BARRAN LIEBMAN LLP

ATTORNEYS

2020 Case Law Update

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CHAPTER 1. FEDERAL LEGISLATION AND AGENCY RULES

Section A. Occupational Safety and Health Administration ("OSHA")

OSHA Issues Final Rule on Crane Operators. The Department of Labor's Occupational Safety and Health Administration (OSHA) published a final rule that amends standards for construction employers concerning the training, certification or licensing, and evaluation of crane and derrick operators. Evaluation and Documentation took effect 2/7/2019.

Section B. Department of Labor ("DOL")

Department of Labor Notice of Proposed Rulemaking to Increase Exempt Workers Salary to $35,308. On March 7, 2019, the Department of Labor issued a Notice of Proposed Rulemaking that would increase the minimum salary for exempt workers from $23,660 to $35,308 annually. It would also increase the minimum salary threshold for Highly Compensated Employees from $100,000 to $147,414. The Department of Labor suggests that this change would increase the number of workers eligible for overtime by 1 million.

Department of Labor Opinion Letter on "gig workers'" Employment Status – FLSA2019-6 (4/29/19). The DOL released an opinion on whether so called "gig workers" are employees or independent contractors under the Fair Labor Standards Act (FLSA). The DOL opined that certain workers providing work for a virtual marketplace are independent contracts. The DOL applied its long-standing six factor test which contains the following factors: (1) the nature and degree of the potential employer's control; (2) the permanency of the worker's relationship with the potential employer; (3) the amount of the worker's investment in facilities, equipment, or helpers; (4) the amount of skill, initiative, judgment, or foresight required for the worker's services; (5) the worker's opportunities for profit or loss; and (6) the extent of integration of the worker's services into the potential employer's business. Ultimately, the DOL letter concluded that the gig workers were independent contractors because they demonstrated economic independence, rather than economic dependence, in the working relationship between your client and its service providers.

Department of Labor Opinion Letter on FMLA – FLMA2019-1-A. In a recent FMLA Opinion letter (FMLA2019-1-A, Mar. 14, 2019), the Department of Labor made clear that employers and employees cannot delay the start of FMLA leave. In other words, employees do not get to choose the start and employers must designate FMLA leave from the first day of the employee's qualifying absence. However, this does not apply to Oregon employers because there is a contradictory Ninth Circuit precedent on this issue. The Ninth Circuit has held that it is legal for an employee to decline to start FMLA leave and use paid time off provided by the employer instead even during a FMLA-qualifying absence.

Therefore, despite this letter, Oregon employers must allow employees to decline the use of protected leave while they exhaust their paid leave banks.

Department of Labor Opinion Letter on Rounding Practices for Calculating Employee Hours – FLSA2019-9 (7/1/19). The DOL released an opinion letter addressing permissible rounding practices for calculating an employee's hours under the Services Contract Act (SCA) which uses

principles applied under the Fair Labor Standards Act (FLSA). The rounding practice in question "rounds" and employee's hours six decimal points, and then rounds that amount of time two decimal points to calculate pay. The DOL opined that this is an acceptable employment practice.

EEOC Rescinds Policy of Blocking Mandatory Binding Arbitration of Employment Discrimination as a Condition of Employment. In 1997, the EEOC adopted the Policy Statement on Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment. However, following the issuance of that statement, the U.S. Supreme Court has issued numerous cases supporting the utilization of mandatory arbitration, including its recent case of *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). Additional cases have followed, including the Supreme Court's 2001 case in *Circuit City Stores v. Adams*, and six other decisions, all of which are cited in the above-referenced EEOC recission of policy.

Therefore, at the end of 2019, the EEOC has rescinded its 1997 Policy Statement since the EEOC believes that the statement does not reflect current law.

Department of Labor Issues New "Joint Employer" Rules under FLSA. On January 16, 2020, the DOL will publish its first substantive revision in 60 years to rules establishing what constitutes a joint employer relationship under the Fair Labor Standards Act. These new rules are significant for those that rely on staffing agencies, subcontractors, and franchise agreements. The final rule uses a four-factor test that is modeled after the seminal Ninth Circuit case, *Bonnette v. California Health & Welfare Agency*, and considers whether the potential joint employer: (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records.

The rule adds that the degree of control over the employee's work must be substantial, but does not go so far as to limit joint employers to those who retain day-to-day supervision or control over an employee's work schedule. The new rule also clarifies that the touchstone for any joint employment relationship is that the potential joint employer actually exercised significant control over the terms and conditions of the employee's work. The rule goes into effect on March 16, 2020.

Section C. Executive Orders and Actions

Return of "No-Match" Letters. The Social Security Administration will resume sending "no-match" letters to employers in 2019 when information on submitted tax forms does not match information in SSA records. The letters specifically caution employers against taking any adverse employment action against a referenced employee solely on receipt of the letter and that the letter makes no statement on the referenced employee's immigration status. The letter's stated purpose is to report an apparent error in either the employer's records or SSA's records, and to seek assistance in conforming those records.

CHAPTER 2. OREGON LEGISLATION

SB 726 - The Oregon Workplace Fairness Act. The Oregon Workplace Fairness Act was signed into law on June 11, 2019. The statute of limitations change goes into effect September 29, 2019. The restrictions on nondisclosure agreements and written policy requirements go into effect October 1, 2020. The Act limits the use of nondisclosure agreements, extends the time for filing claims, and requires written anti-harassment and anti-discrimination policies. SB 726 prohibits employers from entering into agreements with employees or prospective employees that contain a nondisclosure, non-disparagement, no-rehire provision, or other provision that prevents the employee from disclosing or discussing conduct that constitutes covered discrimination, unless the employee requests it. Additionally, if, after a good-faith investigation into reports of discrimination or harassment made against a supervisor, an employer determines the supervisor engaged in unlawful conduct, the employer may void any severance or separation agreement with the supervisor.

SB 726 changes the statute of limitations for many discrimination claims from one year to five years. The new five-year statute of limitations period applies to prohibited conduct that occurs on or after the effective date of SB 726. Lastly, SB 726 requires written anti-harassment and anti-discrimination policies to include additional information required by SB 726, and the policies must be provided to employees at the time of hire and when a covered complaint is made. SB 726 requires that the policy must do the following: provide a process for employees to report prohibited conduct; identify an individual designated by the employer (and an alternate) who is responsible for receiving reports of prohibited conduct; include the applicable statute of limitations period to an employee's right of action for alleging unlawful conduct; include a statement that an employer may not require or coerce an employee to enter into a nondisclosure or non-disparagement agreement, including a description of the meaning of those terms; include an explanation that an employee claiming to be aggrieved by covered discrimination may voluntarily request to enter into an agreement that contains a nondisclosure, non-disparagement, or no-rehire provision and that the employee would have at least seven days to revoke the agreement; and include a statement advising employers and employees to document any incidents involving covered discrimination or sexual assault.

HB 2016 - Public Workers Protection Act. HB 2016, signed into law on June 20, 2019, relates to collective bargaining and requires public employers to grant reasonable paid time to a public employee, who is a designated representative, to engage in certain activities. In other words, HB 2016 requires public employers provide paid time off for union activity. HB 2016 also makes it easier for employees to opt in to union membership via email or phone, but potentially harder to opt out. It also gives union representatives the right to establish rules regarding appropriate conduct for employees at union meetings, and requires employers regularly provide unions with all employees' contact information, including phones, emails, and addresses. Additionally, it permits a public employer to deduct union fees from an employee's pay.

HB 2341 - Employer Accommodation for Pregnancy Act. HB 2341, signed into law on May 22, 2019, is effective on January 1, 2020. HB 2341 makes it an unlawful employment practice for an employer to deny employment opportunities, fail to make reasonable accommodations, or take certain actions because of the known limitations of an employee or applicant related to pregnancy,

childbirth, or a related medical condition. Essentially, HB 2341 requires employers to provide reasonable accommodations for pregnant employees, aligning with standards for reasonable accommodation under disability laws. The law specifies that the following are all reasonable accommodations for pregnant women or mothers recovering from childbirth: acquisition of equipment, more frequent or longer rest breaks, assistance with manual labor, and modification of work schedules. Employers must post notices, and provide written notices to new employees at time of hire, to existing employees by June 29, 2020, and to an employee who informs their employer they are pregnant within 10 days. HB 2341 applies to employers with six or more employees.

HB 2593 - Nursing Mothers Law. HB 2593, signed into law on May 14, 2019, will go into effect September 29, 2019. HB 2593 conforms Oregon law relating to expression of milk in workplace to the more-generous federal law. HB 2593 requires Oregon employers to provide mothers of new babies with unpaid lactation breaks. It expands existing requirements for rest breaks for expression of milk and will apply to all employers, however employers with 10 or fewer employees can claim undue hardship. HB 2593 also removes timeframe requirements and instead, mandates a "reasonable rest period" to express milk as needed.

