

# Recent Developments in Labor & Employment Law

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# Federal Congressional and Legislative Action and Inaction



# No New Labor & Employment Laws Passed

- Gridlock in Congress continues, and the good news is that no new stand alone federal labor or employment legislation creating extra burdens for private sector employers has been enacted in years!!!
- IMPACT of no federal legislation: States and municipalities have aggressively enacted numerous pro-employee laws



# Congress Passes Sexual Harassment Reform Law for Congress in December 2018

- Amends the Congressional Accountability Act to overhaul how Congress handles sexual harassment claims
- Congress would force lawmakers to reimburse the U.S. Treasury for awards or settlements tied to claims of sexual harassment or retaliation for reporting harassment
- Requires U.S. Congress Office of Compliance to publish on its website an annual report detailing who makes these payments and why
- Removes prior time delays in processing sex harassment complaints



**#MeToo**

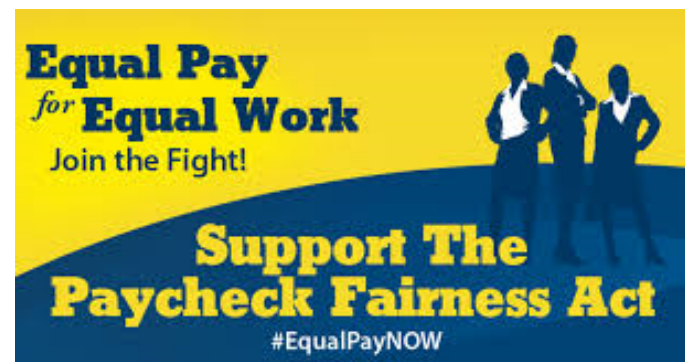
# Raise the Wage Act Reintroduced January 2019, Moved to Full House for Floor Vote

- HR 582, S.150
- Would gradually raise the current \$7.25 minimum wage to \$15 by 2024 (\$1.30 every year); after that, adjustments based on median wage
- February 7, 2019, hearing by House labor committee, indicated that the parties are split on the legislation
- A Full House Vote is expected before the end of July
- 29 states and D.C. currently mandate wages above the federal minimum wage, with other states proposing same
- 7 states and DC have \$15 minimum wage laws



# Paycheck Fairness Act Reintroduced January 2019 and House Passed it on March 29, 2019

- HR 7
- Would end pay secrecy
- Would strengthen remedies available for pay discrimination
- Would ease the burden of proof in establishing a pay discrimination claim
- Would bar employers from basing pay on prior wage history



# Dems Introduce Forced Arbitration Injustice Repeal Act In February

- Would ban mandatory arbitration agreements in employment disputes, and in consumer, antitrust, and civil rights claims
- It would also ban agreements that stop individuals, workers, and business from filing or joining class actions

## FORCED ARBITRATION INJUSTICE REPEAL ACT

This bill prohibits pre-dispute arbitration agreements that force arbitration for all forms employment, consumer, antitrust, or civil rights disputes.

The bill also prohibits the use or threat that prevents workers, entrepreneurs, small business from bonding together for class action not included in an employment, consumer, antitrust, or civil rights dispute.

Prohibits the use or threat that prevents small business, workers, entrepreneurs, small business from bonding together for class action not included in an employment, consumer, antitrust, or civil rights dispute.

It prohibits the practice in any type of discrimination on the basis of sex, family protected status or education, employment, credit, housing, public accommodations and facilities, voting, **access** or accommodations, health care, or consumer benefit or provided by the Federal Government or State government.

Source: HR 1287, 115th Congress (2017-2018)

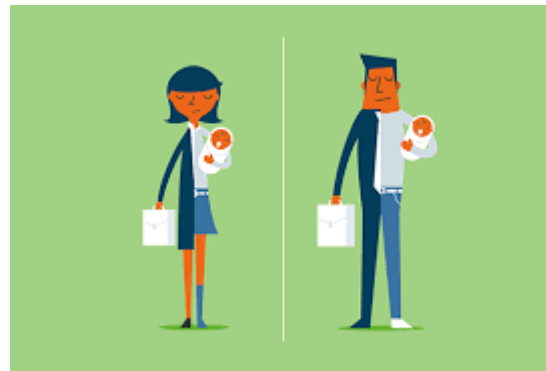


### KEY SPONSORS

House Representative Hank Johnson (GA-11, D)  
House Judiciary Committee Chairman Jerrold Nadler (NY-12, D)  
Senator Richard Blumenthal (CT, D)

# GOP members of Congress Introduce Paid Parental Leave Bill on March 27, 2019

- The first of potentially several proposals to fulfill President Trump's call for a federal paid leave solution for new parents
- The New Parents Act
- Would enable new parents to receive one, two or three months of paid leave through early access to Social Security benefits in exchange for postponing social security in retirement by two, four, or six months





# GOP House Members introduce Freedom For Families Act on April 9, 2019

- Under this law, employers would make pre-tax contributions to health savings accounts for expenses during a period of leave for the birth or adoption of a child, or serious family illness.



# Dems Introduce Equality Act of 2019 on March 13 and House Passed it on May 17, 2019

- Bills would modify existing discrimination laws to extend protection to LGBTQ persons in access to employment, education, credit, jury service, federal funding, housing and public accommodations
- Currently, federal appellate courts and DOJ and EEOC are in disagreement on whether current laws protect employment discrimination against LGBTQ workers
- Supreme Court has granted writs to decide whether Title VII (employment discrimination law) covers LGBTQ



# Dems Introduce Healthy Families Act, Providing Paid Sick Leave to Employees

- Reintroduced on March 14, 2019
- Introduced in each Congress since 2004
- Employers with 15 or more employees would have to provide up to seven days of paid sick leave per year
- Eleven states and DC have paid sick leave laws, and many municipalities have same—Many states are considering legislation
- It would provide paid sick leave to an estimated 34 million private sector workers



# Bipartisan House Lawmakers Introduce Pregnant Workers Fairness Act May 14, 2019

- The law would require employers to offer reasonable accommodations to employees who are pregnant so long as they don't pose an undue hardship
- Would adopt the ADA model for reasonable accommodation



# Fair Chance Act Would Apply Ban the Box Rules to Federal Agencies and Contractors

- Fair Chance Act approved by House Committee on March 13
- It would prohibit federal agencies and federal contractors from asking about job applicants' criminal history until after making a conditional offer of employment
- 33 states and more than 150 cities and counties have passed “ban the box” laws



