SEMINAR

Fall Labor & Employment Law Breakfast Seminar

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Tobias Piering, a counsel with the firm's Labor & Employment and Business Litigation practices, focuses on representing clients in a wide range of litigation matters, including cases involving race, age, disability and gender discrimination, non-competition agreements and trade secret disputes. His recent litigation highlights include two major victories for The Boeing Company—two full defense judgments in complex employment trials in federal court. In addition to litigation, Tobias regularly counsels clients on employment issues and works with clients to draft employment policies, handbooks, employment contracts and severance agreements. He also represents clients in traditional labor matters subject to collective bargaining agreements, including labor arbitrations, grievance disputes and unfair labor practices.

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Melissa earned her B.A. from Georgetown University and her J.D. from Harvard Law School. While attending Harvard, Melissa served on the board of the Women's Law Association and the Association for Law & Business. She was also a recipient of the Puget Sound Area Minority Fellowship, enabling her to work as a legal intern for a local timber company. Prior to law school, Melissa worked as an operations manager at Uber, where she recruited, on-boarded, and optimized the experience of hundreds of contractors across the Pacific Northwest region.

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While at the University of Washington School of Law, Mallory served as editor-in-chief of the *Washington Law Review.* Before law school, Mallory managed two successful political campaigns and directed the fundra ising for a Seattle-based nonprofit.

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I. INTRODUCTION

2018 has seen a raft of interesting developments in labor and employment law. These materials provide a snapshot of some of the most important developments.

II. LEGISLATIVE AND REGULATORY UPDATES

A. Federal Developments

1. EEOC Composition

The EEOC Commission looks a bit different than it did this time last year. Of the five-person bipartisan Commission, there are currently only three members: Acting Chair Victoria A. Lipnic, Chai R. Feldblum, and Charlotte A. Burrows. The EEOC is also without a General Counsel.

Acting Chair Lipnic, a Republican, was originally nominated to the EEOC by President Obama, and was selected in January 2017 to be Acting Chair by President Trump. Her term expires on July 1, 2020. Commissioner Chai R. Feldblum, a Democrat was also originally appointed by Obama and re-nominated 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. Her term expires on July 1, 2019.

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.

A small number of Senate Republicans have stalled President Trump's nominees for these EEOC positions. They have held up the three nominations because of their concerns over Commissioner Chai Feldblum's history of advocating for LGBT rights. It's unclear when the Senate would vote on President Trump's nominees.

2. #MeToo Movement Leads to an Increase in EEOC Charges and Filings

In 2018, the EEOC responded to the revelation of sexual misconduct and abuse by several high-profile men last fall by pursuing more sexual harassment claims and providing additional training to employers.

In October, the EEOC announced that it had pursued more claims involving sexual harassment than in previous years. The EEOC filed 41 cases involving sexual harassment claims—a 50% increase from 2017. Many of the employers the EEOC has sued are restaurants.

The EEOC also noted a 12% increase in sexual harassment charges from 2017 to 2018. For charges alleging harassment, reasonable cause findings increased to nearly 1,200 in FY 2018 compared to 970 in FY 2017. The EEOC explicitly connected its shift in priorities to the #MeToo movement. This is particularly interesting because Acting Chair Lipnic said in March 2018 that she had *not* seen a notable rise in sexual harassment charges since the #MeToo movement gained steam. She now says that the increase in charges "reflects a greater willingness to report [sexual harassment] and speak up about it." For 2018, she said, the "overall charges on all bases of discrimination are down, but charges of sexual harassment are up."

In addition to taking enforcement action, the EEOC also increased its training. In October 2017, it launched "Respectful Workplaces," which teaches supervisors and employees about creating respectful work environments. According to the EEOC, more than 9,000 employees and supervisors participated in the trainings. Another 13,000 employees participated in EEOC's anti-harassment compliance trainings, and the EEOC held over 1,000 outreach events on harassment for more than 115,000 individuals and employers.

3. DOL Revisiting New Threshold for Overtime Pay

The United States Department of Labor (DOL) is taking another run at setting a new salary threshold for overtime pay. A higher threshold would expand the number of salaried workers eligible for overtime pay for working more than 40 hours in a workweek.

Under the FLSA, employees are eligible for overtime pay unless they are exempt. To be exempt, an employee's duties must be primarily executive, administrative, or professional, and he or she must earn at least $23,660 a year. The current threshold was set in 2004.

Former President Obama attempted to raise the threshold to $47,476 a year. A federal judge in Texas struck down the Obama-era rule before it would have gone into effect on December 1, 2016.

The DOL has finished gathering opinions from stakeholders and plans to issue a Notice of Proposed Rulemaking (NPRM) in March 2019. Many commentators think the DOL will propose a new threshold of between $32,000 to $33,000 range. That lower threshold would keep many more employees in the exempt category than would have been the case under the Obama-era rule.

4. NLRB Composition

The Board has five members, appointed by the President and confirmed by the Senate. Each Board member is appointed to a five-year term. There is currently a vacancy on the Board, so the four current Board members are:

- John F. Ring, Chairman – term expires December 16, 2022
- William Emanuel, Member – term expires August 27, 2021
- Marvin Kaplan, Member – term expires August 27, 2020
- Lauren McFerran, Member – term expires December 16, 2019

President Trump nominated Ring, Kaplan, and Emanuel. President Obama nominated McFerran. Previous Board Member Mark Pearce's term expired on August 27, 2018, and President Trump has not appointed someone to fill the vacant seat.

The Board also has a General Counsel who is independent from the Board. The General Counsel is appointed by the President to a four-year term and is responsible for the investigation and prosecution of unfair labor practice cases. The General Counsel also provides general supervision over the NLRB field offices. President Trump nominated Peter Robb who was sworn in as General Counsel in November 2017.

5. More Employer-Friendly Standard for Workplace Policies, Rules, and Handbooks

In a 2017 decision, the National Labor Relations Board (Board) set a new standard to assess the legality of facially neutral workplace policies, rules, and handbook provisions. *See The Boeing Co.*, 365 N.L.R.B. No. 154, *recons. dismissed*, 366 N.L.R.B. No. 128 (2018). The Board's General Counsel has since issued guidance on how to determine the legality of workplace rules and provides examples of rules it considers presumptively valid. This guidance is particularly important because employee handbooks and policies often provide the foundation for workplace operations and should be the starting point for complying with regulations in employers' industries and jurisdictions.

a. No-Camera Rules, No Problem

The Board returned to its earlier standard on workplace rules in *The Boeing Co*. In that case, the key issue was whether Boeing's policy of restricting the use of camera-enabled devices on its property violated Section 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § 158. Section 8 prohibits an employer from interfering with, restraining, or coercing employees "in the exercise of the rights guaranteed in section 7" of the NLRA. 29 U.S.C. § 158(a)(1). In turn, Section 7 guarantees that

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

29 U.S.C. § 157.

First, the Board reviewed the old standard from *Lutheran Heritage*, 343 N.L.R.B. No. 75 (2004). Under *Lutheran Heritage*, even if workplace rules do not explicitly restrict protected Section 7 activities, the rule could nevertheless violate Section 8 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.

Id. The Board concluded that the workplace rule in *Boeing* exposed fundamental problems with the application of *Lutheran Heritage*, and thus overruled the "reasonably construe" standard.

The new standard provides:

> In cases in which one or more facially neutral policies, rules, or handbook provisions are at issue that, when reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the requirement(s).

The Boeing Co., 365 N.L.R.B. No. 154. Thus, when a workplace rule—as reasonably interpreted—does *not* prohibit or interfere with the exercise of Section 7 rights, the rule is lawful and the inquiry ends. There is no need to evaluate business justifications; the focus is on the employee's perspective. The new standard applies retroactively.

Applying the new standard to Boeing's no-camera rule, the Board found that there was a *potential* impact on employees' protected rights to engage in concerted activity but that was outweighed by Boeing's justifications for the rule. Boeing sought to protect its employees'

personal information, its own trade secrets, and the security of its facilities, in turn implicating national security because it has military contracts with the federal government.

When evaluating employment policies, rules, and handbook provisions, the Board explained that it would distinguish between three categories: (1) lawful rules, (2) rules that warrant individualized scrutiny, and (3) unlawful rules. Further, the Board provided that no-camera rules *in general* illustrate the kinds of rules that the Board will find lawful because (1) the reasonable interpretation of these rules does not prohibit or interfere with the exercise of NLRA rights, or (2) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. So, for employers considering adopting a workplace rule that fits in one of those general categories, the Board has indicated its permission.

b. Subsequent Guidance on Handbook Rules

On June 6, 2018, the General Counsel for the Board issued a Guidance Memorandum providing further clarity on the evaluation of workplace rules, policies, and handbooks. Nat'l Labor Relations Bd., Memorandum GC 18-04, *Guidance on Handbook Rules Post-Boeing*, https://www.nlrb.gov/reports-guidance/general-counsel-memos (June 6, 2018). The memorandum explained that the *Boeing* decision "significantly altered its jurisprudence on the reasonable interpretation of handbook rules." *Id.* at 1. When interpreting those rules, ambiguities are no longer interpreted against the employer, and generalized provisions should *not* be interpreted as banning all activity that could conceivably be included.

The memorandum provides that no-photography and no-recording rules are lawful and gives examples of rules within each of the three categories that the Board created in the *Boeing* decision. The first category—rules that are generally lawful—includes:

- Rules about civility
- Rules prohibiting photography and recording
- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations
- Rules about disruptive behavior
- Rules protecting confidential, proprietary, and customer information or documents
- Rules against defamation or misrepresentation
- Rules protecting logos, trademarks, and other intellectual property
- Rules requiring authorization to speak for the company
- Rules banning disloyalty, nepotism, or self-enrichment

Id. at 2-15.

The second category covers rules that fall in a gray zone. These rules warrant individualized scrutiny to determine their legality, which will depend on context. Because these

rules are judged on a case-by-case basis, the memorandum did not explicitly list rules that fall into this category. But it provided some possible examples: confidentiality rules that broadly encompass the employer's business or employee information (as opposed to the confidentiality rules described in category one or category three).

And lastly, the third category consists of rules that the Board considers generally *unlawful* because they prohibit or limit protected rights under Section 7 of the NLRA. The memorandum noted that there are possible special circumstances, however, that could render the rules lawful. These generally unlawful rules include:

- confidentiality rules about wages, benefits, or working conditions; and
- rules against joining outside organizations or voting on matters concerning the employer.

6. Use of Employer Email on Nonworking Time

The Board may do another about-face—it's considering changing its standard for employees' rights to use employer email systems on nonworking time for communications protected by Section 7 of the NLRA.

In *Caesars Entertainment Corp.*, an administrative law judge found that the employer violated the NLRA by maintaining a policy prohibiting the use of its computers to send non-business information. No. 28-CA-060841, 2018 WL 3703476 at *1 (Aug. 1, 2018). The judge relied on a prior decision, *Purple Communications, Inc.* 361 N.L.R.B. 1050 (2014), which provided that employees who have access to employer email systems for work have a presumptive right to use the system on nonworking time for communications protected by Section 7 of the NLRA.

Purple Communications overruled a prior standard that the Board is now considering reviving. Under the old standard, employers could lawfully impose neutral restrictions on employees' nonwork use of employer email, even if the restrictions limited the use of email systems for protected concerted activity.

The Board is considering whether it should leave in place, modify, or overrule the *Purple Communications* standard. On August 1, 2018, the Board called for briefing on this issue by the parties and any other interested amici. Additionally, the policy before the Board in this case applies more broadly to the employers' computer resources, whereas the *Purple Communications* standard was specific to employer email systems. The Board noted this distinction in its call for briefing, asking whether a different standard should apply to computer resources besides email. A handful of Democratic Senators, including Senators Elizabeth Warren and Cory Booker, weighed in on the issue, asking the Board not to change the *Purple Communications* standard. The deadline to submit briefs has passed, and we now wait for the Board's decision.

