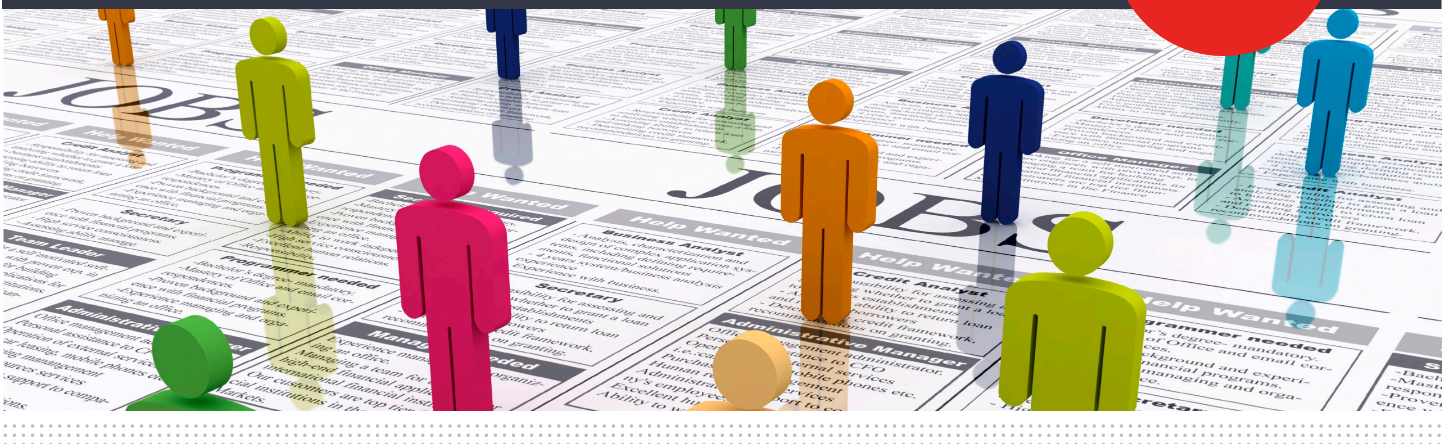
Labor & Employment Law Workshop

2018



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Agenda

11:30 a.m. — 12:00 p.m.	**Registration**
12:00 p.m. — 1:00 p.m.	**Introduction of Guest Speaker** Linda Walton - Perkins Coie **Lunch with Theresa Cropper** **Chief Diversity Officer, Perkins Coie LLP** Implicit Bias: What Every Employment Lawyer and HR Professional Needs to Know *60 Minutes of Ethics CLE Credit*
1:00 p.m.— 1:05 p.m.	**Thank You and Overview of Afternoon** Ann Marie Painter, Perkins Coie
1:05 p.m.— 2:05 p.m.	**Spring Employment Law Update** Linda Walton, Perkins Coie Javier Garcia, Perkins Coie *60 Minutes of General CLE Credit*
2:05 p.m. — 2:20 p.m.	**Break**
2:20 p.m. — 2:50 p.m.	**Restrictions on Employee "Political" Conduct** Ben Stafford, Perkins Coie *30 Minutes of General CLE Credit*
2:55 p.m. — 3:40 p.m.	**Workplace Harassment in the Era of the #MeToo Movement** Chelsea Petersen, Perkins Coie Ann Marie Painter, Perkins Coie *45 Minutes of General CLE Credit*
3:45 p.m. — 4:30 p.m.	**Paid Sick Leave in Washington –What You Don't Know *Can* Hurt You** Bruce Cross, Perkins Coie Julie Lucht, Perkins Coie *45 Minutes of General CLE Credit*
4:30 p.m.	**Wrap-Up and Thank You** Linda Walton, Perkins Coie

Speaker Spotlight

THERESA D. CROPPER | CHICAGO, IL

As Chief Diversity Officer for Perkins Coie LLP, Theresa Cropper is responsible for the firm's diversity policies and initiatives. She develops programs for recruitment, retention, and promotion of lawyers of color, women, gay lesbian bisexual and transgender and those with disabilities. Theresa works with each office to develop and support local diversity initiatives, and she partners with firm management and practice groups to explore ways to promote diversity and inclusion.

Theresa previously served as the National Director of Diversity at DLA Piper US LLP, where she was responsible for implementing all aspects of the firm's national diversity initiative. Before entering the law firm arena, Theresa served as the Dean of Students at Northwestern University School of Law. During her 14-year tenure at Northwestern, she was the first Director of Minority Affairs and led the initiative to increase the diversity of the student body from 9% to over 30%. She also developed model programs for retention and professional development for diverse students. After six years in that position, she was promoted to Dean of Students and worked to create an inclusive community through programming that emphasized a team approach to student problem solving. She launched programs designed to provide professional development outside of the classroom with a focus on leadership, team building, mandatory diversity training, problem solving, and networking. These programs became the hallmark of the Office of Student Affairs.

BRUCE MICHAEL CROSS | PARTNER | SEATTLE, WA

www.perkinscoie.com/BCross/

Bruce Cross, a partner in the firm's Labor & Employment practice, has more than 40 years of experience in the areas of labor and employment law, including NLRB proceedings, labor negotiations and arbitrations, strikes, picketing, boycotts, OSHA, and wage-hour compliance and class actions. He has represented clients such as The Boeing Company, Puget Sound Energy Inc., United Parcel Service, Boise Cascade LLC, General Dynamics Land Systems, Northrop Grumman, Honeywell and Esterline.

JAVIER F. GARCIA | PARTNER | LOS ANGELES, CA

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Javier Garcia focuses his practice on representing clients in a wide range of litigation matters including cases involving race, age, disability and gender discrimination; wage-and-hour class actions; noncompete agreements; trade secrets, Sarbanes-Oxley whistleblower claims and collective bargaining agreement disputes. He counsels clients on employment issues involving employment policies and handbooks, employment contracts, and severance agreements. Javier has also represented clients in labor matters subject to collective bargaining agreements, including labor arbitrations, unfair labor practices, and National Labor Relations Board administrative hearings and appeals. Javier also has experience representing financial institutions in financial services and consumer protection litigation in state and federal courts nationwide, including class actions.

JULIE S. LUCHT | PARTNER | SEATTLE, WA

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

Julie also represents clients in special remedies litigation instigated to protect clients from trade secret misappropriation, corporate raiding, breach of contract and fiduciary duties and other employment-related offenses. She counsels clients in arbitration, mediation and other alternative dispute resolution proceedings and defends clients in class action litigation and in lawsuits litigated by the EEOC.

ANN MARIE PAINTER | PARTNER | DALLAS, TX

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Ann Marie Painter is the firmwide chair of the firm’s Labor & Employment practice and has extensive experience counseling employers in technology, defense contracting, manufacturing, hospitality, retail and finance. Her counsel also includes providing strategic advice on executive and employment agreements, social media policies and use, and employment-focused policies supportive of successful corporate transitions and restructurings.

In her nationwide employment litigation practice, Ann Marie defends employers against the full range of individual, collective and class action employment-related claims. She has litigated numerous employment discrimination and retaliation claims, Fair Labor Standards Act (FLSA) and state wage and hour collective and class actions, and has achieved favorable outcomes for national and regional employers in ADR forums across the United States. When helping employers reduce their litigation vulnerabilities, Ann Marie provides practical and effective approaches to implementing or managing reductions in force, noncompete covenants, privacy policies, ADA accommodations, and wage and hour audits. Her experience includes protecting clients' interests before the U.S. Equal Employment Opportunity Commission and state workforce agencies, including the Texas Commission on Human Rights.

CHELSEA DWYER PETERSEN | PARTNER | SEATTLE, WA

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Chelsea Dwyer Petersen is a partner who focuses her practice on employment litigation with an emphasis on complex class action cases.

Chelsea's areas of experience include proactive defense of discrimination and wage-and-hour class action and collective action cases for clients such as Comcast, The Boeing Company, Amazon and OfficeMax. She has substantial experience in all phases of class cases, including early strategic assessment, defeat of class certification, supervision of large-scale electronic document review, oversight of expert witnesses and taking a case to trial.

She also regularly defends employers against individual discrimination, harassment, retaliation and wage-and-hour claims raised to state and federal enforcement agencies and filed in state and federal court. Representative clients include Microsoft and Starbucks.

BEN STAFFORD | PARTNER | SEATTLE, WA

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Ben Stafford is a partner in the firm's Labor & Employment practice who focuses his practice on employment litigation and counseling.

Ben has extensive experience defending complex wage-and-hour class action cases for clients including The Boeing Company, Comcast, OfficeMax, and Les Schwab. Ben's experience extends to all aspects of such cases, including managing electronic discovery, defeating class certification, taking a case to trial, and appellate practice.

Ben's other areas of experience include proactive defense of individual discrimination, harassment, retaliation, and wage and hour claims arising from federal and state laws such as the Civil Rights Act, the Fair Labor Standards Act, the Americans with Disabilities Act, and the Washington Law Against Discrimination. Representative clients include The Boeing Company and Microsoft.

LINDA D. WALTON | PARTNER | SEATTLE, WA

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Linda D. Walton is a member of the firm's Labor & Employment Law National practice and former chair of the firm's Strategic Diversity Committee. In her practice, Ms. Walton defends both private sector and public-sector employers in state and federal employment-related litigation matters. Through day-to-day counseling and the design and presentation of preventative law training programs for managers, supervisors and human resources personnel, Ms. Walton also devotes a significant part of her practice to advising employers on how to avoid employment litigation. Ms. Walton advises and trains clients on a wide range of employment law matters, including among others, wage-and-hour law compliance, FMLA compliance, Title VII compliance, workplace harassment, and newly emerging employment law issues related to employee and employer use of social media. See Social Media Law, (ALM Law Press Journal 2013), Linda Walton author of Chapter 2 - “Employment Law Issues.” Ms. Walton is also often called upon to conduct sensitive workplace investigations on behalf of both private sector and public-sector employers.

Table of Contents

I. INTRODUCTION 4

II. LEGISLATIVE AND REGULATORY DEVELOPMENTS 4

A. Federal Developments 4

1. The Department of Labor 4

a. DOL Issues New Opinion Letters 4

b. Backlash Delays DOL's Proposed Tipping Rule 5

c. Fiduciary Duty Rule for Investment Advisors Dealt Final Blow by Fifth Circuit 7

d. DOL Launches Self-Audit Amnesty Pilot Program for Wage Violations 7

e. Overtime Exemption Revision Still on the Horizon 8

f. DOL Embraces Economic Realities in New Unpaid Intern Test 8

g. EBSA Factsheet Shows Increased ERISA Enforcement 10

2. National Labor Relations Board 10

a. Board Composition 10

b. "Quickie Election Rule" on Chopping Block 10

3. Equal Employment Opportunity Commission 11

a. Composition 11

b. #MeToo Movement Has Not Increased EEOC Charges, But Will Lead to Commission Guidance 12

c. Pay Data Initiative for EEO-1 Report May Be Revised 12

d. EEOC May Breathe New Life into Wellness Plan Incentives 12

4. Federal Legislation 13

a. Tax Act Gives Credit for Paid Leave, Removes Deduction for Sexual Harassment NDAs 13

b. Rescission of DOL's Fair Pay and Safe Workplaces Rule 14

c. Ending Forced Arbitration of Sexual Harassment Bill 14

d. "Buy American, Hire American" Brings Immigration Measures to Employment 14

B. State and Local Law Developments 14

1. Washington Minimum Wage and Paid Sick and Safe Time 14

a. State Minimum Wage 15

2. State Paid Sick and Safe Time ("PSST") Requirements 15

3. Washington Paid Family and Medical Leave Insurance Program 16

4. Washington Equal Pay Act Update 16

5. Washington Nondisclosure Pertaining to Sexual Harassment Legislation 17
6. Right to "Publicly" Pursue Discrimination Claims 17
7. Fair Chance Act (Ban the Box) 17
8. Washington State Amends Domestic Violence Leave Law 18
9. Local Ordinances 19
a. Local Minimum Wage/Compensation Rates 19
b. Seattle Paid Sick and Safe Time Requirements 20
c. Tacoma Paid Sick Leave 20
d. SeaTac Paid Sick Leave 21
e. Seattle City Council Passes Tax on Largest Businesses in Effort to Alleviate Homelessness 21
C. Other Developments 21
1. EU's General Data Protection Regulation (GDPR) 21
III. CASE LAW DEVELOPMENTS 22
A. Supreme Court 22
1. The Supreme Court Upholds Employment Agreements Requiring Arbitration 22
2. The Supreme Court Holds that Service Advisors at Automobile Dealerships Are Exempt from FLSA Overtime Requirements 23
3. The Supreme Court Reverses Sixth Circuit Decision for Failure to Apply "Ordinary Contract Principles" to Collective Bargaining Agreement 24
4. Lamps Plus Asks Whether Silent Arbitration Agreements Allow Class Actions 25
5. Supreme Court to Decide Whether Public-Sector Unions May Require Employees Who Are Not Members to Pay Fees for Collective Bargaining 26
B. Other Federal Decisions 26
1. The Ninth Circuit Holds that Class Action Status Is Not Appropriate for Cases Involving Variations in State Laws 26
2. The Ninth Circuit Holds that Returning Service Member Was Entitled to Bonus Pursuant to USERRA Based on "Reasonable Certainty" Test 27
3. The Ninth Circuit Holds that Title VII Permits Award to Be "Grossed Up" for Income Tax Consequences 28
4. The Ninth Circuit Holds that an Employer's Failure to Engage in Interactive Process Justified Jury Verdict 29
5. Ninth Circuit Holds that Employers Cannot Use Prior Salary to Justify a Pay Gap Under the Federal Equal Pay Act 30

6. Ninth Circuit Holds that Under Title VII, the 90-day Period to File Suit Begins when an Individual Receives a Right-to-Sue Notice 31

7. Ninth Circuit Holds that Seattle Ordinance Requiring Collective Bargaining with App-Based Drivers Is Not Exempt from Federal Antitrust Law 31

8. Ninth Circuit Holds that Wages May Be Averaged Over a Workweek, Instead of Calculated on an Hourly Basis to Comply with the FLSA 32

9. Challenge to DOL Guidance on Tipped Employees....33

C. Washington Supreme Court Decisions.... 33

1. Washington Supreme Court Holds that Public Employee Terminated for Sending Religious Emails at Work Met Burden in Proving First Amendment Violation 33

2. Washington Supreme Court Holds that Washington Minimum Wage Act Requires that Piece-Rate Agricultural Workers Are Paid Per Hour for Activities Outside of Piece-Rate Picking Work....35

D. Other State Court Decisions 37

1. California Supreme Court Adopts "ABC" Test to Distinguish Between Employees and Independent Contractors for the Purposes of California's Wage Orders 37

2. California Court Allows Pay Equity Class Action to Move Forward 38

E. NLRB Decisions.... 39

1. Board Unravels Obama-Era Policies 39

2. Hy-Brand and the Ongoing Debate Over Joint Employers 40

3. Boeing Embraces Workplace Realities in New Balancing Test for Employer Policies....41

4. *PCC Structurals* Replaces Micro-Units with Communities of Interest....43

5. *UPMC* Permits Reasonable Settlements, Despite Objections 44

I. INTRODUCTION

II. LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. Federal Developments

1. The Department of Labor

The Trump Administration continues to bring new faces into the Department of Labor ("DOL" or the "Department"). Kate O'Scannlain was confirmed as Solicitor of Labor on December 21, 2017. O'Scannlain, a former partner at Kirkland & Ellis LLP, will be the Department's head lawyer and its third-highest ranking official. During her Senate confirmation hearing in November 2017, O'Scannlain spoke in favor of increasing compliance guidance and ensuring the "rules of the road" are clear to employers.