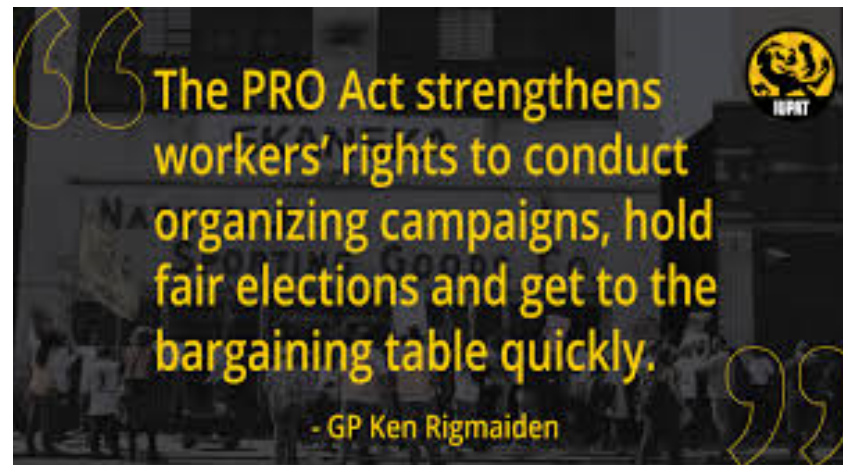
# Dems Introduce PRO Act on May 2, 2019



- Protecting the Right to Organize (PRO) Act introduced
- This is a SCARY bill!!! Organized Labor’s Dream List!!!
  - Would codify ambush election rules, and would remove employer rights in NLRB elections
  - Would codify the NLRB’s controversial Browning-Ferris Industries joint-employer standard
  - Would ban independent contractor status for gig economy workers
  - Would eliminate Right to Work protections in states, including those 27 states that have passed RTW
  - Would codify the persuader rule, requiring employers and their attorneys to file publicly accessible reports on fees paid
  - Would prohibit arbitration agreements in employment contracts
  - Would impose government control over collective bargaining by imposing binding arbitration
  - Would strip away “secondary boycott” protections for employers

# PRO Act, continued

- Coalition for a Democratic Workplace (CDW) Submitted an Excellent Opposition Letter on May 8, 2019—PCCA is a member of CDW and signed the letter



# Dems Introduce Bill to Raise the Minimum Salary for Exempt Status to \$51k on June 11

- The Restoring Overtime Pay Act would preempt the DOL's proposed rule to increase the threshold to \$35,308
- See discussion of Wage and Hour Division proposed rule later in this presentation





# Executive Branch Actions



# White House Issues Fall Regulatory Agenda on October 17, 2018

- Labor and Employment Issues:
  - Wage and Hour Division
    - Regular and Basic Rates under FLSA
    - Joint Employment Under FLSA
    - Changes to Overtime Salary Threshold
  - OSHA
    - Lock-Out/Tag-Out update
    - Workplace Violence in Healthcare
    - Final Injury and Illness Tracking Rule
  - NLRB
    - Ambush Election Regs
    - Joint Employer Rule
  - EEOC
    - New proposed wellness regs under ADA and GINA



# President Trump Calls for Paid Family Leave in State of the Union Address—2/5/19

- He vowed to include money in his coming budget proposal to support nationwide paid family leave “so that every new parent has a chance to bond with their newborn child
- According to SHRM, only 35 percent of employers offer paid maternity leave, and only 29 percent offer paid paternal leave



# DOJ Asks Fifth Circuit Court of Appeals to Affirm Texas Federal Court Ruling Invalidating the Affordable Care Act

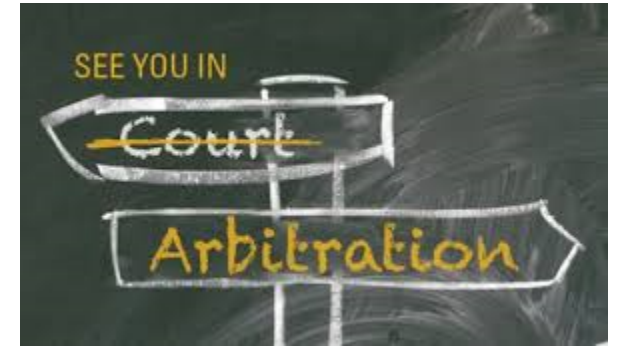
- On March 25, 2019, the DOJ notified the appeals court's clerk of its position and its intent to file briefs supporting the federal district judge's ruling of December 14, 2018



# Supreme Court Developments



# SCOTUS: Arbitrators Decide Disputes About Arbitrability (January 8, 2019)



- *Henry Schein, Inc. v. Archer & White Sales*
- Justice Kavanaugh's first opinion
- Vacated Fifth Circuit ruling that had decided that courts, not the arbitrator should decide whether certain cases should go to arbitration
- Holding: if the arbitration agreement says that arbitrators shall decide questions of arbitrability, then that is who will decide whether the case is subject to arbitration
- Tip: if you want the arbitrator to decide who will decide whether the matter is subject to arbitration, say that in your arbitration agreement

# SCOTUS: Holds that the Federal Arbitration Act (FAA) Did Not Apply to Wage Claims Brought by Interstate Truck Driver, Even If Classified as Independent Contractor

- *New Prime Inc. v. Oliveira (January 15, 2019)*

- Ruling:

- The question of whether the FAA applies to a dispute is for a court to decide
- The “contract of employment” of “any other class of workers engaged in foreign or interstate commerce” exclusion from FAA applies to independent contractors too
- Thus mandatory arbitration agreement not enforceable
- Still a lot of open questions: What is engaging in interstate commerce? The parties stipulated that this driver was engaged in interstate commerce



# SCOTUS Holds that Class Arbitration Must be Explicitly Authorized in the Arbitration Agreement

- April 24, 2019—*Lamps Plus Inc. v. Varela*
- 5-4 vote
- “Under the FAA, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration.”
- TIP: Even though an ambiguous or silent arbitration agreement on the issue of class action arbitrations may be sufficient to avoid it, be clear that the employee is waiving ALL class actions, in court and in arbitration.
- Not an employment case, but relevant to same





# SCOTUS rules that Title VII's EEOC Charge filing Requirement Is NOT Jurisdictional

- June 3, 2019—*Fort Bend County, Texas v. Davis*
- Unanimous Ruling
- Title VII says the claimant must first file a charge of discrimination with the EEOC before being able to file suit
- Plaintiff did not file a religious discrimination Charge, but defendant waited five (5) years before raising that issue!!
- The requirement of filing Charge with EEOC is a claims processing requirement, and the failure to file may be fatal to filing suit, so long as the issue is timely raised by defendants



# SCOTUS Rules that Oil Rig Workers' Overtime Claims Governed by Federal Law, Not California Law

- June 10, 2019—*Parker Drilling Management Service v. Newton*
- Unanimous Decision
- Court held that California's laws governing the minimum wage and payments for "standby time" do not apply to workers on oil rigs in federal waters off the Coast of California.
- Under the Outer Continental Shelf Lands Act (OCSLA), state law does not apply as surrogate federal law unless there is a significant "void or gap" in federal law.