We anticipate that the Board will at least modify the standard so that an employer can consider legitimate business or data concerns and weigh those concerns against an employee's right to use an email system on nonworking time.

7. NLRB and DOL Propose Rulemaking to Define "Joint Employer"

The Board and the DOL are both considering updating their definitions of "joint employer." This term generally refers to entities that jointly employ a group of employees. These new definitions may impact the scope of liability for businesses and entities that exercise control over the employees of a separate business or entity.

On September 14, 2018, the Board issued a proposed rulemaking for determining when an employer qualifies as a joint-employer under Section 2 of the NLRA. 29 U.S.C. § 152(2). The NLRA does not actually contain the term "joint employer," but the issue has arisen as courts address situations where employees are directed by multiple employers. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 475-76 (1964). The proposed rule provides that an entity is a joint employer "only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction." *The Standard for Determining Joint Employer Status*, 83 Fed. Reg. 179 (proposed Sept. 14, 2018) (to be codified at 29 C.F.R. ch. undefined). The employer "must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine." *Id.*

Under the new rule, "[i]ndirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship." Nat'l Labor Relations Bd. Office of Pub. Affairs, *Board Proposes Rule to Change its Joint-Employer Standard*, https://www.nlrb.gov/news-outreach/news-story/board-proposes-rule-change-its-joint-employer-standard (Sept. 13, 2018). The Board recognized that its recent decisions concerning joint employer relationships caused disruption and ongoing uncertainty in the labor-management community. The proposed rulemaking seeks to provide definitive guidance, and the public can comment unitl December 13, 2018.

The DOL is also weighing in on the definition. DOL plans to provide updated rulemaking to define "joint employer" under the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201-19; *see also* 29 C.F.R. § 791.2 (current regulations defining "joint employer"). Like the NLRA, the FLSA does not actually include the term "joint employer" but courts rely on DOL's regulations to distinguish between separate and joint employment. *See Hall v. DIRECTV, LLC*, 846 F.3d 757, 765-66 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 635 (2018). Because most of 29 C.F.R. § 791 was promulgated 60 years ago, DOL "believes that changes in the 21st century workplace are not reflected in its current regulatory framework" and that a new rule is necessary.

Office of Information and Regulatory Affairs, *Joint Employment Under the Fair Labor Standards Act* No. 1235-AA26, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1235-AA26 (last visited October 30, 2018).

DOL intends to follow the public notice and comment process, and Perkins Coie will track the next development. The notice of proposed rulemaking will occur in December 2018, and the draft rule is expected to be published in March 2019.

B. State and Local Developments

1. Washington Takes Aim at Unequal Pay and Opportunities for Career Advancement

Washington employers now face civil and criminal liability for unequal pay and career opportunities based on gender. The Equal Pay Opportunity Act went into effect on June 7, 2018, and updates Washington's Equal Pay Act, which was last modified in 1943. *See* Wash. Rev. Code § 49.58.

Prohibitions on Gender-Based Pay and Career Advancement

The law, among other things, prohibits gender-based pay discrepancies between employees of the same employer who are "similarly employed"—that is, they have the same employer; perform jobs requiring similar skill, effort, and responsibility; and work under similar working conditions. Job title alone doesn't determine who is similarly employed. Employers cannot rely on an employee's previous wage or salary to justify a pay difference. The law also prohibits employers from limiting or depriving employees—on the basis of gender—of career advancement opportunities that would otherwise be available.

But an employer *may* base differences in compensation or career advancement opportunities on bona fide job-related factors. Bona fide job-related factors must be:

> (1) consistent with business necessity; (2) not based on or derived from a gender-based differential; and (3) responsible for the entire differential, although more than one factor may account for it.

Those factors include—but are not limited to:

> (1) a seniority system; (2) a merit system; (3) a system that measures compensation by quantity or quality of production; and (4) a regional difference in compensation.

An employer can also base a compensation differential in good faith reliance on a local ordinance that provides a minimum wage "different from state law." Wash. Rev. Code § 49.58.020(3)(c). The employee's previous compensation history does not, however, provide a defense to a differential based on gender. (Note that the Ninth Circuit held as much under the federal Equal Pay Act in April 2018. *See Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018)).

Penalties

The Washington State Department of Labor and Industries (L&I) will investigate alleged violations, and the statute creates a right of action for employees to pursue their own lawsuits. In addition, the Act makes it a misdemeanor to discriminate against employees with regard to compensation. If there is a violation, the employer can be liable for actual damages, statutory damages equal to actual damages or $5,000 (whichever is greater), interest, and attorneys' fees and costs. Additional penalties may be imposed if the employer has engaged in a pattern of violations.

An employer is not subject to criminal penalties for gender-based career advancement decisions but is subject to the same civil liability when there is a pattern of violations.

Although the statute of limitations is three years, employees may recover wages for up to four years from the time of their complaint.

Prohibited Acts

The law also forbids employers from preventing employees from disclosing their wages and prohibits retaliation against employees for inquiring about or discussing wages under certain circumstances. As with other antidiscrimination statutes, the Act prevents employers from retaliating against employees who file a complaint or lawsuit for unequal pay or career advancement opportunities. An employer also cannot retaliate when an employee asks about or compares salaries, asks for a reason to justify a salary differential, or aids another employee in exercising his or her rights under the Act. But if having access to compensation information is an essential function of an employee's job, the employer can prohibit that employee from disclosing other employees' wages.

Employers should carefully review their compensation policies and ensure that any pay or career advancement differentials are based on job-related factors like the ones outlined in the Act. Perkins Coie can provide formalized pay audits for clients that need help ensuring compliance.

2. Washington's Paid Sick Leave and Additional Requirements for Seattle Employers

Washington voters approved Initiative 1433, which requires employers to provide paid sick leave to all non-exempt employees as of January 1, 2018. Wash. Rev. Code § 49.46.210;

see also Wash. Admin. Code §§ 296-128-600-296-238-760. Subsequently, Seattle amended its Paid Sick and Safe Time (PSST) ordinances to reflect Initiative 1433's provisions. Seattle, Wash., Municipal Code ch. 14.16. Many of Seattle's requirements are the same as the statewide provisions; however, Seattle's PSST applies to *all* employees, unlike the state requirement. The revisions are effective as of July 1, 2018.

For employers that already offer paid sick leave benefits that are at least as generous as the new state (and city, if applicable) requirements, no changes need to be made.

a. Washington's Paid Sick Leave

It has been almost a year since Washington's requirements for paid sick leave took effect, so employers should already have successfully implemented these requirements and systems. We want to highlight the key requirements and provide guidance to keep your businesses on track.

Accrual and Usage

Under Washington law, non-exempt employees accrue paid sick leave at a rate of one hour per 40 hours worked. There is no cap on annual accrual or usage. An employer may provide paid sick leave in advance of accrual, a practice called frontloading. At separation, the employer may seek reimbursement if more hours were frontloaded than actually accrued, but the employee must agree to this wage deduction.

Once accrued, employees may use sick leave to care for themselves or a family member with regard to mental or physical illness, injury, health conditions, medical diagnosis, care, treatment, or preventative care. Employees may also use accrued sick leave when their workplace or their child's school or care center is closed for any health-related reason or for absences that qualify for leave under the Domestic Violence Leave Act.

Paid sick leave accrues in hourly increments but can be used in the smallest increment that the employer uses for time keeping and payroll purposes, unless the employer applies to L&I for a variance from the requirement. When employees take paid time off, they must be paid their normal hourly compensation, which is the rate they would have earned had they been working. But the normal hourly compensation does not include tips, gratuities, service charges, holiday pay, or other premium rates.

Employers may not require that the employee find a replacement worker to cover his or her absence. Employers may impose a 90-day waiting period from the start of employment before the employee may use accrued time.

Unused Paid Sick Leave

Unused paid sick leave carries over to the next year; however, employers may cap the carryover at 40 hours. Upon the employee's separation from employment, employers are not required to cash out unused paid sick leave. But if the employee is rehired within 12 months of separation, the employer must reinstate any previously accrued unused paid sick leave. *Id.*

Notice, Communications, and Policies

Employers may require employees to give reasonable notice of their absences, so long as providing notice does not interfere with the employees' lawful use of sick leave. After an employee has been absent for more than three days, the employer may require verification that the absence is for an authorized purpose. The employee is allotted a "reasonable time period" during or after leave to provide notice. Such verification requirements, however, may not result in an unreasonable burden or expense on the employee.

Employers must provide regular notification (at least monthly) to employees regarding their available paid sick leave. The notification must include the amount of paid sick leave currently available for use, amount accrued since the last notification, and amount used since the last notification.

Additionally, employers must provide notice (written or electronic) to employees of their paid sick leave policy, including the rate of accrual, the purposes for which it can be used, and the prohibition on retaliating against employees for using their time. This notice should have already been given to all current employees and should be given to new employees when they start. A written policy, however, is required if (1) the employer requires reasonable notice of an absence from work for paid sick leave; (2) the employer requires verification for absences that exceed three days; (3) the employer permits employees to donate accrued leave to other employees; or (4) the employer frontloads paid sick leave.

L&I has provided sample paid sick leave policies that Perkins Coie can customize to fit its clients' businesses.

Retaliation and Discrimination Protections

Employers cannot discriminate or retaliate against an employee for using paid sick leave. Employers also cannot adopt or enforce a policy that leads to discipline against the employee for using paid sick leave.

b. Seattle's PSST Ordinance for *All* Employees

Seattle employers are likely already familiar with Seattle's PSST because the ordinance has been in effect since 2012. Seattle, Wash. Municipal Code ch 14.16. More recently, the City implemented revisions based on the statewide paid sick leave requirements. The revisions are

effective as of July 1, 2018. But for some provisions, Seattle requires even more from employers than the Washington law.

These requirements apply to all employers with employees performing work in Seattle (the employer's actual location is irrelevant). This includes employees who work in Seattle on an occasional basis, once the employee performs more than 240 hours of work in Seattle during a calendar year. Further, the requirements apply to *all* employees, regardless of the type of work they do or their status.

Accrual and Usage

Seattle's PSST ordinance distinguishes employers by tier for purposes of PSST accrual and carryover.

Employer Size	Accrual Rate	Carryover to Next Calendar Year
Tier One At least 1 employee but fewer than 50 FTEs	1 hour per 40 hours worked	40 hours
Tier Two At least 50 but fewer than 250 FTEs	1 hour per 40 hours worked	56 hours
Tier Three 250 or more FTEs	1 hour per 30 hours worked	72 hours (if separate sick leave and vacation banks) or 108 hours (if combined or universal leave policy)

Employer size is based on the number of full time equivalent (FTE) employees, not the number of individual persons employed.

Accrued PSST can be used for essentially the same purposes as under the statewide framework, with minor modifications (e.g., Seattle's PSST can be used to care for a household member in addition to a family member). Employers may frontload PSST hours but, unlike the state law, *cannot* seek reimbursement from the employee at the time of separation if the employee used more PSST hours than he or she had actually accrued.

Employees may use their accrued PSST in the smallest increment that the employer uses for time keeping and payroll purposes. Unlike the state requirement, the employer cannot receive a variance from this requirement. When employees use PSST, they must still be paid their normal hourly compensation, which is the same rate of pay the employee would have earned during the time the paid leave is taken. Seattle allows employers to impose the same 90-day waiting period from the date employment began before an employee may use accrued PSST.

