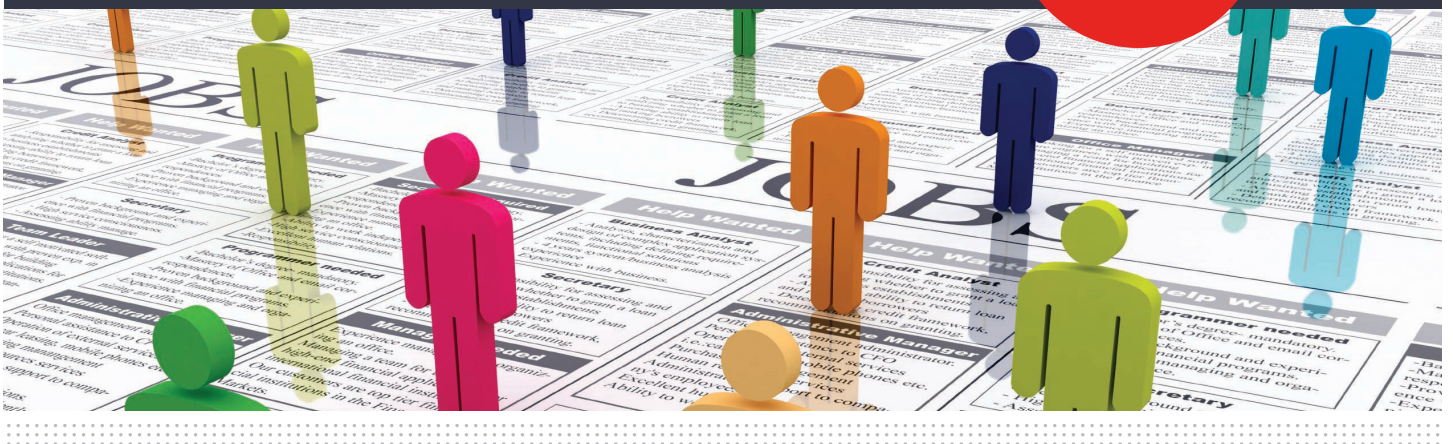


Labor & Employment Law Breakfast Seminar and Webcast

FALL
2019



Speaker Spotlight



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Andrew Moriarty is a labor and employment litigator and counselor to *FORTUNE 500* companies, regional entities and startups. Drawing on both in-house and outside legal experience, Andrew provides practical, scalable legal advice regarding employment contracts, personnel policies and employee handbooks, discipline and discharge, independent contractor classification, statutory and regulatory compliance and union matters. He is an efficient, effective litigator of individual discrimination and contract lawsuits, independent contractor and other wage-and-hour class actions and appeals. Andrew's counsel extends also to employment-related tort claims, including defamation, tortious interference and misappropriation of trade secrets, as well as contract claims involving noncompete, nonsolicitation and other employment and collective bargaining agreements.

Andrew worked in-house for Amazon between 2013 and 2018, where he managed litigation and advised software, robotics, customer service, fulfillment and logistics teams on all aspects of labor and employment law, independent contractor classification, vendor relations and employee mobility.



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Associate Kathryn Ranieri has experience in a variety of complex litigation matters in the areas of employment, securities, class actions, corporate governance and bankruptcy. Kathryn worked on a successful negotiation of a wrongful termination employment dispute, including leading discovery, drafting arbitration submissions, selecting arbitrators and drafting settlement agreements. She also led a civil appeal at the Appeals Court of Massachusetts on transgender rights and prisoner medical treatment and has experience conducting a binding mediation.

While attending Harvard Law School, Kathryn contributed to the Harvard Journal of Law and Gender, volunteered for the Prison Legal Assistance Project, assisted with the Trial Advocacy Workshop and wrote for the Harvard Law School Parody. She also clerked at the Federal Public Defenders office in Seattle. Prior to attending law school, Kathryn interned at the King County Office of Labor Relations, where she assisted labor negotiators in the process of renegotiating contracts with various labor unions.