# SCOTUS Refuses to Undo Prior Law that Gives Federal Agencies Broad Power to Interpret their Own Regulations With Deference by Courts

- June 26, 2019—*Kisor v. Wilkie*
- 5-4 decision. Roberts joined the court's liberal justices
- It did limit the circumstances when deference (called Auer deference) by a federal court is appropriate

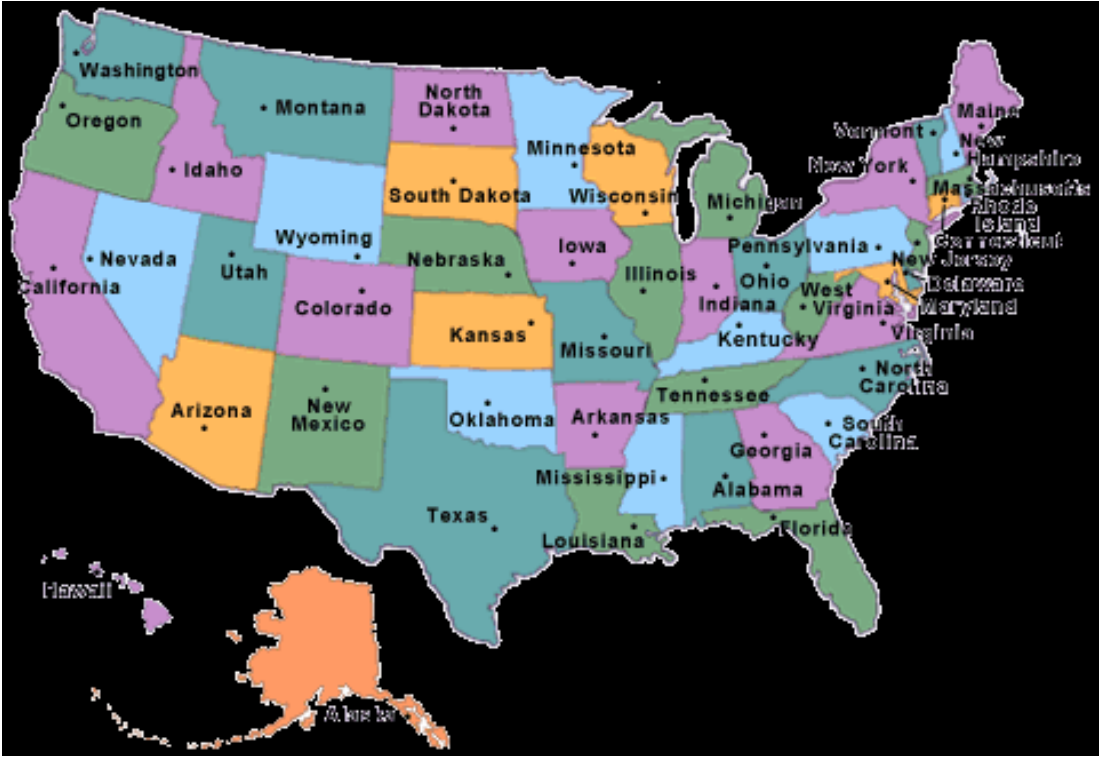


# SCOTUS Agrees to Decide Whether Title VII Covers Gay and Transgender Workers (LGBTQ)

- Writs granted on April 22, 2019.
- Will resolve the contrary views of the DOJ and EEOC on this issue
- The decision could have a political impact
- Note that over 20 states and numerous cities already have laws protecting this status



# State Actions Regarding Labor & Employment Law



# Wage Theft Needs Stiffer Criminal Penalties, Says NY Governor Cuomo

- Knowing or intentional wage theft of over \$50,000 by NY employers would be a Class B felony
- Penalties can range from minimum of one to three years in prison to a maximum of 25 years!!
- New York, New York 🎵
- Colorado and Minnesota passed similar laws this year





# West Virginia's Right to Work Law Declared Unconstitutional—But High Court Stays Decision

- Circuit court judge held that the 2016 law unjustly took union property without compensation
- Unfair to unions to force them to “bear the burden of free riders” and work for them without compensation.
- She ignored the fact that right to work laws have routinely been upheld by courts, including the US Supreme Court, saying these cases were not applying the West Virginia Constitution.
- National Right to Work: “confused and illogical” decision
- Good news: Supreme Court of West Virginia granted stay of the ruling on March 29, pending its ruling on the issue

# Kentucky Supreme Court Declares Kentucky's Right to Work Law Constitutional

- All arguments of the Union rejected by the Court, including the one that said the law created a discriminatory classification of union employees and non-union employees, with the intent to “starve” the unions “based on perceived political bent.”