Unused PSST hours

Unused PSST hours carry over to the following year in amounts based on Tier, as shown in the chart above. Seattle imposes the same requirement as the state regarding termination and reinstatement. Upon the employee's separation from employment, employers are not required to cash out their unused paid sick leave. If the employee is rehired within 12 months of separation, previously accrued unused PSST hours must be reinstated.

Notice, Communications, and Policies

The Seattle ordinance largely provides the same notice and verification requirements as the state law. Employers may require employees to provide reasonable notice of their absence from work so long as the notice requirement does not interfere with the purpose for which the employee is using PSST. Just like the state law, employers may ask employees to verify that PSST hours have been used for a covered purpose after the employee has been absent for more than three consecutive days. The request for verification may not impose an unreasonable burden or expense on the employee. The Seattle ordinance, however, specifies that if the employer does not offer health insurance, the employer and employee must split the cost of obtaining verification.

Seattle employers must notify employees of PSST balances with *each* pay statement, whereas the state requires notification at least monthly. Employers can choose a reasonable system for doing so (e.g., listing on paystubs or providing an online portal where employees can access the information). The notification includes the same contents as the state notification (PSST available, accrued since last notice, and used since last notice).

Employers must also provide a written policy that includes the employer's policies and procedures for complying with Seattle's PSST. This policy must include most of the requirements from the PSST ordinance: the employee's right to PSST; the employer's tier size; the rate of accrual and carry-over cap; the authorized purposes for taking PSST; the notification manner for PSST balances; the reasonable notice requirements for requesting PSST; and the prohibitions against retaliation. Employers must also display a workplace poster provided by Seattle's Office of Labor Standards (OLS) in a prominent place. Seattle has also provided a model PSST policy that Perkins Coie can customize to fit its clients' businesses.

Retaliation and Discrimination Protections

Seattle prohibits employers from taking the same actions as those proscribed in the state law. Employers may not discriminate or retaliate against employees who assert their rights under the PSST ordinance and cannot adopt or enforce a policy that leads to discipline against the employee for his or her good faith use of PSST hours.

3. Changes to Seattle's Minimum Wage Laws

On January 1, 2019, Seattle's minimum wage goes up. (On the same date, the state minimum wage goes up to $12 an hour.) Seattle's OLS announced that the city's minimum wage will increase to:

- $16 per hour for large employers (more than 500 employees worldwide);
- $15 per hour for small employers (500 or fewer employees).

Large employers had been able to meet their minimum wage requirements under a two-tier system: a large employer could elect to pay the full minimum wage or could contribute a portion toward individual medical benefits and pay a lower minimum wage. This two-tier system for large employers ends in 2019.

But small employers still have the choice of paying the full minimum wage or meeting the requirement by paying at least $12 per hour in wages and paying at least $3 per hour toward an employee's medical benefits or reported tips.

4. Employers May Not Require Employees to Disclose Their Religion

A new Washington statute makes it an unfair practice for an employer to require an employee to disclose his or her sincerely held religious affiliation or beliefs, unless the employer needs that information to provide a requested religious accommodation. Wash. Rev. Code § 49.60.208. An employer also cannot require an employee to disclose that information about a fellow employee.

5. The Healthy Starts Act Requires Workplace Pregnancy Accommodations

Washington's Healthy Starts Act, effective as of July 2017, requires employers of 15 or more employees to (1) provide reasonable accommodations to pregnant employees (as further described below), and (2) refrain from taking certain employment actions because of an employee's pregnancy or her need for a pregnancy related accommodation. Wash. Rev. Code § 43.10.005. Although this law has been on the books for a while, we have heard that employers want a recap.

Accommodations: Employer Rights and Responsibilities

There are three categories of accommodations: (1) accommodations that an employer must provide regardless of cost or difficulty; (2) accommodations that an employer has to provide only if they will not be significantly difficult or expensive to implement; and (3) accommodations that may be required depending on an employee's needs and whether the accommodations would be significantly difficult or expensive to implement.

First, employers must accommodate a pregnant employee in four ways, regardless of cost or difficulty:

(1) by providing flexible, longer, and more frequent bathroom breaks;
(2) by modifying a no food or drink policy;
(3) by providing seating or allowing an employee to sit more often if her job requires frequent standing; and
(4) by limiting lifting to 17 pounds.

Second, an employer must provide the following accommodations as needed unless the employer would incur significant difficulty or cost in implementing them. The accommodations that fall within this category are:

(1) Restructuring an employee's job;
(2) Allowing a part-time or modified work schedule;
(3) Reassigning an employee to a vacant position;
(4) Modifying the equipment, devices, or workstation that an employee uses for her job;
(5) Temporarily transferring an employee to "a less strenuous or less hazardous" position;
(6) Providing an employee assistance with manual labor;
(7) Further limiting the lifting an employee has to do; and
(8) Allowing an employee flexibility for scheduling prenatal doctor visits.

Third, an employee may request additional accommodations that the law does not expressly list. If she does, an employer must consider the request. As with the accommodations in the second category, an employer can consider the difficulty and cost of implementing the requested accommodation. But again, the cost or difficulty must be significant. In short, the law provides examples, but an employer must consider and implement accommodations for pregnant employees that do not pose significant difficulty or expense.

An employer also has rights under this law. Except for any of the four absolutely required accommodations, an employer can request written certification from an employee's doctor about her need for an accommodation. And in accommodating a pregnant employee, an employer does not have to create a new position, terminate another employee, transfer another employee who has more seniority, or promote another employee who is not qualified for the position to which that employee would be promoted.

Prohibited Actions

In addition to requiring accommodations, the law prevents an employer from taking certain actions against a pregnant employee simply because of her pregnancy and any pregnancy-related accommodations she needs.

- An employer cannot deny a reasonable accommodation unless it would require significant difficulty and expense. An employer cannot, however, consider difficulty or cost for any of the four absolutely required accommodations listed above.

- An employer cannot take adverse action against an employee who requests or uses an accommodation. So, an employer cannot demote, fire, or decrease the pay of a pregnant employee, for example, solely because she is pregnant or has requested an accommodation.

- An employer cannot deny employment opportunities to a qualified pregnant employee if the employer bases the denial on the need for an accommodation.

- An employer cannot require an employee to take leave if the employer could provide another accommodation to address the health issue.

6. Ring in 2019 with Premiums for Paid Family and Medical Leave

Employer obligations under Washington's Paid Family and Medical Leave Law (PFML) take effect on January 1, 2019. Wash. Rev. Code §§ 50A.04.005–.900. The PFML creates a paid family and medical leave insurance program that offers eligible employees up to 12 weeks of paid leave benefits per year (and sometimes more). The PFML applies to all employers in the state, with some variable treatment based on employer size.

Premiums and Records

Since the PFML is set up as an insurance program, it requires monthly premiums. Starting January 1, 2019, employers must begin collecting premiums from all employees through their payroll systems. The premium amount is 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. One third of the premium goes towards family leave benefits and two thirds of the premium goes towards medical leave benefits.

Employers must remit the premium payments on a quarterly basis to the Washington State Employment Security Department (ESD). Payments are due at the end of the month *after* the end of each calendar quarter. For example, first quarter premiums are due by April 30, 2019. Employers must also provide ESD with quarterly reports including wages and hours worked for each employee. Specifically, the quarterly reports must include each employees' name, social security number, zip code of primary work location, job title, start date, total hours, and wages

paid during that quarter, as well as the total amount of premiums deducted from all employees' wages during the quarter. ESD's reporting tool is under development and will be available by April 2019.

Employer records provided to ESD will remain confidential and not open to public inspection, other than public employees in the performance of their official duties. Employers are subject to penalties if they willfully fail to make the required reports or willfully fail to remit the premiums when due.

Voluntary Plans

Employers can opt out of the PFML program only if they have a comparable plan (referred to as a voluntary plan) that meets the state requirements. To opt out, employers must apply to ESD for approval and pay a $250 application fee. ESD is currently accepting applications online and recommends that employers allow at least 30 days to receive a decision. If the voluntary plan is not approved prior to January 1, 2019, the employer must begin collecting premiums pursuant to the PFML plan and should plan to remit payment to ESD by April 30, 2019. If a voluntary plan is approved after January 1, 2019, the plan will go into effect at the beginning of the next calendar quarter. Voluntary plans must be reapproved annually for the first three years.

Under voluntary plans, the employer may offer an accelerated payment schedule to incentivize the employee to return to work sooner. For example, if an employee intends to take ten weeks of PFML leave, the employer could offer six weeks of paid leave and the compensation of the remaining four weeks when the employee returns to work. The employee may accept or reject the offer. This accelerated payment schedule is not available under the state's plan.

Because PFML benefits are portable between jobs, employers operating voluntary plans are still subject to quarterly reporting requirements to the ESD.

Employee Eligibility and Leave Benefits

Employees may be eligible to take leave for a covered event beginning January 1, 2020, depending on further qualifications. Employees are eligible for the PFML benefits once they have worked 820 hours during a "qualifying period." Wash. Rev. Code § 50A.04.015. A qualifying period is when an employee works four out of five calendar quarters prior to taking PFML leave. For voluntary plans, employees must have also worked at least 340 hours for their current employer before qualifying for those benefits.

Once eligible, employees may take 12 weeks of paid leave for the birth or adoption of a child, for a serious health condition of the employee or employee's family member, or for an exigency arising from a family member on active military duty or notified of an impending call

to active duty. Employees may take 16 weeks of combined family *and* medical leave. An employee may also take an additional two weeks of paid leave if there is a serious health condition related to a pregnancy.

To receive the PFML benefits, the employee must file a claim with ESD and notify their employer. If the leave event is foreseeable, the employee must provide 30 days' notice. If the event is unforeseeable, the employee should give notice as soon as practicable. Once ESD approves the claim, ESD pays the benefits directly to the employee. The benefit amount is determined as a percentage of the employee's average weekly wage during the two highest quarters in a qualifying period. The maximum weekly benefit amount is $1,000, and the minimum weekly benefit amount is either $100 or the employee's full wage, whichever is smaller. Employees are permitted to take paid leave in increments as small as eight consecutive hours.

Employees subject to a collective bargaining agreement that was in effect as of October 19, 2017, are not subject to the PFML until that agreement expires or is reopened.

More to Come

The ESD has delineated multiple phases of rulemaking to implement the full extent of the PFML. Phase One and Two rulemaking—recently completed—consisted of rules for collective bargaining agreements, premium liability, voluntary plans, employer responsibilities, penalties, and small business assistance. Phase Three rulemaking will include benefit applications and eligibility. Phase Three draft rules have been published, and ESD is currently accepting public comments. ESD plans to file Phase Three proposed rules on January 3, 2019. The rules will take effect on April 22, 2019.

Phase Four rulemaking will include continuation of benefits and fraud. ESD will publish their first draft rules on November 14, 2018. The proposed rules will be filed March 12, 2019, and will take effect on July 6, 2019.

Phase Five rulemaking will include job protection, benefit overpayments, and other miscellaneous items. Lastly, Phase Six rulemaking will include appeals. Phase Five and Six will begin in 2019. There is currently no timeline available.

7. Washington Law Against Discrimination Extends to Another Class of Protected Persons

The legislature added a new protected class under the Washington Law Against Discrimination (WLAD): people who are actual or perceived victims of domestic violence, sexual assault, or stalking. Wash. Rev. Code § 49.76.115. The new statute prohibits employers from refusing to hire, discharging, demoting, suspending, discriminating, or retaliating against someone with regard to promotion, compensation, or other terms, conditions, or privileges of employment because the person is an actual or perceived victim of domestic violence, sexual

assault, or stalking. Similarly, employers cannot refuse to make a reasonable safety accommodation if requested by such person, unless the accommodation would impose an undue hardship on the employer.