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FALL 2019 LABOR & EMPLOYMENT LAW BREAKFAST SEMINAR AND WEBCAST

NOVEMBER 21, 2019 | PRESENTED BY: ANDREW MORIARTY & KATHRYN RANIERI

PERKINScoie
COUNSEL TO GREAT COMPANIES

Labor & Employment Event Presentations

<p data-bbox="565 1346 776 1478">EMPLOYMENT AGREEMENTS AND RESTRICTIVE COVENANTS IN WASHINGTON</p> <p data-bbox="740 1528 813 1549"><small>PERKINScoie COUNSEL TO GREAT COMPANIES</small></p>	<p data-bbox="1040 1388 1256 1436">CHANGING SALARY THRESHOLDS</p> <p data-bbox="1227 1528 1300 1549"><small>PERKINScoie COUNSEL TO GREAT COMPANIES</small></p>
<p data-bbox="548 1667 753 1692">EEO-1 REPORTING</p> <p data-bbox="740 1808 813 1829"><small>PERKINScoie COUNSEL TO GREAT COMPANIES</small></p>	<p data-bbox="1040 1667 1211 1692">NLRB UPDATES</p> <p data-bbox="1227 1808 1300 1829"><small>PERKINScoie COUNSEL TO GREAT COMPANIES</small></p>

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EMPLOYMENT AGREEMENTS AND RESTRICTIVE COVENANTS IN WASHINGTON

PERKINScoie
COUNSEL TO GREAT COMPANIES

Topics

- Noncompetition Agreements
- Confidentiality & Nondisclosure Agreements



NONCOMPETITION AGREEMENTS IN WASHINGTON:

THE NEW LEGAL LANDSCAPE

Under Current Law

NONCOMPETES ARE:

- disfavored . . . but enforceable
- often upheld . . . if reasonable

Current Test for Enforceability

1. Legitimate business interests:
 - goodwill
 - trade secrets
 - confidential information
2. Reasonable in scope and duration
3. Not inconsistent with public interest

Enforceable as Modified

- *Most agreements* allow a court to modify the agreement and enforce as modified
- *Law* permits a court to modify and enforce as modified:
 - if partial enforcement would not offend public policy or cause injustice
 - no strict “blue pencil” rule

Noncompetes Draw Media and Political Attention

“American businesses are paying out a historically low proportion of their income in the form of wages and salaries. But the Jimmy John’s employment agreement is one small piece of evidence that workers, especially those without advanced skills, are also facing various practices and procedures that leave them worse off . . .”

The New York Times (Oct. 14, 2014)

Noncompetes Draw Media and Political Attention

“Fast-food franchisor Jimmy John’s will not enforce agreements signed by low-wage employees that barred them from working at other sandwich shops. . . . The agreement comes two weeks after Illinois Attorney General Lisa Madigan filed a lawsuit claiming Jimmy John’s non-compete agreements served no legitimate business interest and should be struck down.”

Fortune (June 22, 2016)

Noncompetes Draw Media and Political Attention

“The Obama administration . . . called on U.S. states to ban agreements prohibiting many workers from moving to their employers’ rivals . . . so-called non-compete agreements interfere with worker mobility and states should consider barring companies from requiring low-wage workers and other employees who are not privy to trade secrets or other special circumstances to sign them.”