Patrick Pizzella was sworn in as Deputy Labor Secretary on April 17, 2018. Pizzella is not a new face at the DOL, having served as a senior official in the Department under George W. Bush. He returns to the Department after serving as a member of the Federal Labor Relations Authority, where he frequently authored pro-management dissents.

Finally, President Trump nominated Scott Mugno to be head of the DOL's Occupational Safety and Health Administration ("OSHA"). Mugno currently serves as FedEx's Vice President of Safety, Sustainability, and Vehicle Maintenance. Though nominated in 2017, Mugno has yet to receive official approval by the Senate because his nomination was not confirmed before the end of the Senate's 2017 session. Currently, Mugno's Senate vote has yet to be rescheduled. Mugno's delay is characteristic of the struggle many Trump nominees have experienced on the road to confirmation.

The Department's budget narrowly escaped the chopping block for fiscal year 2019. Trump's initial proposal decreased the DOL's funding by 21% of its prior level. Such a sharp cut would have created a short leash for enforcement initiatives. However, Congress's $1.3 trillion omnibus spending bill, approved on March 22, 2018, allocated $12.2 billion to the Department. This amount exceeds the DOL's prior discretionary funding level by $129 million.

a. DOL Issues New Opinion Letters

The Department of Labor announced in June 2017 that it would once again issue opinion letters to aid employers and employees in applying the Fair Labor Standards Act ("FLSA") and the Family and Medical Leave Act ("FMLA"). After almost ten months of silence, on April 12, 2018, the Wage and Hour Division (the "Division") issued its first opinion letter. The question posed to the Division was whether a non-exempt employee who requires hourly 15-minute breaks due to a serious health condition must be compensated for these breaks under the FLSA. The Division said she did not.

The FLSA requires covered employees, also called non-exempt employees, to be paid for their work time. When time is spent in a way that predominately benefits the employer, as opposed to the employee, it is considered compensable time. The Supreme Court of the United States has held that breaks up to twenty minutes generally benefit the employer and thus are considered

paid time. *Sec'y of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420, 430 (3d Cir. 2017); 29 C.F.R. § 785.18. However, in some circumstances, the benefits of a break accrue predominantly to the employee. In these instances, the employer does not have to pay the employee for break time. Additionally, the FMLA provides employees with up to 12 weeks of leave per year for family care and medical needs. While FMLA leave is typically discussed by the day or week, it can be taken in much shorter increments.

The Division found that the 15-minute breaks the employee needed for a health condition qualify as protected FMLA leave time. Further, because the breaks are required to accommodate a medical condition, the benefit of these breaks accrues to the employee. Therefore, the employer does not need to pay the employee for his or her hourly 15-minute breaks. The Division noted that because these breaks are considered FMLA leave, the employee must still receive the same number of compensable breaks as other employees.

Employers and employees can request opinion letters by submitting a request on the DOL website (https://www.dol.gov/whd/opinion/) 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 Division need to discuss the request with the requestor; and
- the requestor's signature, if submitted via mail.

b. Backlash Delays DOL's Proposed Tipping Rule

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) 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. For this reason, the 2011 regulation is often call the "tip pool rule."

On December 5, 2017, the DOL published a notice of proposed rulemaking that would rescind the tip pool rule and permit employers to redistribute tips to non-tipped employees, as long as the employees are being paid minimum wage. The Department stated that it was motivated by a concern that it had improperly construed the FLSA to prohibit tip pools even when employees are paid the full minimum wage. In its notice, the DOL suggested the new rule may benefit tipped employees because the reallocated tips could be used to offer lower menu prices, provide paid leave, or hire additional staff.

The proposal was met with increased backlash after it was revealed on February 1, 2018 that the DOL had removed a quantitative analysis from its proposal that revealed the new rule could let employers keep tips by participating in the enlarged pools themselves. The thinktank Economic Policy Institute performed its own analysis and predicted that up to $5.8 billion could end up with employers instead of workers as a result of the rule change. Shortly after the news broke, the Department's Inspector General began an audit of the rulemaking process to investigate the removal of the data.

Legislators and employee advocate groups, such as the National Restaurant Association, all opposed the rule as harmful for tipped employees. On March 7, two Democratic House Representatives proposed a bill, the Tip Income Protection Act, that would codify the 2011 regulation and block the DOL's proposed rule change. On March 23, President Trump signed a federal spending bill that amends the FLSA to prevent employers from keeping employee tips for any reason, including sharing with managers or supervisors. The bill's rider also gave employees and the DOL the ability to sue for withheld tips.

Following Trump's bill, the Wage and Hour Division of the Department of Labor announced on April 9, 2018 that it would instruct Division staff to police tipping pools and assess violations on employers that retained employee tips or shared them with management. Three days later, Labor Secretary Alex Acosta said he supported the decision to remove quantitative data from the proposal, stating that the analysis required too many assumptions to be reliable. Acosta also noted that independent analyses estimated losses to be between $523 million and $13.2 billion, proving his point that it was difficult to accurately quantify the effect.

Employers that take advantage of FLSA's tip credit provision should confirm that tip pools only include tipped employees. Employers that do not take a tip credit should carefully regulate and document their tip pooling processes to ensure they can show no management or supervisor staff participation.

c. Fiduciary Duty Rule for Investment Advisors Dealt Final Blow by Fifth Circuit

On April 8, 2016, the DOL published a new "Fiduciary Duty Rule" which expanded the definition of "investment advice fiduciary" under the Employee Retirement Income Security Act ("ERISA"). This rule essentially elevated all financial professionals working with retirement plans to the level of fiduciary. Non-fiduciaries need only make suitable investment decisions, meaning that they meet client needs and objectives. Fiduciaries, on the other hand, are held to a higher level of accountability and are required to act in their client's best interest. The rule was originally scheduled to take effect in a phased implementation on April 10, 2017.

Shortly after his inauguration, 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. The Department further delayed effectiveness until July 1, 2019.

However, on March 15, 2018, the Fifth Circuit Court of Appeals vacated the Fiduciary Duty Rule as unreasonable, arbitrary, and capricious. *See U.S. Chamber of Commerce v. DOL*, No. 17-10238, 2018 WL 1325019 (5th Cir Mar. 15, 2018). The Department did not ask for an en banc review of the decision and the ruling took effect on May 7, 2018. The day the Fifth Circuit ruling took effect, the Department issued a nonenforcement policy informing advisors that it will not punish any violations of the Fiduciary Duty Rule while it was in effect.

The Department's last opportunity to appeal the decision is to petition the Supreme Court of the United States by June 13, 2018. There have been no indications that the Department will seek this appeal.

d. DOL Launches Self-Audit Amnesty Pilot Program for Wage Violations

On March 6, 2018, the Department of Labor announced a new program that will allow employers to avoid litigation by self-reporting violations of wage laws. A six-month trial of the Payroll Audit Independent Determination ("PAID") program launched on April 4, 2018. Participants in the program will report accidental violations of FLSA's overtime and minimum wage provisions to the Wage and Hour Division, which will then calculate the amount of owed back wages. Participating employers are incentivized by the guarantee that violations will not result in a formal enforcement action, fines, or liquidated damages.

A major criticism of the program is that it appears to be limited to violations covered by the FLSA. While program participants can rest assured that they will not face litigation on FLSA claims, employees often bring FLSA claims in conjunction with state law claims. If the DOL confirms this limited scope, employers will still be exposed to state liability. However, in the less likely chance that the program does encompass state claims, employers will have an even stronger incentive to participate. Multiple state attorneys general, including the Washington State Attorney General, have expressed concerns that the PAID program will thus incentivize employees to waive state rights. It remains to be seen whether PAID program employers will

require employees to sign some form of state cause of action to ensure their participation avoids all litigation.

e. Overtime Exemption Revision Still on the Horizon

In late 2017, the Department of Labor's attempt to increase minimum salary thresholds for exempt employees hit a roadblock in the court system. 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 FLSA. That threshold amount would automatically increase every three years, beginning in 2020.

However, the Eastern District of Texas held that the Department exceeded its rulemaking authority and declared the new rule invalid. *See Nevada v. U.S. Dep't of Labor*, No. 4:16-CV-731 (E.D. Tex. Aug. 31, 2017). Though the Department is appealing this decision, it is waiting to move forward with the appeal until it revises the regulation.

Since then, all eyes have been on the Department to issue a revised rule. No rule has been released as of yet, but Secretary Acosta told the Senate Appropriations Committee on April 12, 2018 that revision of the rule remains a priority. In a regulatory roadmap released on May 9, the Department announced that it will issue a notice about its plan to revise the Overtime Final Rule sometime in September 2018. While it is unknown if the new rule will keep the old numbers, which nearly doubled current thresholds, employers should prepare for some form of a salary hike.

f. DOL Embraces Economic Realities in New Unpaid Intern Test

The Department of Labor announced on January 5, 2018 that it will revise its approach to distinguish interns from employees for purposes of FLSA coverage. While the FLSA requires that all employees are paid for their work, an unpaid internship is permitted in certain circumstances. Under the Department's 2010 rule, internships had to adhere to all of the following six factors:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Under the prior test, the absence of one factor meant that the internship fell under the FLSA and had to be a paid position. Many circuit courts recognized that this harsh test was inappropriate in many applications. Instead, courts began applying a more flexible rule referred to as the "primary beneficiary" test. The primary beneficiary test aims to examine the realities of the employer-intern relationship and determine whether the primary benefit is the employer's economic benefit or the intern's education benefit. This test provides seven factors for courts to consider, but the list is non-exhaustive. Thus, the failure to meet one criteria does not automatically mean the intern must be considered an employee. The Ninth Circuit was the fourth circuit to apply the primary beneficiary test over the rigid DOL rule in *Benjamin v. B & H Educ., Inc.*, 877 F.3d 1139 (9th Cir. 2017).

In an effort to clarify the correct approach, the Department officially embraced the primary beneficiary test in a new version of Fact Sheet # 71, which provides the test's seven factors as follows:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

This new test is important for any employer that uses unpaid interns. Employers should ensure that their internship programs meet the primary beneficiary test requirements in order to avoid wage obligations.

g. EBSA Factsheet Shows Increased ERISA Enforcement

In March, the Employee Benefits Security Administration ("EBSA"), a DOL agency, released its annual factsheet on its investigatory and enforcement actions. EBSA handles investigations and civil and criminal enforcement actions for violations of ERISA's fiduciary duty provisions.

The 2017 factsheet shows that EBSA is increasing its enforcement activities. EBSA recovered $1.1 billion in direct payments for plans, beneficiaries, and plan participants, a 42% increase from 2016. EBSA's 2017 recoveries include $682.3 million recovered through enforcement actions, which is close to double the amount recovered in 2016. EBSA also filed 50 civil cases, concluded 79 criminal cases in either a conviction or guilty plea, and secured indictments against 113 individuals.

EBSA has focused on an enforcement initiative that ensures pension plan fiduciaries have adequately contacted a missing plan participant. The participants have earned, but are not receiving, vested pension plan benefits. EBSA's enforcement initiative requires plan fiduciaries to search for these participants, inform them of their payable retirement benefits, and facilitate payment.

EBSA's increased enforcement is a good reminder for employers to ensure ERISA plans are up to date and compliant.

2. National Labor Relations Board

a. Board Composition

The National Labor Relations Board ("NLRB" or the "Board") maintained its Republican majority with the appointment of John F. Ring in August. Until last year, Democrats have held the Board's majority since 2007. All three Republican Members hold positions until 2020 at the earliest.

With the new appointment of Ring, the current terms of the existing Board Members are as follows:

- John F. Ring, Chairman (Republican) – Term expires December 16, 2022
- Mark Pearce, Member (Democrat) – Term expires August 27, 2018
- Lauren McFerran, Member (Democrat) – Term expires December 16, 2019
- Marvin Kaplan, Member (Republican) – Term expires August 27, 2020
- William Emanuel, Member (Republican) – Term expires August 27, 2021

b. "Quickie Election Rule" on Chopping Block

During the Obama Administration and under the Board's Democratic majority, the NLRB finalized a rule that shortened the period of time required between a union petition and a union

election. Those on the side of management have referred to the 2014 rule as the "quickie election rule" or the "ambush election rule." The key effects of the rule were the elimination of the requirement that 25 days elapse between the NLRB ordering an election and the election being held, permitting the filing of documents electronically, and the delay of disputes of voter eligibility until after the election.