HB 2992 - Noncompetition Agreements Law. HB 2991, signed into law May 14, 2019, will go into effect January 1, 2020. HB 2992 states that noncompete agreements entered into on or after January 1, 2020, will only be enforceable against Oregon employees if the employer provides the departing employee with a signed, written copy of the agreement within 30 days after the employee's date of termination. A plain text reading of HB 2991 seems to conclude that providing departing employees with a copy of their noncompete agreements on their last day of employment, for example during their exit interview, will not satisfy the statute.

SB 684 - Data Breach Notification Law. SB 684, signed into law on May 24, 2019, takes effect January 1, 2020. HB 684 amends the Oregon Consumer Identity Theft Protection Act (OCITPA). HB 684 extends data breach notification obligations to vendors and broadens the definition of "person information" to include user names and passwords used to access an online account.

HB 2005 - Paid Family and Medical Leave. HB 2005 has passed and been signed into law, making Oregon's family leave law the best in the United States. However, contributions do not begin until 2022, and workers will not start receiving time off until 2023. HB 2005 will provide Oregon workers with 12 weeks of paid leave to welcome a new child, recover from a serious illness, care for a loved one recovering from a serious illness, or to deal with issues related to domestic violence, harassment, sexual assault or stalking. The bill provides for: 12 weeks of leave; paid for through a no more than 1% combined payroll tax of which employees pay 60% and employers pay 40%; employers with less than 25 employees are not required to pay the employer portion of the premium; employers can opt-out of the program if they offer an equivalent private option.

Amendments to OregonSaves. Oregon passed amendments to OregonSaves, effective September 29, creating enforcement procedures for employees who allege an employer failed to comply with the OregonSaves program. Under these provisions, an employee may file a complaint with the Commissioner of BOLI, within two years of the employer's deadline to register with the plan. The

amendment also grants the Commissioner authority to investigate and determine if an employer engaged in an unlawful employment practice.

SB 123 – The Pay Equity Fix Bill. Proposed SB 123 passed in the House and Senate, and now heads to the governor's desk. Proposed SB 123 provides that an employer is not in violation of pay equity requirements for paying a different level of compensation to an employee for modified work in certain circumstances. It provides that an employer may pay employees for work of comparable character at different compensation levels on the basis of certain factors contained in the collective bargaining agreement. It provides that an equal pay analysis demonstrating employer's pay practices in good faith in civil action include review of certain employer practices. It requires courts to order employers to eliminate unlawful wage differential for prevailing plaintiffs and award back pay or unpaid wages as provided under state laws that provide for right of civil action against employer for violation of pay equity requirements. It also provides that evidence that an employer has increased employee's pay as result of pay equity analysis may not be considered admission of liability in civil action.

Amendment to Portland City Code, Chapter 23.01. The Portland City Code was amended to extend protections to Atheists and Agnostics. The amendment to the civil rights code of Portland, Oregon extends protections against discrimination in employment, housing, and public accommodations to atheists, agnostics, and other "non-believers." Thus, employees who suffer discrimination on the basis of non-religion may sue their employer or lodge a BOLI complaint.

CHAPTER 3. WASHINGTON LEGISLATION

Washington Paid Family & Medical Leave. Under Washington's new Paid Family & Medical Leave law, signed into law on July 5, 2017, employers will report and remit premiums for Quarter 1 and Quarter 2 between July 1 and July 31, 2019. Employees may begin taking paid family medical leave on January 1, 2020. The new law requires employers to provide 12 weeks of paid time off for the birth/adoption of a child, or for the serious medical condition of the employee or the employee's family members. This program is funded by premiums totaling 0.4% of gross wages and those premiums are shared between employers, paying 36.67% of the total premium, and employees, paying the remaining 63.33%. Employers who do not elect to cover the employee portion must withhold the employee portion from employees' paychecks, and pay the total premiums to the Employment Security Department (ESD). Employers with less than 50 Washington employees are not required to pay the employer portion of the premiums, but will still be required to report employee hours and wages to the ESD.

Washington Engrossed Substitute House Bill 1450 ("Non-Compete Act"). Washington's new comprehensive legislation which regulates noncompetition agreements, provides that a noncompetition covenant is void and unenforceable unless it meets the following conditions:

- If the covenant is entered into at the commencement of employment, the employer must disclose the terms of the covenant in writing no later than the time of acceptance of the offer, it must specifically disclose if it may be enforceable in the future due to foreseeable changes in the employee's compensation, and it must be supported by additional consideration;

- The employees annualized earning exceed $100,000 per year, or $250,000 for independent contractors (adjusted each year for inflation);
- If the employee is terminated by layoff, the employer must continue paying compensation equivalent to the employee's base salary (minus other earnings) for the time the employee is restricted; and
- The covenant does not have a duration of more than 18 months, unless the employer can provide clear and convincing evidence to show otherwise.
- The restriction is also void and unenforceable if the employee is required to bring or defend a lawsuit or arbitration outside of the state of WA.

Washington's new Non-Compete Act also expressly defines "noncompetition covenant" to exclude nonsolicitation agreements, confidentiality agreements, agreements prohibiting use or disclosure of trade secrets or inventions, and agreements entered into relating to the sale of a business or franchise.

New Amendments to Washington's Equal Pay and Opportunities Act (EPOA) - HB 1696. Washington's most recent expansion of its pay equity legislation, takes effect July 28, 2019. The new legislation adds amendments to generally prohibit employers from inquiring about a job applicant's wage or salary history and imposes new disclosure requirements on salary ranges. All Washington employers, regardless of size, are prohibited from seeking a job applicant's wage or salary history. Exceptions apply where an employer confirms an applicant's prior salary if the applicant "voluntarily discloses" it; or where an employer confirms an applicant's prior salary after making an offer, that includes compensation, to the applicant. Additionally, employers with 15 or more employees are required to provide a job applicant with "the minimum wage or salary for the position for which the applicant is applying."

Seattle Ordinance, CB 119286 (domestic Worker Ordinance). The Seattle Ordinance extends various protections (minimum wage, rest breaks) to domestic workers in Seattle, and goes into effect on July 1, 2019.

Amendments to Washington's Data Breach Notification Law - HB 1071. HB 1071 includes new amendments to Washington's Data Breach Notification Law and takes effect March 1, 2020. HB 1071 amends Washington's Date Breach Notification Law to broaden the definition of personal information to include name, date of birth, and login credentials. Also included are name and student and military ID number, passport number; name and health insurance numbers or medical information; and name and biometric information. Additionally, the law will also require notification to impacted individuals and the attorney general (if more than 500 residents have been impacted) by 30 days, rather than the current 45. When providing notice, companies will also need to explain the "time frame of exposure," in addition to existing content requirements (like the types of information impacted).

CHAPTER 4. FEDERAL & STATE CASE LAW

Section A. Pending Supreme Court Cases

Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, No. 18-1171, 2019 U.S. LEXIS 3933 (6/10/2019). The Supreme Court granted certiorari to determine whether a claim of race discrimination under 42 U.S.C. § 1987 fails in the absence of but-for causation.

R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (4/22/19). The Supreme Court has granted certiorari and heard argument in October 8, 2019 on the limited question of whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender, or (2) sex stereotyping under *Price Waterhouse v. Hopkins*. The EEOC originally brought this claim on behalf of a funeral home employee whose hiring records identified the employee as a man. After six years of employment, the employee told her boss that she identified as a woman and she began wearing women's clothes. She was terminated in part for violating the workplace dress code. The Supreme Court's 30-year old decision in *Price Waterhouse v. Hopkins* prohibits discrimination based on stereotypes of how a man or woman should appear or behave.

Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (4/22/19) and *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (4/22/19). The Supreme Court has consolidated these cases, granted certiorari, and will hear argument on October 8, 2019, on the limited question of whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. The Court will review the Second Circuit's decision in *Altitude Express* to overturn the trial court and side with the employee, reasoning that discrimination based on sexual orientation is a "subset of sex discrimination." The estate of a skydiving instructor initially brought the case alleging he was fired after he told a female client he was homosexual, in an attempt to assuage her husband's concern about his wife being strapped to another man during the skydive. The *Bostock* decision out of the Eleventh Circuit represents the opposite interpretation of the case law, that sexual orientation is not a protected class under Title VII. Bostock argued that his employer had violated Title VII by falsely accusing him of mismanaging public funds so that it could fire him for being gay. Both the trial court and the Eleventh Circuit refused to recognize Bostock's claim under Title VII.