Reuters (Oct. 25, 2016)

Washington’s New Noncompete Law

- Effective January 1, 2020
- Driven in part by:
 - worker justice narrative in the media
 - labor mobility narrative by prominent politicians
- Six big changes

Six Big Changes

(1) NO NONCOMPETES WITH:

- employees whose W-2 earnings are less than \$100,000 a year; and
- independent contractors who earn less than \$250,000 a year from the business seeking to enforce the noncompete.
 - Dollar amounts adjusted annually

Six Big Changes

(2) EIGHTEEN-MONTH PRESUMPTION

- Restrictions longer than 18 months presumed unreasonable
 - Rebuttable by clear and convincing evidence that more time is necessary to protect “business or goodwill”
- No presumption as to restriction less than 18 months

Six Big Changes

(3) LAID-OFF EMPLOYEES

- To enforce noncompete after “termination as the result of a layoff,” employer must pay employee’s base salary
 - Subtract any earnings from subsequent employment in enforcement period
- “Laid off” not defined

Six Big Changes

(4) NO WAIVERS BY “WASHINGTON-BASED” EES/ICS

- No clauses that require disputes to be adjudicated outside Washington
- No clauses that otherwise deprive the employee of new law’s protections

Six Big Changes

(5) DISCLOSURES REQUIRED

- Must disclose terms of noncompete before employee accepts offer of employment
- If applicable, must disclose that a noncompete is not immediately enforceable but might become enforceable if compensation increases

Six Big Changes

(6) ENFORCEMENT

- Attorney general and individuals can sue
- Penalty for overbroad agreements or other violations: greater of actual damages or \$5,000 plus attorneys' fees and costs

Retroactivity

- New law applies to lawsuits brought on or after January 1, 2020
- Except no lawsuits for fees/penalties on pre-2020 agreements if employer isn't trying to enforce

New Law Does Not Extend to:

- Nonsolicitation agreements (defined in RCW 49.62.010(5))
- Confidentiality agreements
- Agreements prohibiting disclosure of trade secrets
- Agreements regarding purchase or sale of an ownership interest in a business
- Certain franchise sale agreements

Miscellaneous Restrictions:

- Anti-moonlighting policies
- Franchisor–franchisee agreements

Noncompete Takeaways

- Review existing noncompete agreements and potentially revise, especially scope and time
 - Consideration if current employees sign new NCAs
- Revise form noncompete agreements, offer letters



CONFIDENTIALITY & NONDISCLOSURE AGREEMENTS



Compensation

SAMPLE LANGUAGE:

I understand that nothing in this Agreement prohibits or restricts me from disclosing my own compensation.

Working Conditions

SAMPLE LANGUAGE:

I understand that if I am a nonsupervisory employee nothing in this Agreement prohibits or restricts me from disclosing my or others' compensation, hours or working conditions.

Sexual Harassment or Assault

SAMPLE LANGUAGE:

I understand that nothing in this Agreement prohibits or restricts me from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through Company, or between employees, or between an employer and an employee off the employment premises.

Trade Secrets

CONSIDER:

18 U.S.C. Section 1833(b): certain disclosures of trade secrets will not expose a person to civil or criminal liability under federal or state trade secret laws.

Topics

IMPORTANT CONSIDERATIONS FOR COMMON PROVISIONS:

- compensation
- working conditions
- sexual harassment or assault
- trade secrets

CHANGING SALARY THRESHOLDS

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FLSA Minimum Salary for Exempt Employees

SEPTEMBER 24, 2019, U.S. DEPARTMENT OF LABOR ISSUED FINAL RULE.

- Administrative, Executive and Professional Exemptions:
 - current minimum salary: \$455 per week / \$23,660 per year
 - new minimum: **\$684 per week / \$35,568 per year**
- Highly Compensated Employee Exemption:
 - current minimum salary: \$100,000 per year
 - new minimum: **\$107,432 per year**

Bonuses and Incentive Compensation

- Some nondiscretionary bonuses and incentive comp (such as commissions) can count toward minimum salary, but:
 - can only satisfy **up to 10%** of the salary requirements; and
 - **must** occur at least annually to count toward minimum.