Under the new administration, the Board is expected to unwind this policy, among other pro-labor positions. Because the 2014 election rule was promulgated through rulemaking, not through a court decision, the Board can review it immediately without waiting for a case that brings it into question. In December 2017, the Board made a request for information with a deadline for responses of February 12, 2018. The NLRB asked for feedback on whether the rule should be retained as is, modified, or fully rescinded. Since then, the Board has extended the deadline twice, first to March 19 and then to April 18.

More than 6,000 responses were received by the April deadline. Employers have argued against the rule because it does not allow enough time to effectively counter a union, whereas labor groups generally favor the removal of an unnecessary delay for elections. If the Board sides with management as expected, employers will be in a much better position to counter a union's message before elections.

3. Equal Employment Opportunity Commission

a. Composition

Of the five seats on the Equal Employment Opportunity Commission ("EEOC" or the "Commission") and the position of General Counsel, only three spots are currently filled. 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. Commissioner Chai R. Feldblum, a Democrat was also originally appointed by Obama and renominated for another five-year term by Trump in December 2017. Charlotte A. Burrows, a Democrat, holds the third and final occupied seat on the Commission.

Trump's two nominees for the Commission, Janet Dhillon and Daniel Gade, will create a Republican majority once they are confirmed. Both Dhillon and Gade have passed the Senate Committee on Health, Education, Labor & Pensions, but still have to receive a full Senate vote. Dhillon, who previously practiced at Skadden, Arps, Slate, Meagher & Flom LLP and Burlington Stores, Inc., has been opposed by the NAACP for being too lenient on businesses. Gade served in the Iraq War and advised the George W. Bush Administration on veteran and disability policy.

However, the seat that garnered the most attention is that of General Counsel. In March 2018, Trump nominated Sharon Fast Gustafson to serve in the position, and her confirmation hearing in front of the Senate Committee on Health, Education, Labor & Pensions was held on April 10, 2018. Gustafson is most well-known for representing a UPS driver in a pregnancy discrimination case that went to the Supreme Court. It is expected that the three new incoming Republicans will put a conservative slant on the EEOC's future positions.

b. #MeToo Movement Has Not Increased EEOC Charges, But Will Lead to Commission Guidance

Acting Commissioner Lipnic stated at a conference on March 13, 2018 that the #metoo movement has not resulted in a notable increase of sexual harassment complaints. The movement, which promotes public awareness of sexual harassment, has led to increased public discourse as well as calls for policy and legislative change. However, despite an increase in public and high-profile allegations of harassment, formal complaints with the EEOC have not followed suit. Lipnic noted that this does not mean cases aren't being pursued. Insurance companies have reported an increase in sexual harassment demand letters and victims may also be engaged in mediation, arbitration, or alternative dispute resolution.

The #metoo movement has also shone a light on the EEOC's enforcement guidance on sexual harassment, which has not been updated since the 1990s. Lipnic announced that the Commission has revised its enforcement guidance and the revisions are currently under review by the Office of Management and Budget. No timeline has been given for the release of the eagerly awaited revised guidance.

c. Pay Data Initiative for EEO-1 Report May Be Revised

In September 2016, the EEOC revised its EEO-1 filing requirements to mandate inclusion of W-2 data. The Commission intended to use this data on how different workers are paid to develop and guide initiatives to close the pay gap. In August 2017, however, the Office of Management and Budget told the Commission the new requirement ran afoul of the Paperwork Reduction Act.

However, there are signs that the EEOC will simply revise the pay data initiative, as opposed to abandon it. Commissioner Feldblum has indicated that the Office of Management and Budget may permit edits to the original EEO-1 W-2 requirement. Additionally, nominee Gustafson was asked about the pay data initiative in her nomination hearing last September and implied she may side with requiring more information. Employers required to file EEO-1 reports will want to keep an eye on how this initiative develops once Gustafson is confirmed.

d. EEOC May Breathe New Life into Wellness Plan Incentives

In 2016, the Commission finalized new rules on wellness plans that would permit employers to offer participation incentives to employees of up to 30% of the employee's health insurance premiums. The rule was opposed by representatives for both employers and employees. Employers argued that the rule violated the Affordable Care Act by imposing a ceiling on the incentives employers could offer. The AARP, on the other hand, sued to block the rule, arguing that the 30% incentive essentially compelled participation and was not voluntary as required by the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). The Commission's regulatory agenda, released in fall 2017, designated August 2018 as the target date for the release of revised wellness rules. Employers eager to implement or grow their wellness plans will want to watch for the results and ensure compliance with any accompanying limitations.

4. Federal Legislation

a. Tax Act Gives Credit for Paid Leave, Removes Deduction for Sexual Harassment NDAs

In December 2017, Congress passed the Tax Cuts and Jobs Act ("TCJA"), which went into effect on January 1, 2018 and contains multiple provisions affecting employers.

First, the TCJA established a new provision, Section 45S of the Internal Revenue Code ("Code"), that creates a tax credit for employer-paid family and medical leave. So long as employers have a written policy permitting at least two weeks of leave and pay at least 50% of an employee's normal hourly wages while on leave, employers can claim up to 12.5% of wages paid on leave as a general business credit. For each additional percentage point of wages paid, the credit increases by 0.25% to a maximum of 25%. However, this credit will not apply to wages paid in tax years that begin after December 31, 2019. This indicates that Congress is incentivizing employers to institute these leave policies, which will then be harder to remove once in place. The new credit is particularly important for Washington employers, since recent state legislation, described further below, mandates 12 weeks of paid family and medical leave for eligible employees.

Second, Section 13307 of the TCJA, "Denial of Deduction for Settlements Subject to Nondisclosure Agreements Paid in Connection with Sexual Harassment or Sexual Abuse," amends Code Section 162 to make sexual harassment and sexual abuse settlements, payments, and attorneys' fees non-deductible if the settlement or payment is covered by a nondisclosure agreement. This embraces the growing nationwide trend of discouraging agreements that force sexual harassment claims to be resolved privately. Recent Washington legislation, described further below, also partakes in this initiative.

Third, the TCJA narrowed the availability of deductions on top executives' pay. Section 162(m) of the Code permits companies with publicly traded equity to take up to a $1 million tax deduction for the salaries of principal executive positions, including CEO and CFO. However, performance-based pay, including bonuses and stock options, and commission-based pay are excluded. Companies could sidestep Section 162(m)'s $1 million ceiling with these two loopholes. The TCJA closed these loopholes and also made the limits applicable to companies with publicly traded debt. Further, the TCJA imposes a new 21% tax on executive compensation over $1 million.

Finally, the TCJA eliminates deductions for business-related entertainment expenses, but retains a deduction for business-related meals. The pre-TCJA tax code permitted businesses to deduct up to 50% of meals and entertainment expenses, with some exceptions permitting a 100% deduction. The Code created a subjective standard for determining what was deductible and thus was ripe for abuse. The TCJA addresses this subjectivity by amending Code Section 274 to eliminate all deductions for business-related entertainment. Business-related meals, however, still qualify for the 50% deduction.

b. Rescission of DOL's Fair Pay and Safe Workplaces Rule

In 2014, then-President Obama signed an executive order that requires contractors bidding for federal jobs to disclose citations for labor law violations. In 2016, the Department of Labor passed the Fair Pay and Safe Workplaces rule to implement this executive order. In March, President Trump signed his own executive order revoking Obama's order. Further, the House of Representatives has approved a measure that would halt implementation of the Fair Pay and Safe Workplaces rule and the Senate is expected to follow suit.

Enacted to improve compliance with labor laws, the Fair Pay and Safe Workplaces rule has also been referred to as the "blacklisting" rule. Those opposing the rule argue that it unfairly permits past labor law violations to be held against a contractor without any due process because the violations have not necessarily been adjudicated. Under the new administration, it seems that these arguments have predominated.

c. Ending Forced Arbitration of Sexual Harassment Bill

The Ending Forced Arbitration of Sexual Harassment Act of 2017 is another example of the many judicial and legislative measures taken recently in response to the #metoo movement. The Act, H.R. 4734, was introduced to the House of Representatives by Rep. Cheri Bustos (D-IL) on December 26, 2017. If enacted, the Act will exclude sexual harassment claims from employee arbitration agreements. This mirrors the recent Washington state legislation that prevents employers from requiring private arbitration of sexual harassment claims. Questions have been raised about whether the state legislation spreading across the country is actually preempted by the Federal Arbitration Act, which declares arbitration agreements to be valid and enforceable. Federal legislation will hopefully clear up the preemption question and thus permit states to pursue these important employee protections.

d. "Buy American, Hire American" Brings Immigration Measures to Employment

On April 18, 2017, President Trump signed the Buy American, Hire American executive order, bringing his immigration initiatives into the employment sphere. The order targeted the improper employment of foreign workers. Proponents of the order believe that strict immigration policing will raise wages and decrease unemployment for American workers. On May 11, 2018, the Department of Justice and U.S. Citizenship and Immigration Services released a statement saying they will collaborate to determine and prevent employers from fraudulently or discriminatorily bringing foreign employees into the United States. Rigorous immigration enforcement will mean more scrutiny on visa-holding employees, so employers with foreign workers will need to make sure their documentation processes are equally as rigorous.

B. State and Local Law Developments

1. Washington Minimum Wage and Paid Sick and Safe Time

As described in previous updates, Initiative 1433, approved by Washington voters in 2016, provides for increases in the state minimum wage and requires Washington employers to provide paid sick leave as of January 1, 2018.

a. State Minimum Wage

On January 1, 2018, the state minimum wage increased to $11.50 per hour. The minimum wage will increase to $12 per hour in 2019, and again to $13.50 per hour in 2020. Starting in 2021, the minimum wage will increase with inflation.

2. State Paid Sick and Safe Time ("PSST") Requirements

As of January 1, 2018, Washington employers are required to provide employees with paid sick and safe time leave. This requirement applies to all employees covered by Washington's Minimum Wage Act. Employees who meet the "white collar" exemptions (executive, administrative, professional and outside sales employees) are not covered, but all nonexempt employees are covered, even temporary and casual employees.

Requirements include the following:

- Paid sick leave accrues at a minimum rate of one hour of paid sick leave for every 40 hours worked as an employee.
- An employee is entitled to use accrued paid sick leave beginning on the 90th calendar day after the start of employment.
- Unused paid sick leave of 40 hours or less must be carried over to the following year.
- Employers may not cap sick leave accrual or use, but they may limit carry over of paid sick leave to 40 hours between calendar years.
- Employers are allowed to provide employees with more generous carryover and accrual policies.
- Paid sick leave must be paid to employees at their normal hourly compensation.

Employees may use 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.

Employers should be mindful that the law contains an anti-retaliation provision, which prohibits employers from adopting or enforcing any policy that counts the use of authorized paid sick leave as an absence that may lead to or result in discipline against an employee. It is also unlawful for an employer to interfere with, restrain, or deny the exercise of any employee right provided under or in connection with the Minimum Wage Act. This means that an employer may not use an employee's exercise of any of the rights under the MWA as a negative factor in any employment action such as evaluation, promotion, or termination, or otherwise subject an employee to discipline for exercising rights under the MWA.

Employers must provide a notice to each current employee and to each new employee on or before the first day of work, containing the following information:

- The employee's entitlement to PSST,
- The rate at which PSST will accrue,
- The authorized purposes for which PSST may be used, and
- That retaliation for use of PSST (and the employee's exercise of other rights under the employment laws) is prohibited.

The Washington State Department of Labor and Industries (L&I) has posted sample policies for employers on their website, but it is recommended to consult with legal counsel if you are modifying an existing policy or have employees in Seattle, which has its own paid sick leave ordinance. *See* https://www.lni.wa.gov/WorkplaceRights/LeaveBenefits/VacaySick/EmployerInfo.asp.

It is important to note 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.

3. Washington Paid Family and Medical Leave Insurance Program

Washington has enacted a paid family and medical leave insurance program that provides eligible employees with 12 weeks of partial wage replacement for the birth or adoption of a child or for the serious health condition of the employee or the employee's family member, or payment for 16 weeks for a combination of both.

The program will be funded by premiums paid by employers and by employees through payroll assessments beginning on January 1, 2019. The law sets the initial premium rate at 0.4 percent of an employee's taxable wage base. Employees will pay 63 percent of the total premium rate, and employers will pay 37 percent, although employers may opt to pay more. For example, a full-time employee earning $15 per hour will contribute $1.51 per week, while the employer will contribute 89 cents. The funding mechanism will allow eligible employees to apply for benefits beginning on January 1, 2020.

The program covers all employers in the state. Employers with fewer than 50 employees will not be required to pay the employer share of the premium, but they may opt to do so. Employers with 150 or fewer employees will also be eligible for state assistance to cover premiums. Employees are eligible for benefits once they have completed 820 hours of work for any employer in Washington in the qualifying period. An employee establishes a qualifying period by working four out of five calendar quarters prior to the leave application.

4. Washington Equal Pay Act Update

The legislature recently updated Washington's Equal Pay Act for the first time since 1943 by passing House Bill (HB) 1506. The law, among other things, prohibits gender-based pay discrepancies between employees of the same employer who are "similarly employed"—that is, they perform jobs requiring similar skill, effort, and responsibility under similar working conditions. Employers cannot rely on an employee's previous wage or salary to justify a pay

discrepancy between genders. The law also prohibits employers from limiting or depriving employees of career advancement opportunities that would otherwise be available on the basis of gender.

The Washington State Department of Labor and Industries will investigate alleged violations. If a violation is found, the employer can be liable to the aggrieved employee for actual damages, statutory damages equal to actual damages or $5,000 (whichever is greater), and interest. Additional penalties may be imposed if the employer has engaged in a pattern of violations. The statute also creates a private claim for employees to pursue their own lawsuits. Although the statute of limitations is three years, employees may recover wages for up to four years from the time of their complaint.

The law also forbids employers from requiring employees not to disclose their wages and prohibits retaliation against employees for inquiring about or discussing wages under certain circumstances.