Intel Corp. Investment Policy Committee v. Sulyma., Docket No. 18-1116. The Supreme Court granted certiorari in a Ninth Circuit case addressing the "actual knowledge" standard in the statute of limitations for fiduciary breaches. The Ninth Circuit held that a plaintiff's access to documents disclosing an alleged breach of fiduciary duty did not trigger the Employee Retirement Income Security Act's (ERISA) statute of limitations. The Ninth Circuit held that actual knowledge is required to start the limitations period. The issue before the Supreme Court is whether the three-year limitations period in Section 413(2) of the Employee Retirement Income Security Act (ERISA), which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bars suit when all the relevant information was disclosed to the plaintiff by the defendants more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information.

Thole v. U.S. Bank, N.A. Docket 17-1712. The issue before the Supreme Court is the following: (1) whether an ERISA plan participant or beneficiary may seek injunctive relief against fiduciary misconduct under 29 U.S.C. § 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof; and (2) whether an ERISA plan participant or beneficiary may seek restoration of plan losses caused by fiduciary breach under 29 U.S.C. § 1132(a)(2) without demonstrating individual financial loss or the imminent risk thereof.

Section B. Recent Supreme Court Cases

Fort Bend Cnty. v. Davis, 139 S. Ct. 1843 (6/3/19). Resolving a circuit split, the Court overruled precedent from the Fourth, Ninth, and Eleventh Circuits, that EEOC exhaustion for employment discrimination was jurisdictional so courts lacked subject matter jurisdiction over claims the plaintiff never presented to the EEOC. This decision by the Court has been misinterpreted as eliminating the requirement for plaintiffs to exhaust administrative remedies before filing a Title VII claim for discrimination. In fact, the Court held that the administrative exhaustion requirement was "mandatory without being jurisdictional." A plaintiff can still get into federal court with employment discrimination claims that did not first pass through the EEOC, but the claims will be dismissed if the defendant pleads the appropriate affirmative defense of administrative exhaustion. This case is also a reminder that the discrimination claims in court must match the EEOC charge. The plaintiff here filed an EEOC charge claiming sexual harassment, but her claim in court alleged sexual harassment and religious discrimination under Title VII. She had tried to add her religion claim to the EEOC charge by handwriting the word "religion" on the intake form, but never revised the formal EEOC charging document.

Food Mktg. Inst. v. Argus Leader Media, No. 18-481, 2019 U.S. LEXIS 4200 (6/24/19). The Supreme Court gives broad meaning to "confidential" in FOIA exemption for commercial and financial information. The Court held that the Freedom of Information Act (FOIA) allows a federal agency to withhold from disclosure, records submitted by a private entity when the submitter keeps the records secret and the agency promises to keep the records from disclosure. This decision comes as the EEOC is set to begin collecting pay data from employers. The decision has implications for pay and workforce demographic data collected by the Labor Department and the EEOC because companies could claim that the information they turn over to the agencies is similarly confidential.

Kisor v. Wilkie, No. 18-15, 2019 U.S. LEXIS 4397 (6/26/19). The Supreme Court declined to overturn two decades-old rulings, outlining *Auer* deference. The doctrine of "*Auer* deference," gives federal agencies broad power to interpret their own regulations. In a 5-4 decision, the Supreme Court reaffirmed that judges must defer to an agency on ambiguous regulations as long as its approach is reasonable.

Yovino v. Rizo, 139 S. Ct. 706 (2/25/19). The Supreme Court held that the federal courts may not count the vote of a judge who dies before the decision is issued, even if the judge had indicated a vote before he or she died. In remanding the case, the Supreme Court made no pronouncements regarding the merits of the case which involve a question about an exception under the Equal Pay Act of 1963.

Lamps Plus, Inc. v. Varela, 578 U.S. ___ (2019). The Supreme Court narrowed an avenue for resolving employment disputes through class arbitration by holding that class arbitration is only available if there is an affirmative contractual basis for concluding that the parties explicitly agreed to it. The Court's reasoning relied on its 2010 decision in *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), in which it held that, under the FAA, if an agreement is silent as to class arbitration, there is no basis to conclude the parties' agreed to class arbitration. In other words, employers cannot be required to arbitrate on a class basis based on ambiguity or silence in an arbitration agreement because ambiguity or silence is not sufficient to infer the parties' agreement to arbitrate claims using a class action. Thus, employees cannot seek to arbitrate employment related claims using a class action unless an arbitration agreement expressly provides for the use of class arbitration.

Fort Bend Cty. v. Davis, 587 U.S. ___ (2019). The Supreme Court resolved a deep circuit split by holding that Title VII's charge-filing requirement is not a jurisdictional issue, but a mandatory processing rule. By holding that Title VII's charge-filing requirement is a nonjurisdictional issue, the Supreme Court clarified that employers can waive the procedural defense if not timely raised. Workers still have an administrative exhaustion requirement under Title VII, but since it is not a jurisdictional requirement, defendants cannot raise the issue at any time. Defendants' will lose the procedural defense against workers who fail to file discrimination claims with the EEOC prior to going to court under Title VII if raised too late.

New Prime Inc. v. Oliveira, 139 S. Ct. 532 (1/15/19). The Supreme Court held that interstate trucking independent contracts are exempt from the FAA. The Court reasoned that an interstate truck driver's wage and hour dispute was not subject to arbitration under the FAA because, although his employment contract labeled him as an independent contractor, the driver's agreement to work was a "contract of employment" outside the FAA's coverage. Additionally, the Court clarified that the trial court, not the arbitrator, must decide the threshold question of whether the drivers are excluded from the FAA because the agreement's "delegation clause" can only be enforced if the FAA applies.

Parker Drilling Management Service, Ltd. v. Newton, 587 U.S. _ (2019). The Supreme Court unanimously declined to extend California's wage and hour laws to employees working on offshore drilling platforms because the Outer Continental Shelf Lands Act only incorporates state law when federal law's silence on an issue creates a "gap" for state law to fill.

Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (1/8/19). The Supreme Court unanimously held that courts may not override a contract containing an arbitration delegation clause even if the court thinks the merits of the claim are "wholly groundless." When the parties agree that an arbitrator should decide the threshold question of arbitrability, the "wholly groundless" exception is not available under the FAA as grounds for a court to decline to send a case to an arbitrator to decide arbitrability because the court thinks the claims are frivolous.

Klein v. Or. Bureau of Labor & Indus., No. 18-547, 2019 U.S. LEXIS 4150 (6/17/19). The Supreme Court remanded the case to the Court of Appeals of Oregon for further consideration in light of *Masterpiece Caskeship, Ltd. V. Colorado Civil Rights Comm'n*, 584 U.S. _ (2018). The

issues in *Klein* are the following: (1) whether Oregon violated the free speech and free exercise clauses of the First Amendment by compelling the Kleins to design and create a custom wedding cake to celebrate a same-ex wedding ritual in violation of their sincerely held religious beliefs; (2) whether the Supreme Court should overrule *Employment Divisions, Department of Human Resources of Oregon v. Smith*; and (3) whether the Supreme court should reaffirm Smith's hybrid-rights doctrine, applying strict scrutiny to free exercise claims that implicate other fundamental rights, and resolve the circuit split over the doctrine's precedential status.

Mount Lemmon Fire District v. John Guido, 139 S. Ct. 22, (11/6/18). The Supreme Court clarifies that the ADEA applies to all public employers regardless of the number of employees they employ. Therefore, all public employers should comply with the requirements of the Older Workers Benefit Protection Act (OWBPA) when offering a settlement or severance agreement to an employee by including a release of claims waiver that complies with the Older Workers Benefit Protection Act to effectively release a claim under the ADEA.

Section C. Gender Discrimination

Ochs v. Eugene Emeralds Baseball Club, Inc., No. 17-36019, 2019 U.S. App. LEXIS 16135 (9th Cir. 5/30/19). The Ninth Circuit held that a trial court erred by granting summary judgment in favor of the employer for a hostile work environment claim because the employee provided sufficient evidence that her manager repeatedly and aggressively called her names for about a three-year period. The employee alleged that her male supervisor repeatedly and aggressively called her a "bitch," often in response to routine questions, for about a three-year period, and called her a "f*****g bitch" and a "c**t" once. The court held that although these kinds of epithets will not always satisfy the "because of sex" factor, in this case, a reasonable jury could find that the supervisor's behavior was objectively severe or pervasive enough to alter the conditions of employment and create a hostile working environment, and the employee subjectively perceived her environment to be abusive given her numerous complaints to her supervisor and coworkers.