8. Employment Agreements with Waiver Provisions for Discrimination Claims

Under a new Washington law—enacted in response to the #MeToo movement—employment agreements that waive an employee's right to file a lawsuit or agency complaint for discrimination under state and federal law are unenforceable. So, under this law, an employer could not require an employee to resolve claims of discrimination in a confidential dispute resolution process. *See* Wash. Rev. Code § 49.44.085.

Although state law now prohibits employers from using that contract mechanism, the law may be preempted by the Federal Arbitration Act. Any determination on that question, however, would result from litigation, so we do not yet know how a court might answer the question.

9. Employee Disclosure of Sexual Assault or Harassment

The legislature enacted a new provision concerning the enforcement of nondisclosure agreements (NDAs) between employer and employee, effective June 7, 2018. Wash Rev. Code § 49.44.210. The statute provides that NDAs signed as a condition of employment cannot prevent an employee from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events that the employer coordinates, or between an employer and an employee off premises. Such agreements are void and unenforceable. The statute's new requirement, however, does not apply to settlement agreements between a current or former employee and an employer. Employers also cannot discharge or retaliate against an employee for disclosing sexual harassment or sexual assault occurring under those circumstances.

If an employer has defined "confidential information" so broadly in its NDAs that the phrase could be interpreted to prevent these kinds of disclosures, those NDAs should be reviewed and revised. The risk of a completely *unenforceable* agreement may weigh in favor of including an explicit carve out to be clear that the NDA complies with the statute.

10. Potential Changes to Overtime Exemptions for White-Collar Workers

L&I has circulated a pre-draft rule with proposed changes to white-collar exemptions from overtime pay. Wash. Dep't of Labor & Indus., *Executive, Administrative, Professional & Outside Sales Rulemaking First Pre-Draft Rule* https://lni.us.engagementhq.com/learn-about-eap-exemptions (Oct. 5, 2018). As currently drafted, the rule would provide overtime protection to thousands of workers in the state by increasing the threshold salary levels for a number of positions.

Currently, the compensation threshold for individuals employed in a bona fide executive, administrative, or professional capacity never exceeds $250 per week (at times, the threshold is lower based on the primary duties of the employee). Under the proposed rule, the threshold would be *much* higher, but the exact amount is not yet specified. The draft provides a range between $720 to $1440 per week, defined as 1.5 to 3 times the statewide minimum wage received for a 40-hour work week. The weekly calculations are based on the 2019 statewide minimum wage, which is $12 per hour. Similarly, under current regulations, professional computer employees are exempt from overtime if they receive at least $27.63 per hour. The proposed rule increases that threshold as well. The draft provides a range between 2.5 to 6.5 times the minimum wage rate, or $30 to $78 per hour. L&I held feedback sessions throughout the month of October in various locations around the state. There will be public hearings on the proposed changes at a yet-to-be-determined date. The deadline for public comments has lapsed.

11. Employers May Not Consider Criminal History Early in the Hiring Process

Two years after the amendments to Seattle's ban-the-box ordinance took effect, the Washington Legislature enacted a statewide ban-the-box law—the Fair Chance Act. *See* Wash. Rev. Code ch. 49.94. The law prevents employers from inquiring or obtaining information about an applicant's criminal history—arrest or conviction— until after they determine that the applicant is otherwise qualified for the position. "Otherwise qualified" means that the job applicant meets the basic qualifications for the position as set out in the job ad or description without considering criminal background. Once an employer makes that determination, it may obtain criminal background information about the applicant.

The law has some exceptions, though. Employers can obtain criminal background information for applicants early in the process if: (1) the employer is hiring for a position with unsupervised access to children or vulnerable people; (2) the employer, a financial institution for instance, is explicitly allowed or required by another law to consider criminal history; (3) the employer is a law enforcement or criminal justice agency; (4) the employer is "hiring" a nonemployee volunteer; or (5) the employer is required to comply with the rules or regulations of a self-regulatory organization (defined by the Securities Exchange Act).

The law also prohibits employers from advertising job openings in a way that excludes people with criminal records from applying. Ads that state "no felons" or "no criminal background" or 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. For a first violation, the Attorney General will issue a notice of violation and offer its assistance to help an employer comply with the law. For a second violation, the Attorney General will seek a civil penalty of up to $750, and for each subsequent violation, a monetary penalty of up to $1,000. An employer may also be on the hook for costs and attorneys' fees the Attorney General incurs in enforcing the law.

Employers should ensure their hiring practices, application materials, and job announcements are compliant. Employers must also continue to comply with Seattle's ban-the-box ordinance.

12. Discovery Rule Limits Disclosure of Medical Records in Discrimination Cases

Employers defending against discrimination and harassment claims under WLAD face a new roadblock to discovering potentially relevant evidence under a new Washington statute. Wash. Rev. Code § 49.60.510. The law prohibits defendants from obtaining a plaintiff's medical records during discovery unless the plaintiff:

> (1) alleges a specific diagnosable physical or psychiatric injury as a proximate result of the defendant's conduct; (2) relies on the records or testimony of a health care provider or expert to seek general damages; or (3) alleges that the employer failed to accommodate a disability or discriminated against the plaintiff because of a disability.

Without any of the above, a court will find the plaintiff's medical records privileged and not allow the defendant access to them.

Even when the information is relevant, the law limits what kind of medical information the defendant can access. For example, even if one of the exceptions applies, the law limits an employer-defendant to records: (1) created two years before any alleged unlawful conduct and (2) related to the diagnosable injury or disability specified by the plaintiff. The only exception to the law's temporal limitation is where the court finds "exceptional circumstances" and permits discovery of records made earlier than two-years prior. The law, however, does not explicitly authorize the court to expand discovery of medical records to other medical conditions not specifically identified by the plaintiff, even if other conditions are potentially relevant to damages or facts of the case.

This new law severely limits defendants' ability to identify pre-existing medical and mental health conditions that may be relevant to plaintiff's credibility and damages or to events that gave rise to the lawsuit. Now defendants will be hampered in their ability to argue that other medical issues in a plaintiff's life may be the reason for emotional distress or a diagnosed mental health condition, rather than defendant's action. Indeed, under the new statutory standard, plaintiffs are seemingly licensed to withhold relevant mental health records yet offer cherry-picked testimony about alleged harm to a plaintiff's mental health to support their claim for emotional distress damages.

The statute also noticeably departs from the ruling in *Lodis v. Corbis Holdings*, where the Washington Court of Appeals held that "when a plaintiff puts his mental health at issue by alleging emotional distress . . . [t]he defendant is entitled to discover any records relevant to the plaintiff's emotional distress." 292 P.3d 779, 791 (Wash. Ct. App. 2013).

Employers will have a limited ability to explore a plaintiff's pre-existing medical and mental health conditions in employment lawsuits. Employers will therefore have a difficult time showing that other issues in a plaintiff's life (as opposed to the employer's actions) may be the reason for their alleged emotional distress.

III. CASE LAW DEVELOPMENTS

A. Federal Decisions

1. The Supreme Court Enforces Arbitration Agreements with Class Waivers

Near the end of last term, the U.S. Supreme Court considered whether to enforce arbitration agreements that include a waiver of an employee's right to participate in any class, collective, or representative proceedings. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). The case forced the court to grapple with potential conflicts between two federal statutes, the Federal Arbitration Act (FAA) and the NLRA. 9 U.S.C. §§ 1-14; 29 U.S.C. § 151-69. For those who have been following the Supreme Court's jurisprudence on arbitration more generally, the outcome of this case—enforcement of the agreements—likely came as no surprise. As a practical matter, arbitration agreements are frequently used by employers with regard to employment-based disputes. This case requires many of those provisions to be enforced.

Facts and Background

Epic Systems, a healthcare data management software company, required its employees to sign an arbitration agreement which provided that they would resolve any employment-based dispute with Epic through individual arbitration and waive their right to participate in any class, collective, or representative proceedings.

Jacob Lewis was a former Epic employee who was subject to the arbitration agreement. He sued Epic in federal court individually and on behalf of similarly situated employees. He claimed that they had been denied overtime wages in violation of the FLSA. 29 U.S.C. §§ 201-19. The district court denied Epic's motion to dismiss the complaint, holding that the arbitration agreement was unenforceable because it violated Section 7 of the NLRA, which protects the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. The Seventh Circuit affirmed, holding that the language of Section 7 unambiguously protects collective remedies and that the FAA does not override that protection. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).

The Court's Holding

The Supreme Court granted certiorari and consolidated the case with two other cases, *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) and *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015), where the employer and employees had similarly

entered into these types of arbitration agreements. The sole issue before the court was whether the arbitration agreements were enforceable. Justice Gorsuch, delivering the opinion of the Court, found that "as a matter of law the answer is clear." *Epic Sys. Corp.*, 138 S. Ct. at 1619. The court held that the agreements were enforceable.

The employees argued that the FAA's "savings clause" created an exception for their case and allowed the courts to refuse to enforce the arbitration agreements. The savings clause provides that courts may refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The employees argued that the NLRA rendered their arbitration agreements unlawful because of the collective action waivers. Because those provisions were unlawful, the employees could revoke them on grounds of illegality.

The Court addressed this argument first by putting aside other concerns—whether the savings clause saves defenses arising from federal statutes, whether this could be grounds for revocation, and whether the NLRA even renders class waivers illegal. But even assuming all those issues went in the employees' favor, the Court still disagreed with the employees' savings clause argument. The Court explained that the savings clause recognizes only defenses that apply to *any* contract, not defenses that apply only to arbitration agreements or target the fundamental attributes of arbitration. "[T]he saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" *Id.* at 1622 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)).

Next, the employees argued that even if the FAA requires enforcement of the agreements, the NLRA overrides the FAA and makes the agreements unlawful. Their argument rested on Section 7 of the NLRA, which guarantees workers:

> the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

29 U.S.C. § 157. They argued that Section 7 demonstrates an irreconcilable conflict between the NLRA and the FAA and a clear congressional mandate to displace the FAA.

The Court found "no conflict at all." *Epic Sys. Corp.*, 138 S. Ct. at 1625. In interpreting the statute, the Court explained that the "concerted activities" right in the NLRA appears at the end of a detailed list of activities (forming, joining, or assisting labor organizations, bargaining collectively), so the general phrase "concerted activities" should be understood to embrace activities similar in nature to the preceding specified activities. *Id.* (relying on *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) and discussing *ejusdem generis* canon). Essentially, that reading suggests that the right to engage in concerted activities protects

employee activity to exercise the right of free association in the workplace, not to employee activity in the courtroom.

The Court highlighted other holes in the employees' argument as well. Namely, that their cause of action did not even arise under the NLRA. It arose under the FLS,A which allows employees to sue on behalf of themselves and other employees. But the employees could not argue that the FLSA conflicts with the FAA because the Court had already squarely addressed and rejected that position. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

The Court also rejected the employee's final position: that even if Section 7 of the NLRA did not apply to their suit, the Court should defer to the Board's interpretation that the NLRA displaces the FAA. The employees relied on the Board's 2012 decision, *In Re D. R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), which the Fifth Circuit later reversed with regard to the arbitration agreement enforcement issue. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013). The Court found that no deference toward the Board was due. The Court held that although statutory ambiguities represent an implicit delegation to the agency that administers the statute, that does not include a delegation "to address the meaning of a second statute [that the agency] does not administer." *Epic Sys. Corp.*, 138 S. Ct. at 1629 (relying on *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984)). Further, the Board and the Solicitor General's Office filed competing briefs in which they disputed the interpretation of the NLRA. Those competing positions undermined any deference to the Executive Branch on the question. *Id.* at 1630.