5. Washington Nondisclosure Pertaining to Sexual Harassment Legislation

Senate Bill 5996 prohibits employers from requiring employees, as a condition of employment, to sign nondisclosure agreements that prevent them from disclosing sexual harassment or sexual assault in the workplace, or at work-related events coordinated through the employer, between employees, or between an employer and an employee off the employment premises. Such agreements are void and have no legal effect. However, the law does permit nondisclosure agreements as part of settlements of sexual harassment claims. The law also makes it an unfair practice under the Washington Law Against Discrimination ("WLAD") for an employer to retaliate against an employee for disclosing or discussing work-related sexual harassment or assault.

6. Right to "Publicly" Pursue Discrimination Claims

The legislature also recently passed Senate Bill 6313, which makes certain provisions in employment agreements void and unenforceable, such as the following:

- A requirement that employees waive their right to publicly pursue a claim under the WLAD or federal antidiscrimination laws, or waive their right to file complaints with the appropriate state or federal agencies; or
- A requirement that employees resolve discrimination claims in a confidential dispute resolution process.

On its face, the law prohibits employment agreements that require employees to resolve discrimination complaints via private, confidential arbitration. Mandatory arbitration clauses are allowed, however, if there is not an accompanying confidentiality requirement.

7. Fair Chance Act (Ban the Box)

Two years after the amendments to Seattle's ban-the-box ordinance took effect, the Washington Legislature enacted a statewide ban-the-box law. House Bill 1298 prohibits employers from

inquiring or otherwise obtaining information about an applicant's arrest or conviction history until after they determine that the applicant is otherwise qualified for the position. Once an employer has determined that an applicant is otherwise qualified, it may obtain that information.

The law also prohibits employers from advertising employment openings in a way that excludes people with criminal records from applying. Ads that state "no felons" or "no criminal background" or otherwise convey similar messages are prohibited. The law does not create a private claim and may be enforced only by the Washington Attorney General's Office.

Washington is the 11th state to enact a "ban the box" law that prohibits public- and private-sector employers from asking applicants about arrests or convictions before conducting an initial screening to identify qualified applicants. Employers should begin reviewing their hiring practices, application materials, and job announcements now to ensure they are compliant.

8. Washington State Amends Domestic Violence Leave Law

The Washington State legislature recently passed House Bill 2661, which amends the Domestic Violence Leave Law to require employers to provide reasonable safety accommodations to victims of domestic violence, sexual assault, or stalking and incorporates additional prohibitions on discriminating or retaliating against actual or perceived victims of domestic violence. The bill was signed into law by Governor Inslee on March 13, 2018, and went into effect on June 7, 2018.

Washington's existing Domestic Violence Leave law applies to all Washington employers and provides that employees who are victims of domestic violence, sexual assault, or stalking, or have a covered family member who is such a victim, may take an unpaid leave of absence for the following reasons:

- to seek legal or law enforcement assistance or remedies to ensure the health and safety of the employee or the employee's family members;

- to seek treatment by a health care provider for physical or mental injuries caused by domestic violence, sexual assault, or stalking, or to attend to health care treatment for family members who are victims;

- to obtain, or assist a family member in obtaining, assistance from social services programs, such as a domestic violence shelter or rape crisis center;

- to obtain, or assist a family member in obtaining, mental health counseling; or

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

Amendments Requiring Reasonable Safety Accommodations

The recent amendments go a step further and require employers to make "reasonable safety accommodations" for employees who are victims of domestic violence, sexual assault, or

stalking, or who have family members that are victims, absent undue hardship to the employer (defined as significant difficulty or expense). "Reasonable safety accommodations" may include changing the employee's work phone number, email address, or work station; transfer to an alternate work site; reassignment; implementation of locks or safety procedures; and other adjustments to the workplace or employee's situation.

The amendments allow an employer to request verification of the need for a safety accommodation, including verification that:

- the employee or his or her family member is a victim of domestic violence, stalking or sexual assault; and

- the safety accommodation the employee is requesting is for the purpose of protecting the employee or family member because of victim status.

Such verification can be limited to an employee's written statement. In addition, the amendment permits job applicants (rather than just employees) to bring a claim for damages against a prospective employer for violation of the law.

An employer is not required to make a reasonable safety accommodation if the employer can show that the accommodation would pose an undue hardship on the employer's business. "Undue hardship" is defined as an action requiring significant difficulty or expense.

Amendments Prohibiting Discrimination and Retaliation

The amendments also prohibit employers from refusing to hire an otherwise qualified individual because the individual is an actual or perceived victim of domestic violence, sexual assault, or stalking. Further, employers must not discharge, threaten to discharge, demote, suspend or in any manner discriminate or retaliate against an individual because the individual is an actual or perceived victim of domestic violence, sexual assault, or stalking.

9. Local Ordinances

a. Local Minimum Wage/Compensation Rates

Local minimum wage and compensation rates have recently increased in several municipalities. The table below provides the rates as of January 1, 2018.

Municipality	**Minimum Wage**
Tacoma	$12 per hour
SeaTac	$15.64 per hour for hospitality and transportation employees within the city
Seattle	For large employers (over 500 employees): o $15 per hour for large employers that contribute to medical benefits; o $15.45 per hour for large employers that do not contribute to medical benefits.

	For small employers (500 or fewer employees): o $11.50 per hour for small employers that contribute to medical benefits; o $14.00 per hour for small employers that do not contribute to medical benefits.

b. Seattle Paid Sick and Safe Time Requirements

Seattle recently amended its PSST ordinance to align with Washington Initiative 1433. The amended legislation was approved by Seattle City Council on December 11, 2017 and went into effect on January 14, 2018. Seattle's Office of Labor Standards ("OLS") has proposed administrative rules to reflect the amended ordinance, which are more favorable to employees to align with existing PSST rules or policies.

Currently, Seattle PSST rules cover all employees working in Seattle, including hourly and overtime-exempt employees, for an employer of any size. Employees who occasionally work in Seattle are covered by the PSST ordinance upon working more than 240 hours in a year in Seattle.

Employees may use sick time for mental or physical illness, injury, health condition, or medical appointment, for themselves or a child, spouse, registered domestic partner, parent, parent-in-law, grandparent, sibling, or grandchild. Employees may use safe time for domestic violence, sexual assault, or stalking, as well as closure of employee's workplace or child's school/place of care for a critical safety issue, for themselves, a family member, household member, or roommate.

The OLS announced final revisions to administrative rules for the PSST ordinance, effective July 1, 2018. In addition, OLS announced a notice and comment period for a modified proposal for the rule defining "normal hourly compensation."

OLS is proposing a definition of normal hourly compensation that does not require inclusion of holiday pay and other premium rates, in contrast to the initial proposed definition. This revised definition is consistent with the approach taken by L&I and many other jurisdictions.

Members of the public have until June 19, 2018 at 5:00pm PST to comment on the modified rule for normal hourly compensation. OLS anticipates finalizing this rule by July 1, 2018.

Employers must display the workplace poster in the specific size created by OLS; the current size is 11 x 17 inches

c. Tacoma Paid Sick Leave

Tacoma paid sick leave ordinance amendments, which took effect in January 2018, largely reflect the Washington paid sick leave requirements, but apply to all employees and permit employees to use PSST for bereavement purposes as well.

Employers must update employees, electronically or in writing, regarding the amount of accrued paid sick leave they have available at least once per month.

d. SeaTac Paid Sick Leave

SeaTac's PSST ordinance applies only to certain hospitality and transportation employers.

e. Seattle City Council Repeals Tax on Largest Businesses in Effort to Alleviate Homelessness

On May 14, 2018, the Seattle City Council unanimously passed an ordinance establishing an annual tax of $275 per full-time-equivalent employee in Seattle businesses that generate more than $20 million. This covered about 585 businesses, or three percent of all businesses in the city. The ordinance was calculated to generate about $47 million annually and was set to expire on December 31, 2023. The funds generated from the tax were to be used for housing and homelessness services. This ordinance was repealed on June 12, 2018 and will not go into effect.

C. Other Developments

1. EU's General Data Protection Regulation (GDPR)

The European Union's General Data Protection Regulation (GDPR) and its strict new data breach notification requirements went into effect on May 25, 2018. This new regulation applies to all U.S.-based companies, government agencies, non-profits, and other organizations that collect personal data or behavioral information from an individual located in an EU member state. Companies should note that no financial transaction is required for the GDPR to apply; the collection of personal data, that is, personally identifiable information, triggers GDPR coverage.

Under the new data protection regime, companies will be required to limit their collection, processing, and storage of personal data. Among other requirements, they must maintain clear and accurate records of their data processing activities, document the flow of data within their organizations, and provide prompt, detailed notification in the event of a breach. Companies may be required to designate a data protection officer to advise and monitor their compliance and to determine whether a data protection impact assessment is required. Penalties vary depending on the type of violation, but can be as high as 20 million euros or 4 percent of a company's worldwide annual turnover.

Employers subject to the GDPR should be aware of new privacy notice requirements for their EU-based employees. Specifically, employers must provide more detailed information than was necessary under the previous EU data protection regime, in a concise, accessible, and understandable format. This may be accomplished by providing employees with a short privacy notice with the key privacy information and links to more detailed information for those who are interested. Alternatively, an employer can provide different privacy notices for each type of data subject. Employers may deliver the new privacy notices to employees however they deem most appropriate, as long as they are seen by all staff. Posting on noticeboards is not recommended as this may not ensure that the notices are seen by all staff.

Article 13 of the GDPR sets forth the required information that must be provided to data subjects, which include employees and other staff:

- The employer's name and contact details, and the Data Protection Officer's contact details (if applicable);
- The purposes and legal basis of processing;
- The categories of personal data concerned;
- The recipients of staff personal data and, if such data is transferred outside the EU, the protective measures to safeguard such transfers;
- Retention periods for such data;
- Details of data subject rights (including, among other things, rights to correct and access their information and ask for it to be erased); and
- The right to lodge a complaint with a data protection authority.

Employers should also ensure that their employee termination and hiring and recruiting processes are updated to reflect the new requirements. HR professionals are most likely to encounter the GDPR through whistleblower employees, compliance hotline complaints, and business partner or customer requests regarding compliance. Employers should provide training to employees at onboarding and on a recurring basis to ensure compliance with the new data security requirements.

III. CASE LAW DEVELOPMENTS

A. Supreme Court

1. The Supreme Court Upholds Employment Agreements Requiring Arbitration

In May 2018, the Supreme Court held that arbitration agreements must be enforced pursuant to the Federal Arbitration Act (“FAA”), and neither the FAA’s saving clause nor the National Labor Relations Act (“NLRA”) restricts enforcement. *Epic Sys. Corp. v. Lewis, Nos*. 16-285, 16-300, 16-307, __ S. Ct. __, 2018 WL 2292444 (May 21, 2018). The Court considered the issue raised in *Epic Systems Corp. v. Lewis*, consolidated with *Ernst & Young v. Morris* and *National Labor Relations Board v. Murphy Oil USA, Inc*. In a 5-4 opinion authored by Justice Neil Gorsuch, the Court held that arbitration agreements that require parties to arbitrate individually and to waive their rights to class or collective actions are enforceable.

Background

The three consolidated cases are substantially similar. The Ninth Circuit focused on *Epic Systems*, where the plaintiff filed a class action wage-and-hour claim against his former employer. The employer moved to compel arbitration as per the terms of its employment agreement, which mandated that disputes be resolved through individual arbitrations. The district court granted the motion to compel arbitration.

The Ninth Circuit reversed the district court’s ruling. The court held that the FAA, which generally requires courts to enforce arbitration agreements, did not control because the

arbitration clause was impermissible under the NLRA. Specifically, the Ninth Circuit ruled that pursuing claims as a class or collective action is a "concerted activity," which is protected by Section 7 the NLRA.

The Opinion of the Court

The Supreme Court disagreed and reversed the Ninth Circuit's ruling.

The majority held that the NLRA was narrow in its scope, protecting only employee rights to organize unions and to bargain collectively, without addressing class or collective action procedures. The court considered the language of Section 7, which provides employees with "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." The Court noted that Section 7 does not contain a right for class or collective actions on its face. Absent such language, the "other concerted activities" catchall should be read narrowly in light of its surrounding language. The Court held that the limited protections of the NLRA do not include the "highly regulated, courtroom-bound activities of class and joint litigation."

In its opinion, the majority considered statutory sections that define regulatory regimes for union organization and bargaining, noting that Congress failed to adopt similar provisions for the adjudication of class or collective actions. The Court found it "hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about . . . class and collective action procedures" if Congress intended Section 7 to create rights to pursue class and collective actions. The Court thus concluded that the NLRA did not limit the FAA's mandate that courts enforce arbitration agreements according to their provisions, which may require individual arbitration and the waiver of class or collective actions.

"The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written," Gorsuch wrote.

Takeaway for Employers

Although the *Epic Systems* holding is a win for employers seeking to enforce agreements mandating individualized arbitration, arbitration agreements remain subject to traditional and generally applicable contract defenses, such as fraud, duress or unconscionability.

In addition, the dissent in *Epic Systems* underscored that the majority opinion did not jeopardize discrimination complaints asserting disparate-impact or pattern-or-practice claims that call for proof on a group-wide basis. It is unclear whether such claims can be brought on behalf of a class where an employment contract would otherwise compel individual arbitration.

2. The Supreme Court Holds that Service Advisors at Automobile Dealerships Are Exempt from FLSA Overtime Requirements

In *Encino Motorcars LLC v. Navarro et. al*, the divided Supreme Court held that service advisors at car dealerships are exempt from the Fair Labor Standards Act ("FLSA") overtime requirements. 138 S. Ct. 1134 (2018). The majority opinion, authored by Justice Clarence

Thomas and joined by Chief Justice John Roberts and Justices Samuel Alito, Anthony Kennedy, and Neil Gorsuch, reversed a Ninth Circuit ruling providing FLSA protections for such employees. The key issue at hand was whether service advisors constituted "salesm[e] . . . primarily engaged in . . . servicing automobiles."