# Tennessee Adopts Two Employer/Business Friendly Laws

- **Bullying Lawsuit Safe Harbor Law:** an employer can be legally immune from a lawsuit based on bullying if it adopts the model policy created by the Tennessee Advisory Commission on Intergovernmental Relations
- **New Law Adopts More Business Friendly Analysis for Independent Contractor Status:** Uses IRS 20 factor test with no presumption of employee status; moving in the opposite direction of California and other states using the ABC test



# Michigan AG Plans on Attacking Independent Contractor Misclassifications

- Dana Nessel claims that misclassification is costing the state \$107 Million annually through reduced tax revenue
- In April of 2019, she created a new “Payroll Fraud Enforcement Unit” to focus on “wage theft” by businesses misclassifying their workers



MICHIGAN

# ALERT: Medical Marijuana Users Are Winning Cases Under State Law—Despite Federal Ban

- Note the recent trend in states that have legalized medical marijuana to find protection under state law for users who are fired because use of marijuana is a federal crime
  - Note New York City's new ban on preemployment tests for medical marijuana
  - As of May 31, 2019 10 states and DC allow recreational marijuana, and 33 states and DC have medical marijuana laws
- Many of the state laws have protection against discrimination, but some don't—multistate employers are at risk in some states
- Be careful and make sure you check out state law before terminating employees who admit to using medical marijuana—you will probably proceed with termination in the end, but understand the risk of a claim



# New Trend? Washington State Mandates Panic Buttons for Adult Entertainers

- A panic button must be placed in each room where an entertainer may be alone with a customer as well as in bathrooms and dressing rooms
- Also, an establishment receiving information that a customer has committed “an act of violence, including assault, sexual assault, or sexual harassment towards an entertainer” will be required to record the customer’s name, and if the allegation against the customer is brought in a statement made under penalty of perjury, the customer must be banned from returning for at least three years.



# California Becomes First State to Outlaw Employer Bans on Hair Styles Associated with Race

- Governor signed the new law on July 3, 2019
- The law (CROWN Act) (Creating a Respectful and Open Workplace for Natural Hair) forbids California employers from banning twists, braids, dreadlocks, or other hairstyles historically associated with race
- California joins New York City and Chicago in enacting this law



The CROWN Act

# Other State and Municipality Law Trends to Keep Up To Date On If You Operate in Multiple States

- Paid Sick Leave Laws
- Ban the Box Laws
- Bans on Asking Applicants About Prior Salary
- “Me Too” Legislation, Beefing Up Employer Compliance Requirements in Sexual Harassment Prevention (E.g, New York State and New York City)
- Wage Theft Laws Imposing Criminal Penalties for Wage Violations and Misclassification
- Guns in Trunk Laws
- Pay Equity Laws



# Court Decisions/Actions Regarding General Labor & Employment Law Matters



# Fifth Circuit Court of Appeals Reverses 37 Years of Precedent in Expanding Citation Options on Construction Sites

- *Acosta v. Hensel Phelps Construction Co.* (November 2018)
- OSHA has the authority to cite “controlling employers”, usually the general contractor, at multi-employer worksites regardless of whether the controlling employer’s employees were affected by the safety violation





# Texas Federal Judge Rules that ACA is Unconstitutional

- *Texas v. USA* (12/14/18)
- Federal judge in Fort Worth, TX agreed with the arguments of attorneys general of 18 states, and concluded that the ACA in its entirety is invalid.
- The judge however denied a request for a national injunction, and simply issued a declaratory judgment.
- So.....the ACA is still the law of the land until a final decision, likely by a higher court, is issued.
- As mentioned earlier, DOJ supports the ruling on appeal



# “WHO DAT” Case Fails!!



- Fans sued the NFL because of the worst call in the history of professional football
- The federal court eventually granted the NFL’s motion to dismiss
- There is no justice!!!



# 7<sup>th</sup> Circuit Rules Against Scabby the Rat!

- *Construction and Gen. Laborers Union No. 330 v. Town of Grand Chute*. (February 14, 2019)
- Court held that the code enforcement officer in Grand Chute, Wisconsin, did nothing unconstitutional or otherwise improper when he ordered a local union to deflate a Scabby Rat balloon that members put up to protest an auto dealer's pay rates
- Court warned that if the city had allowed Santa, or Spider Man balloons, it might be a different result



# On the Other Hand.....New York Federal Judge Rules Against NLRB, Letting Scabby the Rat Stay Up as Part of Union Protest

- **King v. Construction & General Building Laborers Local 79:** July 1, 2019 ruling allows a rotating menagerie of inflatable rats and an inflatable cockroach to continue to stand outside of a trio of Staten Island grocery stores as part of a union's protest
- The judge held that Construction and General Building Laborers Local 79's peaceful use of stationary, inflatable rats and a cockroach to publicize a labor protest is protected by the First Amendment
- **This is a set back for NLRB General Counsel Peter Robb, who takes the position that use of inflatables as unlawful coercion of businesses that don't directly employ protesting workers, i.e. a secondary boycott**
- This ruling finds that use of inflatables is not picketing
- NLRB has a case pending involving the same issue. STAY TUNED



# Court Actions Involving Discrimination and Harassment Issues



# White Welder Can't Show Bias in His Discharge for Using the N Word

- *Vess v. MTD Consumer Grp. Inc.* (January 10, 2019): Fifth Circuit Court of Appeals upholds Mississippi federal court decision
- Plaintiff fired for repeated use of the “N” word, plus commenting that a machine had been “N-rigged”.
- A few weeks prior to his termination he reported to management that a black female employee had said about plaintiff: “He ain’t no man. He’s a white man. They ain’t never made a good white main”.
- She was not disciplined for her comments, and he was fired.
- Court: He was in a leadership position, she was not. His conduct was more serious than hers. “Courts have found the “N” word may be the most inflammatory and offensive racial slur in the English language”.



# BIG BUCKS!! Dishwasher Fired for Resting on Sunday Gets \$21.5M Jury Verdict in Florida

- *Jean Pierre v. Park Hotels & Resort, Inc.* (January 14, 2019)
- Hotel Dishwasher was a member of the Soldiers of Christ Church, a Catholic Missionary group, who couldn't work on Sundays
- Her request to be off on Sundays was accommodated by the hotel for many years.
- Her last manager, allowed her to swap with co-workers on Sundays, as the employer had done for years, but he changed his mind and fired her. BIG MISTAKE!!!
- Lesson Learned: DO NOT ALLOW YOUR FRONT LINE SUPERVISORS TO TERMINATE EMPLOYEES WITHOUT APPROVAL FROM UPPER MANAGEMENT OR HR DEPARTMENT!!!!!!!!!!!!!!!



