Annual Labor Seminar

The Year's Update in Labor and Employment Law

January 27, 2017

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CASE LAW AND LEGISLATIVE UPDATE

I. STATUTES, REGULATIONS AND PROPOSED LEGISLATION

A. Enacted Statutes and Rules

1. New NLRB Rules on Representation Elections

On December 12, 2014 the NLRB issued a new set of regulations relating to representation elections. The new rules went into effect on April 14, 2015 and amend the current rules to provide the following: (1) unions may file election petitions electronically; (2) within seven days of filing of the petition, the employer must provide the union with a list of employees eligible to vote along with a list of job classifications, shifts and work locations in order to assist the union in presenting the regional director with its arguments as to the appropriate unit for the election; (3) after the presentation of arguments relating to the nature of the proposed bargaining unit, the regional director will determine whether an election will be held with the regional director's opinion eligible for appeal to the full board; and (4) within seven days of the regional director's order of an election, the employer must provide to the union phone numbers and email addresses as well as home addresses for the employees in the proposed unit. The former Board recommendation was that elections be held within 42 days of the filing of the petition. Under the new rules, those elections could be held within 10-14 days after the filing of the petition. However, the actual average has been 20-24 days with virtually no change in win percentage.

2. Federal, Oregon, and Portland Ban-the-Box

The Fair Chance Act would block federal agencies and government contractors from using an applicant's criminal history before making a conditional employment offer. Though the bill had bi-partisan support and was expected to pass fairly easily, it has been stalled and its passage before the end of the current presidential term is in doubt.

Oregon Ban-the-Box. Oregon's statewide ban-the-box law went into effect on January 1, 2016, making it unlawful for employers in Oregon to solicit information from an applicant about criminal convictions prior to an initial interview. The law seeks to improve the prospects for individuals with a criminal conviction by providing them with an opportunity to explain past issues or possible misunderstandings with their employer. The law did not change what employers can screen for, only when they could consider the applicant's criminal background.

City of Portland Ban-the-Box. On July 1, 2016, the City of Portland will enforce its own more stringent ban-the-box ordinance which requires employers to: (1) delay a criminal background check until after making a conditional job offer; (2) not consider certain criminal records; and (3) perform an analysis before rejecting an applicant on the basis of a prior criminal conviction. Excluded from the ordinance are law enforcement agencies, jobs involving direct access to children, and jobs presenting public safety concerns, among others. If an employer is not exempt, it may not inquire about an applicant's criminal history until after a conditional offer of employment has been made. The ordinance does not require employers to hire individuals with a

criminal background, but employers are forbidden from refusing to hire an applicant based on the following: arrests not leading to convictions (unless the matter is pending), expunged convictions, or charges resolved through the completion of diversion or similar program (unless the charge involved attempted or actual physical harm). Before rescinding a conditional job offer, employers must assess the relevance of the job applicant's criminal history in relation to the job. The assessment must take into account the nature and gravity of the criminal offense, the time that has elapsed, and the nature of the job. The ordinance does not suggest that the City would challenge an employer's judgment or reasoning on those issues, so long as there is evidence that the analysis did in fact occur.

3. Oregon Wage Discussions

On January 1, 2016, Oregon's Paycheck Fairness Act went into effect making it unlawful for employers to discriminate against an employee for inquiring about, discussing or disclosing the wages of the employee or of another employee. The law also forbids discrimination based on an employee making a wage claim after learning of wage information from another employee. The goal of the law is to eliminate discrimination in pay by allowing an open discussion of wages among employees. One important exception relates to employees who have access to wage information of other employees as part of their job function and disclose that information to someone not authorized to access it on their own. In other words, someone in HR cannot print everyone's pay information and distribute it around the office; the initial disclosure must have been voluntary and authorized.

4. OSHA Workplace Injury Issues

In May 2016, the Occupational Safety and Health Administration (OSHA) issued final rules to "Improve Tracking of Workplace Injuries and Illnesses" and to deter retaliation against workers who report injuries. The rule, which goes into effect January 1, 2017, requires certain employers to submit workplace injury and illness data electronically to OSHA. Under the existing recordkeeping regulations, a workplace injury is "recordable" and must be reported to OSHA if it results in death, missed work, work restrictions or transfers, medical treatment beyond first aid, or a loss of consciousness. This information is recorded on the OSHA 300, 300A, and 301 forms, which remain unchanged.

Electronic Reporting Requirements

The rule requiring electronic submission of this information phases in compliance over two years depending on employer size. Employers with 250 or more employees in industries covered by the recordkeeping regulation must submit:

- information from their 2016 Form 300A by July 1, 2017;
- information from their 2017 Forms 300A, 300 and 301 by July 1, 2018; and
- beginning in 2019, the information must be submitted annually by March 2.

Employers with 20 to 249 employees in certain high-risk industries must submit:

- information from their 2016 Form 300A by July 1, 2017;
- information from their 2017 Form 300A by July 1, 2018; and
- beginning in 2019, the information must be submitted annually by March 2.

In addition, OSHA announced it will start publishing workplace-specific injury reports online to encourage comparisons between employers. Currently, only general statistics on injury reporting trends within certain industries are available. OSHA will not publish the personal information of injured workers.

Anti-Retaliation Requirements

The new rule also includes provisions that go into effect on August 10, 2016, which seek to deter retaliation against workers that report injuries, including: (1) employers must advise employees of their right to report injuries by posting a qualifying poster or conveying its content; (2) procedures for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and (3) that employers may not retaliate against employees for reporting work-related injuries or illnesses.

Comments: Drug Testing

Although the new rule does not specifically address drug testing, the commentary associated with the rule warns employers that mandatory post-accident testing programs may violate the new rule if they are pretext for retaliation against employees who report injuries. OSHA warns that, although post-accident testing may be reasonable in some circumstances, mandatory drug testing after every accident is a form of intimidation that discourages employees from reporting workplace injuries. OSHA explained that post-accident employee drug testing and incentive programs are still possible under the new rule and that employers do not need to specifically suspect drug use before testing; however, employers should only require drug testing if there is a reasonable possibility that drug use by the employee who reported the accident contributed to the injury. Additionally, if the method of drug testing only indicates recent use of the drug, but not actual impairment, it may also unreasonably deter reporting.

B. Pending Legislation and Potential Statutory and Regulatory Changes and Directions

EEOC refreshes guidance on retaliation. In August 2016, the EEOC replaced its 1998 Compliance Manual section on retaliation with new "Enforcement Guidance on Retaliation and Related Issues." While there is no substantial change in the guidance offered by the EEOC, the new guidance section provides a consistent EEOC interpretation of the laws it enforces and the sometimes inconsistent lower court decisions. The guidance is a useful resource for employers designing policies, practices and trainings.

EEOC issues revised EEO-1 Form requiring reporting of pay data. In October 2016, the EEOC released an updated EEO-1 reporting form affecting employers with 100 or more employees and

federal contracts with 50 or more employees. For the first time, the form will require those covered employers to provide employee pay data as reflected in Box 1 of their W-2 forms. Critics of the new form argue that relying on W-2 earnings may show an apparent pay disparity where none actually exists. For example, when one employee exercises stock options in a year and another does not. The new form must be used for 2017, although the date for usage has now been extended to March 31, 2018 to allow employers more time to collect and report data.

DOL issues final rule on paid sick leave for federal contractors. Also in October 2016, the DOL issued a lengthy final rule requiring federal contractors to provide up to seven days of paid sick leave to their employees. The rule provides to federal contractors entered into on or after January 1, 2017 with only limited exceptions. Much like the state-wide law that took effect in Oregon in 2016, the DOL rule requires covered contractors to accrue paid sick leave at a rate of one hour for every 30 hours worked and contractors must allow employees to accrue up to 56 hours per year. Alternatively, contractors may choose to front load at least 56 hours of paid sick leave at the beginning of each accrual year. Contractors must also allow employees to carryover unused sick leave from one year to the next.

EEOC v. United Parcel Serv., Inc., No. 15-4141 (E.D.N.Y., filed 7/15/15). The EEOC alleges that since 2004, UPS has violated Title VII in failing to hire or promote individuals whose religious practices conflict with the company's grooming and appearance policies. Those policies require that male employees' hair not grow below collar length. Title VII requires employers to accommodate the religious belief of employees and applicants unless doing so would cause "undue hardship" to the employer.

EEOC Revises Pregnancy Bias Guidelines. In response to the Supreme Court's decision in *Young v. UPS, Inc.*, 135 S. Ct. 1338 (2015), the EEOC has issued new guidance that reflects the court's holding that women may prove unlawful pregnancy discrimination if the employer accommodated some workers but not pregnant women. The guidelines repeat the court's holding that even facially neutral employer policies may violate the Pregnancy Discrimination Act if they impose significant burdens on pregnant employees without a sufficiently strong justification.

EEOC Brings Claims on Behalf of Gay and Transgender Employees for Gender Discrimination. On April 1, 2015, the EEOC issued a ruling that the Army had discriminated against a transgender civilian employee by denying her access to the women's restroom and creating a hostile work environment by allowing a supervisor to intentionally misuse her former name and male pronouns. On June 5, 2015, the EEOC filed a lawsuit charging a financial services corporation in St. Paul Minnesota of gender discrimination against a transgender employee. It was the third lawsuit of its kind and is part of the EEOC's Strategic Enforcement Plan adopted in December 2012, which includes "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions." The lawsuits claims include allegations the employer subjected the employee to a hostile work environment because of sex and had a company-wide policy or practice that discriminated against transgender female employees by precluding their use of a restroom that is consistent with their sex.

On March 1, 2016, in continuation of its Strategic Enforcement Plan, the EEOC filed two more complaints alleging private employees had been unlawfully discriminated against for their sexual orientation under Title VII. (*EEOC v. Scott Med. Health Ctr.*, No. 16-225 (W.D. Pa. filed Mar. 1, 2016) and *EEOC v. Pallet Cos.*, No. 16-595 (D. Md. filed Mar. 1, 2016). Though no federal appeals court has ruled that Title VII coves sexual orientation discrimination, most have ruled that Congress never reached that issue when it enacted Title VII. These cases will "test the waters" in those jurisdictions and will likely have a significant impact on the EEOC's enforcement strategy going forward.

DOL Seeks Information on Electronic Devices and Predictive Scheduling. The DOL has signaled that it intends to issue a formal Request For Information (RFI) to gauge the impact of the use of electronic devices by nonexempt employees on the amount of hours worked. This would be the first step in proposing regulations regarding the common practice of checking one's email or cell phone when work updates come through during non-working hours. The DOL also intends to issue a RFI relating to how electronic devices enable last minute scheduling – an issue that has also been referred to as "Protective Scheduling" which may hint at future regulations that penalize employers for late notice employee scheduling changes. Oregon considered such a measure during its 2015 legislative session, but a rule did not emerge from the committee. However, house and senate work groups are continuing to examine the issue and a moratorium on local Predictive Scheduling regulations remains in place until 2017.

C. Executive Orders, Minimum Wage, Fair Pay, LGBT Bias

Oregon's Minimum Wage Increases in a Unique Fashion. On July 1, 2016, Oregon began pioneering a unique and complex multi-tiered minimum wage system with significant annual increases. No other state has a minimum wage system like this today. Under the new law, the state will be split into three geographic regions with three different minimum wage rates and three different rate increase schedules. Initially, on July 1, 2016, the base state minimum wage increased from the current rate of $9.25 per hour to $9.75 per hour for most counties. Employers within the Portland Urban Growth Boundary ("UGB") are required to pay a minimum wage of $9.75 per hour. However, employers located in the nonurban counties of Baker, Coos, Crook, Curry, Douglas, Gilliam, Grant, Harney, Jefferson, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, and Wheeler are required to pay a minimum wage of $9.50 per hour. The minimum wage rates will steadily increase at different rates in each subsequent year, as described in the chart below. By July 1, 2023, the base minimum wage will rise to $13.50 per hour, while minimum wage for employers in the Portland UGB will be $14.74 per hour and in the nonurban counties will be $12.50 per hour. After 2023, annual increases for the base minimum wage will be pegged to the cost of living index. Employers in the Portland UGB will pay a premium of $1.25 per hour over the adjusted base rate, while a discount of $1.00

per hour will apply to employers in the nonurban counties. The rate schedule is below:

Date	Base	Portland UGB	Nonurban Counties
July 1, 2016 – June 30, 2017	$9.75	$9.75	$9.50
July 1, 2017 – June 30, 2018	$10.25	$11.25	$10.00
July 1, 2018 – June 30, 2019	$10.75	$12.00	$10.50
July 1, 2019 – June 30, 2020	$11.25	$12.50	$11.00
July 1, 2020 – June 30, 2021	$12.00	$13.25	$11.50
July 1, 2021 – June 30, 2022	$12.75	$14.00	$12.00
July 1, 2022 – June 30, 2023	$13.50	$14.75	$12.50
After July 1, 2023	CPI adjusted	+$1.25	-$1.00

Employers' first task under the new law is to determine where their business is located for purposes of determining what rate will apply. BOLI has released the final version of rules defining the "employer's location." The rules adopted are substantially different from early drafts, but still focus on the employee, not the employer's location.