Background

Hector Navarro had been hired as a service advisor by Encino Motorcars, LLC, a Mercedes-Benz car dealership in Los Angeles. Service advisors were hired to meet and greet car owners, respond to owners' complaints with repair service suggestions, and provide cost estimates. Navarro and other service advisors worked at least 55 hours per week and sought overtime compensation for the hours worked over 40, as required by the FLSA overtime provision.

The FLSA exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" at a covered dealership from its overtime pay requirement. In 1961, Congress exempted all car-dealership employees from the FLSA's overtime pay requirement. In 1966, however, Congress limited the exemption to care salesmen, mechanics, and partsmen. In 2011, the Department of Labor ("DOL") instituted a regulation that provided FLSA coverage to service providers.

Navarro and the other plaintiffs claimed Encino Motors violated the FLSA by failing to pay them overtime wages. The federal district court dismissed the claim, holding that service advisors were exempt from the FLSA. The Ninth Circuit reversed the district court in reliance on a 2011 DOL regulation under which service advisors were protected by the FLSA. This case was brought before the Supreme Court in 2016, and the Court vacated the Ninth Circuit decision, holding that the DOL's regulation was invalid for failing to provide an explanation for its departure from the long-standing exemption of service advisors from the FLSA. The case went back to the Ninth Circuit which applied a narrow interpretation to the FLSA exemptions and again held that service providers are not exempt.

The Opinion of the Court

After the second hearing before the Supreme Court, the majority again reversed the Ninth Circuit on this issue and held that service providers are exempt from FLSA overtime requirements. The Court rejected the Ninth Circuit's principle that the FLSA should be construed narrowly, asserting that with no "textual indication" that its exemptions should be construed narrowly, they should be given a "fair (rather than a narrow) interpretation." The Court held that "[a] service advisor is obviously a salesman" who sells car services to car owners.

3. The Supreme Court Reverses Sixth Circuit Decision for Failure to Apply "Ordinary Contract Principles" to Collective Bargaining Agreement

In *CNH Industrial v. Reese*, the Supreme Court reversed the Sixth Circuit's decision that a collective bargaining agreement vested health care benefits for life in certain retirees, holding that the Sixth Circuit erred in its analysis of the agreement by failing to apply ordinary contract principles. 138 S. Ct. 761 (2018).

Background

In 1998, CNH Industrial N.V. and CNH Industrial America LLC (collectively, "CNH"), entered into a collective bargaining agreement with its employees. Under the agreement, health care benefits under a group benefit plan were provided to certain "[e]mployees who retire under the . . . Pension Plan." Other benefits, such as life insurance, terminated upon retirement. The agreement contained a general durational clause stating that it would expire in 2004.

In 2004, upon the expiration of the agreement, a class of CNH retirees and surviving spouses sought an injunction preventing CNH from changing their health care benefits and a declaration that the benefits vested for life. While the lawsuit was pending, the Supreme Court decided *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015), which held that collective bargaining agreements must be interpreted "according to ordinary principles of contract law." The district court subsequently granted summary judgment to CNH based on Tackett, but, upon reconsideration, granted summary judgment to the retirees.

The Sixth Circuit affirmed the decision. The court noted that the agreement was "silent" on the issue of health care benefits vesting for life and that the general durational provision was inconclusive for two reasons: (1) the agreement stated that coverage of certain benefits, such as life insurance, terminated at a different time that other provisions, and (2) the agreement "'tied' health care benefits to pension eligibility." The court concluded that the agreement was therefore ambiguous, which allowed the court to refer to extrinsic evidence that supported a finding that benefits were vested in retirees for life. The court recognized that it was using the same analysis to "infer vesting" as it used in *International Union et al. v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), but claimed that this did not conflict with the Supreme Court's holding in Tackett requiring the application of ordinary principles of contract law.

The Opinion of the Court

The Supreme Court disagreed. In a per curiam opinion, the Court held that the Court of Appeals' application of Yard-Man inferences was, in fact, inconsistent with Tackett. While acknowledging that, under ordinary principles of contract law, when a contract is ambiguous, courts may consult extrinsic evidence to determine the intention of the parties, the Court held that the 1998 agreement was not ambiguous. The agreement at issue is ambiguous only if "it could reasonably be read as vesting health care benefits for life." The Court stated that the agreement could only be viewed as ambiguous by employing Yard-Man inferences rejected by Tackett because they are not "established rules of interpretation."

4. Lamps Plus Asks Whether Silent Arbitration Agreements Allow Class Actions

Also on class action, *Lamps Plus, Inc. v. Varela* asks the Supreme Court whether class arbitration is permitted when it is not expressly prohibited by the applicable arbitration agreement. 701 F. App'x 670 (9th Cir. 2017), cert. granted, No. 17-988, ___ S. Ct. ___, 2018 WL 398496 (Apr. 30, 2018).

On August 3, 2017, the Ninth Circuit Court of Appeals affirmed the District Court for the Central District of California's decision to permit class arbitration for employees' data breach

claims. The Ninth Circuit held that class arbitration is permitted, so long as the ambiguous arbitration agreement could be reasonably read to allow it. However, the Circuit did acknowledge that the Supreme Court had previously held that "a party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id*. at 672 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010)). Despite this, the Ninth Circuit found that a contract that does not expressly mention class arbitration is not "silent" for purposes of Stolt-Nielson. "'[S]ilence' in [the] Stolt-Nielsen analysis constituted more than the mere absence of language explicitly referring to class arbitration; instead, it meant the absence of agreement." *Id*. The Circuit found that the breadth of the arbitration agreement plausibly covered class proceedings. *Lamps Plus* will add nuance to the overarching question the Supreme Court's holding in Epic Systems that employers can outright bar class arbitration.

5. Supreme Court to Decide Whether Public-Sector Unions May Require Employees Who Are Not Members to Pay Fees for Collective Bargaining

On February 26, 2018, the Supreme Court heard arguments *in Janus v. American Federation of State, County and Municipal Employees Council 31, et al*. 851 F.3d 746 (7th Cir. 2017), *cert. granted*, ___S. Ct. ___, 2017 WL 2483128. The Court is expected to decide whether public-sector unions may collect agency fees applied toward collective bargaining costs from non-union members very soon. Justice Neil Gorsuch, who has consistently voted with the more conservative justices on the Court, is expected to provide the fifth vote against the unions.

B. Other Federal Decisions

1. The Ninth Circuit Holds that Class Action Status Is Not Appropriate for Cases Involving Variations in State Laws

In *In re Hyundai and Kia Fuel Econ. Litig.*, 881 F.3d 679 (9th Cir. 2018), the Ninth Circuit held that class action status is not appropriate for cases involving variations in state law and vacated a district judge's approval order of a $210 million settlement in January 2018. The class action, certified in 2015, consolidated claims against Hyundai Motor America Inc. and its affiliate Kia Motors for overstating fuel efficiency estimates for certain vehicles from 56 cases across multiple states.

The Opinion of the Court

A split three-judge panel held that the class should not have been certified for settlement purposes because predominating common questions required for class certification under Federal Rule of Civil Procedure 23(b)(3) were defeated by state law variations. The Ninth Circuit ruled that the district court had erred in concluding that the settlement of claims eliminated the necessity to conduct a choice of law analysis and to ensure that all class action certification requirements were met.

The court held that "permitting class designation despite the impossibility of litigation," limited the ability of class counsel to negotiate because they "could not use the threat of litigation to

press for a better offer, and the court [faced] a bargain proffered for its approval without benefit of adversarial investigation."

In her dissent, U.S. Circuit Judge Jacqueline Nguyen stated that the defendants' common course of conduct was sufficient to establish predominance. She claimed that the majority's ruling "deals a major blow to multistate class actions," and diverges from well-established doctrine in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) by putting the burden of proof on the proponent to establish that California law should be applied to all class members' claims instead of placing the burden with the proponent of foreign law. Some plaintiffs and defendants in the case both asked the Ninth Circuit to reconsider the matter through a Petition for Rehearing En Banc.

2. The Ninth Circuit Holds that Returning Service Member Was Entitled to Bonus Pursuant to USERRA Based on "Reasonable Certainty" Test

The federal Uniformed Services Employment and Reemployment Rights Act ("USERRA") gives employees who leave work to enter active military service the right to reinstatement when they are released from active duty. The employee is entitled not only to the job he or she left, but also to be reinstated into the position he would have held if his employment had not been interrupted by military service. This is called the "escalator principle"—the analogy being that the employee is entitled to be placed back on the employment status escalator where he would have been if he had not stepped off to enter military service. In *Huhmann v. Federal Express Corporation*, 874 F.3d 1102 (9th Cir. 2017), the Ninth Circuit considered how to apply this principle when advancement depends on additional training and passing qualifying tests.

Background

Dale Huhmann was a pilot for FedEx, assigned to fly a smaller, "narrow-body" jet. FedEx had an extensive and challenging training program for pilots like Huhmann to become qualified to fly a larger, "wide-body" jet. Huhmann was selected for the training, but was recalled to active military service just before his training was to start. During the three years he remained on active duty, FedEx and the union that represented the pilots negotiated a new labor agreement, and FedEx offered its pilots a "signing bonus" if the new contract was ratified. The bonus for the pilots of wide-body planes was higher than the bonus for the pilots of narrow-body planes. The bonus was payable to all active pilots and those absent on military service (after they returned to FedEx). The labor agreement was ratified, and FedEx paid the bonuses to active pilots.

When Huhmann returned to FedEx at the conclusion of his military service, the company paid him the smaller bonus because he had not yet qualified to become a wide-body pilot. However, Huhmann promptly entered the training program, successfully completed it about three months later, and became a wide-body pilot. He sued FedEx, claiming entitlement to the larger bonus.

The escalator principle requires that a returning service member be given the status he would have been "reasonably certain" to have attained absent the leave for military service. To apply the "reasonably certain" criteria, courts use both a "forward-looking" test and a "backward-looking" test. First, the court must determine whether it appears that an employee would have

obtained the position if his or her employment had not been interrupted by military service. If so, the court must then determine whether, as a matter of hindsight, the person either has or would have completed the necessary prerequisites for the position. Only the first determination was in question because following his return to work, Huhmann did in fact pass the training and become a wide-body pilot.

FedEx argued that it was not reasonably certain that Huhmann would have qualified and become a wide-body pilot if he hadn't left for military service because achieving that position wasn't automatic merely based on the passage of time, but required skill, ability, and the judgment of the flight instructors.

The Opinion of the Court

The Ninth Circuit disagreed, noting that absolute certainty was not required. Pointing out that Huhmann had diverse and long experience as both a military and a civilian pilot, his past job performance was good, he was selected for the training, and trainees were given multiple opportunities to pass portions of the training they initially failed, the court concluded that it was reasonably certain that Huhmann would have become a wide-body pilot but for his absence for military service. He was therefore entitled to the higher bonus.

3. The Ninth Circuit Holds that Title VII Permits Award to Be "Grossed Up" for Income Tax Consequences

In November 2017, the Ninth Circuit Court of Appeals joined the Third, Seventh, and Tenth Circuits in ruling that trial judges have the discretion to adjust damages awards under Title VII of the Civil Rights Act of 1964 to account for higher income taxes the plaintiff will pay on a lump-sum amount received in one year versus what the taxes would have been if the amount had been paid over several years. This is sometimes referred to as "grossing up" the award for tax consequences.

In *Clemens v. CenturyLink, Inc.*, 715 F. App'x 614 (9th Cir. 2017), Arthur Clemens, Jr., sued his employer for race discrimination and retaliation in violation of Title VII. A jury found in his favor on the retaliation claim. It awarded him, among other things, damages for lost wages. The trial court denied his request that the damages award be increased to address the income tax consequences he would experience. Clemens appealed.

Remedial purpose of Title VII

Discussing whether Title VII permits such gross-up adjustments, the Ninth Circuit panel pointed out that Title VII exists in large part to make persons whole for harm caused by unlawful employment discrimination and that courts have full equitable power to accomplish that goal. The ability to grant back pay is one of those powers.

The court then noted that Title VII awards are subject to income taxes by the recipients and that a lump-sum award will sometimes push a plaintiff into a higher tax bracket than he would have been in if the compensation had been received over several years. When that happens, the result is that the plaintiff 'does not obtain full relief because he is less well off financially than if the violation had never occurred.

The Ninth Circuit joined the Third, Seventh, and Tenth Circuits, which had already ruled that trial courts have the discretion, in appropriate cases, to award an income tax adjustment. Only the District of Columbia Circuit has ruled otherwise, but that decision was very brief and did not address the "make-whole" remedial purpose of Title VII.

Although ruling that trial courts have the discretion to make an income tax adjustment, the Ninth Circuit did not consider whether such an adjustment was appropriate in Clemens's case. Instead, it sent the issue back to the trial court for consideration. In doing so, the court made clear that it 'was not suggesting that such adjustments are automatic, or even presumptively appropriate. Rather, the plaintiff has the burden of showing an income-tax disparity and justifying any adjustment.

Takeaway for Employers

The key takeaway for employers is that a successful plaintiff will not only be entitled to recover his attorneys' fees under Title VII but will also be able to recover an additional amount to cover any extra income taxes he will need to pay because of the lump-sum award. All of that comes out of the employer's pocket. An important reminder comes from the fact that the jury apparently rejected Clemens's claim of race discrimination, but found that the company retaliated against him for making complaints. That result (rejecting the underlying claim of discrimination but finding retaliation motivated by an employee's complaints) is both common and difficult for employers to defend.

4. The Ninth Circuit Holds that an Employer's Failure to Engage in Interactive Process Justified Jury Verdict

In *Dunlap v. Liberty Natural Products, Inc.*, 878 F.3d 794 (9th Cir. 2017), the employer discharged a disabled employee at the conclusion of her workers' compensation claim. The employer argued there were no available reasonable accommodations for the employee. The Ninth Circuit disagreed and upheld the jury's verdict in the employee's favor.

Tracy Dunlap was employed as a shipping clerk by Liberty Natural Products, a small business in Oregon that imported and distributed botanical products. After about four years of doing her job moving packages, she developed what is commonly referred to as "tennis elbow" in both elbows. She applied for and was awarded workers' compensation benefits for her condition. Nevertheless, she continued to work for two more years with restrictions.