# Trucking Company Settles EEOC Service Dog ADA Suit-*EEOC v. CRST International* (March 6, 2019)

- Company allegedly refused to hire a military veteran after he asked to use an emotional support dog on the job
- EEOC sued company under ADA for failing to offer a reasonable accommodation to the applicant, which would not have created an undue hardship for the employer
- Plaintiff's psychiatrist had prescribed a service animal to help him cope with PTSD. Settlement included back pay, and mandatory ADA training
- Takeaway: Service animals are more and more frequently being used in the workplace, so carefully consider whether there would truly be an undue hardship or direct threat before refusing such a request





## 2d Circuit Joins Other Circuits in Finding that Hostile Work Environment Claims Are Viable Under the ADA in March 2019

- ***Fox v. Costco Wholesale Corp.***: Costco worker allegedly bullied at work for having Tourette's syndrome
- Federal Court of Appeals joined the 4<sup>th</sup>, 5<sup>th</sup>, 8<sup>th</sup>, and 10<sup>th</sup> Circuits in finding that this claim stated a cause of action under the ADA for hostile environment
- Takeaway: Bullying of any kind is inappropriate and your supervisors need to be trained on this, even though it seems to be common sense

ADA  
Americans  
with Disabilities  
Act



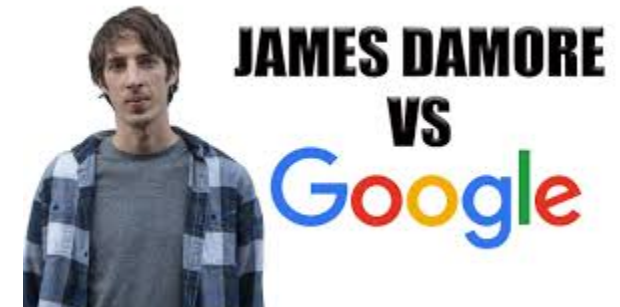
# Fifth Circuit Court of Appeals Denies Heterosexual (Straight) Employee's Retaliation Claim

- ***O'Daniel v. Indus. Serv. Sols. (4/19/19)***
- Heterosexual human resources employee was fired by her Lesbian boss over an anti-transgender Facebook post
- Court ruled that she had no claim under Title VII for sexual orientation based job retaliation since Title VII doesn't include sexual orientation.



# Court Allows Class Claims by Conservative Job Seekers to Proceed Against Google

- *Damore et al v. Google LLC* (June 7, 2019)
- Plaintiffs claim that Google discriminates against conservative, white male applicants, and that it uses illegal hiring quotas to hire female and favored minority candidates. It also alleges that Google singles out conservative and fires them when they share their conservative views with their colleagues.
- Judge denied the motion to dismiss the class, and did indicate that he was not ruling on the merits of the claim, but just on whether the class claims should be dismissed at this stage.



# 7<sup>th</sup> Circuit Holds that Obesity Alone is Not a Protected Disability Under the ADA

- *Richardson v. Chicago Transit Authority* (June 12, 2019)
- The Court of Appeals joined the 2<sup>d</sup>, 6<sup>th</sup>, and 8<sup>th</sup> Circuits in holding that obesity is not a protected disability unless the plaintiff can demonstrate that it is caused by an underlying physiological disorder or condition.
- Plaintiff weighed 566 pounds. Moved to a light duty job for a period, but attempted to move to a bus driving job. It was determined that he could not safely perform the essential functions of that job, so he was moved back to the light duty job. Eventually fired for refusing to provide medical documentation to extend his employment in the light duty job.
- Since he could not establish that there was any underlying medical condition causing the obesity, he was not disabled.
- Contrary to EEOC's position on this issue



# Court Actions Involving Wage and Hour Issues



# 5<sup>th</sup> Circuit Holds That FWW Method of OT Calculation Cannot Be Used When Employer Also Pays Incentive Pay

- ***Dacar v. Saybolt, L.P.*** (Oct. 18, 2018) Oil and Gas Inspectors were nonexempt and paid straight salary with a fluctuating schedule, which usually justifies using the Fluctuating Workweek Formula
- FWW allows overtime hours to be paid at half time, instead of normal time and one half
- The inspectors were also paid incentives on scheduled days off, for working at sea, or for working on a scheduled holiday.
- Fifth Circuit joins with the Wage and Hour Division Position and holds that the employer may not use FWW formula when extra incentive payments of the type here are made to workers
- Comment: this may be limited to time based bonuses, as compared to performance based commissions??
- Advice: consult counsel if you are using FWW method
- Note WHD may issue a proposed rule for FWW that might change this result



# Tennessee Trucking Company Settles FLSA Class Action for \$3.8M

- January 14
- Company was accused of not paying thousands of drivers for time spent in orientation and training.
- General Rule is that orientation and training mandated by the employer is compensable time



# Rhode Island Exotic Dancer FLSA Collective Action Certified

- March 14: Strippers claim they were misclassified as independent contractors and not paid overtime
- Judge found that there were sufficient similarities in how the workers were treated by employer
- Relevance: Don't classify any workers as independent contractors without careful vetting and legal analysis





# West Virginia Pipeline Company Settles Overtime Case for \$3.7M with DOL



- ***Acosta v. Team Environmental LLC.*** (March 14 Court Approved the Settlement)
- 300 safety inspectors will split the \$3.7M
- They were paid a day rate with no overtime when they worked over 40 hours
- Paying generous day rates to nonexempt workers in the oilfield was very common 5 years ago, but the frequency of lawsuits has lessened that violation
- Remember: generosity is not a defense to not following the rules of the FLSA

# Fifth Circuit Holds that Directional Drillers Are Independent Contractors

- ***Parish et al v. Premier Directional Drilling, L.P.*** (February 28, 2019)
- In a somewhat surprising decision, the court of appeals overruled the district court's ruling in favor of the plaintiffs, who claimed that there were improperly classified as Independent Contractors
- The court evaluated the facts and despite the fact that the company also had employee directional drillers, determined that the factors supported independent contractor status
- It is highly recommended that if you use independent contractors that you not also employ employees doing the same thing that the ICs do



# NLRB Developments



# NLRB Proposed Joint Employer Rule Update

- Comments initially due November 13, 2018
- Deadline extended until December 13, 2018
- December 28, 2018, DC Circuit upholds Browning Ferris NLRB joint employer standard, but remands to NLRB
- Dems (Congress and State AGs call for withdrawal of proposed rule in early January 2019)
- Chairman Ring rejects request for withdrawal in mid January 2019
- In remanded case, GC Robb asks NLRB to scrap Browning Ferris standard in April 2019
- Rule still on track for implementation—Should be soon
- Litigation will no doubt follow if rule implemented