EEOC v. Costco Wholesale Corp., 2018 U.S. App. Lexis 25539 (7th Cir. 9/10/18). The Seventh Circuit reiterated that harassment need not be overtly sexual to be actionable under Title VII and that a workplace visitor can create a hostile work environment. The situation at issue involved a man stalking a Costco employee while on the job for over a year, including the unwanted touching of the face and wrists as well as unwanted, largely friendly conversation. The court noted that the determination of whether a workplace was hostile is based on "all of the circumstances," and found that even non-lewd public behavior such as this could form the basis of employer liability.

Section D. Racial Discrimination

Lambert v. Tesla, Inc., 923 F.3d 1246 (9th Cir. 5/17/19). The Ninth Circuit accepted *Luce, Forward* as binding precedent and held that Tesla, Inc. may require a black production associate to arbitrate his 42 U.S.C. § 1981 racial discrimination and retaliation claims pursuant to a mandatory arbitration agreement in his employment contract. The Ninth Circuit stated this outcome was required because of the court's 2003 ruling in *Luce, Forward* which held that claims under Title VII of the 1964 Civil Rights Act can be forced into arbitration. The Ninth Circuit stated

that "[j]ust as *Luce, Forward* found no conflict between Title VII and arbitration, so we find no conflict between § 1981 and arbitration."

Section E. LGBT Discrimination

EEOC v. A&E Tire, Inc., 2018 U.S. Dist. Lexis 150451 (D. Colo. 9/5/18). A federal district court denied an employer's motion to dismiss, holding that a transgender man had stated a sufficiently plausible claim for sex discrimination under Title VII of the Civil Rights Act when he alleged sex stereotyping in his employment decision. The EEOC sued an employer for discriminating against the transgender man by refusing to hire him after he disclosed his birth sex. There is currently a circuit split as to whether the sex discrimination prohibited by Title VII includes discrimination based on "sexual orientation" or "gender identity." However, the court held that making an employment decision based on a person's transgender status amounted to a form of sex stereotyping, and thus is prohibited under Title VII.

Zarda v. Altitude Express, 855 F.3d 76 (2d Cir. 4/18/17), *remanded by* 2018 U.S. App. LEXIS 4608 (2/26/18). In July 2017, the DOJ signaled a significant policy change by filing an *amicus brief* with the U.S. Court of Appeals and taking the position that Title VII of the Civil Rights Act does not protect employees from discrimination based on sexual orientation. At issue was a case brought by the estate of a skydiving instructor that alleged he was fired after he told a client he was to jump tandem with that he was homosexual, so her husband should not be anxious about them being strapped together for the jump. The Second Circuit sided with the employee, and the employer has filed a motion for certiorari to the Supreme Court. There is currently a circuit split with respect to whether the gender discrimination protections of Title VII extend to protect discrimination on the basis of sexuality.

Section F. Americans with Disabilities Act ("ADA")

Richardson v. Chicago Transit Authority, 926 F.3d 881 (7th Cir. 6/12/19). The Seventh Circuit has joined other circuits (8th, 6th, and 2nd) in the view that severe obesity unaccompanied by an underlying disability is not protected under the ADA. Finding the EEOC interpretative guidance on the definition of "physical limitation" unpersuasive and sticking to the plain reading of the statutory text, the court found plaintiff's interpretation overbroad. The court classified weight as a physical characteristic (akin to eye or hair color), not a medical condition. Plaintiff could also not sustain a claim for discrimination for being regarded as disabled because he had no evidence his employer perceived his obesity as affecting his physiological systems. The Ninth Circuit has not yet decided how to treat obesity under the ADA, but employees in Washington can seek relief under the Washington state disability law.

Section G. Free Speech in the Workplace

Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (6/27/18). The Supreme Court held on June 27, 2018 that public sector employees cannot be compelled to pay fair share fees to unions because it violates employees' First Amendment rights. The Court stated that requiring individuals to endorse ideas they disagreed with runs counter to First Amendment principals, and that the proposed justifications of maintaining labor peace and eliminating the risk of "free riders" could be mitigated

through less restrictive means. The Court thus overturned its prior decision in *Abood v. Detroit Bd. of Ed.*, 97 S. Ct. 1782 (1977) and held that neither an agency fee nor any other payment to the union may be collected or attempted to be collected in any way, unless the employee affirmatively consents to pay.

Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 8/23/17), *reh'g den.*, 2018 U.S. App. Lexis 1945 (1/25/18), *cert. den*, 139 S. Ct. 634 (1/22/19). The Supreme Court will not take up review of the Ninth Circuit denying preliminary injunction to a high school football coach who was suspended for kneeling to pray on the 50-yard line after games. The court held that the coach was acting within his school duties, and when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. The coach petitioned the Supreme Court to take up the issue of whether public employees retain any First Amendment rights in their jobs under the Free Speech Clause. The opinion denying the petition stated that the "Ninth Circuit's understanding of the free speech rights of public school teachers is troubling and may justify review in the future." Justice Alito's opinion also stated that the coach still has live claims, not presented in the petition for certiorari, under the Free Exercise Clause and under Title VII of the Civil Rights Act of 1964. Many read this opinion to signal interest from the court in reviewing their holding in *Emp't Div., Dep't of Human Res. of Or. v. Smith*, which held that the First Amendment does not prohibit application of a neutral law to religious conduct.

Danielson v. Inslee, No. 18-36087, 2019 U.S. App. LEXIS 38552 (9th Cir. 12/26/19). The Ninth Circuit ruled that public sector unions cannot be required to refund compulsory agency (fair share) fees collected prior to the Supreme Court ruling in *Janus v. AFSCME*, *supra*. The Court found that the defendant unions acted in good faith because the collection of agency fees was directly authorized under both state law and decades of Supreme Court jurisprudence prior to *Janus*. Thus, unions are not subject to retroactive liability because of their good faith reliance on current law. This case is consistent with a Seventh Circuit ruling on the same issue, which was the only other circuit to have addressed it when the Ninth Circuit decided this case.

Section H. Family and Medical Leave Act ("FMLA")

Olson v. United States, 2019 U.S. Dist. Lexis 1728 (D. Or. 1/4/19). An Oregon District Court conducted a bench trial verdict and found in favor of the employer where plaintiff had failed to demonstrate that defendants' failure to notify her of her FMLA rights interfered with her rights under the FMLA. The court reasoned that even when an employer fails to notify the employee of their FMLA rights, the FMLA, "provides no relief unless the employee has been prejudiced by the violation."

Ruiz v. Paradigmworks Grp., Inc., 2018 U.S. Dist. Lexis 28878 (S.D. Cal. 2/22/18). Although an extended medical leave *may* be a reasonable accommodation if it does not impose an undue hardship on the employer, a federal district court in Southern California affirmed that the burden is ultimately on the employee to prove that an extension of leave would in fact be reasonable. Here, an employee's medical leave had already been extended twice before she requested another extension for an additional 5-6 weeks. Rather than grant the extension, the employer terminated her. The court granted summary judgment for the employer, holding that "even a finite leave is

not a reasonable accommodation unless it is likely that at the end of the leave, the employee would be able to perform his or her duties." Because the employee did not offer sufficient evidence to prove that an additional extension would be a reasonable form of accommodation, or that she would be able to return at the end of the third extension, her claims were dismissed.

Section I. Public Accommodation

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (6/4/18). On June 4, 2018, the Supreme Court held that the Colorado Civil Rights Commission's conduct in evaluating a baker's reasons for refusing to bake a wedding cake for a same-sex couple violated the Free Exercise Clause. The Court acknowledged that from the baker's perspective, his cakes were a form of artistic expression, as well as a component of his sincere religious beliefs. While the Court noted that it was "unexceptional that Colorado law can protect gay persons in acquiring products and services on the same terms and conditions as are offered to other members of the public," the Court emphasized that the law must be applied in a manner that is neutral toward religion. The Court held that in this case, the baker was deprived of the neutral treatment to which he was entitled, as the Commission displayed "clear and impermissible hostility" toward his religious beliefs. Additionally, the Court pointed to disparities between the Commission's treatment of the baker's case and the treatment of bakers who objected to making cakes with anti-gay messages, with who the Commission had sided. Therefore, given the lack of neutral treatment mandated by the Free Exercise Clause, the Court held that the Commission's actions violated the state's duty under the First Amendment.

Section J. Wage and Hour

Mendoza v. Fonseca McElroy Grinding Co., 913 F.3d 911 (9th Cir. 1/15/19). The Ninth Circuit certified to the California Supreme Court, the question of whether off-site mobilization work was subject to California's prevailing wage requirements. The court certified the case to the California Supreme Court because of the potential scope of the decision and because no California court had addressed whether off-site mobilization work, performed by workers who were otherwise employed on a public works project, entitled the workers to prevailing wages for those efforts.