One month after Dunlap's workers' compensation claim was closed, Liberty discharged her because of her perceived inability to perform the essential functions of her job. Dunlap sued under the Americans with Disabilities Act ("ADA") and the comparable Oregon state law that prohibits discrimination on the basis of disability. After a trial, a jury found that Liberty discriminated against Dunlap in violation of the ADA and Oregon state law, and awarded her $70,000 in emotional distress damages. The trial court judge added $13,200 for back pay and more than $117,000 in attorneys' fees, for a total judgment of more than $200,000. Liberty appealed.

Liberty's principal argument on appeal was that Dunlap failed to meet her burden to prove that there was a reasonable accommodation that would have enabled her to perform the essential

functions of her job. The Ninth Circuit panel disagreed. After pointing out that the ADA requires employers to make reasonable accommodations concerning an employee's disability, the court emphasized that once an employer becomes aware of the need for accommodation, it has a "mandatory obligation" to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations that would enable her to perform the essential functions of the job.

Reviewing the evidence presented at trial, the court noted the following: (1) Liberty was aware of Dunlap's disability and her desire for an accommodation; (2) there was evidence that on-site carts and other affordable assistive devices (such as a scissor lift table) were readily available to Liberty; (3) those devices would have enabled Dunlap to perform the essential functions of her job; and (4) there was evidence that Liberty discouraged the use of on-site carts and refused to consider Dunlap's proposed accommodations. That evidence was enough to uphold the jury's verdict that Liberty discriminated against Dunlap because of her disability.

Takeaway for employers

This case is a reminder that employers must engage in an interactive process with an employee who has a disability in a good-faith effort to find a reasonable accommodation that would enable the employee to do her job without imposing an undue hardship on the employer. Failing to undertake that process can expose an employer to substantial liability.

5. Ninth Circuit Holds that Employers Cannot Use Prior Salary to Justify a Pay Gap Under the Federal Equal Pay Act

In April, the Ninth Circuit held that employers cannot justify a gender pay differential using the prior salary of an employee. *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018). In an opinion by Judge Stephen Reinhardt, the en banc court overturned its 1982 ruling in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), which permitted employers to use prior salary—a "factor other than sex" —to justify pay gaps between men and women under the federal Equal Pay Act ("EPA"). In its ruling, the court sought to clarify the law and hold that "prior salary alone or in combination with other factors cannot justify a wage differential."

Background

The Fresno County Office of Education hired Aileen Rizo as a math consultant in 2009. In her previous job as a math teacher, she earned $52,630 for 206 working days. The County determined her salary through its standard operating procedure by taking her prior salary, adding five percent, and placing her in the corresponding step. Based on the calculations, she was hired at step 1 of level 1 of the hiring schedules, which corresponded to a salary of $62,133 for 196 days of work.

In 2012, Rizo learned that her male colleagues had been hired as math consultants at higher salary steps and she filed a complaint. She sued Jim Yovino in his official capacity as the Superintendent of the Fresno County Office of Education in 2014. The County moved for summary judgment in 2015, asserting that the pay discrepancy between Rizo and her male colleagues was based on her prior salary, which constituted a permissible affirmative defense. The district court denied summary judgment, explaining that the County's standard operating

procedure conflicts with the EPA because "a pay structure based exclusively on prior wages is so inherently fraught with the risk—indeed, here, the virtual certainty—that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand." The district court certified the question for interlocutory appeal.

A Ninth Circuit three-judge panel vacated the denial of summary judgment, holding that *Kouba v. Allstate Insurance Co.* permitted prior salary to serve as a factor other than sex justifying a pay disparity under the EPA. The Court subsequently granted a petition for rehearing en banc to clarify the law and the status of *Kouba*.

The Opinion of the Court

In its ruling, the Ninth Circuit held that relying on prior salary would serve to perpetuate the pay gap and "allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum." The court stated that "any other factor other than sex" is restricted to "legitimate, job-related factors such as a prospective employee's experience, educational background, ability or prior job performance." In passing the EPA, Congress sought to eliminate discrimination, and, the court stated, the use of prior salary in determining future salary cannot constitute an affirmative defense for a pay gap.

6. Ninth Circuit Holds that Under Title VII, the 90-day Period to File Suit Begins when an Individual Receives a Right-to-Sue Notice

In *Scott v. Gino Morena Enterprises, LLC*, 888 F.3d 1101 (9th Cir. 2018), the Ninth Circuit held that the 90-day period for filing a civil action referenced in 42 U.S.C. § 2000e-5(f)(1) begins when an aggrieved person is given notice of the right to sue by the Equal Employment Opportunity Commission ("EEOC"), not when the person becomes eligible to receive such notice. The court also held that the plaintiff's Title VII claims based on allegations occurring after she filed her first administrative charge are permissible only to the extent that the acts were part of a single employment practice.

In its opinion, the court explained that a claimant is required to exhaust administrative remedies by filing a charge with the EEOC (or equivalent state agency) and receiving a right-to-sue letter. The charge must be filed no later than 180 days after the allegedly illegal employment practice took place. After the administrative remedies are exhausted, a claimant has 90 days to file a civil action. In this case, the plaintiff filed a complaint in state court almost a full year after she filed her first charge with the California Department of Fair Employment and Housing, but before she had received a right-to-sue notice from the EEOC. The court confirmed that the plaintiff filed her charge in a timely manner because the 90-day period began only when she received the right-to-sue notice.

7. Ninth Circuit Holds that Seattle Ordinance Requiring Collective Bargaining with App-Based Drivers Is Not Exempt from Federal Antitrust Law

In *U.S. Chamber of Commerce v. City of Seattle*, No. 17-35640, __ F.3d __, 2018 WL 2169057 (9th Cir. May 11, 2018), the Ninth Circuit held that a 2016 Seattle ordinance requiring app-based drivers to bargain collectively was not preempted by the NLRA, but was not exempt under the

Sherman Antitrust Act. This ruling partially reversed the trial court's dismissal of the suit, but affirmed the lower court's rejection of the claim that the ordinance was preempted by the NLRA.

In December 2015, the Seattle City Council adopted Ordinance 124968 (the "Ordinance"), which requires collective bargaining between "driver coordinators" or entities such as Uber and Lyft that "hire[], contract[] with, or partner[] with for-hire drivers," and the drivers who contract with them. The Ordinance went into effect on January 22, 2016 and the U.S. Chamber of Commerce filed suit claiming that the Ordinance was preempted by the Sherman Act and the NLRA.

In considering whether the Ordinance violated the Sherman Act, the court analyzed state-action immunity, which gives states and municipalities the flexibility to adopt laws that restrict competition. To obtain state-action immunity, a state action must be (1) "clearly articulated and affirmatively expressed as state policy," and be (2) "actively supervised by the State." The court found that the Ordinance did not meet either requirement. First, the court noted the absence of statutes showing that the state legislature "contemplated allowing for-hire drivers to price-fix their compensation." Second, the court concluded that the Ordinance does not provide for "state" supervision, but rather limits supervision to a city agency. Therefore, the court concluded, that the Ordinance is not exempt from the Sherman Act.

The court did, however, agree with the lower court that the Ordinance was not blocked by the NLRA through a *Machinists or Garmon* preemption.

8. Ninth Circuit Holds that Wages May Be Averaged Over a Workweek, Instead of Calculated on an Hourly Basis to Comply with the FLSA

In November 2017, in *Douglas v. Xerox Business Services, LLC*, 875 F.3d 884 (9th Cir. 2017), the Ninth Circuit held that employers are in compliance with the FLSA as long as the wages they pay for the workweek divided by the total number of hours worked averages out to at least the minimum wage.

The plaintiffs in the case were customer service representatives who earned different rates based on the tasks performed, with one rate below the minimum wage. Xerox, the employer, would average the employees' wages for each workweek and divide them by the hours worked to ensure that they were paid the minimum wage. If there was a discrepancy, Xerox would pay the difference to meet the minimum wage requirement.

The employees argued that wages need to be determined on an hourly basis, not a workweek average. However, the court concluded that a workweek approach to calculating wages was acceptable under the FLSA. The court's ruling aligned with similar holdings in the Second, Fourth, and Eighth Circuits, as well as the D.C. Circuit.

The Ninth Circuit certified the question of whether a workweek period is in compliance with Washington's Minimum Wage Act when an employee is paid on a piecework basis (as opposed to an hourly basis) to the Washington Supreme Court. This issue was also recently addressed by the Washington Supreme Court in *Carranza v. Dovex*, 416 P.3d 1205 (Wash. 2018), where the state court rejected the workweek average approach and held that the state minimum wage statute required compensation by the hour. That case is summarized below.

9. Challenge to DOL Guidance on Tipped Employees

In February 2018, a Ninth Circuit majority voted to rehear en banc nine consolidated cases brought by former servers and bartenders alleging that their employers improperly claimed the tip credit and, as a result, failed to pay them the required minimum wage. In September 2017, a three-judge Circuit panel had decided that courts owed no deference to 2016 DOL guidance delineating when employers can claim tips toward the federal minimum wage in situations in which employees perform two jobs for the same employer.

The underlying cases are *Alec Marsh v. J. Alexander's LLC*, No. 15-15791; *Crystal Sheehan v. Romulus Inc.*, No. 15-15794; *Silvia Alarcon v. Arriba Enterprises Inc.*, No. 15-16561; *Sarosha Hogan et al. v. American Multi-Cinema Inc.*, No. 15-16659; *Nathan Llanos v. P.F. Chang's China Bistro, Inc.*, No. 16-15003; *Kristen Romero v. P.F. Chang's China Bistro, Inc.*, No. 16-15004; *Andrew Fields v. P.F. Chang's China Bistro, Inc.*, No. 16-15005; *Alto Williams v. American Blue Ribbons Holdings LLC*, No. 16-15118; and *Stephanie Fausnacht v. Lion's Den Management, LLC,* No.16-16033, each in the U.S. Court of Appeals for the Ninth Circuit.

C. Washington Supreme Court Decisions

1. Washington Supreme Court Holds that Public Employee Terminated for Sending Religious Emails at Work Met Burden in Proving First Amendment Violation

In *Sprague v. Spokane Valley Fire Department*, 409 P.3d 160, 186 (Wash. 2018), the Washington Supreme Court held that a former fire captain from the Spokane Valley Fire Department met his burden in showing that the department's restrictions on his religious speech violated the First Amendment. The department terminated the captain after he repeatedly used his work email to send religious messages to a Christian fellowship group in violation of the department's email policy. Although the policy was neutral on its face by banning all personal use of email at work, the court concluded that the policy had been applied in a manner that was not viewpoint neutral. Thus, the court remanded the case to the lower court to decide whether the discharge was justified and if not, what damages the former captain suffered.

As a general rule, public employees maintain their First Amendment right to speak freely on matters of public concern. Thus, the state may not fire or discipline an employee in a way that infringes upon the employee's interest in free speech. A public employee's right to speak, however, is not absolute. The state, as an employer, also has a legitimate interest in promoting the efficiency of the public services it performs through its employees. Therefore, a public employee's speech will be protected under the First Amendment only if it meets two criteria: (1) the employee was speaking as a citizen on a matter of public concern and (2) the employee's interest in speaking outweighs the employer's interest in restricting the employee's speech.

Nevertheless, even if those criteria are met, an employer may restrict employees' speech in a private forum so long as the restrictions are reasonable and viewpoint neutral. When the government targets particular views taken by speakers on a subject, it violates the First Amendment's requirement of viewpoint neutrality.

Background

Jonathan Sprague was a captain for the Spokane Valley Fire Department. During his employment, he started a Christian fellowship group for other firefighters. He created a list of work email addresses for 46 firefighters he thought would be interested in the fellowship's activities and began using the department's email system to send emails about these activities. Sprague's emails often cited to Bible passages and addressed topics to be discussed at the fellowship meetings, which ranged from religious topics to non-religious topics such as mental health concerns and leadership.

The fire department, however, maintained a policy that employees could use its email system for department business only and not for personal business. Nonetheless, the department had an electronic bulletin board connecting its 180 employees that was used for a variety of reasons, including personal business and concert tickets. The department also provided an employee assistance program ("EAP") for its employees and sent EAP newsletters from its insurer that covered a variety of topics such as mental health, parenting, and team building activities.

Sprague's supervisors disciplined him for his personal use of departmental emails and asked that he use his personal email address and send the emails only to the personal email accounts of others. Sprague refused to comply and the department sent a letter calling his posts "inappropriate and prohibited behavior," specifically opposing Sprague's use of religious symbols and scriptural quotations.

Sprague argued that the topics discussed in the EAP newsletters were open for discussion over the department's email system and that he was doing precisely the same thing with his email discussing the fellowship. The department took the position that the EAP newsletters were not meant to "invite comment or discussion from [department] employees," but also acknowledged that employees could respond if they had pertinent information regarding resources that other firefighters could use. Sprague was eventually terminated for repeatedly violating the email policy.

The Opinion of the Court

After reviewing the evidence, the Washington Supreme Court concluded that there was no genuine issue of material fact that the fire department had engaged in viewpoint discrimination when it applied its email policy to Sprague's speech. Accordingly, the court held that Sprague met his initial burden to show that the department's restrictions on his speech violated the First Amendment. Thus, on remand, the burden shifts to the department to show that it would have taken the same action even if the captain had not engaged in religious conduct.

In finding that the department violated Sprague's First Amendment right to free speech, the court first concluded that Sprague spoke as a citizen rather than as an employee speaking pursuant to his public duties as a fire department captain. Second, the court held that only some of Sprague's communications touched on matters of public concern. Specifically, the emails that he sent discussing the mental health and well-being of firefighters related to public safety and were matters of public concern, particularly in light of a firefighter who had recently committed suicide. Likewise, the court said that Sprague's e-mails and posts discussing leadership were also a matter of public concern.