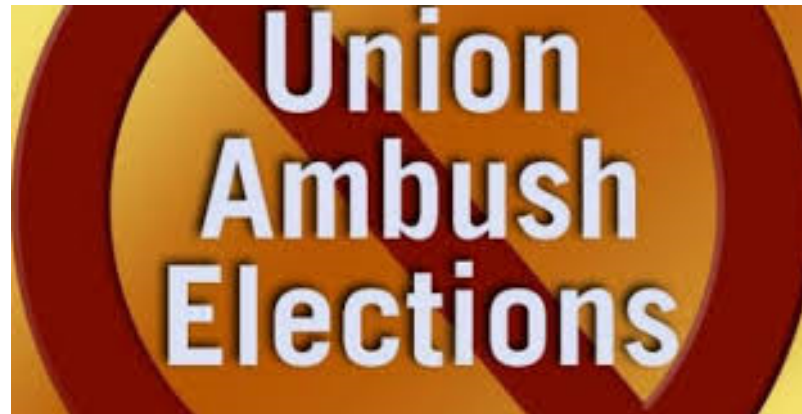
# Mark Gaston Pearce Is Out!!!



- In a surprising move, President Trump nominated Mark Pearce to serve a third term on the NLRB last year
- Business groups were fighting this nomination, given Mr. Pearce's pro-union slant
- Pearce withdrew his name from consideration on February 5, 2019
- This is good news for employers!!!

# NLRB Possible Modification of the Pro Union Ambush Election Rules Still Pending

- Hopefully will extend the amount of time between petition and election—now running about 21 days; it used to be around 42 days on average
- Hopefully will extend the time between petition and hearing to at least 12 days (now 8 days)
- Comments period over—waiting for a proposed rule—Hope for a Spring 2019 issuance busted



# Workplace Conduct Rules Get Second Look in NLRB Spree

- In late October 2018, the NLRB acted on 41 workplace rule cases, in light of the Boeing decision in 2017
- One of my cases that had been pending for two years (attacking 15 handbook rules for one of my clients under heavy organizing by the IBEW) got remanded back to Pittsburgh Region for additional consideration
- Finally, in March, the Region allowed the union to withdraw the Charge
- Justice Served
- NLRB has a webpage where you can track all of their Advice Memos on Handbook Rules Post-Boeing. Very helpful when you update your handbooks. Go to [www.nlr.gov](http://www.nlr.gov), then press News & Publications, then press Advice Memos, then click on the link to Recent Advice Memos Dealing with Handbook Rules

# NLRB Announces Its Rule Making Agenda

- May 22, 2019
- Joint Employer standard
- NLRB Election procedures
- Formation of Section 9(a) bargaining relationships in the Construction Industry
  - Under current law construction can withdraw from “prehire relationships” once a labor contract expires, unless the union can establish that it represents a majority—clarification of this standard and process is expected
- Access to Employer Property



# NLRB GC's Partial Wish List to Reverse Prior NLRB Pro Union/Employee Rulings

- **Joint Employment**
- **Protection for highly inappropriate conduct**
- **Rules for disrespectful conduct**
- **Rules for use of employer intellectual property**
- **Rules for cameras or recordings**
- **Rules for confidentiality in workplace investigations**
- **Organizing through employer email systems**
- **Off duty picketing**
- **Dues deductions after contract expires**
- **Rules that make it difficult for employees to stop dues**
- **Giving witness statements to union**
- **Discipline prior to initial bargaining**
- **Offensive social media postings**
- **Off hour access to workplace**
- **Scabby the Rat**
- **MANY MORE on his agenda**



wish list

# NLRB Narrows Scope of NLRA Section 7 Protection for Protected Concerted Activity

- ***Alstate Maintenance LLC (January 11, 2019)***
- NLRB reverses prior Board decision and holds that even if an employee states a gripe referencing coworkers through the plural pronoun “we”, it is not necessarily protected and may be a valid basis for discipline or discharge
- It also held that an individual complaint is not elevated to protected status simply because it is made to a manager in the presence of other employees



# NLRB Returns to Old Test for Independent Contractor Status

- ***Super Shuttle DFW (January 25, 2019)***
- NLRB returns to the traditional common law IC analysis and restores significance to a worker's "entrepreneurial opportunity" for financial gain in determining IC status
- The Board identified 10 factors to review in determining IC or employee status (see next slide)
- In a related development, NLRB Division of Advice issued a memo to its field offices finding that Uber drivers are independent contractors. April 16, 2019



# NLRB 10 Factors For IC Analysis



- **Extent of control which, by the agreement, the master may exercise over the details of the work**
- **Whether or not the one employed is engaged in a distinct occupation or business**
- **The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision**
- **The skill required in the particular occupation**
- **Whether the employer or worker supplies the instrumentalities, tools, and the place of work for the person doing the work**
- **The length of time for which the person is employed**
- **The method of payment, whether by time or by the job**
- **Whether or not the work is part of the regular business of the employer**
- **Whether or not the parties believe they are creating the relation of master and servant (employee)**
- **Whether the principal is or is not in business**

# NLRB Changes Precedent for Companies Acquiring Union Companies

- *Ridgewood Health* (April 3, 2019)
- Employers that purchase a union company without hiring all of the seller's employees can set their own terms and conditions without bargaining with the Union
- However, if the buyer indicates that it plans on hiring all of the seller's employees, or if it refuses to hire employees because of union animus, it must bargain with the union about initial terms and conditions.



# NLRB Rules That Employers Can Boot Union Organizers from Public Areas of Employer's Private Property

- *Pittsburgh Medical Center* (June 14, 2019)
- NLRB reverses four decades of precedent in ruling that an employer may prohibit nonemployee union organizers from accessing public areas on private property (in this case a public cafeteria in a hospital), so long as it does not allow other outside members of the public to solicit in such areas



# NLRB Approves Employer's Limiting Union Access to One of Its Stores

- *Fred Meyer Stores* (June 18, 2019)
- CBA with Union limited union visitation to one or two union representatives in the breakroom
- Union sent 8 agents into the store, some of whom fanned out to the store's selling floor
- Board held that the Company acted lawfully in directing union agents to leave the store and tell them to speak to employees in the breakroom
- The Company also cased some of the union agents to be arrested, but the decision did not address the arrest issue.