For example, if an employee performs more than 50% of his or her work (per pay period) at a permanent fixed business location in Oregon, the employee's wages will be based on the location of the business. On the other hand, if an employee performs more than 50% of his or her work (per pay period) in a location other than the employer's fixed location, the employee is to be paid based on the actual location of work. One exception to this is delivery drivers who begin and end their day at a permanent fixed business location; they will be paid based on the location of the business.

The rules impose a recordkeeping requirement on the employer to track the location of hours worked for each individual employee that works in more than one region during a pay period, so it can be determined which minimum wage rate should apply. Employers are relieved of this recordkeeping requirement if they pay the employee the highest minimum wage for the region in which the employee worked.

Oregon New Itemized Paystub Requirements. Effective January 1, 2017, employers in Oregon must include additional categories of information on itemized paystubs. Part of the intention is to provide greater transparency in pay practices. Among other details, the paystub must provide information about: rates of pay; whether the employee is paid by the hour, shift, day or week, or a on a salary, piece or commission basis; the amount and purpose of each deduction made during the pay period; the regularly hourly rate of pay; the overtime rate of pay; the number of regular

hours worked and the pay for those hours; the number of overtime hours worked and pay for those hours; the piece rate, the number of pieces completed at each rate, and the total pay for each rate. The employee must expressly consent for an employer to be authorized to send itemized information in electronic form, and he or she must have the capacity to print or store the statement at the time or receipt. Records must also now be retained by the employer for three years from an employee's date of termination and must be provided to the employee for inspection upon request. Oregon currently only requires that employers retain payroll records for two years, but federal law is three years.

EEOC Widens Claimant's Access to Employer Statements. As of January 1, 2016, the EEOC uniformly allows workers charging unlawful discrimination to obtain the employer's position statement responding to the charge, standardizing a process previously left to the discretion of individual field offices. The statements will exclude confidential information. The EEOC will allow charging parties 20 days to respond to the position statement. The response will not be provided to the employer charged with discrimination during the EEOC's investigation.

Worker Must Make More Than $47,476 to be Exempt from Wage and Hour Laws. The DOL issued final rules increasing the salary threshold for exempt employees, not subject to overtime pay, which is expected to re-classify approximately 4 million U.S. workers. Currently, employees that make less than $23,660 are entitled to overtime wages under the FSLA; however, effective December 1, 2016, that threshold would nearly double to $47,476, which is the 40th percentile of earnings for full-time salaried workers in the lowest-wage Census region, currently the South. Additionally, the annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test will increase to $134,004, which is the 90th percentile of full-time salaried workers nationally. Beginning on January 1, 2020, those thresholds will automatically update every three years according to the referenced indexes.

The Department of Labor Looks to Crack Down on Misclassification of Employees. On July 15, 2015, the DOL issued guidance asserting that employers are misclassifying workers as "independent contractors" rather than "employees" to avoid FLSA regulation, including wage and hour and overtime rules. The consequences of misclassifying employees as contractors may include an award of back pay, back taxes and other damages. When reviewing these issues, the courts will use the "economic realities test" which looks to six factors to determine whether the worker is actually an independent business person or an employee dependent on the employer to make a living.

D. ADA

New EEOC Guidance on Employer Provided Leave and the ADA. On May 9, 2016, the EEOC provided employers with guidelines regarding employer-provided leave as an accommodation under the ADA. The guidance emphasizes that employers must offer disabled employees the same leave benefits as non-disabled employees. For example, if the employer offers paid sick leave and paid time off, those options must be available to an employee taking leave for disability purposes. The guidance further states that employers must consider offering unpaid leave to accommodate a disabled employee even if it does not have a policy that otherwise would

provide for leave. What is more, employers must consider making exceptions to any "maximum leave" policies if a disabled employee is required to take more leave than is otherwise permitted by the employer's policy. An employer would not be required to consider leave as a form of accommodation if providing the leave would be an undue hardship on the business. In addition, employers may request a doctor's note or other documentation, so long as that requirement is consistent with all employees.

Revised Requirements for Service Animals. In July of 2015, the DOJ released a supplemental guidance on service animals under the ADA, intended to clarify 2011 regulations. Pursuant to the earlier regulations, a service animal consists of: (1) a dog; (2) trained to do work or perform tasks for an individual with a disability; and (3) the task performed must relate to the disability. The supplemental rules clarify several points, including that a dog that merely provides comfort or emotional support does not qualify as a service animal under the ADA, but a dog that relieves serious anxiety issues may.

Oregon law leaves open the possibility that an "emotional support" animal may qualify as a service animal. A service animal may be used to prevent anxiety attacks, but it must be trained to do something, not simply provide comfort. Oregon law more broadly defines service animal as a "dog or other animal designated by administrative rule" that is trained to do work or perform tasks for the benefit of the individual. That definition would seemingly put it in line with the federal standards as Oregon does not yet have administrative rules broadening the scope of service animal to more than a dog.

A business may not ask a person with a service animal what his or her disability is; rather, it can only inquire regarding: (1) whether the animal is required because of a disability; and (2) what work or task the animal has been trained to perform. Businesses may not ask for and the person is not required to provide documentation supporting his or her entitlement to use a service animal. The animal can be removed from the business if it is not house broken or if its owner is not able to adequately control it. Businesses may not charge extra fees for a person's use of a service animal. In addition, service animals must be permitted to accompany their handler to and through self-service food lines, such as a salad bar. Hotels and other places of public accommodation are forbidden from forbidding service animals, limiting guests to "pet-friendly" rooms or charging an extra cleaning fee for the animal.

E. Leave Laws

FMLA. On May 27, 2015, the DOL posted new model forms for FMLA with two changes, (1) the forms do not expire until May 31, 2018, and (2) they include notice that information about genetic testing and diseases or disorders need not be disclosed pursuant to the Genetic Information Nondiscrimination Act (GINA). Employers can update their forms by going to the DOL's website, www.dol.gov/whd/fmla. Corresponding Oregon leave forms for OFLA can be found at http://www.oregon.gov/boli/TA/docs/OFLA_SHC_Cert_template.pdf.

Oregon Sick Leave. Starting June 1, 2016, Oregon employers must implement a sick leave policy that will allow an employee to earn and use up to 40 hours of sick time per year. Sick time is

protected and employers must not retaliate or discriminate against an employee who inquires about, requests, or uses protected time.

Accrual: Sick time must accrue at a rate of at least one hour for every 30 hours worked, unless the employer elects to frontload sick time. Employees begin to earn and accrue sick time on the first day of employment.

Carryover: An employee may carry over up to 40 hours of unused sick time from one year to the next but an employer may limit an employee to accruing no more than 80 hours of sick time and to using no more than 40 hours of sick time in a year.

Use: Employees may use sick time beginning their 91st day of employment and it may be used for the employee's own physical or mental illness, injury, or health condition (including routine doctor or dentist appointments), for the care of a family member, for absences due to domestic violence, or in the event of a public health emergency. The employee cannot be required to find a replacement worker or work an alternate shift as a condition of, or to make up for, the use of sick time.

Increments of Use: Employers must allow employees to use sick time in hourly increments unless to do so would impose an undue hardship on the employer and the employer has a policy that allows an employee to use at least 56 hours of paid leave per year that may be taken in minimum increments of four hours.

Paid Sick Time: Employers with 10 or more employees must provide paid sick time. However, the threshold number of employees for paid sick time drops to 6 for employers that maintain any office, store, restaurant or establishment within the City of Portland. Sick time must be paid at the employee's regular rate of pay.

Unpaid Sick Time: Employers with fewer than 10 employees (or fewer than 6 for Portland employers) must offer unpaid sick time, but may elect to offer it as paid.

Vacation/PTO: Employers are free to provide for more generous sick leave policies and may comply with the law through vacation or paid time off policies so long as the minimum requirements are met.

Employee Notice Requirements: For planned sick time use, employers may require that employees comply with the usual notice and procedural requirements for absences and requesting time off so long as those requirements do not interfere with the employee's ability to make use of accrued sick time. However, an employer may not require more than 10 days' advance notice of foreseeable leave and the employer must allow leave without notice for unplanned absences.

Limited Union Exception: the law provides a limited exception for employees whose terms and conditions of employment are covered by a collective bargaining agreement, who are employed through a hiring hall or similar referral system, and whose employment benefits are provided by a

joint multi-employee trust or benefit plan. Other unionized workers who do not fall within this exception must be provided sick time in accordance with the law.

Local Ordinances Preempted: Oregon sick leave will preempt local governments from setting any sick leave requirements. That means that, as of January 1, 2016, Portland's Sick Time Ordinance will no longer be in effect, leaving employers to focus just on the Oregon state-wide requirements. Employers subject to the Portland Ordinance should continue to comply with it through the end of the year. A Eugene ordinance was slated to go into effect July 1, 2015; however, the City Council voted to repeal it as a result of state wide sick leave.

Implementation/enforcement: BOLI has been charged with developing regulations and drafting required notices for the law.

DOL Amendment of FMLA Definition of Spouse. Effective March 27, 2015, the DOL has issued a final rule under the FMLA's definition of "spouse" where the definition is based on the state law where the marriage was performed ("state of celebration" rule) as opposed to the state in which the employee resided when the employee applied for leave based upon a same-sex marriage (the "state of residence" rule). The new definition expressly includes both same-sex and common-law marriages and provides that when a person meets the definition of spouse, the employee may have additional rights to care for a stepchild or stepparent of the spouse without having to establish an "in loco parentis" relationship.

F. Current Supreme Court Docket

G. G. v. Gloucester Cnty. Sch. Bd., 822 F.3d 709 (4th Cir., 4/19/16) (*cert. granted, 10/28/16, 2016 U.S. LEXIS 6408).* The 4th Circuit Court of Appeals deferred to the Department of Education's interpretation of Title IX, which provides for the protection of transgender students and provides for student restroom access congruent with gender identity. Title IX forbids education programs that receive federal funding from discriminating on the basis of sex. The DOL issued guidance in a December 2014 letter, that discrimination can include treating students a certain way based on gender stereotypes, similar to the EEOC's strategic enforcement of Title VII. The county school board passed a resolution that contravened the DOE's guidance, stating rather that "students with gender identity issues shall be provided an alternative appropriate private facility." The Court of Appeals held that the county school board's regulations were unlawful and enforced the DOL's guidance reasoning that Title IX contained ambiguity on the matter.

EEOC v. McLane Co., Inc., 804 F.3d 1051 (9th Cir. 10/27/15), *petition for cert. filed*, (4/4/16). In this subpoena enforcement action, the EEOC was attempting to determine whether a strength test had a discriminatory impact on women. In a traditionally broad approach to EEOC subpoenas, the Ninth Circuit held that the EEOC was entitled to compel production of "pedigree information" of other applicants who took the test. Such information included names, social security numbers, last known addresses and telephone numbers which would have allowed the EEOC to contact the applicants.

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., No. 14-13710, 2016 U.S. Dist. LEXIS 109716 (E.D. Mich. 8/18/16). The first two suits filed by the EEOC against private-sector employers which alleged that discrimination based on transgender status was sex discrimination under 150,000 settlement following a previous district court ruling in 2015 when the court had rejected the Title VII claim based on transgender status or gender identity, holding that those categories were not protected categories under Title VII, but that the employee could pursue a claim under a sexual stereotyping theory. In *Harris Funeral Homes*, the employer was granted summary judgment since the employer, requiring the plaintiff to dress as a man at work, would infringe on the employer's rights under the Religious Freedom Restoration Act. The court found that the EEOC had not explored the possibility of accommodation under the two statutes and never discussed such an option. The court found that the EEOC had a "demanding burden" under the RFRA to show that its position furthered a compelling governmental interest through the "least restrictive means."

Kowitz v. Trinity Health, No. 15-1584, 2016 U.S. App. LEXIS 18559 (8th Cir. 10/17/16). Employer may have been aware of an employee's need for an accommodation to complete CPR recertification or a job reassignment while she continued to recover from neck surgery. The decision was significant because it reaffirmed, and arguably extended, the concept that an employee need not use "magic words" to invoke the ADA's interactive job accommodation process. The court held that, in addition to not needing to use specific words, that a request for an accommodation may be implied from the circumstances and context of the situation. In this matter, the employee's doctor's note that the employee would have continuing medical restrictions should have been sufficient to initiate the interactive process and explore potential accommodations. The dissent argued that the court's decision essentially eliminates the standing requirement that an employee take some affirmative action to request an accommodation.

Villarreal v. R.J. Reynolds Tobacco Co., No. 15-10602, 2016 U.S. App. LEXIS 18074 (11th Cir. 10/5/16). Federal age bias law does not permit for "disparate impact" claims by older applicants, who can only sue for intentional bias. The case involved a 49 year-old applicant that was not selected for a territory manager position targeted toward applicants "2-3 years out of college" and recruiters were told to avoid applicants "in [the] sales force for 8-10 years." The court held that the EEOC's contrary interpretation of Age Discrimination in Employment Act was not entitled to deference because it contradicted the plain language of the ADEA, which limited disparate impact claims to employees, to the exclusion of applicants.

