return to the Ninth Circuit for a decision.

C. Washington Supreme Court Decisions

1. Washington Supreme Court Places Heavier Burden on Employers Relating to Missed Meal Periods

Under regulations that implement the Washington Minimum Wage Act, employees who work five consecutive hours are entitled to receive a thirty-minute meal break between the second and fifth hour of employment. *See* WAC 296-126-092. Employees, however, may choose to waive their meal break. Although not required, the Washington Department of Labor & Industries "recommends" that employers obtain a "written request" from an employee who chooses to waive a meal break.

In *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576 (2017), the Washington Supreme Court addressed whether employers must *ensure* that their employees actually take their meal breaks or if it is sufficient to *provide* them with a meaningful opportunity to do so. The court held that although an employer is not strictly liable if an employee misses a meal break, the employer bears the burden of proof to show that the missed meal break was actually provided or it was waived.

The Facts

The plaintiff, Michael Brady, filed a class action lawsuit for unpaid wages, alleging that his employer, Autozone, "withheld" meal periods from employees under Washington law. Brady filed a motion to certify a class of employees who were also allegedly denied meal periods. Brady's position was that Autozone not only had an obligation to provide employees with meal breaks, but that Autozone also had to ensure that employees took that break. The federal district

court rejected Brady's position and refused to certify the class, holding that "employers have met their obligation under the law if they ensure that employees have the opportunity for a meaningful meal break, free from coercion or any other impediment." *Id.* at 579. The district court also rejected the argument that an employer is strictly liable whenever an employee misses a meal break.

Brady appealed and the Washington Supreme Court agreed to address two questions: (1) whether an employer is strictly liable under Washington law (WAC 296-126-092) if an employee misses a meal period and (2) if an employer is *not* strictly liable, whether the employee carries the burden to prove that his employer did not allow the employee an opportunity to a meaningful break as required by the law.

No Strict Liability for Missed Meal Break

As to the first question, the court held that an employer is not automatically or "strictly" liable under Washington law if an employee misses a meal period. In reaching this conclusion, the court reasoned that because employees can waive their meal period if they so choose, an employer cannot be held liable simply because an employee failed to take a meal period to which he or she was legally entitled.

But There Is a New Standard for the Burden of Proof

As to the second question, whether employers or employees must prove that an employee had a meaningful opportunity for a break to avoid liability, the court offered a mixed response. Employees carry the prima facie burden of showing that they did not take a meal period to which they were entitled. The burden then shifts to employers to prove either that no violation occurred or that the employee waived his or her meal period.

In articulating this new standard for the burden of proof, the court indicated that it was selecting between the approach taken by the California Supreme Court and that previously articulated by Division One of the Washington Court of Appeals.

The employer asked the court to adopt the test used by the district court and by the California Supreme Court in *Brinker Restaurant Corporation v. Superior Court*, 53 Cal. 4th 1004, 273 P.3d 513, 139 Cal. Rptr. 3d 315 (2012). Under *Brinker*, employers are required only to provide a meal period to employees by offering them a "reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." 53 Cal. 4th at 1040. Brady argued that the court instead adopt the Washington appellate court precedent from *Pellino v. Brink's Inc.*, 164 Wn. App. 668 (2011). Under *Pellino*, employers have "a duty to provide meal periods and rest breaks and to ensure that the breaks comply with the requirements" under Washington law. 164 Wn. App. At 688. Further, if an employee waives a meal break, that waiver must be "knowing and voluntary" and waiver is an "affirmative defense," upon which the employer bears the burden of proof. *Id.* at 697.

The court agreed with Brady's position, concluding that Washington law "ultimately provides greater protection for workers" than the *Brinker* court did. *Brady*, 188 Wn.2d at 583. As articulated by the court, the *Pellino* standard imposes the prima facie requirement that the employee provide evidence that he or she did not receive a timely meal break. Then, the burden shifts to the employer to rebut this by showing that in fact no violation occurred or that a valid waiver exists.

Ultimately, the court's opinion leaves considerable uncertainty, as the standard articulated by the court—while rejecting *Brinker*—closely mirrors the approach articulated in *Brinker*. Further, if there is no strict liability for missed meal periods, it remains unclear how employers can prove that "no violation occurred." That is, the court's opinion does not clearly articulate what it means for an employer to "provide" meal breaks as required by law.