United States EEOC v. Global Horizons, Inc., 915 F.3d 631 (9th Cir. 2/6/19). The Ninth Circuit reversed the district court's dismissal of claims regarding "non-orchard related matters," and held that the district court should have applied the common-law agency test to determine joint employer status under Title VII. The Ninth Circuit held that the employers in this case who used labor contractors to recruit H-2A workers could be liable under Title VII as joint employers for non-workplace matters even if those matters are contractually delegated to a labor contractor. The Court determined that the growers were joint employers because they had ultimate control over the workers' housing, meals, transportation, and wages, even though responsibility over those matters were delegated. This ruling makes it easier for workers to bring discrimination claims against agricultural employers under a joint employer theory.

Dynamex Operations W. v. Superior Court of L.A. Cty., 416 P.3d 1 (4/30/18). In determining whether to classify workers as employees or as independent contractors for purposes of California's wage and hour law, a hiring entity asserting independent contractor status must establish each of

the three factors of the "ABC Test" by showing that: (A) the worker is free from its control over how to perform the service; (B) the service or work performed is outside the usual course of hiring entity's business; and (C) the worker is engaged in independent work.

Vazquez v. Jan-Pro Franchising Int'l, Inc., 939 F.3d 1045 (9th Cir. 9/24/19). The Ninth Circuit certified to the California Supreme Court, whether its ruling in *Dynamex Operations W. v. Superior Court of L.A. Cty.*, 416 P.3d 1 (4/30/18), should apply retroactively, and whether it should apply to franchisers and joint-employer relationships. The California Supreme Court should rule on this question in 2020.

Section K. Retaliation

Greisen v. Hanken, No. 17-35472, 2019 U.S. App. LEXIS 16202 (9th Cir. 5/31/19). The Ninth Circuit upheld a former city police chief's recovery on First Amendment retaliation claims. The former city police chief brought a First Amendment retaliation claim against the city manager for unlawfully retaliating against him after he raised concerns with various government officials about a city manager's accounting and budgeting practices, and "but for" the manager's actions, he would not have been fired. After the former chief of police raised concerns about the city manager's accounting and budgeting practices, the manager initiated three investigations against him, suspended him without pay, and prevented him from speaking publicly about the city's finances. After the manager resigned, his replacement fired the chief. The chief's complaints about corruption in city finances were not part of his official duties, and his complaints were to people outside his normal chain of command. The court held that the former police chief spoke as a private citizen on a matter of public concern, and the manager unlawfully retaliated against him for his protected speech, in violation of the First Amendment.

Arias v. Raimondo, 860 F.3d 1185 (9th Cir. 6/22/17), *cert. den.*, 138 S. Ct. 673 (1/8/18). The Ninth Circuit held that the FLSA protects plaintiffs from retaliation from their employer and their employer's agents and attorneys. An undocumented worker brought a claim against his employer after the employer threatened to reveal his undocumented status if the worker took a position with another company. After the claim was brought, the defendant's attorney contacted immigration officials to facilitate the plaintiff being taken into custody at a scheduled deposition. The plaintiff then brought claims against the employer's attorney for retaliating against him in violation of the FLSA. The attorney defended that because he never personally employed the plaintiff, he was not subject to the provisions of the FLSA. The court disagreed and distinguished the FLSA's economic provisions from the anti-retaliation provisions, which extend to "any person" acting directly or indirectly in the interest of an employer in relation to an employee.

Section L. Employment Agreements and Waivers

Asarco LLC v. United Steel, Paper & Forestry, 910 F.3d 485 (9th Cir. 12/4/18). The Ninth Circuit held that the district court properly affirmed an arbitration award in favor of the union, which sought relief concerning a bonus provision in the parties' collective bargaining agreement, because the arbitrator was authorized to reform the agreement, despite the no-add provision, based on a finding of the parties' mutual mistake.

Curtis v. Irwin Indus., 913 F.3d 1146 (9th Cir. 1/25/19). The Ninth Circuit held that unionized employees could not pursue overtime claims under Cal. Lab. Code § 510 because the claim was controlled by the employee's CBAs and because it was preempted under 29 U.S.C. § 185 of the Labor Management Relations Act (LMRA). This case is a reminder that employers should always look to use a preemption defense when a FLSA suit is file against a unionized employer.

Section M. Arbitration

Taylor Sheet Metal, Inc. v. Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers Union, Local No. 16, No. 18-35176, 2019 U.S. App. LEXIS 15590 (9th Cir. 5/24/19). The Ninth Circuit reversed an Oregon federal district court's decision, and held that the NLRB's "One Employee Doctrine" does not apply to contracts that contain an interest arbitration provision. This ruling comes from a case where one employee signed and was subject to a "pre-hire CBA" that included an interest arbitration provision, which required the parties to arbitrate disputes over any new contract terms. Eventually, the union notified the company, Taylor Sheet Metal, Inc., that is was reopening the CBA. After the union declared impasse and submitted the dispute to arbitration, Taylor Sheet Metal objected to arbitration and repudiated the CBA under the "One Employee Doctrine." In reversing the lower court's decision, the Ninth Circuit held that an employer may not repudiate a CBA that contains an interest arbitration provision under the "One Employee Doctrine" because the duty to bargain with the union came from the CBA itself and not from any statutory obligation. Additionally, the Court noted that, when a CBA contains an arbitration provision, any acts of repudiation or termination shall be resolved in arbitration.

Section N. Proof and Procedure

Frost v. BNSF Ry. Co., 914 F.3d 1189 (9th Cir. 1/30/19). The Ninth Circuit reversed the lower court's judgment because it erred when it instructed the jury that the employer, BNSF Railway Co., could not be liable if it terminated the employee due to an "honest belief" that he violated the employer's safety rules. The Ninth Circuit found the "honest belief" jury instruction was inconsistent with the Federal Railroad Safety Act's (FRSA) statutory mandate and case law. The court reiterated that to establish a claim of unlawful discrimination under the FRSA, a plaintiff must prove by a preponderance of the evidence that his protected conduct was a contributing factor in an adverse employment action.

Moussouris v. Microsoft Corp., 2019 BL 491717 (9th Cir., No. 18-35791, unpublished 12/24/19). A group of three employees were barred from representing a class of 8,600 other employees based upon a claim of discrimination on the basis of gender. The Ninth Circuit found that common questions producing common answers must be applicable to all of the 8,600 individual circumstances and supported the district court's dismissal of the class allocations. There was no "common mode of discretion" exercised by the managers and the persons in the class held 8,000 different jobs, including individual managers who had a wide berth to conduct evaluations, and more than 2,000 of the proposed class members exercised some managerial responsibility themselves over other women in the proposed class. Indeed, 472 of the women proposed class members were "managers of mangers."

Section O. Other

Beckington v. Am. Airlines, Inc., No. 18-15648, 2019 U.S. App. LEXIS 17229 (9th Cir. 6/10/19). The Ninth Circuit upheld the district court's decision to dismiss a case brought by an airline pilot against their employer for allegedly colluding with a union in the union's breach of its duty of fair representation under the Railway Labor Act. The district court dismissed the case for failure to state a claim. The Ninth Circuit affirmed the dismissal because no provision of the Railway Labor Act prohibited an employer from participating in a union's breach of duty to its members.

Bergelectric Corp. v. Sec'y of Labor, No. 17-72852, 2019 U.S. App. LEXIS 17046 (9th Cir. 6/6/19). The Ninth Circuit upheld an OSHA safety citation against Bergelectric and finds solar panel installation is not roofing work. The initial case revolved around the question of what is considered "roofing work." Bergelectric Corp. was hired to install solar panels on the roof of a hangar at the Marine Corps Air Station Miramar in San Diego, California. Workers from Bergelectric used safety precautions such as warning lines and safety monitors which are appropriate for roofing work. OSHA did an inspection of the project and subsequently issued a citation against Bergelectic. Following a hearing, the administrative law judge ("ALJ") found that the company was not engaging in roofing work and therefore should have complied with the fall protection standard under 29 C.F.R. 1926.501(b)(1) which requires using guardrail systems, safety net systems, or personal fall arrest systems. The Ninth Circuit upheld the OSHA citation and concluded that workers installing roof-top solar panels need to follow general construction fall-prevention regulations, not less restrictive fall protection requirements for roofing work.