Justice Thomas joined the Court's opinion in full, but wrote separately to note that the agreements are enforceable under the FAA's plain meaning as well.

The Dissent

Justice Ginsburg dissented—joined by Justices Breyer, Kagan, and Sotomayor—and noted the "extreme imbalance" between employers and employees and that Congress attempted through the NLRA to place the parties on more equal footing. *Id.* at 1633 (Ginsburg, J., dissenting). Under her interpretation of Section 7 of the NLRA, lawsuits to enforce workplace rights fit within the "concerted activities" umbrella. *Id.* at 1637. And agreements that waive these rights are unlawful. Because illegality is a traditional, generally applicable contract defense, she would have concluded that the defense fits within the FAA's savings clause. *Id.* at 1645.

2. The Ninth Circuit—Relying on *Epic*—Enforces Uber's Arbitration Agreements

Arbitration agreements are also often used between companies and contractors. The Ninth Circuit recently relied on *Epic* to enforce arbitration agreements between Uber and its independent-contractor drivers. In *O'Connor v. Uber Techs.*, ___ F.3d ___, 2018 WL 4568553

(9th Cir. Sept. 25, 2018), the Court held that arbitration agreements between Uber and its partner-drivers were enforceable. The Court reversed denial of Uber's motion to compel arbitration. The Court also reversed the District Court's class certification order because the District Court based its order on what it found to be *unenforceable* arbitration agreements.

The case arose from a putative class action complaint filed in 2013 in which the drivers alleged they were misclassified as independent contractors rather than employees resulting in violations of state and federal laws.

The plaintiffs made two arguments for why the arbitration agreements were unenforceable. First, they argued that the lead plaintiffs in *O'Connor* constructively opted out of arbitration on behalf of the entire class. The Court found that argument unpersuasive. The lead plaintiff did not have authority to take that action on behalf of other contractors, and no federal case law supported their position. *Id.* at *4.

Second, they argued that the arbitration agreements contain class action waivers in violation of Section 7 of the NLRA, rendering them unenforceable. *Id.* at *5. After *Epic*, the parties submitted supplemental briefing in which the plaintiffs acknowledged that the Supreme Court's decision extinguished their argument. The court agreed that the *Epic* case foreclosed the plaintiff's argument and thus there was no reason why the arbitration agreements should not be enforced.

3. The Supreme Court Strikes Down Non-Member Agency Fees for Public Unions

It violates the First Amendment to require nonconsenting public-sector employees to pay agency fees. That's what the Supreme Court held in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, __ U.S. __, 138 S. Ct. 2448 (2018). Although the decision applies only to public unions, it shows how the Supreme Court is likely to treat similar fees for private sector employees in unionized workplaces.

Facts and Background

The Illinois Public Labor Relations Act (IPLRA) allowed state and local employees to unionize. After an employee's workplace unit unionized, an employee did not have to join the union. But the union became the employee's sole representative. That meant that only the union could negotiate with an employer about compensation, other conditions of employment, and policy issues like layoffs, promotion, nondiscrimination policies, and privatization. Under the scheme, an employee had to be represented by their union; an employee could not negotiate directly with his or her employer.

An employee did not have to join the union and pay full union dues, but nevertheless had to pay an agency fee because the union acted as the employee's representative. The agency fee was a percentage of the union dues for "chargeable" expenditures. The agency fee covered costs for collective bargaining, contract administration, and the union's pursuit of matters relating to wages, hours, and conditions of employment. The agency fee could not, however, include any costs for supporting electoral candidates. Based on those standards, the union reached a "proportionate share" for the nonmember employee, which the employer automatically deducted from the employee's paycheck. The agency fee also included costs for other related activities: lobbying, social and recreational activities, litigation, and other services that would benefit employees in the unit. The chargeable amount for the nonmember employees of the at-issue unit was over 78% of the full union dues.

Mark Janus worked for the Illinois Department of Healthcare and Family Services as a child support specialist. The union represented the employees in Janus's unit. Janus declined to join the union because he did not agree with its collective bargaining positions and did not want to pay any union fee. But under the scheme outlined above, he had to pay about $535 a year in agency fees.

The Court's Holding

The Court—Justice Alito writing for the majority and joined by Chief Justice Roberts, Justice Thomas, Justice Gorsuch, and Justice Kennedy—ruled for Janus, holding that the IPLRA violated the First Amendment. The Court surveyed its earlier free speech cases regarding the level of scrutiny that applies to agency fees. Although the Court did not "decide the issue of strict scrutiny," it rejected a "minimal scrutiny" standard as "foreign to our free-speech jurisprudence." *Id.* at 2460. It instead applied an "exacting scrutiny" standard. *Id.* Under that standard, the IPLRA failed because it compelled nonmembers "to subsidize private speech on matters of substantial public concern." *Id.*

The Court expressly overruled its 41-year-old holding in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that public-sector employees who did not join a union nevertheless had to pay union fees for collective bargaining activities because those employees benefited from those activities. The Court had also held, however, that nonmember employees could not be required to pay for the political activities of the union because those fees would violate the constitutional free speech rights of employees who disagreed with the union's political views.

In striking down *Abood*, the Court rejected "labor peace" as a justification for the fees in *Janus*. Although the Court assumed that labor peace was a compelling state interest, it concluded that there was no evidence that without agency fees, the bargaining unit structure would descend into chaos. Indeed, the Court knocked down a central assumption in *Abood*: "that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked." *Id.* at 2465. The Court pointed to federal law as an example. Under federal law, a chosen union became the exclusive representative of all

employees—as under the IPLRA—but could not collect agency fees. Because the federal scheme had worked well, the Court debunked the idea that agency fees were necessary to tamp down discord.

The Court also rejected the Union's free rider argument. The Court concluded that avoiding free riders in this context was not a compelling state interest. And the Court rejected the notions that unions would be unwilling to represent nonpaying nonmembers and that it was unfair to require unions to fairly represent nonpaying nonmembers.

The Court also rejected the idea that union speech should be treated like employee speech—and could therefore by regulated by requiring employees to "subsidize speech with which they may not agree." *Id.* at 2472.

In its final line of reasoning, the Court took aim at *Abood* itself, concluding that it was wrongly decided; unworkable because the line between chargeable and nonchargeable expenses had been impossible to precisely draw; legal and factual developments undermined the premises on which *Abood* was decided; and *Abood* was an outlier in the Court's First Amendment jurisprudence.

The Court concluded:

> We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

Id. at 2485-86.

The Dissent

In her dissent, Justice Elena Kagan—joined by Justices Sonia Sotomayor, Ruth Bader Ginsburg, and Stephen Breyer—took a different view:

> There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

Id. at 2501 (Kagan, J., dissenting).

4. The Ninth Circuit Holds that Employers Cannot Justify Wage Differences by Relying on Prior Salary

In considering a question about the federal Equal Pay Act, the Ninth Circuit held that an employer cannot justify a difference in wages between male and female employees by relying on prior salary. *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018).

The Equal Pay Act prohibits employers from paying male employees more than female employees for "equal work," subject to four exceptions:

> (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

29 U.S.C. § 206(d)(1). In *Rizo*, the Ninth Circuit addressed the fourth exception.

Facts and Background

The Fresno County Office of Education hired Aileen Rizo as a math consultant in October 2009. Before that, she had worked in Arizona as a middle and high school math teacher, and her annual salary was $50,630 for 206 working days. She also received a yearly stipend of $1,200 for her master's degrees.

When the County hired her, it set her pay based on its Standard Operating Procedure 1440 (Procedure). The Procedure implemented 10 stepped salary levels, with another 10 salary steps in each level. The Procedure set pay by taking the new hire's previous salary, adding 5% to it, and then situating the new hire on the correct step of the salary schedule. Under the Procedure, the County did not rely on experience. Rizo was placed at step 1 of level 1 of the hiring schedule, and she earned $62,133 for 196 days worked and a $600 yearly stipend.

In 2012, Rizo learned that she made less than her male colleagues, who were hired after her at higher salary steps. She filed a complaint with the County, and in response, the County claimed that it had reviewed the salary placements for the previous 25 years and determined that more women were placed at higher steps than men. Rizo argued that the data showed otherwise.

Rizo sued the County, and in 2015, the County moved for summary judgment. The County argued that relying on Rizo's prior salary was permissible under the fourth exception in the EPA. The District Court for the Eastern District of California denied the County's motion, concluding that the Procedure clashed with the Equal Pay Act because relying on prior salary would perpetuate pay disparities between men and women. It certified the question to the Ninth Circuit for interlocutory review.

A three-judge panel of the Ninth Circuit vacated the summary judgment denial and remanded. The panel held that a prior Ninth Circuit case—*Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982)—controlled and permitted prior salary alone to qualify as a "factor other than sex." The panel reasoned that under *Kouba*, considering prior salary alone to set current salary was permissible as long as the employer could justify its consideration as reasonable and furthering a business purpose. After that, a majority of the active judges on the Ninth Circuit voted to hear the case en banc.

The Court's Holding

In an opinion authored by Judge Reinhardt before his death, the en banc panel first discussed the reason behind the Equal Pay Act. The panel said that the Act "'creates a type of strict liability' for employers who pay men and women different wages for the same work: once a plaintiff demonstrates a wage disparity, she is not required to prove discriminatory intent." *Rizo*, 887 F.3d at 459 (quoting *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986)).

The Ninth Circuit "conclude[d], unhesitatingly, that 'any other factor other than sex' is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance." *Id.* at 460. According to the majority, prior salary—whether considered alone or along with other factors—is not job-related. Even though the catchall provision applies to many job-related factors, according to the majority, it does not extend to reasons that are simply good for business. In the majority's view, prior salary does not legitimately measure "work experience, ability, performance, or any other job-related quality." *Id.* at 467. The County, therefore, failed as a matter of law to prove an affirmative defense.

The majority took pains to acknowledge that it expressed a general rule and did not resolve how it applies in every situation. As an example, the majority said that it did not decide "whether or under what circumstances, past salary may play a role in the course of an individualized salary negotiation." *Id.* at 461.

The Concurrences

Three concurring opinions express varying degrees of disagreement with the majority. Judge McKeown, joined by Judge Murguia, agreed with most of the majority opinion but found that it went "too far" in holding that employers may never consider prior pay on its own. *Id.* at 469 (McKeown, J., concurring). Judge McKeown would have held that prior salary alone is not a defense to unequal pay, but would have allowed employers to consider prior salary along with other factors when they set an employee's initial pay. The burden would be on the employer to show that the differential rested on a valid job-related factor. Although Judge McKeown agreed that the County failed on its affirmative defense in this case, she was concerned that the majority's rule would stifle women in salary negotiations when they would benefit from disclosing prior salary.

Judge Callahan, whom Judge Tallman joined, agreed that women should receive equal pay for equal work, but found that the majority failed to "follow Supreme Court precedent," ignored "the realities of business," and articulated a rule that "may hinder rather than promote equal pay for equal work." *Id.* at 472-73 (Callahan, J., concurring). Judge Callahan wrote that prior salary can be job-related because it allows employers to offer a competitive wage and does not necessarily embody gender bias.

And finally, Judge Watford read the Equal Pay Act differently to reach the same result. In his view, "past pay can constitute a 'factor other than sex,' but only if an employee's past pay is not itself a reflection of sex discrimination." *Id.* at 478 (Watford, J., concurring). Under that reading, "[i]f an employer seeks to justify paying women less than men by relying on past pay, it bears the burden of proving that its female employees' past pay is not tainted by sex discrimination, including discriminatory pay differentials attributable to prevailing market forces." *Id.* at 478-79. He believed employers would rarely be able to make that showing.