Proof of Waiver

In light of this decision, employers should review and reconsider their current meal break policies. Washington employers can no longer avoid liability by arguing simply that the employee had a "meaningful opportunity" to take a meal period break and chose not to do so. Instead, employers will be best served by being able to provide evidence that the employee either did not miss the break or affirmatively and consciously waived it. Without written or other proof of waiver, this may be difficult for employers to demonstrate. Therefore, employers should consider revising their meal period policies so that an employee is required to sign or otherwise document a waiver of any missed meal periods.

2. Washington Supreme Court Clarifies Elements of Prima Facie Case Under the *McDonnell Douglas* Framework

In *Mikkelsen v. Pub. Utility District No. 1 of Kittitas County*, No. 93731-1, __P.3d__, 2017 WL 4682306 (Wash. Oct. 19, 2017), the Washington Supreme Court considered the elements for a plaintiff to establish a prima facie of discrimination case under the Washington Law Against Discrimination (WLAD). The court ultimately concluded that a plaintiff need not prove that she was replaced by a member outside her protected class in order to establish a prima facie case of discrimination.

The Facts

The Public Utility District No. 1 of Kittitas County (the "district") discharged Kim Mikkelsen after 27 years of service. Mikkelsen sued the district alleging that, among other things, her dismissal violated the WLAD because she was discriminated against based on her gender. Specifically, Mikkelsen claimed that Charles Ward, the general manager, exhibited a bias against women and older employees, and that gender and age discrimination were substantial factors in his decision to fire her. She also argued that her dismissal violated the progressive correction action policy the district distributed to its employees.

With regard to Ward, Mikkelsen alleged that he talked over her in meetings, regularly disregarded her input in favor of her male colleagues, and stopped asking her to serve as an acting manager and asked only the male members of the management team to serve in that role. She also alleged that he frequently referred to women in the office as "girls," "gals," or "ladies" but did not refer to men as "guys," "men," or "boys." Eventually, after communication broke down between Mikkelsen and Ward, he fired her without explanation. She was replaced by a 51-year old woman.

The Decision

The trial court had granted the district's motion for summary judgment and dismissed all of Mikkelsen's claims with prejudice. On appeal, the Washington Supreme Court addressed the following three issues:

(1) Is the replacement element required to establish a prima facie case of discrimination under the *McDonnell Douglas* framework?

(2) Can Mikkelsen show a genuine issue of material fact as to whether the discrimination was a substantial factor in her dismissal?

(3) Can Mikkelsen show a genuine issue of material fact as to whether the corrective action policy modified her at-will employment status?

Id. at *4.

The court began by analyzing the elements of a prima facie case under the standard set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), noting that "[t]o establish a prima facie case of discrimination, Washington courts have held that plaintiffs must prove that they were replaced by someone outside of their protected group—the replacement element." *Id.* at *5. The court further analyzed the issue to "clarify that the replacement element is not required to prove a prima facie case" under the first step of the *McDonnell Douglas* framework, reasoning that it must have been erroneously included in Washington courts' application of the framework. *Id.* Rather, the court found that the authority from other cases "requires only that a plaintiff prove membership in a protected class, termination from a job for which she was qualified, and that the employer continued to seek candidates for the position." *Id.* at *7. Further, the court recognized that this evidence may be relevant after a plaintiff establishes a prima facie case: "the attributes of a successor employee may be relevant to the second or third steps under the *McDonnell Douglas* framework." *Id.*

In applying this framework, the court affirmed summary judgment dismissal of Mikkelsen's age discrimination claim because she presented almost no evidence of age discrimination. But, the court reversed summary judgment dismissal of Mikkelsen's gender discrimination claim because the facts taken in the light most favorable to her created a material issue of fact about whether gender discrimination was a substantial factor in the decision to fire her—namely, the evidence

of her manager's treatment of her was sufficient to establish that his reason for her termination may have been pretext for discrimination:

> The evidence Mikkelsen presented, taken together, demonstrates a genuine dispute of material fact as to whether the breakdown in communication between Mikkelsen and Ward occurred because she is a woman. From this record, a reasonable jury could believe that Ward fired Mikkelsen because she was an assertive woman who challenged his gender stereotypes, or the jury could believe that Ward harbored no gender bias and fired Mikkelsen simply because their personalities and management styles clashed.

Id. at *9.