Goings v. Calportland Co., 280 Or. App. 395 (8/31/16). ORS 656.018 provides that the workers' compensation system within the State of Oregon is the exclusive remedy for employees suffering injuries on the job. However, Section (3)(a) provides an exception for "willful and unprovoked aggression" which is a substantial factor in the injury. In the *Goings* case, a particular supervisor had been aware of Goings' injury and allegedly assigned him to perform certain work that same afternoon, knowing that the possibility of injury was great. The Court of Appeals allowed Goings' claim to proceed against the supervisor under Section (3)(a).

Landers v. Quality Commc'ns, 135 S. Ct. 1845 (*cert. granted, 4/20/15*). Plaintiff's complaint did not make factual allegations providing an approximation of the overtime hours worked, his

hourly wage, or the amount of unpaid wages. The Court of Appeals held that the omission of those allegations barred plaintiff from relief under Rule 8. The plaintiff declined to amend the complaint and instead appealed his claims. Significantly, the court did not require the plaintiff to approximate the number of hours worked without compensation but found that, at a minimum, a plaintiff must state that in at least one workweek he worked in excess of 40 hours and was not paid either overtime or minimum wage for that week.

II. DECISIONS OF THE SUPREME COURT

Encino Motorcars, LLC, v. Hector Navarro, 136 S. Ct. 2117 (6/20/16). The Supreme Court held that arbitrary and capricious changes in regulations by the Department of Labor did not carry the force of law and were not entitled to any deference from the Court. In 2011, the DOL changed a longstanding enforcement policy that exempted service providers of vehicles the same as service providers of boats and airplanes when it excluded the latter from the exemption with minimal explanation. The Court refused to enforce the regulation because the change did not appear to have a logical explanation, and an explanation was required where the change would overturn decades of industry reliance.

CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642 (5/19/16). The Supreme Court held that a party need not prevail on the merits to be entitled to recover attorney fees under Title VII's fee shifting statute. The Court found no indication that Congress intended to so limit a defendant's opportunity to recover fees and that the statute permits the recovery of fees expended in defending cases based on the merits, and also when defending frivolous, unreasonable, or groundless litigation.

Green v. Brennan, 136 S. Ct. 1769 (5/23/16). If an employee claims he has been fired or constructively discharged for discriminatory reasons, the "matter alleged to be discriminatory" includes the discharge itself, and the statute of limitations period begins running only after the employee's employment is terminated. Here, the plaintiff had worked for the postal service for 35 years, in 2008 he was passed over for a promotion, in 2009 he was accused of the criminal offense of intentionally delaying the mail. Plaintiff signed a settlement agreement that allowed him to avoid charges if he resigned. Plaintiff's resignation, however, was not effective for several more months. When plaintiff brought claims of wrongful/constructive discharge, he was outside the statute of limitations period based on the alleged conduct, including his execution of the release. Plaintiff was within the limitations period if it was based on his date of resignation. In a 7-1 decision, the Supreme Court held that a claim for wrongful or constructive discharge cannot proceed absent the requisite discharge, and therefore the statue will not begin to run until the employee has formally left his post.

Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (3/29/16), *reh'g denied*, 84 U.S.L.W. 3704 (6/28/16). A 4-4 tie in the Supreme Court resulted in affirmation of the status quo in California, where public school teachers are required to pay certain union dues whether or not they chose to join the union. Some have speculated that Justice Scalia (who died shortly before the decision was announced) would have broken the tie and voted against the unions, which would have had significant consequences on union issues across the country. On June 28, 2016, the Court denied

a request for a rehearing by the teachers that challenged the union. They had asked the Court to reconsider once a ninth justice was appointed.

Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (3/22/16). Class certification was appropriate under FRCP 23(b)(3) where the employees relied on an expert's study to determine how long various pre and post work activities took for purposes of bringing an FLSA wage claim. Employees brought claims against Tyson Foods alleging that it had failed to pay them for time donning and doffing protective gear before and after their work in a pork processing plant. Some employees took very little time to change and get to their workstations, while others took upwards of 30 minutes. The employer argued that the employees that took less than the "average" time devised by the employees' expert would be getting an undeserved windfall based on the class certification. The court disagreed and held that the statistical evidence was properly admitted and that the use of "representative samples" is permitted in determining damages for an individual employee and is thus acceptable for use by the class. The court further noted that the employer could present its own evidence challenging the statistical evidence proffered by the employees.

The Court distinguished this case from a similar issue in *Wal-Mart Stores, Inc., v. Dukes,* where it held that anecdotal evidence of sexual discrimination could not be generalized across a class of plaintiffs to overcome the absence of a common policy of discrimination because the experience of those employees had little relationship to one another. In contrast, the employees in *Tyson* worked at the same facility, did similar work, and were paid under the same policy. Furthermore, the court noted that the plaintiff had offered to split the trial in such a way so that the most similarly situated employees would be tried together, but Tyson rejected that approach, and in a way created the issue it sought to appeal.

DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (12/14/15). Consumers must individually arbitrate their disputes with DirectTV Inc. because the Federal Arbitration Act (FAA) preempts the use of invalid state law to render the arbitration provision unenforceable. The decision is relevant for agreements in the employment context as the Supreme Court typically does not distinguish between consumer and employment arbitration. At issue was whether the arbitration clause in the DirectTV contract that specified it was unenforceable if the "law of your state" made class-action arbitration waivers unenforceable. California had such a law, but the court held that the FAA pre-empted California law and that DirecTV's contract provision was not intended to include invalid laws.

Mach Mining, LLC v. EEOC, 135 S. Ct. 1645 (4/29/15). The Supreme Court held that courts have authority to review whether the EEOC has fulfilled its Title VII duty to attempt conciliation between employers and claimants prior to bringing claims against employers. To comply with Title VII's conciliation provision, the EEOC must inform the employer of the allegation and describe what the employer has allegedly done wrong and which employees have been affected. Then the EEOC must try to engage the employer in a discussion so as to provide an opportunity to remedy the allegedly discriminatory practice. The EEOC can show that it met the conciliation requirement by submitting a sworn affidavit detailing its efforts. The remedy for a finding of

insufficient conciliation is an order to undertake additional conciliation, not dismissal of the discrimination charge.

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (6/1/15). The Supreme Court held that to prevail on a disparate treatment religious bias claim under Title VII, a job applicant must only show that her need for an accommodation was a motivating factor in the employment decision, not that the employer had actual knowledge that the applicant would need a religious accommodation. The case involved a female applicant who was rejected because she wore a Muslim head scarf, or hijab, for her interview. She was not offered a job because her head scarf violated Abercrombie's "look policy" that disallowed hats or other head coverings. Abercrombie claimed it had no actual knowledge that the head scarf was indicative of a need for a religious accommodation from that policy. The Supreme Court held that when the employment decision is "motivated" by the employee's need for a religious accommodation, here an exception to the "look policy," then the employer's action violates Title VII regardless of whether it had actual knowledge of the need for an accommodation. Abercrombie subsequently settled the case for $44,600.

King v. Burwell, 135 S. Ct. 2480 (7/7/15). The Supreme Court upheld the government's interpretation of the Affordable Care Act ("ACA"), which provided for health care subsidies to residents of states that opted out of creating a health care exchange. The case centered on a phrase of the law that provided for subsidies on insurance purchased from "an Exchange established by the State." The court agreed that the plain meaning of the words suggested that individuals obtaining insurance through the federal exchange would not be entitled to subsidies. However, the court held that such a ruling would destabilize the individual insurance markets in those states and such a result "would likely create the very economic 'death spirals' that Congress designed the ACA to avoid through its interlocking requirements." Looking at the broader context of the law, the majority held that the seven words at issue must be understood in such a way to be consistent with Congress' intent to "improve health insurance markets, not to destroy them."

In a strong dissent, Justice Scalia argued that the majority was improperly re-writing the ACA because as stated it would not work as well as hoped. Based on the fact that the law has twice been upheld by controversial Supreme Court decisions, he further suggested that the nickname of the law be changed from Obama Care to "SCOTUS care."

M&G Polymers USA, LLC v. Tackett, 135 S. Ct. 926 (1/26/15). Courts deciding whether union retirees have lifetime healthcare benefits should apply ordinary contract principles rather than special interferences or presumptions, primarily based on ERISA statutes. The court's decision finds inapplicable a judicial reference in the "*Yard-Man*" defense where the Sixth Circuit had found that retiree healthcare benefits are vested for life in the absence of specific language to the contrary in either a collective bargaining agreement or a health plan document. The decision was unanimous and the matter has been remanded to the Sixth Circuit for further consideration under "ordinary principles of contract interpretation."

Applying that standard, the Sixth Circuit Court of Appeals held in *Gallo v. Moen Inc.*, 813 F.3d 265 (6th Cir. 2/8/16), *reh'g denied*, 2016 U.S. App. LEXIS 5557 (6th Cir. 3/16/16) that a group of retirees of the employer defendant were not entitled to lifetime health care benefits because those benefits were not vested under the new framework for evaluating and interpreting collective bargaining agreements. The court specifically noted that *M&G Polymers USA, LLC* rejected inferences in favor of vesting health care benefits for life as too speculative and too far removed from the context of any particular contract to be useful in determining the parties' intentions. The court determined that, when a specific clause in a CBA does not include an end date, courts must look to the general durational clause to determine a termination date. In this case, the contract had a term of three years. The court was unpersuaded by the retirees' argument that benefits vested based on the CBA's use of the future tense when describing the benefits and the fact that the company continued to pay benefits for five years after the plan's closing agreement. The court noted that "a company to its credit hopes to subsidize healthcare benefits for its retirees for as long as possible does not mean it has promised to do so, and above all such action does not mean that it has no right to alter those benefits in the future."

Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (3/25/15). The United States Supreme Court vacated the judgment of a lower court which had dismissed a claim against UPS by a driver whose pregnancy led to medical restrictions. Her doctor had limited her to lifting no more than 20 pounds (whereas drivers are typically required to be able to lift up to 70 pounds). The plaintiff requested a light-duty assignment, but the company denied the request. She asserted that such assignments were available to other workers such as drivers who had been injured on the job, or who had been provided with an accommodation for a disability, or who had lost their Department of Transportation certifications, and that the company was in violation of the Pregnancy Discrimination Act by refusing to provide her light duty.

One major issue in the lawsuit was the proper comparison. Instead of apples to apples, the plaintiff and the company argued over whether the plaintiff was entitled to a work adjustment even if it was available only to a subset of employees. To state it more precisely, who are the "other persons" in this language taken from the statute?

"[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as *other persons* not so affected but *similar in their ability or inability to work*."

The lower court held that UPS's denial of the request did not discriminate on the basis of sex, because UPS's policy treated pregnant workers and non-pregnant workers alike, and that the plaintiff could not compare herself to workers who were accommodated for on-the-job injuries, ADA accommodations, or the loss of DOT certifications because her situation was dissimilar. The statutory language is not simple, even though it seems so; the Supreme Court split 5-4, and the case will return to the lower court for trial. But both sides of this kind of dispute have caveats to consider.

For the plaintiffs asserting such a claim, the court cautioned that pregnancy did not create a sort of "most favored nation" status through which the pregnant employee automatically became

entitled to any adjustment provided to any other employee. Or, as Justice Breyer commented, the law "does not say that the employer must treat pregnant employees the 'same' as '*any* other persons' (who are similar in their ability or inability to work), nor does it otherwise specify *which* other persons Congress had in mind."

For the employers defending such a claim (or making pregnancy-related decisions), the court instructed that they will have to be able to justify a refusal to accommodate a pregnant employee by citing legitimate, nondiscriminatory reasons, and that those reasons "cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates." Instead, the employer's reasons must be sufficiently strong to overcome the intent of this important law, and the plaintiff can challenge the explanation by, for example, showing that the employer accommodates a large percentage of non-pregnant workers but, at the same time, fails to accommodate a large percentage of pregnant workers.

While this case was pending, the EEOC issued a Guidance on pregnancy discrimination. The Court declined to view that Guidance as authoritative; so, expect a revision.

The case would not be complete without a few pithy comments from the dissent:

"Faced with two conceivable readings of the Pregnancy Discrimination Act, the Court chooses neither. It crafts, instead, a new law that is splendidly unconnected with the text and even the legislative history of the Act. To 'treat' pregnant workers 'the same . . . as other persons,' we are told, means refraining from adopting policies that impose 'significant burden[s]' upon pregnant women without 'sufficiently strong' justifications. Where do the 'significant burden' and 'sufficiently strong justification' requirements come from? Inventiveness posing as scholarship—which gives us an interpretation that is as dubious in principle as it is senseless in practice."

III. DECISIONS OF THE FEDERAL COURTS

A. Employment Discrimination

1. Arbitration Agreements

Ziober v. BLB Res., Inc., 2016 U.S. App. LEXIS 18516 (10/14/16). USERRA claims are arbitrable under a mandatory arbitration agreement signed with an employer if the employee has not waived any "substantive" rights by going to arbitration rather than selecting one of the methods for resolution specifically stated in the statute. The court finds that going to arbitration is simply a "forum selection" and is not a waiver of substantive rights.

Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 8/22/16). Becoming the second such circuit to do so, the Ninth Circuit has now held that an employer's arbitration agreement with employees that blocked employees from joining with other employees in a legal claim, whether in court or in arbitration, violates the National Labor Relations Act. Thus, the Ninth Circuit has come out against the Fifth Circuit and two other Circuits on this point. With five separate

Circuits ruling on the issue and the NLRB continuing to rule that such agreements are illegal, it now becomes apparent that the case will head to the Supreme Court for a final decision. Attorneys filed a petition for review on September 8, 2016.