Petition for Certiorari

The County has petitioned the United States Supreme Court to consider the case. Pet. for Writ of Certiorari, *Yovino v. Rizo* (2018) (No. 18-272). The County urges the Supreme Court to hear the case to resolve a Circuit split that pits the Ninth Circuit—which, of course, decided that prior salary is never a factor other than sex for purposes of pay differentials—against four other Circuits that have said prior salary alone or in combination with other factors can be a factor other than sex. The County also argues that it adopted the Procedure precisely to account for unfair discrepancies in pay.

The Chamber of Commerce of the United States of America and Workplace Compliance have filed amicus briefs from the employer perspective, urging the Court to take the case. They argue that the Ninth Circuit's rule ignores the legitimate reasons employers rely on prior salary in setting current salary—to attract competitive candidates, gain information about appropriate salaries when there aren't better ways to get the information, and weed out applicants that they couldn't afford. They also argue that prior salary is a poor proxy for gender-based pay discrepancies or at least that it doesn't entirely answer why the gap persists. Finally, they argue that they now have no flexibility in considering prior salary even outside the Ninth Circuit because to have multiple regimes—one in which they can't consider prior salary and others in which they can—simply doesn't work.

5. The Ninth Circuit Clarifies Tip Credits for Dual Workers

The Ninth Circuit recently clarified employers' use of the tip credit under the FLSA for workers engaged in dual jobs. *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018).

Statutory Background

In tipped occupations, the FLSA allows employers to take a tip credit. A tipped employee is "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). Employers can use an employee's tips to offset minimum wage, paying as little as $2.13 per hour to tipped employees under federal law. But the employer must make up the difference if an employee's wages and tips don't meet the minimum wage.

The DOL's dual jobs regulation provides:

> In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

29 C.F.R. § 531.56(e).

Because the regulation was confusing to employers, DOL later issued guidance explaining the regulation. The guidance says that an employer can take a tip credit for an employee's time doing tasks related to his or her tipped occupation, even if those duties are ones that wouldn't produce tips—that is, the tasks like Marsh had to do. But those tasks had to be incidental to the regular duties of the tipped job. If they were more than 20% of an employee's working hours, the employer can't take the tip credit for the related tasks.

The guidance also says that an employer can't take the tip credit for tasks unrelated to the tipped job. Unrelated tasks for a server would be things like maintenance and cleaning. An employee who does a tipped job and unrelated tasks—an untipped job—is employed in dual jobs.

Facts and Background

Marsh worked as a server at J. Alexander's, a chain restaurant. He usually worked 32 hours a week and spent almost half his time on non-tipped tasks. Those tasks included cutting and stocking fruit, cleaning the drink dispenser, stocking ice, taking out the trash, and cleaning the restrooms. He did those tasks when there were no customers in the restaurant. J. Alexander's paid Marsh an hourly tip credit wage of $4.65 per hour and $4.80 per hour (based on Arizona minimum wage law) for the two years he worked there.

Marsh sued J. Alexander's, alleging that his former employer violated the FLSA because he was a dual employee working in both a tipped and a non-tipped occupation. That is, he was a tipped employee when serving customers and a non-tipped employee when he did other tasks when the restaurant was closed. He claimed that J. Alexander's could pay him the tipped wage for his work as a server but not for his non-tipped work. It had to pay him the full minimum wage for that work.

In the District Court for the District of Arizona, J. Alexander's moved to dismiss Marsh's complaint for failure to state a claim. The District Court granted the motion and denied Marsh leave to amend. The District Court held that (1) because Marsh was paid minimum wage per workweek, it did not matter how much he was actually paid per hour; (2) the dual jobs regulation is unambiguous and does not recognize employees as working in different occupations when the non-tipped tasks are related to the tipped occupation; and (3) even if the dual jobs regulation is ambiguous, the DOL's interpretation of the regulation is not entitled to agency deference.

Marsh appealed and his case was consolidated with a dozen other similar workers. A three-judge panel of the Ninth Circuit agreed that the DOL's interpretation of its dual jobs regulation was not entitled to agency deference. The panel concluded that "the Guidance's focus on duties and tasks was inconsistent with the dual jobs regulation's focus on jobs." *Id.* at 617. The panel affirmed the District Court's dismissal. A majority of the Ninth Circuit's active judges voted to rehear the case en banc.

The Court's Holding

In an opinion authored by Judge Paez, the en banc panel held that the DOL "foreclosed an employer's ability to engage in this practice by promulgating a dual jobs regulation in 1967, 29 C.F.R. § 531.56(e), and subsequently interpreting that regulation in its 1988 Field Operations Handbook." *Id.* at 616. He wrote that the agency regulation was entitled to deference under *Chevron*. And giving that deference, "[t]he dual jobs regulation establishes that an employee is entitled to the full minimum wage for any time spent in a non-tipped occupation." *Id.* at 623 (citing 29 C.F.R. § 531.56(e)).

The panel then turned to whether the guidance related to the regulation was also entitled to deference. The court held that "[b]ecause the dual jobs regulation is ambiguous and the Guidance's interpretation is both reasonable and consistent with the regulation," the guidance was entitled to deference. *Id.*

Then, having concluded that both the regulation and guidance were entitled to deference, Judge Paez concluded that:

> Together, these two provisions [the regulation and the guidance] clarify the boundaries of acceptable tip credit use and ensure that a server's tips serve as a gift to the server, as opposed to a cost-saving benefit to the employer. Although the agency had a number of options available to resolve this issue, it is neither

> appropriate nor reasonable for us to override the DOL's dual jobs regulation and its Guidance where, as here, the latter is consistent with the former and both are consistent with the purpose of the FLSA.

Id. at 633.

Judge Paez afforded no weight to J. Alexander's argument that they were not on notice that they needed to comply with the DOL guidance. He said that the guidance had been around since 1988, and the DOL had advanced the interpretation of the dual job regulation from the guidance in a 2010 amicus brief. He also quickly dispensed with J. Alexander's argument that the 20% threshold was unworkable: "The allegations that would trigger a FLSA wage violation claim require more than de minimis claims based on seconds or minutes spent rolling silverware or sweeping a customer's shattered glass." *Id.* at 631. And he found that Marsh alleged much more than a de minimis claim and that it would not be hard for an employer to track an employee's time spent on non-tipped work.

Based on that holding and reasoning, Judge Paez concluded that Marsh stated two claims: (1) "that he is entitled to the full hourly minimum wage for the substantial time he spent completing related but untipped tasks, defined as more than 20% of his workweek"; and (2) "that he is entitled to the same for time he spent on unrelated tasks." *Id.* at 633. He reversed the District Court and remanded for further proceedings.

The Partial Concurrence and Partial Dissent

Judge Graber concurred in part and dissented in part. She agreed only that Marsh had stated the second claim: that J. Alexander's denied him wages for work unrelated to his tipped occupation. She would have concluded that the guidance "that focuses on the amount of time spent engaged in related but non-tipped work" is not entitled to deference because the DOL's interpretation was inconsistent with the regulation. *Id.* at 634. And without that deference—and therefore reliance on the guidance—Marsh could not state a claim that J. Alexander's denied him full wages for the time that he spent doing work related to his job as a server.

The Dissent

Judge Sandra Ikuta, joined by Judge Consuelo Callahan, dissented. Judge Ikuta saw the DOL's interpretation not as guidance but as "detailed and specific legislation that effectively eliminated an employer's statutory right to take a tip credit." *Id.* at 637. She believed that "[b]y deferring to the agency, and thus letting it improperly assume legislative authority, the majority fails in its duty to check the agency's attempt to exploit ambiguous laws as license for [its] own prerogative." *Id.* at 637-38 (internal quotation marks omitted; second alteration in original). Because the purported interpretation was actually improper legislation, Judge Ikuta would have

afforded it no deference. She deemed the guidance "the Time-Tracking Ruling" and concluded that it could not be viewed as interpreting the dual jobs regulation.

B. Washington State Supreme Court Decisions

The Washington Supreme Court has been very active in the employment arena lately. This section discusses a number of recent decisions.

1. Trade Secrets Are Not Always So Secret

In *Lyft, Inc. v. City of Seattle*, 418 P.3d 102 (2018), the Washington State Supreme Court held that companies' trade secrets are *not* categorically excluded from disclosure under the Public Records Act (PRA). Wash. Rev. Code ch. 42.56. To prevent disclosure requires more.

Facts and Background

Lyft and Raiser, a subsidiary of Uber, operate as transportation network companies (TNCs) in Seattle. In 2014, the City of Seattle passed an ordinance that limited the number of TNC drivers that could be active at any given time. Lyft and Uber opposed the ordinance and attempted to overturn it through a voter referendum. Later, after a mediation with the City, Lyft and Uber withdrew their referendum proposal. Instead, the parties agreed that Lyft and Uber would each submit quarterly reports to the City with specific operational data, including: the total number of rides, the percentage of rides completed in each zip code, pick-up and drop-off zip codes, the percentage of rides requested but unfulfilled, the number of requested rides for accessible vehicles, and collision data. Lyft and Uber were concerned about the confidentiality of the information provided, so the City agreed that it would maintain the highest possible level of confidentiality for the information provided, within the confines of the law.

Afterwards, Jeff Kirk, a resident of Texas, submitted a PRA request to the City for the Lyft and Uber reports for the last two quarters of 2015. The City provided notice of the request to Lyft and Uber, and thereafter, Lyft and Uber sought an injunction under the PRA to prevent disclosure. The trial court granted Lyft and Uber's request for a permanent injunction, concluding that the reports were trade secrets under the Uniform Trade Secrets Act (UTSA) and therefore exempt from PRA disclosure. Wash. Rev. Code ch. 19.108. Both parties sought direct review.

The Court's Holding

The Washington State Supreme Court reversed. The decision provides a thorough analysis of the interplay between the PRA and UTSA. Essentially, the PRA injunction standard must *always* be considered with regard to PRA requests, even when other statutes apply. Under the PRA, all public records must be made available for public inspection and copying *unless* the records fall within a specific PRA exemption or "other statute" which exempts or prohibits

disclosure. Wash. Rev. Code § 42.56.070(1). The court found that the UTSA is incorporated as an "other statute" but it contains no specific exemption of trade secrets from public disclosure laws. *Lyft, Inc.*, 418 P.3d at 108. Thus, even though the Court found that the trial court sustainably concluded that the reports are trade secrets under the UTSA, that alone is not enough to prevent disclosure under the PRA.

When an injunction is sought, courts must follow a two-step inquiry. "First, the court must determine whether the records are exempt under the PRA or an 'other statute' that provides an exemption in the individual case. Second, it must determine whether the PRA injunction standard is met." *Id.* at 113. And an injunction is warranted under the PRA only if (1) disclosure would clearly not be in the public interest, and (2) disclosure would substantially and irreparably damage any person or vital government function. *Id.* at 113. Under the UTSA, to get an injunction, a party "must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him." *Tyler Pipe Indus. v. Dep't of Revenue*, 638 P.2d 1213, 1217 (Wash. 1982) (quoting *Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union*, 324 P.2d 1099, 1101 (Wash. 1958)). The court rejected the UTSA injunction standard for public records constituting trade secrets and instead set a higher bar for companies to meet.

It is important to note, however, that this case provided a *categorical* holding. Thus, trade secrets *may* be excluded from disclosure. But to do so, the records must meet the injunction standard under the PRA. Wash. Rev. Code § 42.56.540. On remand, the trial court was ordered to make a fact-based determination for injunctive relief under the PRA. More broadly, employers in regulated industries often must submit business information to public agencies on a regular basis. They should take note of the PRA standard and be prepared to allege those elements if a request for disclosure is made and the company seeks an injunction.