The court reasoned that the department's business-only email policy was reasonable, but that it was applied to Sprague in a discriminatory manner that was not viewpoint neutral. In particular, the department permitted the discussion of topics such as suicide, mental health, and team-building over its e-mail system via the EAP newsletters and potential employee discussion, but prohibited Sprague from speaking on these same topics from his religious viewpoint. Once the department opened its e-mail system to discuss these topics, it could not exclude religious viewpoints on the same topic.

Takeaway for Public Employers

Public employers should take care to ensure that their neutral employment policies are actually enforced in a neutral manner. When a government employer targets particular views taken by speakers on a subject, it violates the First Amendment's requirement of viewpoint neutrality.

Although private employees do not have the same free speech protections, this case also serves as a reminder to all employers that selective enforcement of a policy may be used as evidence of discrimination or disparate treatment if an employee is ever terminated for violating that policy.

2. Washington Supreme Court Holds that Washington Minimum Wage Act Requires that Piece-Rate Agricultural Workers Are Paid Per Hour for Activities Outside of Piece-Rate Picking Work

In *Carranza v. Dovex*, 416 P.3d 1205 (Wash. 2018), the Washington Supreme Court held that under Washington law, agricultural employers who pay their workers on a "piece rate" basis for what they pick must also pay their pieceworkers for time spent performing activities outside of piece-rate picking work. A majority of the court ruled that the plain language of the Washington Minimum Wage Act ("MWA") requires employers to compensate their workers "at a rate of not less than [the applicable minimum wage] *per hour*." RCW 49.46.020(1). This statutory language, the court explained, allows agricultural workers to be paid on a piece-rate basis for the hours in which they are conducting piece-rate picking work, and requires that they are compensated for the hours of work outside of piece-rate work on a minimum-wage basis.

Background

In 2016, two plaintiffs filed a class action against Dovex on behalf of the seasonal and migrant agricultural workers hired by Dovex every summer to harvest apples, pears, and cherries in Dovex's orchards. The workers were compensated on a piece-rate basis, by which they were paid a specific amount of money per bin or lug of picked fruit. While they agreed that the piece-rate compensated them for certain non-picking tasks such as going up and down ladders, moving between trees, and emptying fruit bins, they argued that they had a right to compensation for activities that were not allegedly covered, such as transporting ladders to and from the company trailer, traveling between orchards, attending mandatory meetings or trainings, and storing equipment.

Both parties agreed that the MWA requires Dovex to pay its employees minimum wage for all hours worked and for the time that employees spend on work-related tasks outside of piece-rate picking activities. The parties disagreed, however, on how to comply with the minimum wage requirement.

The plaintiffs asserted that Dovex was required to pay its workers for each hour actually worked—paying a minimum wage per hour for activities outside of piece-rating picking in addition to the piece-rate for picking activities. Dovex contended that, under the MWA, it was not required to pay on an hourly basis, but could use the approach of "workweek averaging." Under this approach, Dovex only had to ensure that when a worker's weekly compensation was averaged across all hours worked on all tasks in a week, the average hourly rate was at least equal to the minimum wage.

The Opinion of the Court

Although the court recognized the permissibility of workweek averaging under the Fair Labor Standards Act, ("FLSA"), it underscored the distinction between the relevant FLSA language and that of Washington's MWA. The court noted that under the FLSA, "[e]very employer shall pay to each of his employees . . . in any workweek . . . wages at" not less than minimum wage. 29 U.S.C. § 206(a). In the MWA, however, the plain language states that payment of minimum wage is "per hour" as opposed to "in any *workweek*." The court therefore concluded that state law requires a right to minimum wage per hour.

The court noted a similar holding by the Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005), in which the Ninth Circuit rejected workweek averaging as compliant with the MWA and held that the statute requires employers to provide compensation on a per-hour basis for hourly employees.

In its opinion, the majority distinguished this case from *Demetrio v. Sakuma Brothers Farms, Inc.*, 355 P.3d 258 (Wash. 2015), in which the court held that workweek averaging is an acceptable method of calculating the rate of pay for employee rest break. The court noted that the question at issue was focused on mandatory rest breaks, not payment for hours worked.

After concluding that Dovex must pay its workers on a per-hour basis, the court addressed the second certified question of how to calculate the rate of pay for time spent performed on activities outside of piece-rate picking work. The court held that the rate of pay for non-piece-rate picking activities must be at least the state minimum wage or the agreed upon rate, whichever is higher.

The dissent asserted that the majority "disregards the fact that piece-rate compensation is calibrated to account for the so-called 'down time' necessarily involved in piecework." The dissent alleged that, in focusing solely on the "per hour" language of the MWA, the majority failed to consider the meaning of the word "rate" in the statute, which led to a misinterpretation of the statute. According to the dissent, "[t]he MWA prescribes a minimum wage rate per hour, which is not the same as a minimum wage that must be paid per hour." The dissent further contended that the majority "erroneously" interpreted the decision in *Demetrio*, which, "in fact . . . reinforces that the MWA allows workweek averaging of piece-rate compensation as a permissible measure of minimum wage compliance."

While the court stated that its conclusion is limited to the context of agricultural workers, it remains to be seen how this ruling may affect workers across other industries.

D. Other State Court Decisions

1. California Supreme Court Adopts "ABC" Test to Distinguish Between Employees and Independent Contractors for the Purposes of California's Wage Orders

The California Supreme Court recently set forth a new standard for distinguishing between employees and independent contractors under California's Industrial Welfare Commission ("IWC") Wage Orders. Ruling unanimously, the court embraced the "ABC" test adopted in several other jurisdictions. The ABC test places the burden on the service recipient (often referred to as the "hiring entity") to establish all three of the ABC test factors in order to establish a contractor relationship. The court rejected the long-used multifactor test, rooted in principles of agency, that was confirmed in the 1989 California Supreme Court case, S. G. *Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989), and is applicable to claims based on California's Wage Orders.

In *Dynamex Operations West, Inc. v. Superior Court*, two delivery drivers brought a putative class action lawsuit alleging that Dynamex's contracted delivery drivers were employees, not independent contractors. 416 P.3d 1 (Cal. 2018). The drivers claimed that their "misclassification" violated Wage Order No. 9 and various sections of the California Labor Code, including Labor Code Section 2802 that addresses reimbursement of "reasonable" and "necessary" business expenses. The trial court certified the class which was defined as drivers who, during a pay period, did not themselves employ other drivers and did not do delivery work for other delivery businesses or for the drivers' own personal customers.

In certifying the class of drivers, the trial court relied upon the three alternative definitions of "employ" and "employer" set forth in the applicable Wage Order, and as interpreted by the California Supreme Court in *Martinez v. Combs*, 231 P.3d 259 (Cal. 2010). In challenging class certification, Dynamex appealed. It filed a petition for a writ of mandate, arguing that the trial court had improperly based its certification decision on the definition of "employ" from the Wage Order rather than using the common law *Borello* test for ascertaining independent contractor status. The trial court and Court of Appeal rejected Dynamex's contention that the *Borello* test was the appropriate standard under California law for distinguishing employees and independent contractors.

The California Supreme Court agreed with the Court of Appeal and held that the trial court did not err in concluding that the "suffer or permit to work" definition of "employ" contained in the Wage Order may be relied upon in distinguishing between an employee or independent contractor for purposes of the obligations imposed by the Wage Order. Under the Wage Order's definition of "suffer or permit to work," the California Supreme Court concluded that to engage independent contractors, the hiring entity must establish the three factors outlined in the "ABC" test utilized in other jurisdictions. Specifically, the court adopted Massachusetts' version of the ABC test. The court stated that "the burden [is] on the hiring entity to establish that the worker is an independent contractor" and that the hiring entity must prove that the worker:

> (A) is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of such work and in fact;
>
> (B) performs work that is outside the usual course of the hiring entity's business; and
>
> (C) is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

This decision is limited to disputes brought under California's Wage Orders, which impose obligations related to the minimum wages, maximum hours, and meal and rest breaks for categories of California employees. The court expressly declined to address whether the *Borello* standard was applicable to claims under California Labor Code Section 2802 for reimbursement of expenses. The *Dynamex* decision affirmed the Court of Appeal's conclusion that "the *Borello* standard applied in determining whether a worker is an employee or an independent contractor" for claims outside the scope of the applicable wage order.

Companies doing business in California that engage independent contractors to provide services in California should consult experienced counsel to review independent contractor agreements and contracting practices. Modifications may be necessary to achieve compliance with the ABC test as used in Massachusetts.

2. California Court Allows Pay Equity Class Action to Move Forward

A California state court recently granted class certification for a pay equity action brought by women employees and former employers of Google, after initially denying class certification. *Ellis v. Google*, No. CGC-17-561299 (Cal. Super. Ct. 2017). The court's initial denial was due to an overbroad class definition and in part because the plaintiffs had failed to state their claims adequately under the California Equal Pay Act. That decision had been hailed a victory for Google and employers more generally.

Procedural History

In December 2017, the court held that a class compromised of "all women employed by Google in California" was overbroad and unascertainable, and that the claims were factually insufficient to state a claim under California's Equal Pay Act.

The court ultimately allowed the amended class complaint to proceed because the plaintiffs (a) narrowed the definition of the class, and (b) provided factual specificity to support their claims. The narrowed class included women employed by Google in California in 30 positions (including all levels), which fall within six categories of "Covered Positions": (1) Software Engineer Covered Positions; (2) Software Manager Covered Positions; (3) Engineer Covered Positions; (4) Program Manager Covered Positions; (5) Sales Covered Positions; and (6) Early Childhood Covered Positions.

The court also recognized the increased factual specificity of the amended allegations. The plaintiffs specifically alleged that Google considered prior compensation when determining

starting salary and level, and cited statistical evidence of historical sex-based pay disparities, which are perpetuated by relying on prior compensation. In addition, plaintiffs challenged:

- Google's centralized decision making and uniform policies in job assignment, promotions, compensation, and advancement as discriminatory against women.
- Google consideration of prior compensation when assigning an employee's initial "level."
- Google's use of stereotypes about what men and women can or should do (e.g., placing women into lower-paying Sales Brand Evangelist jobs instead of higher-paying Sales Representative jobs).

Plaintiffs also referred to a report conducted by the DOL's Office of Federal Contract Compliance Programs ("OFCCP"), which analyzed the compensation data for Google's 21,000 employees in its California headquarters in 2015 and "found systemic compensation disparities against women pretty much across the entire workforce."

Takeaway for Employers

This type of class action serves as a reminder that employers should carefully review their hiring, leveling, and compensation practices to ensure compliance with the rapidly evolving pay equity requirements in California, Washington, and elsewhere.

E. NLRB Decisions

1. Board Unravels Obama-Era Policies

The new Republican-majority NLRB has been busy unraveling legal precedent set during the Obama Administration. The drive is led by the NLRB's new General Counsel, Peter Robb. Since Robb was sworn in on November 17, 2018, he has undone many notable Obama-era cases in just his first month.

Robb's intention to revert to pre-Obama position was made clear in an advice memorandum put out on December 1, 2017. The memorandum, GC Memo 18-02, listed issues that are to be Mandatory Submissions to Advice, meaning the Board can consider the topics without adjudication in regional offices. The labor issues listed in Robb's memo are regarded as the most controversial and pro-employee decisions from the past decade.

Shortly after the memo was published, the NLRB decided a slew of cases on issues Robb targeted, described further below. Robb's memo also indicates that more reversals on listed issues may be imminent. For example, the Obama-era Board forbade broad disrespect policies in employee handbooks as impinging of Section 7 rights, *see Casino San Pablo*, 361 NLRB No. 148 (Dec. 16, 2014), but we should expect to see a position from the current Board that allows such policies. On the chopping block too is the Obama-era Board's conclusion that employees have a statutory right to use employer email for organizing activities. *See Purple Commc'ns, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014). The current Board will likely reverse the narrower definition of independent contractors established in *FedEx Home Delivery*, 361 NLRB No. 55

(Sept. 30, 2014). Robb also targets the ruling in *Pier Sixty, LLC*, 362 NLRB No. 59 (Mar. 31, 2015) that an employee posting on social media is still within the protections of the NLRA.

Most of the targeted issues and overturned cases were decided through rather technical analyses, which lead to inconsistency and a lack of predictability for management. Now that these approaches are being walked back, management can expect the NLRB to focus on practicality and choose realities over technicalities.

2. Hy-Brand and the Ongoing Debate Over Joint Employers

In recent months, a spotlight has been on the NLRB to clarify its seemingly ever-changing stance on joint employers. Joint employer status determines whether or not an entity is required to collectively bargain with a union. Classic examples of joint employer relationships are a security guard that is employed by a security company, but working at and reporting to a separate location; or a cleaning person employed by a cleaning service to clean another company's offices. In these scenarios, the facility owners, though not the direct employer, would be considered a joint employer because they co-determine the terms and conditions of employment. Therefore, joint employers are bound by collective bargaining agreements and NLRA provisions.

Prior to 2015, courts would not recognize an entity as a joint employer unless it actually exercised "direct and immediate" control over terms and conditions of employment. *Airborne Express*, 338 NLRB 597, 597 n.1 (2002); *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186, at *13 (Aug. 27, 2015). The right to control was not enough if it was not exercised. Further, exercised control that is merely "limited and routine" was insufficient to convert an entity into a joint employer. *TLI, Inc*., 271 NLRB 798, 799 (1984).

In 2015, the NLRB decided in *Browning-Ferris Industries of California, Inc*. to broaden its test for determining whether two employers should be considered joint employers for the purposes of labor organizing. The Board held that two employers will be considered joint employers if (1) they are both employers within the common law meaning; and (2) they share or co-determine the essential terms and conditions of employment. No further requirement need be met and no further restrictions were imposed. Therefore, after *Browning-Ferris*, indirect control, or a mere right to exercise control that is *not* exercised, was sufficient to create a joint employer relationship. This converted many pre-existing arrangements into unexpected joint employer relationships, imposing new bargaining obligations on unsuspecting parties.