A petition for certiorari has now been filed with the Supreme Court on the *Morris* case. However, petitions have also been filed under *NLRB v. Murphy Oil USA* (5th Cir.) and *Epic Systems Corporation v. Lewis* (7th Cir.). It is expected that certiorari will be granted in these three, and one additional case, since it is in fact a clear conflict in the circuits on this point.

Sw. Reg'l Council of Carpenters v. Drywall Dynamics, Inc., 823 F. 3d 524 (9th Cir. 5/19/16). When evaluating the sufficiency of an arbitration decision, the trial court may not exceed its narrow authority to determine whether the arbitrator's award was based on the parties' contract and whether it violated an explicit, well-defined and dominant public policy. The union and association assigned to bargain on its behalf executed a Memorandum of Understanding (MOU) expanding the term of a labor agreement without the employers consent. The arbitrator held that the employer was bound by the MOU, the trial court vacated, holding that the arbitrator's interpretation of the parties' agreement was not possible and contrary to public policy. The Ninth Circuit overturned the trial court's decision holding that it had overstepped its authority and that it can only invalidate an award based on explicit, well-defined and dominant public policy concerns, not general concerns.

Martin v. Yasuda; Amarillo Coll. of Hairdressing, Inc., 829 F.3d 1118 (9th Cir. 7/21/16). Even though employee/students had signed an arbitration clause, they nonetheless proceeded with a lawsuit for 17 months before losing part of a motion and seeking arbitration under the original agreement. Both the trial court and the Ninth Circuit decided that arbitration would be inappropriate since the defendants had knowledge of their existing right to compel arbitration and had litigated for a considerable period of time before seeking arbitration after they had lost a critical motion.

Hermida v. JP Morgan Chase Bank, N.A., 2015 U.S. Dist. Lexis 148734 (D. Or. 11/3/15). The court held that an employer may compel arbitration pursuant to an employment agreement in a suit by employee alleging he was terminated for complaining about illegal activity. The court began by analyzing the strong preference for enforcing arbitration agreements memorialized in the Federal Arbitration Act (FAA). The FAA provides that arbitration clauses "shall be valid, irrevocable, and enforceable" unless contrary to law or public policy. The court was unpersuaded by the plaintiff's argument that the agreement was substantively unconscionable because it favored the employer and upheld the arbitration agreement. The court held that the contract allowed the arbitrator sufficient authority to modify discovery limitations and other procedural terms to provide the employees an opportunity to vindicate their rights. The court also noted that the agreement was broadly applicable to claims the employee and the employer may each raise, and thus sufficiently balanced and not unconscionable under Oregon state law.

Brennan v. Opus Bank, 796 F.3d 1125 (9th Cir. 8/11/15). A senior bank executive had signed an arbitration agreement which incorporated California law with respect to procedural rules, rights and remedies during arbitrations. However, since the agreement said nothing about whether

California law governed the question of arbitrability, the matter was covered by the Federal Arbitration Act and therefore an arbitrator would be entitled to determine whether the agreement was "unconscionable."

Ashbey v. Archstone Prop. Mgmt., Inc., 785 F.3d 1320 (9th Cir. 5/12/15). The Ninth Circuit enforced an employer's dispute resolution policy, including mandatory binding arbitration, contained in its policy manual (handbook). The court distinguished this case from previous cases where handbook arbitration agreements were not enforced by noting that: (1) the employee received a copy of the policy before signing the acknowledgment; (2) the acknowledgment included reference to the dispute resolution policy; and (3) the employee agreed to abide by that policy.

Int'l. Longshore & Warehouse Union v. Columbia Grain, 2015 U.S. Dist. LEXIS 86396 (D. Or. 7/2/15). The Oregon district court found that a local union lacked the authority to compel arbitration of a lost work grievance after the original employer subject to the collective bargaining agreement dissolved and the international union had entered into a memorandum agreement that discharged the claims against the previous company.

2. Proof

Bagley v. Bel-Aire Mech., Inc., 647 Fed. Appx. (9th Cir. 4/8/16). An employee had his 1981 claim revitalized since an employer did not meet its burden of production of proving a bona fide reason for termination by merely stating factors allegedly causing the termination without relating those to the specific case. Notably, the employee was able to show causation through a 36 day span between the date of his complaint and his termination. The case is remarkable in terms of its providing litigants research on issues of proof and summary judgment, timeliness, retaliation, a prima facie case and pretext. The case is a compendium of Ninth Circuit law on these points.

France v. Johnson, 795 F.3d 1170 (9th Cir. 8/3/15), *modified*, 2015 U.S. App. LEXIS 17916 (9th Cir. 10/14/15). The Ninth Circuit adopted the Seventh Circuit's approach that an age difference of less than 10 years between a plaintiff and his or her replacements creates a rebuttable presumption that the age difference was insubstantial. However, in the case of France, he was able to rebut the presumption by showing that his employer had considered age in general to be significant and a supervisor's comment made it appear that age had been a factor.

EEOC v. Freeman, 778 F.3d 463 (4th Cir. 2/20/15). In the Fourth Circuit's decision in this case and in the Sixth Circuit's decision in *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014), the court found that the EEOC had to provide both relevant and reliable statistical testimony to support a disparate impact claim where such statistical evidence is the foundation of the claim. In both the Fourth Circuit and the Sixth Circuit decisions, the court found that the testimony of the EEOC's expert, industrial/organizational psychologist Kevin Murphy, provided unreliable testimony due to the "sheer number of mistakes and omissions in his analysis."

3. Procedure

Escobedo v. Applebees, 787 F.3d 1226 (9th Cir. 6/4/15). The court held that an employee's Title VII sexual harassment and discrimination claim was timely when she filed it within the 90-day limitation period but was denied relief from her filing fee. The court stated that it was reasonable to allow her time to come up with the money for the filing even if it that did not happen within the 90 days. Further, the district court abused its discretion when it denied the relief from the filing fee based on employee's husband's social security income without taking into consideration his liabilities and expenses.

EEOC v. Peters' Bakery, 2015 U.S. Dist. LEXIS 96432 (N.D. Cal. 7/22/15). A district court in California granted a preliminary injunction against the employer enjoining it from terminating an employee that raised Title VII claims. The court stressed that a preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." In this case, the court the court granted the injunction after considering the offending conduct of the employer, previous history with the employee and the likelihood that the employee would prevail on her claims and based on the substantial weight of the evidence.

Reyes v. Dollar Tree Stores, 781 F.3d 1185 (9th Cir. 4/1/15). A case was originally removed to the federal court and then remanded to the state court based upon an evaluation of the amount of money at stake if class certification was granted. However, when the class was actually certified, the amount at stake exceeded the removal floor and the employer moved again for removal. The Ninth Circuit supported the claim since the certification "created a new occasion for removal" and therefore the second removal was in fact permissible and timely since it was done within 30 days of the class certification order.

4. Gender Discrimination

Tornabene v. Nw. Permanente, P.C., 2015 U.S. Dist. LEXIS 172358 (D. Or. 12/28/15). A female cardiac-surgery technician terminated by her employer avoided summary judgment on gender discrimination claims, in part, by identifying a male comparator who was not terminated despite having a similar job and similar performance issues. The court found that the plaintiff established a prima facie case through her protected status and reported remarks suggesting that her supervisor did not like "strong women." The employer presented the plaintiff's subpar performance reviews as evidence that it had a legitimate, nondiscriminatory reason for terminating her. The plaintiff challenged that explanation as pretextual by identifying a similarly situated employee that consistently received poor performance reviews, but had not been terminated.

Teamsters Local Union No. 117 v. Wash. Dep't of Corr., 789 F.3d 979 (9th Cir. 6/12/15). The Ninth Circuit held that female-only correctional officers at women's prison facilities, though a discriminatory gender based hiring practice, was acceptable because it was a bona fide occupational qualification to improve security, protect inmate privacy and prevent sexual assaults.

5. Disability Discrimination

Mendoza v. Roman Catholic Archbishop of L.A., 824 F.3d 1148 (9th Cir. 6/7/16). When the plaintiff took a 10 month leave, her supervisor took over her bookkeeping duties and decided that they only needed a part-time employee to do her job when she returned. Plaintiff declined the part-time job and brought an action on the failure to reinstate her, claiming disability discrimination. The plaintiff, however, could not show that the church's legitimate nondiscriminatory reason for not returning her to work was a "cover" for discrimination and could not show that a full-time job was otherwise available or that the church was motivated by her disability in reducing her work to a part-time position.

Davis v. Bombardier Transp. Holdings, Inc., 794 F.3d 266 (2nd Cir. 7/22/15). The court held that an employee's disability discrimination claims raised after the 300-day time limits for bringing such claims could not survive under the "Lilly Ledbetter Fair Pay Act" exception. That rule makes every paycheck the basis for a claim of compensation discrimination. The court distinguished the employee's claim, however, by noting that she was not making a compensation discrimination claim, but rather that the demotion to the lower paying position was discriminatory, which is not covered by the Lilly Ledbetter rule.

6. Religious Discrimination

Fort Bend Cty. v. Davis, 765 F.3d 480 (5th Cir. 8/26/14), *cert. denied*, 135 S. Ct. 2804 (6/8/15). The Supreme Court denied review of a Fifth Circuit ruling that allowed a county employee's religious discrimination claims to proceed. The employee was terminated after she refused to work because of a "previous religious commitment," which consisted of a "feed the community" event. The issue was whether the event was "motivated" by a religious belief (protected) or simply "associated with" her religious institution. In finding an issue of fact for trial, the 2-1 majority of the court held that there was enough evidence for a jury to find that the church event was a "religious practice" that conflicted with work requirements and that the county failed to reasonably accommodate the practice. In so holding, the court emphasized that judicial inquiry into the sincerity of a person's religious belief "must be handled with a light touch, or judicial shyness," lest the court "stray into the realm of religious inquiry, an area into which we are forbidden to tread."

7. Family Medical Leave

Lane v. Grant Cty., 610 F. App'x 698 (9th Cir. 7/29/15). The Ninth Circuit held that an award of front pay and liquidated damages to an employee that prevailed on her FMLA claim was proper on the basis that the defendant employer failed to prove that it had acted in "good faith" or that it had "reasonable grounds for believing that [its action] was not a violation" of the FMLA.

Aboulhousn v. Merrill Lynch, 606 F. App'x 377 (9th Cir. 6/16/15) (unpublished). The Ninth Circuit held that FMLA leave may be appropriate for an employee that requested time to care for his father's chronic high blood pressure. The issue was whether high-blood pressure qualified as

a serious health condition under the law. The court held that there was a triable issue of fact based on a doctor certification that the father needed 24-hour care to monitor his blood pressure and ensure he took the proper medications.

City of Portland Sick Leave. Effective January 1, 2014, private-sector employers with six or more employees must provide up to 40 hours (or five days) of paid sick leave per year; smaller employers (those with five or fewer employees) must provide up to 40 hours of unpaid sick leave.

Employees—no matter the size of the employer—will be eligible for sick leave if they work in Portland at least 240 hours in a calendar year. Employees who work more than 240 hours will accrue one hour of paid (or unpaid—depending on the size of the employer) sick leave for every 30 hours worked within the Portland city limits (maxing out at 40 hours).

Employees can use sick leave for a variety of reasons, including:

- For an employee's personal mental or physical illness, including pregnancy, childbirth and preventive medical care;
- To care for a family member with an illness, injury or medical appointment;
- If the employee's place of business closes for a public health emergency, or to care for a child whose school or day care closes for a similar reason; and
- For reasons related to domestic violence, harassment, sexual assault or stalking.

If an employee uses three or more consecutive sick days, his or her employer can request reasonable documentation (e.g. documentation signed by a licensed health care provider, a signed personal statement from the employee) showing the employee is out for an approved reason.

Employees can accrue hours at the start of employment. However, they cannot use their accrued time until after they have worked for 90 days.

If an employer already provides employees with five days (or 40 hours) or more of paid time off (or 40 hours of unpaid time off for smaller employers) during the calendar year, such employers will not be required to provide employees with additional sick leave, as long as the employer's policy allows leave to be taken for the same reasons as provided above.

Employers must establish a written policy or standard for an employee to notify his or her employer of the employee's use of sick time (e.g. calling a designated number). Employees are required to follow such policy and, when the need for leave is foreseeable, comply with such policy as soon as practicable. If the need for leave is not foreseeable, employees should provide notice as soon as possible.

Employers may not require an employee to:

- Find a replacement as a condition of using sick time; or
- Verify absences lasting fewer than three days (except in limited circumstances).

In addition, employers may not discriminate or retaliate against employees who request, use, or complain that they are not receiving sick leave.

Employers must provide and post a notice of an employee's rights to sick leave. The City will provide employers with a template for this notice. The notice must be posted in a conspicuous and accessible location where employees work, such as break rooms or bulletin boards, where other types of notices are posted.