2. Contractor Defeats Summary Judgment on Her Gender Discrimination Claim

In a recent opinion, the Washington State Supreme Court considered whether summary judgment dismissal of an independent contractor's gender discrimination claim and negligent misrepresentation claim was proper, as well as the dismissal of the breach of contract claim. *Specialty Asphalt & Constr., LLC v. Lincoln Cty.*, 421 P.3d 925 (Wash. 2018). With regard to contractor/employment issues, the Court held that, viewing the evidence together, there were competing inferences of discrimination and nondiscrimination which were sufficient to overcome a motion for summary judgment. This decision follows the trend from the Court's prior decision in *Mikkelsen v. Public Utility District No. 1 of Kittitas County* to make the summary judgment standard more lenient for employment discrimination claims. 404 P.3d 464 (Wash. 2017).

Facts and Background

The lawsuit arose from Lincoln County's attempt to hire a contractor to complete a paving project. Specialty, owned by Lisa Jacobsen, responded to a call for bids from the County for the project. The bid proposal explicitly stated that no bond was required for the project. The proposal also announced a scheduled walk-through of the project site to learn about the scope of work. Jacobsen, on behalf of Specialty, attended the walk-through. At the beginning of the walk-through, Nollmeyer, the County operations and permit coordinator, told Jacobsen her shoes with heels were not the most appropriate attire. A few days later, a male representative of Arrow, another paving company, which is owned by a male acquaintance of Nollmeyer's, requested to see the project. Nollmeyer responded to the request and essentially gave him an unscheduled private walk-through.

Prior to the bid deadline, Nollmeyer called Jacobsen and discouraged her from bidding on the project. Nevertheless, Jacobsen submitted a bid on behalf of Specialty. Arrow submitted a bid as well. Nollmeyer admitted that he checked Specialty's contractor status through the Department of Labor & Industries' website prior to awarding the bid but could not recall if he did so for Arrow. The County awarded the bid to Specialty, but then informed Specialty of an additional requirement to obtain a bond before proceeding. The day after awarding the bid, the County began tracking Specialty's contractor status on an ongoing basis through the Department of Labor & Industries' website.

Specialty and the County went back and forth on the bond requirements. At first the County withdrew the bid award and sent out a new call for bids *with* a bond requirement, then withdrew the rebidding process and informed Specialty that it would proceed with Specialty's bid so long as Specialty obtained the bond. The County even offered to reimburse Specialty for the bond premium expense. Jacobsen believed that this would expose both parties to liability for collusion or bid rigging. Specialty then filed suit.

The trial court granted summary judgment in favor of the County for the gender discrimination claim. In an unpublished opinion, the Court of Appeals affirmed, holding that Jacobsen failed to show that because of her gender, she was treated differently than members of the opposite sex. Essentially, the court found "no evidence that Arrow was treated differently" to establish disparate treatment, and because the alleged disparate treatment did not cause Specialty to lose the bid. *Specialty Asphalt & Constr., LLC v. Cty. of Lincoln*, 200 Wn. App. 1034, 2017 WL 3723090, at *3 (Wash. Ct. App. Aug. 29, 2017) (unpublished).

The Court's Holding

The Washington State Supreme Court reversed. The Court admitted that some elements of Specialty's evidence might not create a reasonable inference of discrimination, but when viewed together, there were clearly reasonable inferences of discrimination and

nondiscrimination which was sufficient to defeat a motion for summary judgment. The court considered direct evidence of discrimination (e.g., the shoe comment and discouraging phone call), comparative evidence of the contracting companies (e.g., the scheduled and unscheduled walk-through) and post-award treatment of Specialty (e.g., the bond requirement and ongoing contractor tracking).

This case is important because the court extended the standard from *Mikkelsen* to claims of gender discrimination for contractors. In *Mikkelsen*, the court held that evidence in discriminatory actions should be "taken together" when considering whether the record contains reasonable but competing inferences of discrimination and nondiscrimination. 404 P.3d at 475. Further, to establish discriminatory action, "plaintiffs may rely on circumstantial, indirect, and inferential evidence." *Id.* at 526. The court embraced these standards in *Specialty*.

The plaintiff in *Mikkelsen* brought a claim under RCW 49.60.180 which delineates unfair employment practices against applicants and employees. In contrast, Specialty's claim was brought under RCW 49.60.030 which was made applicable to contractors through caselaw. *See Marquis v. City of Spokane*, 922 P.2d 43, 45 (Wash. 1996) (holding that under the broad protections of RCW 49.60.030, independent contractors can bring a claim for discrimination in the making or performing of a contract for personal services). Thus, it is possible that the Court's reasoning in *Specialty* (and therefore in *Mikkelson* as well) may be applied to gig economy contractors.

3. Clarification of the Tests for Wrongful Discharge in Violation of Public Policy

The Washington Supreme Court recently clarified which wrongful discharge in violation of public policy tests—there are two—apply to different theories of liability. *See Martin v. Gonzaga Univ.*, 425 P.3d 837 (Wash. 2018). The Court has been active in deciding cases on this cause of action in recent years, and this opinion cleans up some of its previous analysis.

Facts and Background

Gonzaga University hired David Martin in 2008 to work as an assistant director of the University's fitness center. He was an at-will employee with no written contract for a set period of employment. The assistant athletics director supervised Martin.

Before the University hired Martin, it considered padding the walls of the fitness center's basketball court. That year, fitness center leadership worked with a risk manager to decide whether the center needed padding; the University ultimately declined to add padding. In 2007, the University commissioned another study and the assistant athletics director recommended that the University pad the walls. Students had been injured when they collided with the bare concrete walls. The University again declined to add padding.

In April 2011, Martin's supervisors rated his performance below average. They identified problems with his interpersonal skills, problem solving, professional development, and leadership responsibilities. They noted that sometimes he displayed a great work ethic and sometimes he didn't. During the performance review, Martin's supervisor asked him how he could improve his performance and how to improve the fitness center. Martin suggested a new swimming program and criticized the center, but did *not* mention the basketball court walls.

After the meeting, Martin emailed the swimming program idea to someone higher up his chain of command, who was concerned that Martin was not complying with University policy in making the proposal. Martin's supervisor then met with Martin to discuss the email and Martin's insubordination; after the meeting, Martin left work early without permission. The University put Martin on administrative leave and told him that during the leave, he could not contact anyone at the University except for human resources and his supervisor.

In violation of that directive, Martin called the assistant to the University president. The assistant told Martin to follow his "chain of command" in the athletics department. Instead, Martin emailed the president directly; he again did *not* mention the wall padding. A couple of days after that a student got a concussion and stitches after running into the wall at the basketball court. And the day after that, the University terminated Martin because he hadn't improved his performance.

After he was terminated, Martin wrote a letter to the University president and the athletics director. He told them that the University hadn't responded to safety concerns while he was in the athletics department and said that they fired him as pretext for expressing concern about safety issues.

Martin then sued the University, alleging wrongful termination in violation of public policy. He claimed that the University fired him for bringing up safety concerns about the basketball court—that is, for whistleblowing.

The trial court and Court of Appeals granted the University's motion for summary judgment, but the Court of Appeals relied on the Perritt test, a four-part framework for wrongful discharge suits based on a treatise by Henry Perritt. The Supreme Court took up Martin's case to clarify whether the Perritt test applied to claims involving whistleblowing.

The Court's Holding

The wrongful discharge in violation of public policy tort is a narrow exception to the at-will employment doctrine. An employee must demonstrate that the employer terminated him for a reason that contravenes a clear mandate of public policy. If the employee does that, the employer must prove that it dismissed the employee for another reason. As set out in *Gardner v. Loomis Armored, Inc.*, 913 P.2d 377 (Wash. 1996), the Washington Supreme Court generally limits the tort to four situations: (1) the employee is fired for refusing to commit an illegal act;

(2) the employee is fired for performing a public duty; (3) the employee is fired for exercising a legal right; and (4) the employee is fired for whistleblowing.

In that same case, the Supreme Court adopted a four-part framework—the Perritt test—to analyze claims that did not fall neatly into one of those categories. The framework requires: (1) the employee to prove a clear public policy (the clarity element); (2) the employee to prove that discouraging the conduct the employee engaged in would jeopardize that public policy (the jeopardy element); (3) the employee to prove that the conduct caused the dismissal (the causation element); and (4) the defendant must not be able to give an overriding justification for dismissing the employee (the absence of justification element). *Id.* at 382.

In previous cases, the Court has held that the Perritt framework doesn't apply when a claim fit in one of the categories of wrongful discharge. Here, Martin's claim fit in the fourth category—whistleblowing. He didn't need to prove the clarity, jeopardy, causation, and absence of justification elements as articulated in the Perritt framework.

The Court of Appeals erred by applying that test instead of the standard in *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984) and *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 821 P.2d 18 (Wash. 1991)—the standard that applies when one of the four specific categories is at issue. Under that standard, an employee has to show that his discharge may have been motivated by reasons contravening a clear public policy and that the public policy linked-conduct significantly factored into the employer's decision to discharge the employee. If the employee demonstrates that prima facie case, the employer then has the burden to show a legitimate, nonpretextual, and nonretaliatory reason for discharging the employee. And finally, if the employer meets that burden, the employee must show that the employer's reason is pretextual or "although the employer's stated reason is legitimate, the [public-policy-linked conduct] was nevertheless a substantial factor motivating the employer to discharge the worker." *Martin*, 425 P.3d at 844.

Under the correct test, Martin's claim failed because there was no evidence that he complained about the wall padding or that the University took action against him because of those complaints.

4. Piece Rates, Production Minutes, and Limits on Employer Flexibility

The Washington Supreme Court has recently responded to various certified questions regarding piece rate and production-based compensation structures. Although the contexts of these structures is somewhat unique, the cases signal that the Court may analyze more of these arrangements in the coming years.

a. Agricultural Piece Rate Compensation

In *Carranza v. Dovex Fruit Co.*, 416 P.3d 1205 (Wash. 2018), the Court answered two certified questions from the United States District Court for the Eastern District of Washington.

Facts and Background

In 2016, two plaintiffs brought a putative class action against Dovex Fruit on behalf of Dovex's seasonal and migrant agricultural workers. In the summer, Dovex employs hundreds of workers to pick cherries, pears, and apples. The employees were paid based on how many pieces of fruit they picked.

They also had to perform other tasks for which they argued they were entitled to compensation aside from the piece rate. Those tasks included moving ladders, traveling between orchards and orchard blocks, going to meetings and trainings, and storing materials. But they acknowledged that certain other tasks—not simply picking—were part of the piece rate: going up and down ladders to pick the fruit, moving among the trees, and emptying their bins. The workers alleged that Dovex failed to pay them minimum wage for the non-piece work.

Judge Salvador Mendoza from the Eastern District of Washington certified two questions to the Washington Supreme Court: (1) whether Washington's Minimum Wage Act ("MWA") requires agricultural employers to pay pieceworkers for time doing things outside of the piece-rate picking work; and (2) if the MWA did require it, how those employers had to calculate that rate of pay.

The Court's Holding

The MWA sets the minimum wage for the state, and by initiative, Washington voters expanded the MWA to agricultural workers. The Court—with Justice Yu writing for the majority—zeroed in on the MWA's requirement that an employer must pay a minimum wage "per hour." Those words, according to the Court, demonstrated the legislature's "intent to create a right to compensation for each individual hour worked, not merely a right to workweek averaging." *Id.* at 1210. The Court compared that language to the FLSA and noted that the FLSA focuses on a "workweek" in setting its minimum wage. Because of the difference in language, the Court held that "employees have a per hour right to minimum wage." *Id.* The Court further noted that its interpretation cohered with previous Washington case law and Ninth Circuit case law.

