



COUNSEL TO GREAT COMPANIES

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# Labor and Employment Law Breakfast Seminar

November 13, 2018 – Seattle, Washington

November 14, 2018 – Bellevue, Washington

# Agenda

Federal Law Updates

State and Local Law Updates

Federal and State Case Law Developments

Questions, Discussion, and Wrap Up

James Sanders | Tobias Piering | Melissa Verrilli | Mallory Webster

# #MeToo Movement at the EEOC

Significant increase in sexual harassment complaints filed at the EEOC

The EEOC has filed 50% more sexual harassment claims than it did in 2017



# NLRB – Reviewing Workplace Rules

The new standard

The Board will evaluate two things:

- the nature and extent of the potential impact on NLRA rights, and
- legitimate justifications associated with the requirement

*The Boeing Co.*, 365 N.L.R.B. No. 154 (2018)



# NLRB – Employer Email Systems

The current standard:

Employees have a presumptive right to use employer email systems on nonworking time for communications protected by Section 7 of the NLRA.

*Purple Communications, Inc.*, 361 N.L.R.B. 1050 (2014)

NLRB is considering whether to adhere to, overrule, or modify the standard.

What about employer computer resources, more broadly?



# Salary Threshold for Overtime Exemptions

## Federal:

Current threshold: \$23,660 per year (set in 2004)

Predicted increase: **\$32,000 or \$33,000** per year



## State:

Current threshold: \$250 per week, equals approx. \$13,000 per year (set in 1976)

Pre-draft rule: increase to between \$720 to \$1440 per week, equals approx. **\$37,500 to \$75,000** per year

# NLRB and DOL to redefine “Joint Employer”

## National Labor Relations Board:

Proposed Rulemaking under the National Labor Relations Act

Joint Employer if the “two employers share or codetermine the employees’ essential terms and conditions of employment”

## Department of Labor:

Plans to issue a proposed rulemaking under the Fair Labor Standards Act

Current regulation was promulgated 60 years ago

# New Washington Laws

#1: “Ban the box” for criminal history of job applicants

#2: Limited access to employee medical records in litigation



#3: NDAs cannot prevent disclosure of sexual harassment

#4: WLAD extends to another class of persons

#5: Employers are prohibited from requiring religious disclosure



# Washington's Equal Pay Opportunity Act

Employers cannot rely on an employee's previous wage to justify a pay difference

Compensation differences may be based on bona fide job-related factors

- Seniority system
- Merit system
- Regional differences
- System that measures compensation by production

# Workplace Pregnancy Accommodations

## Employers must:

- provide flexible, longer, and more frequent bathroom breaks
- modify a no food or drink policy
- provide seating or allow an employee to sit more often if her job requires frequent standing
- limit lifting to 17 pounds



# Washington's Paid Family and Medical Leave



Monthly premiums collected through payroll

0.4% of employee's taxable wage base

**January 1, 2019** – are you ready for premiums?

Employers pay 37% of the premium, employees pay 63%

Quarterly reports submitted to ESD

DIY: Voluntary Plans

# Arbitration Agreements with Class Waivers

Arbitration agreements with class waivers are enforceable

- Class actions are not “concerted activities”
- No conflict between NLRA and Federal Arbitration Act

*Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)



Ninth Circuit followed suit, applying *Epic* to Uber’s arbitration agreements with its independent contractors (drivers)

# Will *Epic* Remain in Effect?

## The Restoring Justice for Workers Act (H.R. 7109)

- Would overturn *Epic*
- Outlaw use of class action waivers in employment contracts
- Bar agreements that require employment disputes to be arbitrated

State law limits: Washington's new law voiding agreements that waive an employee's right to file a lawsuit or agency complaint for discrimination under state and federal law

# Federal Court Decisions: Union Dues

- Non-member agency fees violate First Amendment
  - They compel nonmembers “to subsidize private speech on matters of substantial public concern.”
- Applies only to public sector employees, but likely to apply same rule to private sector

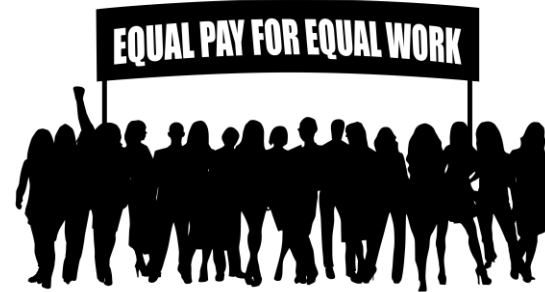
*Janus v. American Federal of State, County & Municipal Employees, Council 31*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 2448 (2018)

# Ninth Circuit on the Federal Equal Pay Act

Employers cannot justify wages differences by relying on prior salary

*Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018)

Will the Supreme Court weigh in?



# Wrongful Discharge in Violation of Public Policy

- Two tests: (1) for four recognized public policies, and (2) for other situations (the “Perritt test”)
- Washington Supreme Court clarifies that the Perritt test does not apply for the four recognized public policies

*Martin v. Gonzaga Univ.*, 425 P.3 837 (Wash. 2018).





# Piece Rate and Commission Based Work

- Trio of Cases – Washington Supreme Court (*Dovex Fruit, Hill*) and District Court for the Western District of Washington (*Sampson*)
- Washington Supreme Court rules that work done based on an increment of time is not piece rate work
- Washington Supreme Court is active in this area

# Trade Secrets Are Not Always Secret

Trade secrets are *not* categorically excluded from disclosure under the Public Records Act.



An injunction is warranted under the PRA only if:

- disclosure would clearly not be in the public interest, and
- disclosure would substantially and irreparably damage any person or vital government function.

*Lyft, Inc. v. City of Seattle*, 418 P.3d 102 (Wash. 2018)

# Work-Free On-Duty Meal Periods

During an on-duty meal period, the employee must be “relieved of *all work duties.*”



Consequences: Double damages and prejudgment interest  
*Hill v. Garda CL Northwest, Inc.*, 424 P.3d 207 (Wash. 2018)

# Contractor Gender Discrimination Claims

Competing inferences of discrimination and nondiscrimination are good enough to overcome summary judgment

Applying the same summary judgment standard from **employment** discrimination cases to **independent contractor** discrimination cases

*Specialty Asphalt & Constr., LLC v. Lincoln Cty.*, 421 P.3d 925 (Wash. 2018)



# Questions

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