Effective January 1, 2020

- Only a few weeks to ensure compliance
- Insufficient salary → overtime and other liability
- Insufficient salaries?
 - Increase salary
 - Reclassify as non-exempt
- Don't forget duties test and salary basis

Proposed Salary Threshold Increases in Washington

- Labor and Industries' proposal would incrementally increase minimum exempt salaries to 2.5 times the minimum wage by 2026
- Longer phase-in for smaller employers
- As of July 1, 2020, minimums would be:
 - \$675/week (\$35,100/year) if 50 or fewer employees
 - \$945/week (\$49,140/year) if more than 50 employees
- By 2026, \$1,536/week (\$79,872/year)
- Final decision on proposed rule expected by Dec. 2019

Seattle Minimum Wage Increase

- Seattle's Office of Labor Standards recently announced an increase to the minimum wage, effective January 1, 2020:
 - Increase to **\$16.39/hour** from \$16.00/hour for large employers (501 or more employees);
 - Increase to **\$15.75/hour** from \$15.00/hour for small employers (500 or fewer employees) who **do not** pay at least \$2.25/hour toward the employee's medical benefits and/or where the employee **does not** earn at least \$2.25/hour in tips; and
 - Increase to **\$13.50/hour** from \$12.00/hour for small employers (500 or fewer employees) who **do** pay at least \$2.25/hour toward the employee's medical benefits and/or where the employee **does** earn at least \$2.25/hour in tips
- A new workplace poster containing information on labor standards for 2020 will be available in December

EEO-1 REPORTING

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EEO-1 Report

- Required annual compliance survey to analyze representation trends
- Covered employers must submit data on employee:
 - race
 - ethnicity
 - gender
 - job category

Prior Stay and Collection Order

- 2017: OMB halted new EEO-1 form requiring pay data
- March 2019: Federal judge reinstated collection
- Despite pending appeal, EEOC announced collection of 2017 and 2018 pay data

EEO-1 “Component 2” Pay Data

- Total number of employees **and** total number of hours worked broken down by:
 - race
 - ethnicity
 - gender
 - 10 EEO-1 job categories
 - 12 new pay bands

Sample Form

Job Categories	Salary Compensation Band	Number of Employees (Report employees in only one category)															Total Col. A-N
		Race/Ethnicity															
		Hispanic or Latino			Non/Hispanic or Latino												
		Male					Female										
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or more races		
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O			
1 Executive/ Senior Level Officials and Managers	1. \$19,239 and under																
	2. \$19,240 - \$24,439																
	3. \$24,440 - \$30,679																
	4. \$30,680 - \$38,999																
	5. \$39,000 - \$49,919																
	6. \$49,920 - \$62,919																
	7. \$62,920 - \$80,079																
	8. \$80,080 - \$101,919																
	9. \$101,920 - \$128,959																
	10. \$128,960 - \$163,799																
	11. \$163,800 - \$207,999																
	12. \$208,000 and over																

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Moving Deadline

1. September 30, 2019 deadline for 2017 and 2018 pay data
2. Continued collection until court-approved target response rate
3. November 11, 2019 collection cut-off
4. Court-ordered January 31, 2020 deadline

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Submission Tips

- Submission through an online portal:
 - review filing requirements
 - formulate collection process
 - <https://eeocomp2.norc.org/>
- Statistical analysis:
 - use counsel
 - evaluate potential trends and impacts on protected classes

Future Submissions?

- **No** pay data collection in future years
 - Burden on employers > usefulness to agency
- **Must** submit 2017 and 2018 pay data
- Future reinstatement possible

NLRB UPDATES

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Board Composition

- Existing Democratic vacancy
- McFerran (D) off on December 16, 2019
- 3-0 Republican majority during 2020 election year

Updates to Election Rules

AUGUST 12, 2019 NOTICE OF PROPOSED RULEMAKING

- Blocking Charge Policy
 - Vote-and-impound procedure
- Voluntary Recognition Bar
 - “Reasonable period of time” → 45-day bar
- Non-Election Recognition in the Construction Industry
 - Union must provide “extrinsic evidence” that its recognition based on a “contemporaneous showing” of majority support