# NLRB Finds that Arbitration Agreement that Restricts Employee Access to NLRB is Unlawful

- *Prime Healthcare* (June 18, 2019)
- Unanimous ruling by 3 Republican and 1 Democrat Board members.
- The arbitration agreement did not explicitly prohibit workers from filing charges with the NLRB, but it interfered with that right due to the breadth of its language on what types of claims must go to private arbitration. A contract that makes arbitration the sole forum for all claims, including those handled by the NLRB or other administrative agencies, violate the NLRA.
- TIP: check you arbitration agreement to ensure that it doesn't preclude filing NLRB charges or other





# NLRB Eases Standard For Withdrawing Recognition from Union



- ***Johnson Controls*** (July 3, 2019)
- Complicated decision, but a good one for employers.
- Main elements:
  - Employer who has evidence that the Union has lost majority support may announce its intent to withdraw recognition at the expiration of the CBA (called an anticipatory withdrawal), and refuse to bargain for a successor contract
  - Union will not be able to file an unfair labor practice to block the anticipatory withdrawal based on claim that it had reacquired majority support by the time of anticipatory withdrawal
  - If Union wishes to challenge the withdrawal, it must file a petition for an election within 45 days of the announced withdrawal

# EEOC Developments



# Senate Approves Janet Dhillon to Chair EEOC on May 8, 2019

- Dhillon was in house counsel for several major corporations
- She should be a good choice for employers
- This gives the EEOC a quorum, allowing it to conduct business
- Questions: Will she proposed eliminating the pay data reporting? Will she support changing EEOC's position on LGBTQ coverage? Will she be more friendly to employers when it comes to enforcement and investigation tactics?



# EEOC Nets \$505M for Discrimination Claimants in 2018 Fiscal Year

- \$354M from settlements, conciliation and mediation
- \$53.5 from litigation in federal courts
- 27% increase from Fiscal Year 2017
- 30% increase in inquiries to the Commission, perhaps as a result of the #MeToo movement
- 50% increase in sexual harassment suits filed by EEOC
- Harassment prevention still at the forefront of the Commission's goals



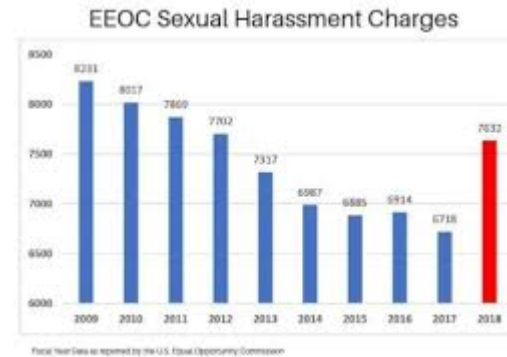
# EEOC 2018 Stats, continued

- Received 76,418 Charges (lowest number since 2006)
- Resolved 90,558 Charges
- Breakdown on basis for Charge:
  - 51.6% (39,469) were Retaliation
  - 32.3% (24,655) were Sex
  - 32.2% (24,605) were Disability
  - 22.1% (16,911) were Age
  - 9.3% (7106) were National Origin
  - 4.1% (3166) were Color
  - 3.7% (2859) were Religion
  - 1.4% (1066) Equal Pay Act
  - .3% (220) Genetic Information
- Filed 199 lawsuits: 117 individual, and 45 suits involving multiple victims



# EEOC Sexual Harassment Charges Higher Than Estimated

- FY 2018: there were 7609 charges filed
- FY 2017: there were 6696 charges filed
- 13.6% increase
- EEOC filed 66 lawsuits alleging workplace harassment, with 41 of them alleging sexual harassment
- HR reps report to EEOC that there has been a significant increase in sex harassment complaints
- Reasonable cause findings in harassment charges spiked to nearly 1200 during the FY, a 23.6% increase
- Increased prevention focus by employers the best way to change this trend



# EEOC Working With Employers to Find Solutions to Rise in Sex Harassment Claims

- #Me Too Movement did not make more harassment occur
- “It made employees realize that they could talk about it and report it and that something would change.” EEOC Commissioner Charlotte Burrows on February 21
- EEOC working with industry leaders to work on a solution
- Note: It appears Trump will nominate Burrows for another term



# EEOC Convenes Industry Leaders Roundtable on Harassment

- On March 20, EEOC Convened an “Industry Leaders Roundtable Discussion on Harassment Prevention”
- Purpose was to better understand the needs of workers and employers in their industries and the wide range of solutions to prevent workplace harassment
- Only one representative from the construction industry, Chief Legal Officer for National Association of Homebuilders.
- Written statements from participants can be found at [https://www.eeoc.gov/eeoc/task\\_force/harassment/3-20-19/](https://www.eeoc.gov/eeoc/task_force/harassment/3-20-19/)







# Trump to Nominate Keith Sonderling to Open Republican Seat on EEOC

- Sonderling, former management labor attorney, is currently with Wage and Hour Division, and was the Acting Administrator while waiting for Cheryl Stanton's confirmation
- Under his leadership, WHD issued three Proposed Rule Changes (See WHD slides)



# Wage and Hour Division Developments



# DOL Wage and Hour Division Announces New Compliance Assistance Tool

- On February 7, 2019, DOL announced that its Wage and Hour Division launched an enhanced electronic version of the **HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT (FLSA)**
- Simple and mentions most of the basic rules that all employers need to know about



# New Overtime NPRM Issued By DOL on March 7, 2019—Here we go again!!

- Published in Federal Register week on March 22--this is a **proposed** rule, with 60 day comment period
- DOL says it hopes to issue a final rule by January 2020
- Changes minimum salary threshold from \$455 per week to **\$679 per week**, which is equivalent to **\$35,308 per year**
- Changes total compensation requirement for “highly compensated employees” (HCE) from current level of \$100,000 to **\$147,414 per year**
- Allows employers to use non-discretionary bonuses and incentive payments to satisfy up to 10% of the standard salary level
  - Payments must be made on an annual or more frequent basis
  - Catch up payment is also allowed in the NPRM
- A commitment to conduct a periodic review to update the salary threshold, with notice and comment rulemaking



# Overtime NPRM, cont.



- No changes in overtime protections for police officers, fire fighters, paramedics, nurses, laborers including non-management production line employees, non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremens, and construction workers
- No changes in job duties test
- No automatic adjustments to the salary threshold
- DOL says it will make more than 1M more workers eligible for overtime