8. Affirmative Action

Fisher v. Univ. of Texas, 136 S. Ct. 2198 (6/23/16). Abigail Fisher, a white high school graduate, applied for admission to the University of Texas's 2008 class and was rejected. At the time that she applied, the University had identified what it considered a compelling interest in having a "critical mass" of minority students enrolled. To achieve that goal, it used race as an explicit plus factor in its application process. Fisher filed suit alleging that the University's consideration of race in admissions violated the Equal Protection Clause of the Fourteenth Amendment. Applying the strict scrutiny test that the Supreme Court articulated in *Grutter v. Bolinger*, 539 U.S. 306 (2003) for race-conscious admissions programs, the district court granted summary judgment to the University. On appeal, the Fifth Circuit affirmed, holding that, under earlier Supreme Court affirmative action cases, the court was required to give substantial deference to the University both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. The Supreme Court vacated and remanded the case back to the Fifth Circuit, holding that the appellate court failed to apply the strict scrutiny standard correctly. The Supreme Court explained that "some, but not complete" judicial deference was proper in evaluating the University's stated goal of diversity. "However, once the University has established that its goal of diversity is consistent with strict scrutiny, the University must prove that the means it chose to attain that diversity are narrowly tailored to that goal. On this point, the University receives no deference." The Fifth Circuit erred in showing any deference in step two of the strict scrutiny test.

41 C.F.R. 60-250; 41 C.F.R. 60.300. In August 2013, the US Department of Labor's Office of Federal Contract Compliance Program issued its final rule regarding contractor affirmative action and nondiscrimination policies towards protected veterans. The rule amends regulations to require that Federal contractors and subcontractors conduct more substantive analyses of recruitment and placement actions taken under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). Among other things, the rule imposes the following obligations:

- The VEVRAA Final Rule requires contractors to adopt annual hiring benchmarks based on the national percentage of veterans in the workforce (currently 8%) or their own benchmark based on data provided by the Bureau of Labor Statistics.
- The OFCCP may conduct compliance evaluations to determine if the contractor is taking affirmative action to employ veterans. A compliance evaluation may include a comprehensive analysis of the contractor's hiring practices, a desk audit, an off-site review of records, or a more focused review restricted to one or more components of the

contractor's organization or employment practices. Where the OFCCP finds deficiencies, it shall make efforts "to secure compliance through conciliation and persuasion."

- When listing job openings, contractors must provide that information in a manner and format permitted by the appropriate state employment service agency, so the agency can access and use the information to make the job listings available to job seekers.

9. Retaliation

Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255 (9th Cir. 3/23/16). A school teacher alleged that her employer constructively discharged her in retaliation for comments made to supervisors and students' parents criticizing the school's special-education program. The Ninth Circuit affirmed summary judgment, in relevant part, holding that the teacher's comments were made in her role as an employee, and not as a member of the public, thus her statements were not entitled to First Amendment protection.

Dossat v. F. Hoffmann-La Roche LTD., 600 F. App'x 511 (9th Cir. 4/9/15) (unpublished). The court affirmed a jury verdict that a supervisor intentionally inflicted emotional distress on an employee after he filed an age discrimination charge. The supervisor's conduct consisted of making a trigger pulling gesture to indicate that the employee would be fired, yelling and cursing at him, and reprimanding him and docking his pay despite positive work reviews.

10. Remedies and Settlements

EEOC v. Allstate Ins. Co., 778 F.3d 444 (3rd Cir. 2/13/15), *reversed in part*, 2016 U.S. Dist. Lexis 34366 (E.D. Pa. 3/17/16). The defendant allowed its employees to move from employee status to independent contractor status, selling the defendant's products. As part of the requirement for the move, the employees were required to sign a release of all pending claims. The EEOC argued that there should be a concern when a release forecloses new business opportunities, but the court found that the EEOC failed to explain why such financial pressure is "more offensive" than the pressure one is bound to feel when required to sign a release in exchange for severance pay. On March 17, 2016, a district court held that the *Allstate* ruling was non-binding dicta and chose not to follow it in *Romero v. Allstate Ins. Co.*, 2016 U.S. Dist. LEXIS 374366 (E.D. Pa. 3/17/16).

11. EEOC and Administrative Agencies and EEOC Rules

EEOC v. Flambeau, Inc., 131 F. Supp. 3d 849 (W.D. Wis. 12/31/15). The protections set forth in the ADA's safe harbor permits employers to design insurance benefit plans that require otherwise prohibited medical examinations as a condition of enrollment without violating 42 USC §12112(d)(4)(A), which generally prohibits requiring employees to submit to medical examinations. In so holding, the court rejected the EEOC's recently proposed regulations, which prohibit any mandatory testing to participate in an insurance benefit plan, as being contrary to the original intent of the law. The court reasoned that the intention of the ADA was not to prohibit employers from asking for relevant medical and disability related information, but rather to provide a mandate for the elimination of discrimination against individuals with disabilities.

Congress memorialized that intent in the ADA's safe harbor, which provides an exemption for testing requirements related to the administration of a bona fide insurance benefit plan. The court granted the employer's motion for summary judgment against the EEOC's claims, holding that the test required to participate in its group health insurance plan were within the safe harbor and therefore did not violate the ADA. On February 25, 2016, the EEOC appealed that ruling.

<u>EEOC Issues Final Rules Regarding the ADA and Wellness Programs</u>. On May 17, 2016, the EEOC issued guidance regarding what it believes constitutes a permissible wellness plan under the ADA. Generally, pursuant to the ADA, an employer cannot request disability related information from an employee or request that an employee complete a medical examination unless such requests are pursuant to a qualifying "voluntary" wellness program. The EEOC's guidance states that a plan is voluntary if (1) participation is not required; (2) non-participation would not result in denied or limited health coverage; (3) employees are not retaliated against for not participating; and (4) employees are provided with actual notice of changes. The EEOC guidance also states that a wellness plan is only "voluntary" if the financial reward for participation "does not exceed…[t]hirty percent of the total cost of self-only coverage." The EEOC guidance is not consistent with previous interpretations of the ADA's safe harbor provisions, as described by the *Flambeau, Inc.* court, *supra.* The EEOC has argued the *Flambeau, Inc.* was wrongly decided and appealed that decision.

12. <u>Wage and Hour</u>

Or. Rest. & Lodging Ass'n v. Perez, 816 F.3d 1080 (9th Cir. 2/23/16). Employer tip pooling arrangements with employees that are not customarily tipped (the "back-of-the-house" employees like dishwashers and cooks) are invalid, regardless of whether the employer takes a tip credit. In 2010 the court had held that tip pooling was permitted so long as the employees were paid a base wage above the minimum, that is, the employer did not take a tip credit against employee's wages. In response, the DOL enacted regulations forbidding tip pooling (mandatory tip sharing arrangements) with employees that are not customarily tipped, regardless of whether the employer takes a tip credit. 29 CFR §531.52. A divided *Perez* court held that the DOL had the authority to enact such a regulation, despite the FLSA's silence on that specific issue. As such, the court held that the regulation superseded its decision in *Cumbie* and that tip pooling arrangements must be limited to employees that are customarily tipped, such as servers, and exclude employees not customarily tipped, such as dishwashers and cooks.

On March 23, 2016, a District Court in the 10th Circuit stated that the *Perez* decision was unpersuasive and chose not to follow it, holding that the DOL did not have the authority to regulate tip pooling under the FLSA when employers do not take a tip credit. *Brueningsen v. Resort Express, Inc.,* 2016 U.S. Dist. LEXIS 39747 (D. Utah 3/24/16)

Bucklin v. Zurich Am. Ins. Co., 619 F. App'x 574 (9th Cir. 7/20/15) (unpublished). Interpreting the FSLA and California Labor Code, the court held that insurance company claim adjusters were properly classified as "administrative" and exempt from overtime pay requirements. Under the administrative exemption to the FLSA, the employer must establish several elements showing that the employees performed management work with minimal supervision and had broad

discretion to perform their duties, in addition to minimum salary requirements, which were not in dispute. The court noted that the employees met all the requirements of the test because their work directly related to the company's management policies, their authority was broad and included setting reserves and settling claims by regularly exercising discretion and independent judgment.

Velazquez v. Costco, 603 F. App'x 584 (9th Cir. 3/25/15) (unpublished). The court affirmed a trial court judgment awarding damages to employees that had been mischaracterized as "managers" and exempt from the FLSA based on how the employees actually spent their time, not the employer's job description or understanding of the employees' positions. In interpreting the California Labor Code, the court held that the employer failed to prove that the employees "spent more than half of their time on managerial duties" and therefore they were entitled to overtime wages. The court reversed an award of continuing wages after the employees' positions were terminated as the misclassification was not "willful." Further, the employer was not entitled to an offset for the employees' alleged failure to mitigate based on the employees' failure to raise the issue of misclassification to the employer's attention.

Green v. Fed. Express Corp., 614 F. App'x 905 (9th Cir. 6/22/15) (unpublished). The Ninth Circuit affirmed the federal court's denial of class-action status to employees in holding that an employer has no obligation to police employee meal breaks to confirm that they are not performing work while on break. Further, the employer had no duty to sift through volumes of electronic data to confirm that employees were actually taking authorized breaks.

13. Class Action

Vaquero v. Ashley Furniture Indus., 824 F.3d 1150 (9th Cir. 6/8/16). The Ninth Circuit affirmed class certification for a group of commissioned sales associate employees bringing a wage claim on the basis that they were required to do many tasks unrelated to sales and entitled to additional pay. The court rejected the employer's argument to decertify the class on the basis of an alleged uniform lack of proof, suggesting that would be an issue for summary judgment. Further the court reiterated that class certification will not fail solely because of individual questions about the amount of damages allegedly incurred by different class members.

Allen v. Bedolla, 787 F.3d 1218 (9th Cir. 6/2/15). The court reversed a district court's approval of a class action settlement on the basis that it had failed to meet heightened procedural standards. To survive appellate review of a class action settlement, a court must show it had comprehensively explored all factors relating to the proposal. In this case, the court questioned the lack of support in the record for the settlement that included over $1 million in attorney fees and only $20-25 dollars per class member.

14. Sexual Harassment

Arizona ex rel. Horne v. Geo Grp., Inc., 816 F.3d 1189 (9th Cir. 3/14/16). The court permitted individual employees to join an EEOC class action after the EEOC had sent notice of class litigation and without attempting conciliation for each of the new employees individually during

the course of the reasonable cause determination investigation. The court held that the employees were accounted for by the EEOC when it referred generally to the "class" of female employees and attempted conciliation on that basis.

Nichols v. Tri-Nat'l Logistics, Inc., 809 F.3d 981 (8th Cir. 1/4/16), *reh'g denied*, 2016 U.S. App. Lexis 2438 (8th Cir. 2/11/16). An employee can pursue a sexual harassment claim against her employer when supported by conduct that occurred outside the workplace and during non-business hours. The employee was a female long haul truck driver partnered with a male employee. She claimed that the male employee's actions created a hostile work environment after she refused to have sex with him for $800. In holding that the employer was not entitled to summary judgment, the court held that there was a question of fact as to when the employee reported the offensive conduct and whether her employer took appropriate action within a reasonable time. The dissent argued that the only credible evidence was that the employer re-assigned the employee within a couple days of her first complaint, and even that delay came after the employee declined the employer's offer to immediately re-assign her.

Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264 (4th Cir. 5/7/15). The court held that a single incident of a supervisor's use of racial slurs, and an employee's subsequent termination after reporting the conduct, was actionable race discrimination under Title VII. The supervisor allegedly called the black employee a "porch monkey" twice during separate arguments on the same day. The employee reported it to a superior and she was terminated five days later. The court held that the use of a term as offensive as "porch monkey" could rise to the level of "severe" actionable conduct or a reasonable belief that a hostile work environment was "in progress." Further, the court held that her termination was actionable retaliation by the employer, even if the workplace had not yet devolved into a hostile environment, because early reporting should be encouraged and not punished.

Maliniak v. City of Tucson, 607 F. App'x 626 (9th Cir. 4/9/15) (unpublished). The court held that a single incident within the 300-day statute of limitations could be combined with an incident occurring before the statute of limitations to constitute, under the totality of the circumstances, a hostile work environment. A female employee had complained about a sign she found at work, which was not directed toward her, that used the word "B!*tch" [sic]. In bringing gender discrimination claims against her employer, she combined that incident with other incidents that predated the statute of limitations, relating to men at her work using the women's restroom. The court held that the incidents could be part of the same actionable hostile work environment claim for limitations purposes.

15. Whistleblower

U.S. ex rel. Hartpence v. Kinetic Concepts, Inc., 792 F.3d 1121 (9th Cir. 7/7/15). The court eliminated one of the requirements for whistleblowers to be able to recover under the False Claims Act ("FSA") as an "original source." Specifically, the court eliminated a previous requirement that the whistleblower must also have had a hand in the public disclosure of the fraud, as such a requirement does not appear in the language of the rule. The FSA allows persons and entities with evidence of fraud against federal programs to potentially earn a financial

recovery if the fraud is proven. To recover, the whistleblower must be an "original source." The court held that the law requires that an original source meet only two criteria: (1) voluntarily inform the government of the facts underlying the complaint's allegations before filing an action; and (2) must have direct and independent knowledge of the allegations underlying the complaint. This ruling is in line with other circuit courts on this issue.