Employee Use of Company Email

- *Caesars* case still pending
- *Purple Communications*
 - Employee right to use employer’s email system during non-working time for organizing and protected activities, absent “special circumstances”

Joint Employer Standard

BROWNING-FERRIS → HY-BRAND → BROWNING-FERRIS

- *Browning-Ferris*
 - Share or codetermine essential terms and conditions of employment
 - Direct or indirect
 - Exercised or merely reserved rights
- Proposed regulation
 - Control over essential terms:
 - possessed **and** exercised
 - substantial, direct and immediate control
 - not limited and routine

Narrowing Scope of Protected Concerted Activity

- *Alstate Maintenance LLC*
 - Employee refused to work for customer who previously did not tip
 - Not protected activity because not aimed at a term/condition within employer's control
 - Overruled *WorldMark by Wyndham* (complaint in group setting *per se* concerted activity)

Narrowing Scope of Protected Concerted Activity

- *Quicken Loans, Inc.*
 - Isolated, profane gripes about a customer not protected activity
- *General Motors LLC*
 - Profane or offensive statements during concerted activity protected?

Access to Employer Premises

- *Bexar County Performing Arts Center Foundation*
 - Can deny access to off-duty employees of an on-site contractor unless:
 - work regularly and exclusively on the property, and
 - no more reasonable non-trespassory alternative
- *UPMC Presbyterian Shadyside*
 - Absent discrimination, no duty to allow the use of its public areas by nonemployees for promotional/organizational activity

Access to Employer Premises

- *Kroger Mid-Atlantic*
 - Two *Babcock* exceptions:
 - no other means for communicating with target employees
 - pre-existing access for nonemployees
 - Can block rep access, even if permitted for other third-party purposes (civic, charitable, commercial)

Unilateral Employer Action

- *MV Transportation, Inc.*
 - “Clear and unmistakable waiver” replaced by “contract coverage”

Mandatory Arbitration

- *Briad Wenco*
 - “Savings clause” → no interference
- *Cordúa Restaurants, Inc.*
 - *Wake of Epic Systems*
 - Mandatory arbitration agreements OK in response to class claims
 - Discipline OK for refusing to sign

Mandatory Arbitration

- *Prime Healthcare Paradise Valley, LLC*
 - *Boeing* Category 3: Arbitration agreement impermissibly limited filing of charges without justification
- *Planet Beauty*
 - Arbitration as the exclusive forum for all claims → unjustified interference

Independent Contractors

- *SuperShuttle DFW*
 - Franchisees operating shared-ride vans were excluded from NLRA coverage as independent contractors
 - Return to common-law agency test
 - Significance of “entrepreneurial opportunity”
- *Velox Express, Inc.*
 - Independent contractor misclassification not a stand-alone violation of NLRA
- Compare to *Dynamex’s* presumption of employment, unless:
 - free from control and direction;
 - outside the usual course of business; **and**
 - customarily engaged in work as an independently established occupation/business

Micro-Units

- *The Boeing Company*
 - Petitioned-for unit of two job classifications, inappropriate for collective bargaining
 - Return to traditional community-of-interest standard
 - 3-step process:
 1. Does unit share a community of interest?
 2. Do excluded employees’ distinct interests outweigh similarities?
 3. Industry-specific guidelines

Beck Objectors—Lobbying Costs

- *United Nurses & Allied Professionals (Kent Hospital)*
 - Use of nonmember (*Beck* objector) funds OK for representation/bargaining costs, not OK for lobbying costs

Protecting the Right to Organize (PRO) Act

PROPOSED OVERHAUL OF NLRA

- Empower NLRB to fine employers for suppressing union rights
- Bypass court enforcement
- Mirror *Dynamex*
- Misclassification as *per se* NLRA violation
- Effective repeal of right-to-work laws
- Replace secret ballot with card check

Questions?



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