On December 14, 2017, shortly after General Counsel Robb released his advisory memo, the Board overturned *Browning-Ferris* in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017). The Board acknowledged that the sudden about-face in *Browning-Ferris* "subjected countless entities to unprecedented new joint bargaining obligations that most may not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity." 365 NLRB No. 156, at *2. To much fanfare from employers, the *Hy-Brand* Board returned the joint employer test to its pre-*Browning-Ferris* form: "Thus, a finding of joint-employer status shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that

is ‘limited and routine.’” Id. at *6. A few days later, the NLRB remanded *Browning-Ferri*s to the D.C. Circuit for a revised review in light of *Hy-Brand*.

Unfortunately for employers, the *Hy-Brand* decision was short-lived. Less than three months after the decision was issued, the Board announced that they were vacating the ruling. Board Member William Emanuel, one of the majority Members voting in favor of the 3-2 *Hy-Brand* decision to overturn *Browning-Ferris*, was also a former partner of Littler Mendelson, P.C. The Board’s Designated Agency Ethics Official determined that this created a conflict of interest for Emanuel because Littler Mendelson represented *Browning Ferris* Industries in the exact case *Hy-Brand* overruled. Thus, the Board announced on February 26, 2018 that, because of this conflict, Emanuel should have been disqualified from participating in the *Hy-Brand* proceedings and the decision overruling *Browning-Ferris* is “of no force or effect.” Press Release, NLRB, Board Vacates *Hy-Brand* Decision (Feb. 26, 2018), https://www.nlrb.gov/news-outreach/news-story/board-vacates-hy-brand-decision.

Even before *Hy-Brand* was vacated, Congress decided to take the resulting confusion about the proper joint employer rule into its own hands. In November 2017, the House of Representatives passed H.R. 3441, called the Save Local Business Act. The Act would codify the pre *Browning Ferris* approach to determining joint employers. However, the bill’s progress halted in the Senate, where there is insufficient Democratic support to undo *Browning-Ferris*. The rescission of *Hy-Brand* may put pressure on the Senate to get the bill approved.

Despite having to vacate *Hy-Brand*, the NLRB has not given up its mission of revising the joint employer rule. Per an announcement made on May 9, 2018, the Board is now looking to rulemaking as the proper mechanism for undoing *Browning-Ferris*. Press Release, NLRB, NLRB Considering Rulemaking to Address Joint-Employer Standard (May 9, 2018), https://www.nlrb.gov/news-outreach/news-story/nlrb-considering-rulemaking-address-joint-employer-standard. In the announcement, Chairman Ring described the joint employer question as “one of the most critical issues in labor law today” and believes “notice-and-comment rulemaking offers the best vehicle to fully consider all views on what the standard ought to be.” The Board has formally submitted its proposal to engage in rulemaking to the Office of Information and Regulatory Affairs. A proposed rule would need the support of a majority of the five-person Board, meaning that support from Democratic Members Pearce and McFerran is not required. Once majority support is achieved, the Board will issue a Notice of Proposed Rulemaking, inviting written public comment for a period typically lasting 60 days. Rulemaking procedures also permit the Board to engage in public hearings, cross-examination, or additional comment periods. On June 5, 2018, Chairman Ring stated that the Board intends to issue a Notice of Proposed Rulemaking by the end of the summer. The rulemaking path, as well as Chairman Ring’s comments, should assuage employers that, despite the rescission of *Hy-Brand*, *Browning-Ferris* is approaching the end of its short tenure.

3. Boeing Embraces Workplace Realities in New Balancing Test for Employer Policies

The same day the Board decided *Hy-Brand*, it also decided *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017). Boeing overturns the *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (Nov. 19, 2004) and its three-part test for determining the legality of workplace policies, in favor of a

simpler balancing test. The Board ultimately held that Boeing's rule prohibiting camera devices, including camera phones, on site was justified by Boeing's interest in protecting intellectual property and trade secrets, and this legitimate interest outweighed any potential impact on employees' union or organizing activities.

Section 7 of the NLRA affords employees the right to organize and collectively bargain. 29 U.S.C. § 157. Under Section 8(a)(1), it is an unfair labor practice to create a workplace that restricts employees' abilities to exercise their Section 7 rights. 29 U.S.C. § 158(a)(1). Therefore, the NLRB can regulate and invalidate workplace policies that chill or restrain employees' exercise of Section 7 rights. In *Lutheran Heritage*, the Board determined that a workplace rule that does not explicitly restrict protected activity may still be unlawful if: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." 343 NLRB at 647.

Application of the *Lutheran Heritage* test has often hinged upon the first prong, whether an employee reasonably construes the rule to be restrictive. The test has proven difficult to apply and has made the lawfulness of workplace policies near impossible to predict. For example, in *Adtranz ABB Daimler-Benz Transportation*, a policy that prohibited "abusive or threatening language to anyone on company premises" was found to be lawful, but in *Flamingo Hilton-Laughlin*, a policy against "loud, abusive or foul language" was found unlawful. *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 27 (D.C. Cir. 2001); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 295 (1999). As the Board acknowledged in Boeing, "*Lutheran Heritage* produced rampant confusion for employers, employees and unions." 365 NLRB No. 154, at *3.

The Board sought to correct *Lutheran Heritage* by creating a test that permitted "meaningful consideration to the real-world 'complexities' associated with many employment policies, work rules and handbook provisions." *Id*. The new rule set forth in *Boeing* balances the impact a workplace rule has on workers' rights against an employer's legitimate rationale for maintenance of the rule. The Board then recognized three categories of workplace policies. The first category contains lawful policies that do not interfere with Section 7 rights or for which the justifications outweigh any impingement on rights. The Board included the rule at issue in the case, Boeing's "no cameras" rule, in this category, as it was enforced to protect trade secrets. The second category covers policies that could unlawfully inhibit protected activities, but could also be legitimately justified, thus warranting a deeper, fact-specific analysis. The last category contains policies that unlawfully limit protected activities and cannot be outweighed by the employers' justifications.

On June 6, 2018, General Counsel Robb released a memo adding detail to *Boeing*'s more balanced approach and clarifying that the NLRB has not yet determined *Boeing*'s effect on rules regarding arbitration or confidential discipline. The memo provided examples of the type of policies that would be included in each category. The first category, policies that do not interfere with Section 7 rights, includes general civility rules, rules that protect confidential or proprietary information, and rules against insubordination, noncooperation, disruptive behavior, defamation, misrepresentation, or nepotism. The second category, policies that may impinge on rights, includes broad conflict-of-interest rules, rules against employer criticism, and rules against

off-duty conduct that may harm the employer. The last category, impermissible policies, includes confidentiality rules encompassing wages and working conditions, rules against membership in outside organizations, and rules limiting voting on employer-related matters.

The Boeing case has been seen by employers as a welcome relief to the uncertainty created by *Lutheran Heritage*. Employers should still ensure all policies have legitimate business justifications and do not impinge on employees' protected activities more than is necessary.

4. *PCC Structurals* Replaces Micro-Units with Communities of Interest

Just one day after *Hy-Brand and Boeing*, the Board decided *PCC Structurals*, which overturned the Obama-era "micro-unit" principle and returned to the traditional community of interest standard for determining whether a petitioned bargaining unit is appropriate.

When a labor organization wants to organize an employer's workers, the organization must identify which employees it will represent. This group of employees is referred to as the bargaining unit and it is this unit that will vote to approve or decline representation. If the employer thinks the proposed unit is inappropriate, it can object to the unit's parameters. A bargaining unit is inappropriate if there is no community of interest. This typically occurs if a proposed unit includes only some, but not all, employees with a shared interest, or if the proposed unit contains so many employees that there is no commonality of interest among them.

In 2011, the day before Democrat Board Member Wilma Liebman was to leave the Board at the conclusion of her term, the Board decided *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). *Specialty Healthcare* addresses instances where an employer objects to a proposed bargaining unit because it excludes employees the employer thinks are part of the community of interest the union seeks to represent. The Board held that, in these instances, "the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees." *Id*. at 934. *Specialty Healthcare's* new standard was significant for two reasons. First, it created a presumption that the unit described in the petition was appropriate if it was based on readily identifiable characteristics, such as job title or plant location. Second, it raised the bar employers must meet to overcome and redefine a proposed unit. Further, the decision provided no guidance as to what "an overwhelming community of interest" would look like or how to prove such a concept.

Specialty Healthcare therefore increased the risk that a single employer would have to deal with multiple bargaining units and different collective bargaining representatives. This is disruptive to operations and creates many practical difficulties for management. For example, the different collective bargaining units may negotiate different terms of employment for very similar employees. This puts management in the position of having to ensure all negotiated terms are enforced for the appropriate employees. It is easy to see how varied terms on issues such as the amount of break time could easily lead to a confusing and complicated management reality for the employer.

Again, in the wake of General Counsel Robb's memo, the Board overturned *Specialty Healthcare* with its decision in *PCC Structurals, Inc.,* 365 NLRB No. 160 (Dec. 15, 2017). *PCC*

Structurals abandoned the "overwhelming community of interest test" and reinstated the traditional community of interest test. Under the traditional test, the appropriateness of a unit is determined by asking whether "the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit." *Id.* at *6.

The return to the traditional test should be welcomed by employers. Without over-fragmentation of their employees, management will face less disruption and pragmatic difficulties with a unionized workforce.

5. *UPMC* Permits Reasonable Settlements, Despite Objections

In late 2016, the Obama-era Board changed the applicable standard for approving settlements in labor disputes. In *United States Postal Service*, 364 NLRB No. 116 (Aug. 27, 2016), the Board held that, when a proposed settlement is objected to by either the charging party or the NLRB General Counsel, the settlement should only be approved if it provides a full remedy for the alleged violations. *Id.* at *3. The *USPS* Board stated that the fullness of a remedy will be based on "whether the proposed order includes all the relief that the aggrieved party would receive under the Board's established remedial practices were the case successfully litigated by the General Counsel to conclusion before the Board." *Id.*

A year later, the new Board has overturned this policy. In *UPMC*, 365 NLRB No. 153 (Dec. 11, 2017), the Board acknowledged that the *USPS* standard causes unnecessary delay and increases the risk that violations will not be remedies at all. *Id.* at *6. In its stead, the Board returned to its traditional test, which allows an administrative judge to accept a proposed settlement over the objections of the General Counsel or charging party, so long as the terms are "reasonable." *Id.* To determine whether a settlement is reasonable, the Board recommended several non-exhaustive factors to consider: "(1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes." *Id.* at *5 (quoting *Independent Stave*, 287 NLRB 740, 743 (1987)).

The revived traditional standard facilitates the settlement process and thus should be a benefit to both employees and management alike.

Paid Sick Leave in Washington – What You Don't Know *Can* Hurt You

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The state of Washington's new paid sick and safe time (PSST) requirements became effective January 1, 2018.

<u>Notification</u>

Employers were required to provide notice to each current employee by March 1, 2018. Employees are required to provide notice to each new employee hired on or before the first day of work. The notice may be provided in written or electronic form and must be made readily available to all employees. The notice must contain the following information:

- The employee's entitlement to PSST,
- The rate at which PSST will accrue,
- The authorized purposes for which PSST may be used, and
- That retaliation for use of PSST (and the employee's exercise of other rights under the employment laws) is prohibited.

Additionally, employers must provide accrued leave balance notification at least monthly. The best practice is to show the accrued balance on a current paystub. The notification must include the following information:

- The amount of PSST accrued since the last notification,
- The amount of PSST used since the last notification, and
- The amount of the PSST currently available for use.

<u>Covered Employees</u>

PSST applies to all employees covered by Washington's Minimum Wage Act, i.e. nonexempt employees. Employees who meet the "white collar" exemptions (executive, administrative, professional and outside sales employees) are not covered by the PSST law. But virtually all other employees are.

PSST applies to full-time, part-time, seasonal, temporary, and casual employees.

PSST applies to all employers. There is no minimum employee headcount threshold; even an employer with only one employee working in the state must allow that employee to accrue and use PSST.

<u>Accrual and Availability</u>

There is no waiting period for the required accrual; covered employees begin accruing on their first day of work in Washington after January 1, 2018. An employee is entitled to use accrued paid sick leave beginning on the 90th calendar day after the start of employment.

The rate of accrual is 1 hour for every 40 hours worked. There is no limit on annual accrual. Unused paid sick leave of 40 hours or less must be carried over to the following year.

The employer can choose what accrual "year" to use (e.g., employee anniversary, calendar, fiscal, etc.). The best practice is to use the same "year" that is used for other benefits purposes. Use of employee anniversary year would avoid employees using their accrued leave in excess of the carryover cap all at the same time.

Payout of accrued leave on termination of employment is not required. Employers are required to restored accrued amount on rehire if rehired within 12 months.

Use of Leave

PSST may be used in four circumstances:

- The employee's own medical needs,
- To care for a "family" member—defined broadly to include grandparents, grandchildren and siblings,
- When the workplace or the employee's child's school or daycare has been closed by order of a public official for a health-related issue, or
- For leave under the state's domestic violence leave act.

Employees may use PSST in the smallest increment the employer uses for timekeeping and payroll—but no larger than one hour.

Paid sick leave must be paid to employees at their normal hourly compensation.

Employers cannot require verification of the reason for use of the leave unless the employee has been absent more than 3 days.

Use of leave may not be counted as an occurrence under a "no-fault" attendance program.

Leave Policies

An employer must create a written PSST leave policy if it chooses to do any of the following (a collective bargaining agreement can satisfy the requirement for a written policy for any of these practices):

- Require reasonable notice for the use of paid sick leave,
- Request verification for absences exceeding three days,

- Implement a shared leave program,
- Frontload paid sick leave to employees,
- Use an accrual year other than January 1st to December 31st, or
- Create a paid time off (PTO) program for its employees.

An employer's leave policy must meet or exceed the PSST requirements, as set out in RCW 49.46.200, RCW 49.46.210, and WAC 296-128. Employers are allowed to provide employees with more generous carryover and accrual policies.

Employers with employees who work in Seattle, Tacoma, and the City of SeaTac must apply the standards of the minimum wage and paid sick leave ordinances in those cities that are more favorable to employees. And, remember that Seattle's and Tacoma's PSST requirements apply to all employees—not just nonexempt employees.