B. Traditional Labor Law

Trump Ruffin Commercial LLC dba Trump International Hotel Las Vegas, Case 28-CA-181475 (11/3/16). On the eve of the presidential election, the NLRB dealt a blow to a major Trump enterprise by ordering management of the Trump Hotel in Las Vegas to bargain with its newly certified union representatives. Though not significant in itself, this case is another example of now President Elect Donald Trump's long and often tumultuous relationship with the unionization at his properties and businesses. Mr. Trump is expected to select conservative members to the Board, which will cause a significant shift in the politics of the board from the last eight years. In addition, Mr. Trump is entitled to appoint at least one Supreme Court justice and possibly up to three over his tenure. Based on those appointments, it would not be surprising for the court to re-hear a case similar to *Friedrichs v. Cal. Teachers Association*, which considered the issue of whether a public employees union can require its members to pay union dues even if the member opts out of the barging unit. That case previously resulted in a split by the high court which issued its decision shortly after Justice Scalia died. A ruling against the union on this issue in the future could have far reaching consequences. In short, expect significant changes in labor relations policies and the law under the new administration.

EEOC Issues Updated Guidelines on National Origin Discrimination. On Monday, November 21, 2016, the Equal Employment Opportunity Commission (EEOC) released new enforcement guidance on national origin discrimination. The guidelines apply to employers with 15 or more employees, as well as employment agencies, state and local employers, and unions. Updates respond to workplace situations such as language issues, segregation, immigration, and human trafficking. The guidelines clarify that an employer may not base an employment decision on an accent unless the ability to communicate in English is required to perform the job effectively and the accent materially interferes with performance. Employees of a certain national origin may not be segregated to work in lower-paying jobs away from public contact because of a customer preference for sales representatives of a different national origin. Individuals are protected regardless of their immigration status or authorization to work. Use of fraud, force, or coercion to exploit workers based on their national origin may violate federal discrimination laws in addition to criminal laws prohibiting human trafficking.

Judge Blocks New Overtime Rule. On November 22, 2016, a federal judge blocked the U.S. Department of Labor from implementing its new overtime rule, just a few days before it was to take effect on December 1, 2016. The case was *State of Nevada, Et Al, v. U.S. Department of Labor,* and related to claims brought by the states against the DOL overtime rule that effectively doubled the minimum salary level for executive, administrative and professional employees required to be exempt from federal overtime requirements. Finding that a group of 21 states who sued the Department of Labor would suffer irreparable harm if the rule took effect as planned, a

federal district court judge in Texas issued an injunction prohibiting the rule's implementation and enforcement. The judge held that the salary level and automatic updating mechanism in the rule exceeded the Department of Labor's authority. The nationwide injunction means the rule did not take effect anywhere on December 1, 2016. Employers who have been planning for the rule's implementation can delay those plans, but should not yet count on the rule being prohibited indefinitely. The preliminary injunction may be modified or dissolved by a further order from the court.

Wayron, LLC, 364 N.L.R.B. No. 60 (8/2/16). Prior to the decision in this case, if an employer argued that it could not afford the wage increase sought by the union, the union was entitled to ask for the employer to turn over its financial records and, in many cases, to allow the union to conduct a financial audit of the employer's records. However, employers traditionally would argue that the wage increase would simply make it noncompetitive, thereby avoiding the audit requirement. However, in *Wayron*, the NLRB has ruled that a statement of non-competitiveness also would require the employer to subject itself to a union-requested audit of its records.

Pac. Mar. Ass'n v. NLRB, 2016 U.S. App. Lexis 12586 (9th Cir. 7/8/16). The NLRB issued, through its administrative law judge, an order that work should go to the IBEW rather than the ILWU. The employer association for the majority of the ILWU work, filed a *Leedom v. Kyne*, 358 U.S. 184 (1958) claim stating that the NLRB had exceeded its authority and that PMA would be "wholly deprived" of a means to vindicate its statutory right. The Oregon district court agreed with PMA and enjoined the NLRB action. The Ninth Circuit reversed the district court, stating that PMA was not wholly without a remedy under the NLRB processes since it could in fact seek to intervene in the action, and the NLRB attorney had stated at the district court level that the Board would grant such a motion. However, the Ninth Circuit also stated that the NLRB "probably exceeded its statutory authority" by issuing the original 10(k) order since IBEW employees were employees of a public employer not covered by the NLRA.

Am. Baptist Homes of the West, 364 N.L.R.B. No. 13 (5/31/16). The NLRB held that it is unlawful for employers to hire permanent replacements for striking workers if the employer's motive is to punish the union and its members and avoid future strikes. In reversing the federal ALJ, the NLRB determined that hiring replacements with a motive to punish was an "independent unlawful purpose" which is forbidden under the NLRA. The board reasoned that the improper motive was retaliatory and would "interfere with employees' future protected activity." Previously, an "independent unlawful purpose" was commonly understood to require action motivated by something outside the bargaining relationship.

Miller & Anderson, Inc., 364 N.L.R.B. No. 39 (7/11/16). In a 3-1 decision the NLRB made it easier for unions to organize a workforce made up of both regular and temporary employees. In overruling prior precedent, the court held that a union seeking to represent employees in bargaining units that combine both categories of employees is no longer required to obtain the employer's consent, and the NLRB will apply the traditional community of interest factors for determining the appropriateness of the composite unit. An employer will only be obligated to bargain over the jointly-employed worker's terms and conditions of employment for those employees over which it possess the "authority to control."

Macy's, Inc. v. NLRB, 824 F.3d 557 (6/2/16). The NLRB's "*Specialty Healthcare*" standard for determining appropriate units in representation elections passed a closely watched test in the U.S. Court of Appeals for the Fifth Circuit, which has been historically skeptical of the NLRB's exercise of discretion under federal labor law. The *Special Healthcare* standard arises from the case by the same name and allows for smaller groups of employees within a business to unionize if the proposed unit constitutes a readily identifiable group sharing a community of interest. Such a finding can only be overcome if the employer establishes that the proposed unit excludes other workers who share an "overwhelming community of interest" with the employees covered by the union's petition. In *Macy's, Inc.,* the court upheld a challenge based on the unionization of its cosmetic and fragrance employees, but not other employees. The court rejected the idea that the departmental units would "wreak havoc" on the retail industry based on the lack of empirical evidence to support such a scenario.

Valley Health Sys. LLC, 363 N.L.R.B. No. 178 (5/5/16). The NLRB held that a hospital rule prohibiting "offensive" conduct violated the NLRA because it had the potential to interfere with the right of the employees to discuss the terms and conditions of employment. The NLRB board held that an employer could not prohibit "offensive" conduct in its handbook, if it lacks descriptive language that would help employees interpret what types of "offensive" conduct the rule is targeting. A policy prohibiting offensive conduct also lists serious forms of objectively clear misconduct would likely be permissible.

T-Mobile USA, Inc. 363 N.L.R.B. No. 171 (4/29/16). In a broad restriction on company work rules, the Board has essentially confirmed their recent practice of taking a broad approach to rules and section 8(a)(1) of the Act, utilizing their clear standard that an ambiguous rule will generally violate the statute since employees are not expected to be lawyers. Therefore, the Board found the following rules to be in violation of section 8(a)(1):

- Prohibiting employees from permitting "non-approved individuals access to information or information resources, or any information transmitted by, received from, printed from, or stored in these resources" without prior written approval.
- "Commitment to Integrity" provision that prohibits "arguing … with co-workers, subordinates or supervisors; failing to treat others with respect; or failing to demonstrate appropriate teamwork."
- Maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management.
- Requiring employees "to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships" and prohibiting employees from making recordings in the workplace.

William Beaumont Hosp., 363 N.L.R.B. No. 162 (4/13/16). Although the employer proved to the ALJ that it would have terminated nurses for aggressive and disruptive behavior that was unrelated to protected activity, the Board nonetheless found the terminations unlawful due to the overly broad conduct rule which prohibited, among other things, conduct that "impedes

harmonious interactions and relationships." The Board majority also found it violated a rule which prohibited "negative or disparaging comments" and "behavior that is counter to promoting team work." The Board decision relies upon *Lutheran Heritage Village-Livonia*, 343 NLRB No. 646 (2004), in which the Board held that an employer violates section 8(a)(1) if it maintains a work rule that employees could reasonably understand to prohibit protected activity.

Hyundai Am. Shipping Agency, Inc. v. NLRB, 805 F.3d 309 (11/6/15). The D.C. Circuit upheld NLRB rulings blocking three employer rules since they interfered with Section 7 rights. The decision invalidated rules barring employees from discussing matters currently under investigation by the employer, limiting information disclosure from electronic systems within the company and prohibiting certain non-work activities during working hours. However, the Circuit Court reversed the NLRB as to a rule that urged employees to make complaints to supervisors rather than their coworkers. The court found that merely encouraging and not requiring to take actions potentially implicating their Section 7 rights does not interfere with 8(a)(1).

Browning-Ferris Indus. of Cal., Inc., 362 NLRB No. 186 (8/27/15). The Board has now altered the test it will apply to joint employer cases. The Board will now apply a common law test on right to control and will apply the standard if the right exists rather than how the right has been exercised. The Board will find that two or more entities are joint in employers if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of that control, the Board will consider the "various ways in which a joint employer may 'share' control over terms and conditions of employment or 'codetermine' them." The Board stated that it will not base its decision on the "bare rights to dictate the results of a contracted service or to control or protect its own property," but rather "will evaluate the evidence to determine whether a user employer affects the means or manner of employees' work or terms of employment, either directly or through an intermediary."

Columbia Univ., 364 N.L.R.B. No. 90 (8/23/16). The Board overruled its decision in *Brown University* and held that student assistants are covered by the NLRA. The Board explained that it has the statutory authority to treat student assistants as statutory employees where they perform work, at the direction of the university, for which they are compensated. The university argued that applying the NLRA to student assistants would infringe upon First Amendment Academic Freedom. The Board disagreed explaining that unionizing grad students would not control or direct the *content* of the speech, which is protected by the First Amendment. The Board ultimately held that "student assistants who have a common-law employment relationship with their university are statutory employees under the Act."

The decision did not provide much guidance on how to determine whether a student is "compensated." Footnote 100 gives some guidance, explaining that "where an educational institution compensates student assistants for performing services that benefit the institution . . . such compensation encourages the student to do the work for ***more than*** educational benefits and thereby establishes an employment as well as an educational relationship." (emphasis added). However, in footnote 56 of the opinion, the Board specifically declined to decide whether this relationship would extend to student athletes.

College Athletes' Petition to Unionize Dismissed (8/17/15). The NLRB has dismissed a petition by Northwestern football players who were seeking to unionize, effectively denying their claim that they are university employees and should be allowed to collectively bargain. The unanimous decision was a victory for the college sports establishment in supporting the NCAA's contention that college athletes are primarily students. In failing to assert jurisdiction, the NLRB avoided the central issue of the case—that is, whether players are university employees. Instead, it found that the novelty of the petition and its potentially wide-ranging impacts on college sports would not have promoted "stability in labor relations."

Sabo, Inc., 362 NLRB No. 81 (4/30/15). The NLRB held that co-worker's discussion of other job opportunities is protected concerted activity, even when not directly involving a call for group action. The conduct was "inherently concerted" because other job opportunities involves a subject of mutual and obvious concern to employees.

FedEx Freight Inc., 362 NLRB No. 91 (5/19/15). The NLRB ordered the employer to bargain with the Local 701 International Brotherhood of Teamsters (IBT) after workers in New Jersey chose IBT representation. IBT has made efforts to unionize large numbers of FedEx employees with mixed results. In this case, the Board rejected FedEx's argument for failing to bargain; namely, that dock workers and drivers must be included in the same bargaining group.

Bosh Imp., Inc., 362 NLRB No. 83 (4/30/15). The NLRB indicated that simply changing unlawful employment policies is not sufficient to avoid an 8(a)(1) violation; rather, an employer must take proactive steps to inform employees of any policy changes. Those steps include posting notices to employees of the change and assuring them that the company will not maintain or enforce the offending provisions.

Chickasaw Nation dba Winstar World Casino, 362 NLRB No. 109 (6/4/15). The NLRB ruled that, based on an 1830 treaty between the tribe and the U.S. Government, the tribes at issue were not subject to the NLRB's jurisdiction. Importantly, tribes that do not have a similar treaty or agreement in place are generally subject to the NLRB's jurisdiction under the "San Manuel" test which grants the NLRB authority to regulate Indian-owned businesses unless the business touches on "purely intramural matters," *i.e.* matters that relate solely to internal Indian affairs. Currently, the U.S. Senate and House are considering similar bills that would eliminate the San Manuel test and exclude tribes from the NLRB's authority as a matter of Indian sovereignty.

AT&T, 362 NLRB No. 105 (6/2/15). The NLRB affirmed an ALJ finding that an employer cannot prohibit employees from wearing allegedly offensive union insignia, including buttons and stickers reading: "WTF Where's the fairness," "FTW Fight to win," "Cut the Crap! Not My Healthcare." Contrary to the employer's argument, the Board did not find that any of the buttons or stickers contained content so vulgar or offensive so as to lose the protection of the NLRA.

S. New England Tel. Co. v. NLRB, 793 F.3d 93 (D.C. Cir. 7/10/15). The court overturned an NLRB ruling that the employer could not prohibit employees from wearing "inmate" shirts at work that stated the employee was a prisoner of the company. The court held that the NLRB should have applied the "special circumstances" exception, which allows employers to forbid

messages that might harm its relationship with customers or its public image. The NLRB had improperly held that the exception did not apply because unless the message in question caused fear or alarm among customers.