Cedar Point Nursery v. Shiroma, 923 F.3d 524 (9th Cir. 5/8/19). The Ninth Circuit upheld a California regulation that allows union organizers to access agricultural works on site to recruit, organize, and hold protests. The Growers, Cedar Point and Fowler Packing Co., alleged that the regulation was unconstitutional because it violated their Fourth and Fifth Amendment rights. However, the Ninth Circuit held that the growers did not suffer the kind of permanent physical invasion necessary to constitute a per se taking under the Fifth Amendment. The court reasoned that allowing union organizers access to agricultural employee's only affected the growers' "right to exclude." Additionally, the court rejected the growers' Fourth Amendment argument that the access regulation effected a "seizure." The court reasoned that the growers failed to produce sufficient authority supporting their claim and failed to show the character of their property was "profoundly different" as a result of the access regulation.

New York v. United States HHS, 2019 US Dist LEXIS 129498 (SDNY 8/2/19). State of New York was lead plaintiff in lawsuit challenging U.S. Department of Health and Human Services' (HHS) proposed rule allowing healthcare workers to deny care based on their religious and moral beliefs. The District Court for the Southern District of New York ruled that HHS acted outside its authority by adopting the rule, and Congress did not delegate authority to HHS to make rules regarding religious conscience protections. The rule conflicts with Title VII of the Civil Rights Act because it would not allow for employers to raise an undue hardship if an employee's religious beliefs conflicted with providing adequate patient care.

CHAPTER 5. NATIONAL LABOR RELATIONS ACT ("NLRA")

King v. Construction & General Building Laborers, Local 79, EDNY No. 1:19-cv-03496 (6/13/19). Is "Scabby the Rat" lawful publicity of a dispute or is he coercion amounting to unlawful secondary activity? For roughly three decades the former has been true, but NLRB General Counsel Peter Robb is urging the latter through General Counsel and court memos. The most recent ALJ opinion says the Board should decide since the decision could overturn substantial Board precedent.

UPMC, 368 NLRB No. 2 (6/14/19). In a case which overrules *Ameron Automotive*, 265 NLRB 511 (1982), and returns to *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and held that an employer does not have to permit non-employee union representatives/organizers to engage in promotional or organizational activity in the public areas of their premises with two exceptions: (1) unless the union has no other reasonable means of communicating with employees, or (2) if the employer discriminates against the union representative by permitting access to other non-employee groups. In order to implement such a policy, the employer should prepare a facially neutral written policy as well as ensure that it has and will consistently enforce that policy against other groups, with documentation of refusals to non-union groups.

Constellation Brands, U.S. Operations, Inc., 367 NLRB 79 (1/31/19). The NLRB agreed with the ALJ that language in an employer's employee handbook was unlawful because it suggests to employees that those who choose union representation are not eligible for its Incentive Plan. The language in the handbook said, "All non-union full time and regular part-time employees of the Company are eligible for the incentive plan." The Board agreed with the ALJ that the language was unlawful because it "conveyed the message that employees choosing union representation are automatically ineligible for the plan." The NLRB notes that benefit eligibility language is lawful if it indicates that employees represented by unions are subject to collective bargaining.

MCPc, Inc, 367 NLRB 137 (5/23/19). The NLRB concluded that MCPc, Inc. unlawfully fired an employee for his protected concerted activity of raising concerns about an executive's pay and employee's heavy workloads at a team building lunch. The employer first argued the employee was fired for accessing and disseminating confidential salary information pursuant to the company's confidentiality policy. The employer later claimed that the employee's discharge was unrelated to its confidentiality policy after an ALJ held the policy to be unlawful. The NLRB concluded that the employer's shifting justifications, seemingly in response to rulings from the ALJ, demonstrated that its rational for discharge was merely pretextual.

Merck, Sharp & Dohme Corp, 367 NLRB 122 (5/7/19). *The NLRB ruled that Merck, Sharp & Dohme Corp.*, lawfully granted "Appreciation Day" on a Friday before Labor Day to all its employees except those in the U.S. who were covered by a collective bargaining agreement lacking that benefit. The Board found that "Appreciation Day" was not motivated by unlawful animus towards unions, but rather "part of the competing and counteracting pressures inherent in the bargaining process." The company claimed it did not extend "Appreciation Day" to union workers because it did not want to bargain with the union over the additional benefit after they refused the company's request for midterm contract changes.

Quality Dining, Inc., 367 NLRB 143 (5/29/19). The NLRB found that, in light of the U.S. Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), Quality Dining, Inc. did not violate federal labor law by maintaining and enforcing an arbitration agreement requiring employees to waive their rights to file class actions for employment-related claims. The NLRB relied on the U.S. Supreme Court's decision in *Epic Systems Corp.*, which held that class action waivers do not violate the NLRA and must be enforced as written under the FAA.

Quicken Loans, Inc., 367 NLRB 112 (4/10/19). The NLRB makes clear that workplace griping is not a protected concerted activity. The Board reversed an ALJ's conclusion that Quicken Loans, Inc. unlawfully fired an employee accused of complaining about the job in a profanity laced bathroom conversation. The conversation at issue involved two co-workers, where the discharged employee empathized with his co-worker's complaints about a customer by stating that he understood the frustration. The Board did not agree with the ALJ's conclusion that this conversation was protected concerted activity under the NLRA. Rather, the Board found the conversation amounted to mere workplace griping and did not constitute concerted activity because there was no evidence that it was intended to instigate any sort of collective behavior.

SuperShuttle DFW, 367 NLRB 75 (1/25/19). The NLRB changed its legal standard for determining employment status and overruled its 2014 *FedEx* decision. The Board stated that the test for determining if a worker is an employee or an independent contractor is one that emphasizes workers "entrepreneurial opportunity" for economic gain. Thus, the Board sets forth a legal standard that combines an analysis under common law and also accounts for workers' "entrepreneurial opportunity." However, the decision only applies to employment status classifications under the NLRA, and does not affect other state or federal employment status laws.

Bexar County Performing Arts Center Foundation, 368 NLRB 46 (8/23/19). The NLRB overturned *New York New York Hotel & Casino*, ruling that contract employees are not generally entitled to the same Section 7 rights as a property owner's own employees. A property owner may exclude off-duty employees of a contractor from its property to engage in organizing, such as hand billing, unless: (1) the contractors work both regularly and exclusively on the property; and (2) the property owner fails to show that they have one or more reasonable non-tresspassory alternative means to communicate their message, which could include use of adjacent public property, newspapers, radio, television, billboards, and social media.

Kroger Limited Partnership | Mid-Atlantic, 368 NLRB 64 (9/26/19). The NLRB held that in order for a union to establish an unlawful denial of access to a non-employee union agent, the General Counsel must prove that access was allowed to other non-employees for similar activities (e.g., protesting) as the union wanted to engage in. Thus, employers may not deny access to non-employees for protest activities while allowing access to charitable, civic, and commercial entities. But employers may ban non-employee access for union organization activities if they also ban comparable organizational activities by other outside groups.

MV Transportation Co., 368 NLRB 66 (9/10/19). The NLRB overruled *Provena St. Joseph Medical Center* (2007), by adopting a "contract coverage" standard rather than a "clear and unmistakable waiver" standard when considering whether an employer's unilateral action is permitted by a CBA and not in violation of the NLRA. As part of its rationale for overruling

Provena, the Board noted that federal courts, including the D.C. Circuit, never accepted or applied the "clear and unmistakable waiver" standard. The Board will now examine the plain language of the CBA and apply ordinary principles of contract law to determine if the action is within the scope of the CBA language. If the CBA covers the act in question, the CBA authorizes the change, *and* there is no Section 8(a)(5) unilateral change violation, the Board will defer to an arbitrator. However, if an employer's proposed change is not covered by the CBA, and the change will substantially impact a term or condition of employment, the Board will still apply the "clear and unmistakable" waiver standard. Since this case was decided, the General Counsel has made it clear to the Regional Directors that the Board wants to get out of the business of interpreting contract language, a job that arbitrators should be doing through the grievance process.

The Boeing Company, 368 NRLB 67 (9/9/19). The NLRB clarified the traditional community of interest standard set forth in *PCC Structurals* (2017), by setting forth a new three-step analysis to determine whether a proposed bargaining unit shares a sufficient community of interest. Under the new community of interest standard the Board will: (1) evaluate whether members of the petitioned-for unit share a community of interest with each other; (2) ascertain whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that outweighs similarities with unit members; and (3) consider guidelines the NLRB has established for appropriate unit configurations in specific industries.