In addition, the court reasoned that the corrective action policy was ambiguous and could possibly be read as establishing a for-cause standard for dismissal and the court reversed and remanded on that issue.

This case is significant because it reduces the burden on a plaintiff to establish a prima facie case of discrimination and clarifies the standard for Washington courts that had been interpreting the standard differently.

3. Washington Supreme Court Allows Cause of Action for Applicants Who Allege That Prospective Employer Refused to Hire Them in Retaliation for WLAD Claim Against Prior Employer

In in *Zhu v. North Central Educational Service District ESD 171*, Case No. 94209-9 (Wash. Nov. 9, 2017), the Washington Supreme Court addressed whether prospective employers may engage in retaliatory discrimination in the hiring process. As phrased by the district court, the Washington Supreme Court considered the following question: "Does RCW 49.60.210(1) create a cause of action for job applicants who claim a prospective employer refused to hire them in retaliation for prior opposition to discrimination against a different employer?" The court concluded that the answer is yes.

The plaintiff in the case, Jin Zhu, had been hired by Waterville School District as a math teacher in 2006. After the district tried to fire Mr. Zhu, he sued, alleging that the district subjected him to racially motivated disparate treatment, a hostile work environment, and retaliation. In particular, he alleged that he was subjected to hostile and abusive actions from his students – namely, he was called a "chink, a communist, and gay" and was the subject of a hateful racial attack on a bathroom wall. Rather than attempting to remedy the situation, Mr. Zhu alleged that Waterville retaliated against him for filing grievances, including discharging him. The case eventually settled and he resigned.

Three months later, Mr. Zhu applied for a position as a math-science specialist at ESD 171, an educational service district that provides "cooperative and informational services to local school districts." *Id.* at 4. Mr. Zhu was one of three applicants who applied and it was undisputed that

the selection committee was aware of his prior lawsuit against Waterville. He was not selected for the job and Mr. Zhu sued, alleging that he was fired in retaliation for opposing unfair practices at Waterville.

In holding that the WLAD *does* prohibit retaliation in hiring, the court first looked to the plain language of the statute, which provides that it is an unfair practice for "any employer . . . [to] discriminate against any person because he or she has opposed any practices forbidden by this chapter." *Id.* at 8 (citing RCW 49.60.210(1)). The court reasoned that because "(1) ESD 171 is an employer, (2) Zhu is a person, (3) refusal to hire is discrimination, and (4) suing for racial discrimination is opposition to practices forbidden by WLAD, then RCW 49.60.210(1) clearly applies to Zhu's claim." *Id.* at 8-9. Further, the court noted that the statute was intended to be interpreted broadly and concluded that "employer" is not limited to the plaintiff's current employer for purposes of the statute due, in part, to the statute's use of "any" before the word "employer." *Id.* at 11.

In addition, the court concluded that the statute prohibits "all forms of discrimination" by employers and is not limited to an established employment relationship. *Id.* at 13. Finally, the court reasoned if the statute were interpreted otherwise, "[t]he purposes of WLAD would be severely undermined." *Id.* at 19. Relevant to this case, the court recognized, is the right to be free from invidious discrimination, which includes "[t]he right to obtain and hold employment without discrimination" for which hiring is an essential part. *Id.*

Therefore, Mr. Zhu's claim that ESD 171 refused to hire him because of his opposition to his former employer's racial discrimination stated a valid cause of action under the WLAD. The court also awarded him attorney fees as the "prevailing party."

As an employer, if you are aware of a prior lawsuit or complaint filed by an applicant under the WALD, you should ensure that you do not take that into account in the hiring process because that applicant may be able to state a claim for retaliation.

D. NLRB Decisions

1. Board Says that Employees Have No Right to Use Customer Data Taken from Employer's Records

In *Macy's, Inc. and United Food and Commercial Workers Union, Local 1445*, 365 NLRB No. 116 (Aug. 14, 2017), the Board reversed the ALJ's finding that Macy's, Inc.'s confidentiality policies unlawfully interfered with employees' Section 7 rights.

Three confidentiality rules were at issue in the case. The first restricted the use of "Confidential Information," which was defined to include "social security numbers or credit card numbers—in short, any information, which if known outside the Company could harm the Company or its business partners, customers or employees or allow someone to benefit from having this information before it is publicly known." *Id.* at 1. The two others prohibited the disclosure of

"personal data," including customers' "names, home and office contact information, social security numbers, drivers' license numbers, account numbers and other similar data." *Id.* at 2.