G4S, 362 N.L.R.B. No. 134 (6/25/15). The NLRB ruled that two security lieutenants were employees under the NLRA and not exempt supervisors, holding that "to prove supervisory status by a preponderance of the evidence, a party must present detailed, specific evidence." The key issue was the employer's unsupported argument that the employees were supervisors because they had the authority to discipline employees. However, the evidence was that in practice, that was not a part of their work.

Wal-Mart Stores, Inc. v. United Food & Commercial Workers, 354 P.3d 31 (Wash. Ct. App. 6/30/15), appeal denied, 367 P.3d 1084 (Wash. 3/30/16). The court affirmed a ruling that Walmart's trespass claim against union organizers was preempted by the NLRA. A party asserting that a state law claim is preempted by the NLRA must present sufficient evidence for a court to conclude that the conduct at issue is potentially subject to the NLRA. The union did so by showing that Walmart had availed itself of the NLRB's jurisdiction on the same issue. The exceptions to the NLRA's jurisdiction did not apply to Walmart as (1) the NLRA matter was not merely a peripheral concern; and (2) the conduct at issue did not involve actual violence, threats of violence or property damage.

Sw. Bell Tel. Co., N.L.R.B. Div. of Advice, No. 14-CA-141000 (2/6/15). A technician claimed that a union representative was required to be present during a search of her vehicle, as part of the investigation of alleged misconduct. However, the Division of Advice found that such a search was not an investigative interview, and therefore a union representative was not required to be present under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

NLRB General Counsel Report on Lawful and Unlawful Work Rules. On March 18, 2015 NLRB General Counsel Dick Griffin issued a thorough report on the legality of employer rules and policy statements that would help employers "review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful." The 30-page memorandum covers rules in the categories of confidentiality, conduct towards employers and supervisors and employees, communications/interaction with third parties, use of logos, copyrights and trademarks, photography and recording, leaving or walking off from work, and conflicts of interest. The most helpful portion of the report is a section with examples of language that is not considered to violate the Act and includes proper language on such items as social media, handbook disclosure, conflicts of interest, employee conduct, solicitation/distribution and threats, harassment, and inappropriate language.

Verizon v. New England, Inc., 362 N.L.R.B. No. 24 (3/9/15), *enforcement denied*, 2016 U.S. App. Lexis 11187 (D.C. Cir. 6/21/16). The Board overturned an arbitrator's award and found that employees did have a right to display picket signs in their cars in a company parking lot, despite the existence of a no picketing clause in the current and enforceable collective bargaining agreement.

Americold Logistics, LLC, 362 N.L.R.B. No. 58 (3/31/15). The one-year bar to a petition for the ouster of a newly "recognized" union (as opposed to the one-year bar on decertification following a certification vote) begins with the first bargaining session rather than the date of voluntary recognition.

Howard Indus., 362 N.L.R.B. No. 35 (3/23/15). Under the decision in *Weingarten*, an employer is entitled to investigate alleged misconduct without interference from union officials and is "free to insist on hearing the employees' own account of the matter." However, the NLRB found that an employee may lack the ability to express himself or may be too fearful or inarticulate to raise extenuating circumstances and therefore a union steward was free to interrupt questioning to ask clarifying questions, advise the employee to refrain from answering questions, and use a notebook providing clarification and counseling to the employee by reminding him of his lack of training defense.

C. Wage and Hour

Corbin v. Time Warner Entm't-Advance/Newhouse P'ship, 821 F.3d 1069 (9th Cir. 5/2/16). A rounding policy used for hourly paid call center employees does not violate the FLSA so long as the policy is facially neutral, and neutral as applied, allowing employees to gain overtime compensation just as easily as may cause them to lose it. The Ninth Circuit also affirmed summary judgment in favor of the employer on the basis that the employee's claim to recover one-minute of uncompensated time was *de minimis* and subject to dismissal. The court affirmed that basis for the decision despite the fact that the defendant had not affirmatively pled it in its answer.

Castaneda v. JBS USA, 819 F.3d 1237 (10th Cir. 5/3/16). The employer did not violate the FLSA when it did not compensate employees for time spent walking between a locker room and production line, where the employees did not present credible supporting evidence of the walk times, and their compensation had been negotiated as part of a collective bargaining agreement and thus was subject to certain FLSA exceptions. Expect Oregon Courts to reach the same decision should this issue arise.

IV. DECISIONS OF THE OREGON COURTS

A. Employment Discrimination

Loczi v. Daimler Trucks N. Am., Multnomah County Oregon Circuit Court Verdict, June 6, 2016. A jury awarded $1.2 million to a 57 year old former engineer for alleged age discrimination. Daimler was not permitted to defend itself against the employee's claim because the judge found bad faith in its failure to provide discovery requested by the plaintiff's attorneys. On multiple days of trial Daimler's attorneys produced boxes of discovery that the court determined to have been previously requested and highly relevant to the claims. The judge took the extraordinary step of sanctioning Daimler with a default judgment on the issue of liability. As the world of electronic information grows in diversity and complexity, where most employees have multiple devices and some use of their devices for both business and personal uses, this case highlights

the importance of carefully coordinating thorough discovery efforts to comply with the rules of civil procedure and avoid disastrous consequences.

Medina v. State, 278 Or. App. 579 (6/2/16). A plaintiff's increasingly frequent discipline after complaining about racial discrimination in the Oregon Department of Fish and Wildlife's promotional process raised a sufficient issue of material fact to preclude summary judgment on plaintiff's discrimination and retaliation claims. Plaintiff was passed up for several promotions and complained that the process was discriminatory. Following that complaint, plaintiff was disciplined six times in two years, allegedly for conduct that similarly situated Caucasian employees were not disciplined for. The court held that evidence was sufficient pretext to overcome the employer's otherwise lawful explanation for plaintiff's discipline history and termination.

La Manna v. City of Cornelius, 276 Or. App. 149 (1/27/16). The court held that the job applicant, who is gay, may pursue age and sexual orientation discrimination claims against a police department after his longtime friend, the chief of police, asked him to withdraw his application under the alleged false pre-text to avoid the appearance of favoritism. During his interview, comments were made that at 50 years old, the applicant was "getting too old for foot chases." After passing several tests and an interview, the applicant withdrew his candidacy at the request of the police chief who told him that based on their friendship, it would look like favoritism if he was hired. Later the applicant learned the department had a policy that required officers be hired on the basis of merit, without reference to personal friendships. In addition, the chief had previously hired four friends, all of whom were heterosexual. The court held that there were sufficient issues of material fact for the jury presented in the applicant's evidence of unlawful age and sexual orientation discrimination, including the interview comments and comparator officers that had been hired. The court also remanded the applicant's First Amendment freedom-of-association claim based on his allegation that he had been discriminated against for having a friendship with the chief.

B. Breach of Contract

Portland Police Ass'n v. City of Portland, 275 Or. App. 700 (12/30/15). The city must reinstate officer after arbitration decision, regardless of its disagreement with the arbitrator's interpretation of its policies. This matter related to the 2010 shooting death of Aaron Campbell by a Portland Police Officer during a welfare check on Mr. Campbell, who was reported to be suicidal. After an investigation, the city terminated the officer that shot and killed Mr. Campbell. The Portland Police Association successfully challenged the termination, resulting in an arbitration decision requiring the city to reinstate the officer. The decision was final and binding. The city believed the arbitrator's decision was unenforceable and refused to reinstate the officer. The city cited ORS 243.706(1), which limits an arbitrator's ability to reinstate an employee that uses unjustified deadly force, in violation of the city's policies. The court rejected the city's position and held that the city could not substitute its judgment as to what constituted an unjustified use of force when the arbitrator had already issued a binding decision finding that the officer's use of force was not unjustified and did not violate policy.

Teegarden v. State ex rel. Or. Youth Auth., 270 Or. App. 373 (4/15/15). The parties settled a pending court action with a release of all claims. Following the resolution, the defendant refused to stop proceeding with new claims and actions, even though the defendant had been aware of the underlying conduct which was the basis of such claims at the time the original settlement was rendered. The Court of Appeals found that the claimed "intentional" torts that arose after the settlement agreement could not have been released by the original settlement agreement, even though the underlying facts supporting the employer's actions had already occurred.

C. Wage and Hour

Dosanjh v. Namaste Indian Rest., LLC, 272 Or. App. 87 (6/24/15). An employer may not withhold an employee's wages based on its belief that the employee stole from the business. At trial, the employee argued that her wages were improperly withheld by her employer. The employer countered that the employee had been stealing from the employer by getting paid by customers "under the table" and therefore she was not entitled to back wages. The court held that the trial judge should have instructed the jury to consider the theft claim and wage claims separately. That is, the employer was not excused from paying his employee wages because it believed she was stealing; rather it was only permitted to raise a separate claim against her for the recovery of those sums.

McCormick v. Cable Commc'n, Inc., 2015 U.S. Dist. LEXIS 89133 (D. Or. 7/9/15). The Judge granted summary judgment against the employee's claim that the employer wrongfully deducted weekly commissions from overtime wages. In so deciding, the Judge noted that FLSA overtime provisions do not regulate how bonuses should be calculated.

Blachana LLC v. BOLI, 354 Or. 676, 318 P.3d 735 (1/16/14). When a predecessor employer incurred liability for wage violations, the company went out of business and a new company occupied the same space. In the BOLI decision, affirmed by the Supreme Court, the successor employer was liable for the predecessor's violations under ORS 652.414(3) and ORS 652.310(1) based upon the following factors: (1) the name and identity of the business; (2) the location; (3) the brief lapse of time between the previous operation and the new operation; (4) the business employed substantially the same workforce; (5) the same service was offered and product utilized; and (6) the same machinery, equipment and methods of production were used. In this case, the successor employer did not employ any of the predecessor's employees and the predecessor employer had signed a release agreement releasing itself from any obligations under the lease and sales agreement.

Delgado v. Del Monte Fresh Produce, N.A., Inc., 260 Or. App. 480, 317 P.3d 419 (2014). A class of minimum-wage production workers at defendant's fresh-cut produce plant brought claims under Oregon's wage and hour law alleging failure to pay wages for time spent donning and doffing protective clothing. At the close of evidence at trial, the defendant made a motion to decertify the class, which the trial court denied. The jury returned a verdict for the plaintiffs, finding that the defendant was a joint-employer. The court then awarded plaintiffs' statutory penalty wages and attorneys' fees. The Court of Appeals concluded that the trial court did not abuse its discretion by declining to decertify the class, in light of the predominance of common

issues and other factors supporting class litigation, and the timing of the motion to decertify. The Court of Appeals affirmed on statutory penalty wages, holding that the defendant's failure to demand submission to the jury on whether defendant was an employer under the statutory penalty wages statute entitled the trial court to enter a judgment consistent with the jury's verdict.

D. Retaliation

Lacasse v. Owen, 278 Or. App. 24 (5/4/16). A declaration that counsel has retained an unnamed expert may create an issue of fact on the issue of causation. The plaintiff alleged his termination was motivated by his involvement in a complaint of sexual harassment occurring at a different company whose ownership interests were intertwined with the employer's. The defendant prevailed on summary judgment by arguing that plaintiff had no evidence that his termination was motivated by improper motives as opposed to poor work performance. The Court of Appeals reversed and remanded, reasoning that the trial court did not give due consideration to an expert declaration from plaintiff's counsel that he had retained an unnamed qualified expert to testify to admissible facts or opinions, creating a question of fact. As an issue related to whether the employer had fabricated computer files to create a false pretext, the court believed a computer expert could raise an issue of fact for the jury.

Rosenfield v. Globaltranz Enters., 811 F.3d 282 (9th Cir.12/14/15), *petition for cert. filed* 5/23/16. An HR manager's complaints to her supervisor about alleged FLSA violations could constitute protected activity under 29 USC §215(a)(3). The court indicated that the key issue was whether the HR manager's complaints could be reasonably understood by her employer to be an assertion of her rights protected by statute, or simply her doing her job to monitor HR issues and statutory compliance. The court found that, though the employee's responsibilities included many aspects of HR, she contended that FLSA compliance was not one of them and that her boss "considered himself solely responsible for FLSA compliance." On that basis, the court held that she could maintain her claim that she was unlawfully terminated for her protected activity of making complaints relating to the compliance issues for which she was not personally responsible for overseeing.

Hall v. State of Oregon, 274 Or. App. 445 (10/21/15). If an original report by an employee was subjectively reasonable, then it can constitute protected whistleblowing, even if later objective evidence demonstrates that the report was mistaken. The employee made a safety claim without the benefit of surveillance video evidence, which did not support his claim. The court held that because the video was not available to the employee, and because his claims were subjectively reasonable at the time they were made based on the information available, that he could maintain his claims of whistleblower protection and retaliation.

Monico v. City of Cornelius, 2015 U.S. Dist. LEXIS 46429 (D. Or. 4/9/15). The court held that a police chief hanging "inspirational posters" could be interpreted as criticizing officers that raised corruption claims and might constitute unlawful retaliation based on the officers' exercise of a protected first amendment right. The posters were placed in the restrooms and included messages of: "don't second-guess the chain of command" and how to be "successful as followers." The court held that the posters could reasonably be understood as intended to shame the officers that

had complained and therefore may deter employees from exercising their constitutionally protected rights in the future.