Queen of the Valley Medical Center, 368 NLRB 116 (11/28/19). The Regional Director certified the union as healthcare employees' exclusive bargaining representative after a mail ballot election. Thereafter, the employer filed a request for review of the direction of election, but started bargaining with the union as the exclusive representative anyway. After the Regional Director denied the employer's request for review, the employer informed the union that, unless the union agreed to certain terms, it would refuse to bargain, and initiate test-of-certification procedures. The employer then ceased negotiations with the union altogether. The Board held that the employer violated Section 8(a)(5) by unlawfully withdrawing recognition from the union, refusing to bargain, and providing information during bargaining, among other unfair labor practices.

McDonald's USA LLC, 368 NLRB No. 134 (12/12/19). This decision by the NLRB ended a three-year case between McDonald's and the Fast Food Workers Committee / SEIU over various unfair labor practices. On special appeal, the Board vacated the ALJ's order denying the proposed settlement agreements, and remanded the case with instructions to approve the agreements. By applying the "reasonableness" factors from *Independent Stave* (1987), the Board found that the settlement agreements were reasonable, that they provide a full remedy to all affected employees, and that accepting the settlement agreements would serve the policies underlying the NLRA as well as the Board's longstanding policy of encouraging the amicable resolution of disputes. The settlements do not impose joint and several liability on McDonald's USA as a joint employer, but the Board noted that they do impose obligations on McDonald's USA to support the remedies agreed to by its subsidiaries and franchisees.

Valley Hospital Medical Center, 368 NLRB No. 139 (12/16/19). The NLRB held that an employer's statutory obligation to check off union dues ends upon expiration of the collective bargaining agreement containing the checkoff provision. The majority held that there is no independent statutory obligation to check off union dues after contract expiration, even where the

contract does not contain a union-security provision. In so doing, the Board overturned *Lincoln Lutheran* (2015) and restored the standard set forth in *Bethlehem Steel* (1962).

Caesar's Entertainment, 368 NLRB No. 143 (12/16/19). The NLRB restored an employer's right to restrict employee use of its email system if it does so on a nondiscriminatory basis. This case overturned *Purple Communications* (2014), and returned to the standard set forth in *Register Guard* (2007 Oregon case). Under the *Register Guard* standard, employees do not have a statutory right to use employer email and other IT resources to engage in non-work-related communications, unless, in rare cases, the use of employer-provided email is the only reasonable means for employees to communicate with each other.

Apogee Retail, 368 NLRB No. 144 (12/16/19). The NLRB ruled that employers may require confidentiality during the course of workplace investigations. The Board explained that its intent was to better align this standard with other federal agency guidance on workplace investigations, including the EEOC's enforcement guidance. This change overturned the standard set forth in *Banner Estrella*, which required employers to prove, on a case-by-case basis, that special circumstances justified the need for confidentiality during a workplace investigation.

Wal-Mart Stores, Inc., 368 NLRB No. 146 (12/16/19). In this case the NLRB applied the standard on handbook policies set forth in *The Boeing Company* (2017), when it found that Wal-Mart's policy on union buttons to be partially lawful and partially unlawful. The employer policy stated that employees were allowed to wear "small, non-distracting" union insignia in the workplace. The Board found that the rule does not violate Section 7 in "customer-facing" areas of the store, but it does violate Section 7 in "employee only" areas. In applying *Boeing*, the Board found that the policy was facially neutral in areas where employees could interface with customers, but in areas where that did not occur, the policy ran afoul of Section 7.

American Water, NLRB Case 14-RD-245062 (11/1/19). A successor employer filed a request for NLRB review of the Regional Director's Order dismissing an employee-filed decertification petition one month after the successor employer voluntarily recognized the union as the exclusive representative. The Board granted the request, and signaled that it was considering overturning the successor bar doctrine set forth in *UGL-UNICCO Service* (2011), which requires a successor employer to bargain for a reasonable period before employees can decertify the union. On November 1, 2019, the employer withdrew its request, and the Board will take no further action on this case. The Board appears to be looking for a future case to revisit (overturn) the UGL-UNICCO Service successor bar.

United Parcel Service, Inc., 369 NLRB No. 1 (12/23/19). The NLRB reinstated the longstanding standard for deferring to arbitral decisions in unfair labor practice cases alleging discharge or discipline in violation of Section 8(a)(1) and (3) of the NLRA. The decision overturned *Babcock & Wilcox* (2014) and restored the deferral standard set forth in *Spielberg Mfg. Co.* (1955). Under the *Spielberg Mfg. Co.* construct, the Board will defer to the arbitrator's decision where: (1) the arbitration proceedings appeared fair and regular, (2) all parties agreed to be bound, (3) the arbitrator considered the ULP issue, and (4) the arbitrator's decision is "not clearly repugnant" to the NLRA.

NLRB Modifications to Representation Case Procedures (12/13/19). The NLRB announced a series of modifications to the Agency's representation case procedures (effective April 16, 2020). The modifications include clarifications to procedures prior to an election that better ensure the opportunity for litigation and resolution of unit scope and voter eligibility issues, and also permit parties additional time to comply with pre-election requirements instituted in 2014. There are numerous changes that all practitioners should review in detail. The most significant changes are: (1) *Unit scope and voter eligibility*: provides a pre-election hearing to determine disputes regarding the appropriate scope of the bargaining unit and issues of supervisory status; (2) *Ballot Impoundment*: when a request for review of a direction of election is filed within 10 business days, and Board has not made a determination by election, ballots that might be affected by Board ruling on the request or decision on review will be segregated and impounded pending the ruling or decision; (3) *Timelines*: Regional Director will schedule the election for the earliest date practicable, but absent waiver by the parties, will not normally schedule an election before the 20th business day after the date of the direction of election; and (4) *Post Hearing/Election Briefs*: parties may now file a post-hearing brief after the pre-election hearing and any post-election hearing within five business days after the hearing.

NLRB Rule Making on Joint Employers (anticipated early 2020). The proposed new rule would change the standard for determining whether two employers, as defined in Section 2 of NLRA, are a joint employer of a group of employees under the Act. An employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction.

NLRB Advice Memo about Uber Drivers' Employment Status (1/25/19). Associate General Counsel Jayme L. Sophir issued an advice memorandum and ultimately concluded that Uber drivers are independent contractors and not covered by the NLRA. Relying on the NLRM's reasoning in *SuperShuttle*, Associate General Counsel, Jayme L. Sophir, found that the UberX drivers were independent contractors because they control their schedule, cars, work locations, and have the ability to work for competitors, and that UberBLACK drivers control their economic opportunity in addition to being free to hire other drivers to work on their behalf, choosing to receive both UberX and UberBLACK assignments, and contracting with Uber as business entities, not individuals. This memo comes several weeks after the DOL's wage and hour division found that so-called "gig workers" were independent contractors.

NLRB General Counsel Memorandum on *Beck* Case Handling and Chargeability Issues in Light of *United Nurses & Allied Professionals (Kent Hospital)* – Memorandum GV 19-06. The NLRB General Counsel Memorandum on *Beck* case handlings offers "guidance to the Regions and the general public regarding case handling procedures in Beck chargeability cases and the proper allocation of secondary expenses flowing from a union's lobbying activities." The take away from the memorandum is that *Beck* objectors no longer need to gather evidence for the NLRB prior to challenging the chargeability of a union expenditure and regional officers have been instructed to investigate all charges brought by *Beck* objectors.

Labor Unions Likely to Face More Litigation. On September 14, 2018, the National Labor Relations Board ordered its field offices to start pursuing challenges against unions for "negligent"

behavior. "Negligent" behavior includes behavior previously viewed as harmless error, such as losing an employee's complaint or not returning phone calls when a worker has questions. This new standard essentially requires unions to conform to a stricter "duty of fair representation" by forcing them to show and prove that they have reasonable tracking systems and work to update workers who file a grievance.

Raytheon Network, 365 NLRB 161 (12/15/18). The case dealt with whether bargaining obligations are required before implementing a unilateral change in employment matters. Consistent with Board cases dating to 1964, but overruling the Board's 2016 decision in *E.I. du Pont de Nemours*, 364 NLRB 113, the Board held that actions do not constitute a change if they are similar in kind and degree with established past practice consisting of comparable unilateral actions. The holding now applies regardless of whether a collective bargaining agreement was in effect when the practice was created or situations where no collective bargaining agreement existed when the disputed actions were taken. Finally, the Board ruled actions consistent with an established past practice do not constitute a change requiring bargaining merely because they involve some degree of discretion.