The Court held that the MWA's "plain language" required agricultural employers to pay their adult workers "at a rate of not less than [the applicable minimum wage] per hour." *Id.* at 1216 (citing Wash. Rev. Code § 49.46.020). That means that those employers may pay agricultural workers on a piece-rate basis only for the time they spend doing piece-rate work. For other activities, agricultural employers have to compensate their employees on a separate

hourly basis. The Court rejected Dovex Fruit's argument that it only had to make sure that an agricultural worker's average weekly compensation at least equaled the minimum wage.

The Court distinguished this case from *Lopez Demetrio v. Sakuma Brothers Farms*, 355 P.3d 258 (Wash. 2015), in which the court interpreted Washington Administrative Code 296-131-020(2) to decide whether it required an agricultural employer to pay workers who are compensated by piece rate separately for mandatory rest breaks. The Court concluded that workweek averaging was acceptable in that case. Here, however, the Court said unlike in *Lopez Demetrio*, it was looking at hours worked, not at rest breaks. And there was no applicable regulation or administrative policy regarding workweek averaging for agricultural workers paid by the piece.

Based on its answer to the first certified question, the Court answered the second question as follows: "The rate of pay for time spent performing activities outside of piece-rate picking work must be calculated at the applicable minimum wage or the agreed rate, whichever is greater." *Carranza*, 416 P.3d at 1208.

The Court explicitly limited its holding to agricultural workers.

The Dissents

Justice Stephens strongly dissented. She contended that the MWA "was never intended to restrict the type of compensation system an employer may use, whether it be an hourly, salary, commission, or piece-rate system." *Id.* at 1214 (Stephens, J., dissenting). She argued that the majority ignored the word "rate" in the MWA, and instead focused on only "per hour," leading the Court to "create[] a 'per hour' right to separate compensation under the MWA." *Id.* In doing so, she charged the majority with ignoring that employers calculate piece-rate compensation to account for "down time" that is inherently part of piecework.

Justice Fairhurst also dissented, but disagreed with Justice Stephens' analysis of interpretive guidance and policies. She found the statutory language unambiguous and would have stopped her analysis there.

b. Piece Rate Pay for Truck Drivers

Facts and Background

Judge John C. Coughenour in the District Court for the Western District of Washington recently certified an MWA question to the Washington Supreme Court in light of *Dovex Fruit*. *See Sampson v. Knight Transp., Inc.*, No. C17-0028JCC, 2018 WL 2984825 (W.D. Wash. June 14, 2018). *Sampson* involved a putative class of commercial truck drivers who live in Washington and claimed that their employer—Knight Transportation—violated the MWA by failing to pay its drivers for rest breaks, all time worked, and overtime. They also claimed that Knight unlawfully deducted wages from their paychecks.

Knight Transportation used two methods—both by the piece—of paying its drivers. First, it paid long-haul drivers who delivered loads across the United States and Canada a mileage-based piece rate. It paid the drivers a set amount per mile depending on the length of the trip. It also paid those drivers a set amount for some "additional duties," such as loading and unloading and crossing the border. Second, Knight paid short-haul drivers who picked up and delivered loads across the Pacific Northwest a flat rate per trip. It also paid short-haul drivers a set amount for certain extra duties.

The plaintiffs claimed that the MWA prohibits those pay structures because drivers spend time on tasks—inspections, paperwork, and refueling—for which they are not specifically paid. Under their view, the piece rates unlawfully subsume the time spent on those tasks.

Knight moved for partial summary judgment, arguing that the plaintiffs' "on-duty, not-driving" claim failed because several courts—including the Western District of Washington—had rejected similar claims in the past. Relying on Washington Administrative Code 296-126-021, Knight argued that it used workweek averaging to ensure it paid its drivers at least minimum wage over the course of a week.

But the plaintiffs argued that *Dovex Fruit* called workweek averaging—even for nonagricultural workers—into question. They argued that they weren't paid minimum wage for their nondriving activities and that Knight's failure to pay minimum wage for those tasks violated the MWA. They argued that Judge Coughenour should deny summary judgment and certify to the Washington Supreme Court the question of whether the drivers were entitled to hourly wages for non-driving work.

The Certified Question

After deciding that Washington law applied to the plaintiffs' claims, Judge Coughenour agreed with plaintiffs that *Dovex Fruit* called into question whether Knight could rely on workweek averaging. He said that although *Dovex Frui*t applied specifically to agricultural workers, the Washington Supreme Court's "interpretation of the MWA would seem to apply to all employers." *Id.* at *9 (citing Justice Stephens' dissent in *Dovex Fruit*). He certified this question to the Supreme Court: "Does the Washington Minimum Wage Act require non-agricultural employers to pay their piece-rate employees per hour for time spent performing activities outside of piece-rate work?" *Id.* Judge Coughenour denied Knight's motion for summary judgment and stayed the case until the Washington Supreme Court answers the certified question.

c. Production Minutes for Piece Rate Work

About four months after *Dovex Fruit*, the Washington Supreme Court handed down its decision in *Hill v. Xerox Business Services, LLC*, 426 P.3d 703 (Wash. 2018). The Court was again answering a certified question—this time from the Ninth Circuit and about whether call center employees were hourly or piece-rate workers.

Facts and Background

Hill brought a putative class action against Xerox, alleging that she and other similarly situated employees had not been paid at least minimum wage for all of their work. She argued that she was an hourly employee entitled to pay for her non-production minute tasks. In the alternative, she argued that even if she was a piece rate worker, she was entitled to back pay.

Xerox agreed that it had to pay its call center employees for all of their time worked at the minimum wage, but contended that it had fully paid Hill for all of her production minutes—that is, for all of her time worked. It relied on workweek averaging. As in *Dovex Fruit*, Xerox applied workweek averaging to calculate whether it complied with the MWA. The employees didn't necessarily receive the minimum wage for each hour they worked.

The MWA allows workweek averaging for commission and piece rate workers, but not for hourly workers. Hourly workers instead receive their contractual rate of pay or the minimum wage, whichever is highest.

Judge Coughenour in the Western District of Washington had concluded that Hill was an hourly worker entitled to the minimum wage on a per hour basis. But he certified the issue for interlocutory appeal because it was a novel one. The Ninth Circuit accepted review and certified the question to the Washington Supreme Court.

The Court's Holding

Writing for the majority, Justice McCloud began by noting that "the characterization of a compensation formula as either hourly or piece rate can have a dramatic effect on the amount of money that a Washington employer must pay its employees." *Id.* at 704. Xerox had structured its compensation system on the "production minute"—a unit of time in which a call service employee handled incoming calls. If that minute was part of a piecework system, one set of regulations applied; if it was part of an hourly system, another set of regulations applied.

The Court held that "[a]n employer's payment plan that includes as a metric an employee's 'production minutes' does not qualify as a piecework plan under WAC 296-126-021." *Id.* at 705. Thus, Xerox's compensation structure was *not* piecework. The Court agreed with Hill and held that the MWA prohibits employers from using clock time as a 'unit of work' for piece rate pay. To allow otherwise, Justice McCloud wrote, would allow the workweek exception to "swallow up the general rule barring workweek averaging for hourly employees." *Id.* at 709. Again, the Court took pains to explain that its decision applied only to Xerox's specific compensation structure.

The Dissent

Once again, Justice Stephens dissented. She believed the majority misconstrued Xerox's compensation structure and improperly converted the employees into hourly workers. She also said that the MWA does not express any preference for a particular method of compensation—contrary to the premise underlying the majority opinion.

5. Double Damages for Failing to Provide Work-Free On-Duty Meal Periods

The Court's recent opinion in *Hill v. Garda CL Northwest, Inc.*, 424 P.3d 207 (2018), held that employees can recover both prejudgment interest and double damages for the same wage violation. The case also discussed what constitutes a legally valid on-duty meal period. To avoid potential liability, employers that provide on-duty meal periods should consider whether their employees are actually relieved of all work duties during those times.

Facts and Background

Garda operates an armored transportation service and, because of the nature of the work (transporting valuables and carrying firearms), its employees are required to *always* exercise some level of alertness. The court referred to this as a "constant vigilance policy." *Hill*, 424 P.3d at 209. Garda paid its employees for a full day of work, including what Garda claimed was an on-duty paid meal period. The Court of Appeals, however, explained that Garda employees do not take *official* meal periods. They simply buy food and beverages, stop for the bathroom, and eat while on their routes.

The employees brought a class action suit against Garda, arguing that this constant vigilance policy prohibited them from taking rest and meal breaks in violation of the Washington Administrative Code § 296-126-092 and the Minimum Wage Act. Wash. Admin. Code § 296-126-092 (guaranteeing workers rest breaks and meal periods); Wash. Rev. Code § 49.46.020 (entitling employees to compensation for all hours worked). The trial court certified the class and relying on *Pellino v. Brink's Inc.*, 267 P.3d 383 (Wash. Ct. App. 2011), granted summary judgment to the class on the issue of liability. In *Pellino*, the Court of Appeals held that a similar policy used by one of Garda's competitors violated the Washington Administrative Code. The court held a bench trial on the issue of damages, and then granted plaintiffs prejudgment interest and double damages for their missed rest breaks and meal periods. The court rejected Garda's defense that there was a bona fide dispute about the wages owed or that the employees knowingly submitted to the violation.

The Court of Appeals affirmed the trial court's liability ruling, but reversed the award of double damages for meal breaks and prejudgment interest for rest breaks. *Hill v. Garda CL Nw., Inc.*, 394 P.3d 390, 396 (Wash. Ct. App. 2017). The Court of Appeals held that Garda established its bona fide dispute defense to double damages because the law was not clear about

whether meal periods could be waived in a collective bargaining agreement. The court also reduced the award of damages for missed rest breaks because it held that prejudgment interest was not available when the plaintiff receives double damages.

The Court's Holding

The Washington State Supreme Court reversed, but only with regard to damages. The Court's opinion did not explicitly rule on the legality of Garda's meal break policy because the Court had denied Garda's petition on that issue. But the Court nevertheless reaffirmed what constitutes an on-duty meal period. During an on-duty meal period, the employee must be "relieved of *all work duties*." *Hill*, 424 P.3d at 213 (emphasis added). The only permissible requirement during that time is that an employee remain on the premises or at a prescribed work site. Garda failed to provide that type of work-free on-duty meal period, even though it paid its employees for the full day.

As to damages, Garda argued that there was a bona fide dispute about the wages owed because of the employee waiver. Employers may avoid liability for *double* damages if they can prove that there was an objective and subjectively reasonable dispute about the wages owed. But the Court rejected Garda's proposition.

The Court concluded that Garda failed to prove a bona fide dispute because Garda acknowledged that the plaintiffs retained the right to *on-duty* meal periods. Instead, Garda argued that the plaintiffs waived their right to *off-duty* meal periods. Garda's dispute, if any, did not matter, however, because it was not about the plaintiff's right to *on-duty* meal periods.

Further, the Court rejected Garda's argument that double damages *and* prejudgment interest for the same violation would constitute impermissible double recovery. Because the harms compensated by the double damages statute and the prejudgment interest statute do not overlap, recovery of both is permissible.

Garda won another bite at the apple, though—ultimately, the court remanded to the Court of Appeals to address Garda's remaining defenses to double damages (whether there was a bona fide dispute based on preemption by federal law, and whether the plaintiffs knowingly submitted to the meal period violation).

Because of that second chance, *Garda* is a bit of a teaser but an important one. Sicne the Court denied Garda's petition for review, we are left with some unanswered questions. For example, if requirements to remain alert and vigilant interfere with a work-free on-duty meal period, what conditions—if any—can an employer impose during an on-duty meal period? As always, Perkins Coie will guide employers through these gray areas.

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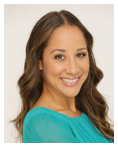

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