E. ADA

Miller v. UPS, Inc., 2016 U.S. Dist. LEXIS 30895 (D. Or. 1/22/16). In denying summary judgment for the employer, the court distinguished essential job duties, which cannot be reasonably accommodated from job "qualification standards," which can be accommodated. The employee sued UPS for taking more than a year to accommodate his deep vein thrombosis and blood clot issues that prevented him from standing and walking for long periods of time. In its analysis, the court clarified that job qualification standards are an employer's core requirements for a job, but noted that those standards are not necessarily the same as essential job duties and, as such, may need to be accommodated under the ADA when the employer can reasonably do so. UPS claimed that standing and walking were essential job duties, but the court disagreed noting that an employee could complete those duties through other means, such as using a motorized wheelchair or taking frequent breaks to rest.

Dunlap v. Liberty Nat. Prods., Inc., 2015 U.S. Dist. LEXIS 51739 (D. Or. 4/20/15). The court held that a former shipping clerk with a heavy lifting restriction was able to perform essential job functions with reasonable accommodation, and had been wrongfully terminated. The employee was able to show that the employer was aware of her need for an accommodation even though she had not expressly requested one because she had filed a previous workers' compensation claim relating to the same injury. The court held that, at the least, the employer's knowledge was enough to trigger its duty to have a discussion with the employee regarding the nature of her condition and potential accommodations.

F. Miscellaneous

Day v. Celadon Trucking Servs. Inc., 827 F.3d 817 (8th Cir. 7/5/16). The defendant purchased a company and as part of the sales agreement agreed to temporarily hire all of the predecessor's employees, but decide within 14 days whether it wished to hire them on a permanent basis. The employees who were not ultimately hired filed a WARN Act claim, and the court found that purchasing a business as an ongoing concern with the employees hired, even on a contingent basis, "creates a presumption that the buyer is the employer for WARN Act purposes if a seller still employs its employees on the date of the sale." Therefore, the successor employer was obligated to send the WARN notice.

Multnomah Cty. Sheriff's Office v. Edwards, 277 Or. App. 540 (4/13/16), *rev. granted*, 360 Or. 26 (7/14/16). The court held that public employers must grant a hiring preference to disabled veterans in a deliberate and systematic manner. A veteran claimed that the sheriff's department unlawfully denied him preference in consideration for a promotion. ORS 480.230 requires that public employers devise and apply a plan for giving disabled veterans preference at every stage of the hiring and promotion process. The court held for the employee, affirming an earlier BOLI decision which stated that when an employer does not use a numbered scoring system, it must select some other "coherent and stable" method of applying the preference.

Loucks v. Beaver Valley's Back Yard Garden Prods., 274 Or. App. 732 (11/12/15). An employee that dies on the job is not considered to have "quit" for purposes of determining when unpaid wages are due. Plaintiff, the personal representative for the estate of the decedent employee, sued the employer alleging that, by dying, the employee had "quit" his employment and that the estate was owed penalty wages under ORS 652.150(1) because the employer failed to pay the employee's wages within five days pursuant to ORS 652.140(2). The court disagreed, noting that quitting suggested that the employee left his employment voluntarily, which was not the case. Rather, the court held that a person who dies while employed has not "quit" and that the estate should be paid the employee's wages on the next regularly scheduled payday pursuant to ORS 652.190.

Moro v. State, 358 Or. 375 (12/10/15). In determining the amount of attorney fees to be awarded for a partially successfully challenge to the legislature's reduction in PERS benefits, the court ordered a special hearing at the trial level to evaluate the public benefit of the claims raised and whether the fee award should be reduced based on allegations of duplicative billings.

Tri-Cty. Metro. Transp. Dist. of Or. v. Amalgamated Transit Union Local 757, 276 Or. App. 513 (2/18/16). As a matter of law, bargaining sessions between TriMet's negotiating team and the union are not "meetings" for purposes of Oregon's Public Meeting Law (ORS 192.690 *et seq.*), but public meeting laws may still apply because TriMet is a governing body with quorum to transact business in the absence of other members. Under those circumstances, the court held that the Public Meeting Law may still apply in certain situations, and the case was remanded to the trial court for further proceedings.

Broadway Cab LLC v. Emp't Dep't, 358 Or. 431 (12/10/15). Certain taxicab drivers performed services for remuneration and were not independent contractors and therefore Broadway Cab was liable for unemployment insurance taxes on the drivers' wages. Broadway contested a tax assessment for unemployment insurance for its drivers, arguing that they were independent contractors because they performed services for passengers and the public at large, and as such they were not employees of Broadway. The court began by reviewing the statutory framework established for categorizing employees as independent contractors for employment tax purposes. Pursuant to ORS 657.040, employment insurance taxes are due on wages paid for services performed by a person for pay. To qualify for the independent contract exception, the person must be responsible for obtaining their own work licenses, be free from the direction and control of the employer, and be "customarily engaged in an independently established business." The court first held that Broadway failed that test because it obtained licenses required. The court also noted that cab drivers were not "customarily engaged in an independently established business" pursuant to ORS 670.600(3) because the drivers (1) did not maintain a separate business location; (2) did not perform services for two or more different persons within a 12 month period; (3) did not advertise for themselves; (4) did not make a significant investment in the business; and (5) did not have authority to hire others to assist in providing the services.

Couch Invs., LLC v. Peverieri, 359 Or. 125 (4/21/16). Failing to request a special finding of fact at the trial court level pursuant to ORCP 62A can result in waiving specific issues on appeal for

failure to preserve. Here, a landlord tried to evict a tenant leasing his gas station property for failing to comply with DEQ regulations. The parties arbitrated the issue of who was responsible for complying with the DEQ regulations under the terms of the lease. The parties disagreed over whether the issue of damages was submitted to the arbitrator. The arbitrator ruled that the landlord was responsible for compliance *and* awarded the tenant the amount necessary to make the repairs to become compliant. The landlord challenged the award in court arguing that it was beyond the scope of the arbitrator's authority and therefore unenforceable. The trial court upheld the award in a general judgment. The Court of Appeals held that the arbitrator had broad authority under ORS 36.600 et seq. to order remedies that were "just and appropriate under the circumstances." The Supreme Court affirmed, but on the narrow grounds that the landlord failed to preserve the scope issue by not requesting a specific finding of fact at the trial court level under ORCP 62A. The court reasoned that even if there was ambiguity in the arbitrator's authority, it was resolved as a factual issue at the trial court level, and not properly preserved on appeal.

Bernard v. S.B., Inc., 270 Or. App. 710 (5/6/15), *appeal denied*, 358 Or. 69 (10/8/15). The court held that, though an employee's non-compete may have been voidable, it was not void at the time the employer threatened to enforce it and therefore the employer's actions were not improper. The employee had quit her job with the employer and gone to work for a competitor. The employer sent her and her new employer correspondence reminding both of the non-compete agreement that the employee had signed. The employee argued that the employer's actions were improper because the non-compete agreement was not valid based on procedural issues. The court held that even if a non-complete is "voidable" doesn't mean that it is "void," and the employer was entitled to bring the existence of the agreement to the employee and her employer's attention.

Murphy v. Goss, 103 F. Supp. 3d 1234 (D. Or. 4/16/15). The court dismissed, on summary judgment, claims of an anesthesiologist who alleged that his section 1983 due process rights had been violated after he had a glass of wine while on call and it was reported as potentially affecting the health or welfare of patients. The court found that the employee's civil rights claims failed to meet the "stigma plus" standard required to prevail on due process claims under the 14th Amendment. The key shortcomings of the employee's claims were that he had not been terminated—a threshold issue for a due process employment claim—and the reporting was not sufficiently egregious to trigger a protected liberty interest.

McManus v. Auchincloss, 271 Or. App. 765 (6/17/15), *appeal denied*, 358 Or. 145 (10/22/15). The court overturned a trial court dismissal of a live-in personal assistant's common law wrongful discharge and IIED claim on the basis that the employee had been discharged for exercising an important public duty; specifically, reporting his employer's possession and display of child pornography. In expanding the basis for a wrongful discharge claim, the court attempted to narrow its decision by noting that a new exception to the at-will employment rule was warranted based on the public's special interest in the reporting of crimes of child abuse. On October 22, 2015, the Oregon Supreme Court denied defendant's petition for review.

B&R Sales, Inc. v. Dep't of Labor & Indus., 344 P.3d 741 (Wash. Ct. App. 3/10/15). The employer was required to make workers' compensation tax payments under RCW 51.08.180 since its employees were held to be "workers" rather than independent contractors. The primary object of their contracts was held to be personal labor despite the fact that they utilized expensive specialized tools and equipment.

V. DECISIONS OF OTHER STATE COURTS

A. Gender Discrimination/Retaliation/Standard of Proof

Boyd v. State, 349 P.3d 864 (Wash. Ct. App. 2/3/15). Retaliation by supervisor is "materially adverse" if several actions taken together would have been enough to dissuade a reasonable worker from making a similar complaint. The Washington Court of Appeals affirmed a verdict in favor of a male nurse that alleged he was retaliated against after rejecting the advances of a female supervisor of the ward adjacent to his. Though she was not his direct supervisor, her threats that he would not work again "in any of the 50 states" and her involvement in an investigation of unrelated claims against him that resulted in his suspension was enough, taken together, to constitute retaliation.

B. ADA

Swank v. CareSource Mgmt. Grp. Corp., 2016 U.S. App. Lexis 15291 (6th Cir. Ohio 8/17/16) (unpublished). The Sixth Circuit held that to decide if a job function is essential, the court must consider the employer's judgment, a written job description prepared prior to the issue arising, the amount of time an employee would spend performing the function, the consequences of not performing the function, and the work experience of former, current and other companies' employees. An employer with rheumatoid arthritis was unable to show that her employer had a reasonable accommodation which would have allowed her to perform her function even though she could not drive to patients' homes. The court specifically looked at the requirements for other nurse employees in the geographical area, including those employed by other companies. The court also found that the company was not required to transfer the employee to other positions in another city because she specifically stated that she was unwilling to relocate.

Oberti v. Pac. Mar. Ass'n, 2015 U.S. Dist. Lexis 40774 (W.D. Wash. 3/27/15). The court allowed an employee's disability discrimination claim to proceed to trial after he was fired for failing to provide a urine sample for drug testing. He alleged he was unable to provide the sample because of a single incident of "shy bladder" syndrome that prevented him from urinating before a male observer. He alleged the condition was a disability under Washington law and that he was entitled to reasonable accommodations. The court noted that Washington State had an especially broad definition of disability that would include "shy bladder" and that if the employee could prove that his condition prevented him providing a urine sample, then he was entitled to an accommodation. The court did note some doubt about the existence of his alleged condition, however.

Steenmeyer v. Boeing Co., 92 F. Supp. 3d 1024 (W.D. Wash. 3/12/15). The court found that an employee's alleged disability of frequent urinary tract infections that required she sit near a restroom was a qualifying condition and allowed her claims to proceed to trial.

*Higgins-Williams v. Sutter Med. Found.*187 Cal. Rptr. 745 (Cal. Ct. App. 5/26/15). The California Court of Appeals affirmed summary judgment of an employee's claim that she was disabled because she was unable to work under her supervisors without feeling anxious. Her concern was that her managers had an abrupt management style and her requested accommodation was to be assigned to new managers indefinitely. The court held that the inability to get along with one's supervisors was not, as a matter of law, a qualifying disability under California law.

C. Wage and Hour

Demetrio v. Sakuma Bros. Farms, Inc., 355 P.3d 258 (Wash. 7/16/15). The issue was whether agricultural employees paid on a piece-rate basis on their rate of production must be paid for break time, and if so, at what rate. Although the employees were allowed breaks, they would often skip them because they only got paid for what they produced. The Washington Supreme Court held that pursuant to Washington law, the employees must be compensated at a rate of minimum wage or their average rate of pay for production, whichever is higher. The goal was to set the incentive such that employees would not benefit from skipping mandatory breaks.

D. Age Discrimination

Barnes v. Hershey Co., 2015 U.S. Dist. LEXIS 89947 (N.D. Cal. 7/9/15). A California district court dismissed age discrimination claims of older employees on the basis that they were not entitled to the additional protections provided for "group terminations" because each termination was independent, conducted by different supervisors, and noted individual reasons for the termination.

E. Wrongful Discharge

Rose v. Anderson Hay & Grain Co., 358 P.3d 1139 (Wash. 10/17/15). The court revived Washington State's common law tort of wrongful discharge in violation of public policy by holding that non-exclusive statutory remedies do not bar such a claim. The court reasoned that the common law exists separate from the state's statutory framework, and that unless a statute expressly states that it is exclusive of other remedies, it will not prevent a plaintiff from bringing alternative common law claims. To allege a common law wrongful discharge claim for the violation of a public policy, the employee must allege that he or she was terminated for one of the following reasons: (1) refusing to commit an illegal act; (2) for performing a public duty, like jury duty; (3) for exercising a legal right, such as filing for workers' compensation claims; or (4) in retaliation for reporting misconduct (whistleblowing).