The ALJ had concluded that these rules unlawfully restricted employees' Section 7 right to communicate with customers about their work-related concerns. The Board reversed, finding that the rules only prohibited employees' use or disclosure of sensitive data (i.e., customers' social security and/or credit card numbers) or information obtained from the employer's own confidential records. While the Board reaffirmed that "employees indisputably have a Section 7 right to concertedly appeal to their employer's customers for support in a labor dispute," the Board held that this right did not overcome their employer's right to protect and prevent the disclosure of "information that their employer lawfully may conceal." *Id.* at 3-4.

Although the Board has recognized for some time that employees have no right to use sensitive data or information taken from the employer's confidential records, it is notable that the majority rejected a broader construction proposed by Member Pearce in his dissent. Member Pearce argued that an employer cannot restrict the use of customer information maintained in files the employer designates as "confidential" because the information is likely available to all employees in the normal course of their employment duties. The majority rejected his position for two reasons. First, the majority noted that the Act does not protect employees' use of information drawn from an employer's records merely because employees have access to it as part of their duties. Second, the majority reasoned that "there is . . . no evidence in this case that the [employer's] customer contact information was available to 'all employees,' as the dissent contends, much less that it was used by them in the course of their normal employment duties. . . . Our colleague's unsupported speculation as to the [employer's] 'likely' practices cannot substitute for evidence not in the record." *Id*. at 5 n.10.

2. Board Says Supervisor's Text Messages to Employee Were Unlawful Interrogations

On June 7, 2017, in *RHCG Safety Corp. and Construction & General Building Laborers, Local 79, LIUNA*, 365 NLRB No. 88, the Board disagreed with an employer's contention that "a text message cannot be found to constitute an unlawful interrogation." Instead, the Board held that a coercive text message, like a coercive face-to-face meeting or phone call, could serve as evidence that the employer unlawfully threatened or interrogated employees about their union support or activity in violation of the NLRA and could therefore support a finding that the employer committed an unfair labor practice.

The case involved employees who were part of a union organizing campaign by Laborers Union Local 79. The union had petitioned the Board for a representation election, in which employees were to vote on whether they wanted Local 79 to become their bargaining representative. During the campaign, an employee texted his supervisor to inquire about returning to work after an approved leave of absence. The supervisor replied with a text that read "U working for Redhook or u working in the union?" *Id.* at 1.

According to the 3-0 Board decision, in which Chairman Miscimarra joined with Members Pearce and McFerran, an employee would interpret the supervisor's message to strongly suggest that working for Redhook was incompatible with supporting or working in the union. Therefore, the Board agreed with the ALJ that the text message constituted an unlawful interrogation and violated Section 8(a)(1) of the NLRA, which provides that is an unfair labor practice for an employer or its agents to restrain or coerce employees in the exercise of their Section 7 rights.

Under Section 7 of the NLRA, all employees have the right to engage or refrain from engaging in protected, concerted activity concerning their terms and conditions of employment. This includes the right to join and be represented by unions and to engage in collective bargaining with their employers. Employers and unions are prohibited from engaging in conduct that interferes with employees in their exercise of their Section 7 rights under the NLRA.

In reaching its conclusion, the Board rejected the employer's contention that a text message could not constitute an unlawful interrogation, finding that "an unlawful interrogation need not be face-to-face." *Id.* at 1 n.4. The Board noted that the employer had offered "no reason why the Board should provide a safe harbor for coercive employer interrogations via text messages." *Id.* at 1 n.4.

The Board also rejected the argument that the text message at issue was inadmissible at the unfair labor practice hearing because the screenshot of the text offered by the General Counsel did not include the entire communication between the employee and his supervisor. The Board reasoned that the Federal Rules of Evidence permit introduction of only a part of a writing, and there was nothing in the record to suggest the text message at issue was incomplete or that the "missing" text messages could have negated the coercive nature of the "are-you-for-the union" inquiry. *Id.* at 2.

The Board's decision highlights the need for employers to consider how to communicate with employees, particularly during an organizing campaign. Employers should be clear on the kinds of and forms of communication that are appropriate between a manager and employee given the possibility that a text message can be interpreted as coercive.