The Boeing Co., 365 NLRB 154 (12/14/17). The Board overruled its decision in *Lutheran Heritage Village-Livonia*, 343 NLRB No. 646 (2004), which articulated the Board's standard concerning whether facially neutral workplace rules, policies, and handbook provisions unlawfully interfered with the exercise of rights protected by the NLRA. Under the *Lutheran Heritage* standard, the Board found that employers violated the NLRB by maintaining workplace rules if the rules would be "reasonably construed" by an employee to prohibit the exercise of NLRA rights. Previously pointing out that employees were not lawyers, the "reasonably construed" standard was broad. However, in place of that standard, the Board will now evaluate two issues: (1) the nature and extent of the potential impact on NLRA rights, and (2) the legitimate justifications of the employer associated with the rule. The Board also pointed out that although a rule may be appropriate as written, it may still violate the NLRA in specific instances where it is used unlawfully to prohibit the exercise of Section 7 rights. Under this standard, the rule being examined was Boeing's no-camera rule that prohibited employees from using camera enabled devices to capture images or video without a valid business need and then approved camera permit. General Counsel issued a guidance memo explaining the implications of the Board's decision in *Boeing*, and informed the regions that ambiguities in rules are no longer interpreted against the drafter, and that generalized provisions should not be interpreted as banning all activity that could conceivably be included. The guidance memo additionally provided examples of various common rules and their impact on NLRA rights. As of August 2019, ALJs were still striking down 75% of the rules they reviewed, with a particularly high percentage of striking down rules on confidentiality and access to social media, while rules on civility usually survive.

Hy-Brand Industrial Contractors, 365 NLRB 156 (12/14/17). The Board overruled its 2015 decision in *Browning-Ferris Industries*, 362 NLRB 186 (2015), and returned to the longstanding pre-*Browning-Ferris* standard governing joint-employer liability with respect to independent contractors. The new standard is that two or more entities are joint employers under the NLRA if there is proof that one entity has exercised control over essential employment terms of another entity's employees, and has done so directly and immediately, rather than indirectly, in a manner that is not limited and routine. Under the pre-*Browning-Ferris* standard, proof of indirect control,

contractually reserved control that has never been exercised, or control that is limited and routine would not be sufficient to establish a joint employer relationship. On February 26, 2018, the Board vacated its decision in *Hy-Brand* due to the Board's Designated Ethics Official's determination that one of the members should have been disqualified. Therefore, the overruling of the *Browning-Ferris* decision now has no force or effect. Note, however, that the Board has begun rulemaking to establish a joint employer rule in line with the decision in *Hy-Brand*, as described above.

CHAPTER 6. OREGON STATE CASES

Section A. Procedure

Tri-Cty. Metro. Transp. Dist. of Or. v. ATU Local 757, 362 Or App 484 (2/15/18). The Oregon Supreme Court reversed and remanded a decision by the Court of Appeals, and held that TriMet was not entitled to the prior ruling that collective bargaining sessions with respondent labor union would not be "meetings" subject for purposes of Oregon's Public Meeting law (ORS § 192.690 *et seq.*). The Court dismissed TriMet's arguments that these sessions were not "meetings" under the law, and that there was no "quorum" as required by the statute. The Court noted that TriMet had merely refused to set a quorum and that its negotiating team clearly "exercised authority that is conferred by law." Therefore, the public meeting laws necessarily must apply to TriMet's collective bargaining team meetings.

Section B. Public Accommodation

Klein v. Or. Bureau of Labor & Indus., 289 Or App 507 (12/28/17), *rev den*, 2018 Or. Lexis 505 (6/21/18). The Oregon Supreme Court declined to review the Oregon Court of Appeals' upholding BOLI's finding that a bakery violated Oregon public accommodation law. The bakery denied "full and equal" service to a person "on account of . . . sexual orientation" when it refused to bake a cake for a same-sex couple. The court determined that "on account of" sexual orientation only required denial of accommodation be casually connected to the protected characteristic or status (sexual orientation). The bakery argued that it did not discriminate against same-sex couples because of their status, as it would serve same-sex couples. The bakery argued that it refused to provide certain services to those same-sex couples, including baking a cake to celebrate a same-sex marriage. However, the court denied to read such a status versus conduct distinction in regards to sexual orientation, noting that the Supreme Court had repeatedly rejected such a distinction when there was such a close relationship between the status (sexual orientation) and conduct (a wedding) at issue. Furthermore, the Court held that, at best, the bakery had shown that its business includes some arguably expressive elements as well as non-expressive elements, thus triggering intermediate scrutiny, which the BOLI order survived. Thus, the burden on the bakery's expressive activities was no greater than is essential to further the substantial interest in promoting the ability of its citizens to participate equally in the marketplace without regard to sexual orientation.

Section C. Other

Pelican Bay Forest Prods. v. W. Timber Prods., 297 Or App 417 (5/8/19). The Oregon Court of Appeals reversed the trial court's ruling and held that information taken by memory can still constitute a "trade secret" under the Oregon Uniform Trade Secret Act. Pelican Bay's former

employee took and disseminated customer information and client lists that Pelican Bay made reasonable efforts to keep confidential. Thus, the appellate court held that the company could maintain a claim for a violation of the Uniform Trade Secrets Act (UTSA) and a claim for intentional interference with economic relations.

Schutz v. La Costita III, Inc., 364 Or 536 (3/14/19). The Oregon Supreme Court held that although the state's "social host" law protects certain persons from liability related to actions taken as "hosts," there is no similar insulation from liability for alleged tortious conduct committed while acting in another role, such as employer. The plaintiff worked as a receptionist at O'Brien Constructors, LLC. After continuous pressure from her supervisor and co-workers to join them for drinks, the plaintiff eventually accepted the invitation. Plaintiff became intoxicated at the event, attempted to drive home, got in a car accident, and sustained severe injuries. Plaintiff sued her employer and supervisor for negligence in organizing and supervising the event; pressuring her to attend; failing to warn her that she would be expected to consume an excessive amount of the alcohol purchased by her employer; permitting her supervisor to organize such events; and failing to train her on proper methods of improving work relationships. Defendant's claimed immunity under Oregon's social host laws. The Oregon Supreme Court held that social host immunity only applies to acts taken in a role as a social host, and defendants were not entitled to that statutory immunity.

Maza v. Waterford Operations, Ltd. Liab. Co., 300 Or App 471 (11/14/19). The Oregon Court of Appeals applied a broad interpretation of Oregon law and concluded that employers are strictly liable for ensuring employees actually take meal breaks. The Court overturned settled wisdom that employers only need to make a meal break available to employees. Employers must also police employees to ensure they take their full meal break. Thus, the obligations of an employer to provide meal and rest breaks for employees just became more onerous with its holding that employers are responsible for ensuring employees receive their full meal period, even if an employee chooses to resume work early. Merely providing the opportunity to take a break is insufficient, the employer must also ensure that the entire meal period—usually 30 continuous minutes for a work period of six hours or more—be taken.

CHAPTER 7. WASHINGTON STATE CASES

Burnett v. Pagliacci Pizza, Inc., No. 78356-4-I, 2019 Wash. App. LEXIS 1522 (Ct. App. 6/17/19). The Washington Court of Appeals held that procedural unconscionability alone is sufficient to void a contract. The court upheld the lower court's denial of the employer's motion to compel arbitration for the employee's wage-related claims because a mandatory arbitration policy in the Employment Relationship Agreement was procedurally and substantively unconscionable. The circumstances surrounding the formation of the parties' agreement to arbitrate were procedurally unconscionable because the employee did not have a reasonable opportunity to review the arbitration policy before he was required to sign the Employment Relationship Agreement. The mandatory arbitration policy was also substantively unconscionable because the prerequisites to arbitration contained in the policy limited employees' access to substantive remedies and discouraged them from pursing valid claims which unreasonably favored the employer and rendered the policy substantively unconscionable.

Floeting v. Group Health, Inc., 192 Wn.2d 848 (Wash. Sup. Ct. 1/31/19). The Washington Supreme Court confirmed that a higher standard exists for instances of sexual harassment in places of public accommodation. The court held that employers are strictly liable for their employees', including nonmanagement employees', discriminatory conduct directed at a customer in a place of public accommodation.

Taylor v. Burlington N. R.R. Holdings, 2018 U.S. App. LEXIS 26224 (9th Cir. 7/1/19). Last year the Ninth Circuit asked the Washington Supreme Court to give its opinion on whether obesity is an impairment under the Washington Law against Discrimination (WLAD). The Washington Supreme Court accepted the certified question from the Ninth Circuit and answered that obesity *always* qualifies as an impairment under the WLAD. Distinguishing other courts that require a separate underlying physiological disorder or condition to prove the resulting symptom of obesity is a disability, the Washington Supreme Court clarified its opinion that obesity qualifies as a disability without proof of its cause because obesity is a physiological condition. Also as a result of this opinion, an employee must not be medically defined as obese to be protected—it is illegal to discriminate against employees who are perceived to be obese.