# SHRM's Comments About the NPRM

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- SHRM filed its comments on May 21—the deadline for comments
  - Rescind the 2016 rule—the court challenge is still pending
  - SHRM agrees with the proposal to set a single, nationwide salary threshold for exempt status and agrees with the increase to \$679 per week or \$35,308 annually
  - The increase for the Highly Compensated Employee (HCE) exemption (from \$100,000 to \$147,414 annually) is **too high**, according to SHRM
  - SHRM backs the proposal to include nondiscretionary bonuses toward the minimum salary level, up to 10%, but suggests that all types of bonuses should be acceptable
  - It agrees with no automatic adjustments, and not varying salary thresholds by geographic area
  - It supports the decision to propose no change in the duties test
  - It asked DOL to provide at least 120 days after a final rule for implementation



# Other Comments



- Worker Advocacy Groups and Plaintiff's lawyers blasted the rule
  - Worker Groups: the \$47,486 threshold in the 2016 rule was the right number
  - Plaintiff's lawyers (NELA) it should be at least \$61,152.10 (the median salary level for American workers)
  - Small Business Groups complained that they won't be able to afford it, and will have to reduce workers. One proposed \$27,000 as fair
  - Attorney Generals in 15 states are discussing filing a lawsuit to block the rule. Instead of one million workers, they want four million workers to get a raise in salary



# Wage & Hour Division Publishes NPRM on Regular Rate—Should be Favorable for Both Employers and Employees

- On Friday, March 29, WHD published a proposed rule to clarify and update the regulations governing regular rate requirements for the first time in more than 50 years
- Among subjects covered in the proposed rule are the:
  - Cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services
  - Payments for unused paid leave, including paid sick leave
  - Reimbursed expenses, even if not incurred “solely” for the employer’s benefit
  - Reimbursed travel expenses that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System and that satisfy other regulatory requirements
  - Discretionary bonuses, by providing for additional examples and clarifying that the label given to a bonus does not determine whether it is discretionary
  - Benefit plans, including accident, unemployment, and legal services; and
  - Tuition programs, such as reimbursement programs or repayment of educational debt
  - Other forms of compensation, including payment for meal periods, “call back” pay, and others

# DOL Issues NPRM on Joint Employer Status Under the FLSA—No April Fool Joke!!

- On April 1, DOL announced its intent to issue a NPRM on Joint Employer Status Under the FLSA
- It will propose a clear, 4 factor test, based on well established precedent that would consider whether the potential joint employer actually exercises the power to
  - Hire or fire the employee;
  - Supervise and control the employee's work schedules or conditions of employment;
  - Determine the employee's rate and method of payment; and
  - Maintains the employee's employment records
- It also sets out a set of 9 examples for comment that would further help clarify joint employer status
- CDW recently sent comments to DOL, approving most of rule, with some suggested modifications
- More info available at [www.dol.gov/whd/flsa/jointemployment2019](http://www.dol.gov/whd/flsa/jointemployment2019)

# Wage and Hour Division Nominee, Cheryl Stanton, Finally Approved by Senate April 10

- Cheryl was nominated in September of 2017
- Former management labor attorney, then head of South Carolina state employment agency
- She is already under fire for taking away enforcement authority from all of her subordinates in WHD while she reviews pending actions



# Wage Hour Division Issues Opinion Letter Confirming that Gig Workers For A Virtual Marketplace Platform Company are Independent Contractors

- April 29, 2019
- Uses six factor economic realities analysis
  - 1. Nature and Degree of the potential employer's control
  - 2. Permanency of the worker's relationship with the potential employer
  - 3. Amount of worker's investment in facilities, equipment, or helpers
  - 4. Amount of skill, initiative, judgment, or foresight required for worker's services
  - 5. Worker's opportunities for profit or loss
  - 6. Extent of integration of the workers services into the potential employer's business
- The model presented by the unidentified business was unusually favorable to IC status
- Only applies to Fair Labor Standards Act status. No impact on other laws, particularly in states that use the ABC test: E.g., California

# Wage and Hour Division Announces New Website for Prevailing Wage Determination Data

- Should be more user friendly
- <https://beta.SAM.gov>



# WHD Has Been Issuing Numerous Opinion Letters to Employers

- This can be a great tool to procure an opinion about your pay practices
- If you get a favorable opinion, and all facts are accurate, it can be used as a defense in subsequent FLSA litigation



# OSHA Developments



**Occupational Safety  
and Health Administration**

U.S. Department of Labor

# Scott Mugno Withdraws His Nomination for OSHA head on Cusp of Senate Confirmation

- Former Fedex official withdraws his nomination on May 14
- He was expected to be an excellent choice from a business perspective
- He waited 19 months from his nomination to have decided he had enough
- Linked In Post by Mugno: “Today’s barriers to government service nearly prohibit serving our country. A dangerous sign of what is occurring today...The politics of safety is severely interfering with the safety of America’s workers. There is no excuse as safety could not be more bipartisan...The American people deserve better.”





# OSHA Renews Its Focus On Trenching and Excavation

- October 1, 2018, OSHA kicked off its National Emphasis Program on Trenching and Excavation
- The NEP requires OSHA area and regional offices to concentrate their enforcement resources on employers performing work involving trenching and excavation
- Compliance officers will initiate inspections under the NEP any time they observe an open trench or open excavation, regardless of whether a violation has been readily observed



# OSHA Back Tracks on Anti-Retaliation Guidance in the Recordkeeping Reg

- October 11, 2018
- OSHA issued compliance guidance that clarifies its position that the regs do NOT prohibit workplace safety incentive programs or post-incident drug testing
- Basically nullifies the prior position that caused so much confusion in the employer community
- Rate based incentive programs are OK
- Post Incident testing Ok, but consistency as applied to similarly situated employees will be important



# Trump Presidency Has Little Impact on Worker Safety Inspections

- OSHA conducted 32,020 inspections in fiscal year 2018, down only 1% from fiscal year 2017
- That number is higher than the final year of the Obama Administration
- The complaints by organized labor are not supported



# OSHA Issues Revisions to Electronic Recordkeeping Rule



- January 25, 2019
- OSHA eliminated the requirement for employers to electronically submit Forms 300 and 301 to OSHA. These must still be kept on site.
- It still requires the following employers to electronically submit form 300A (summary form) to OSHA annually:
  - Establishments with 250 or more employees and
  - Establishments with 20 to 249 employees in certain industries designated by OSHA
    - 75 or so industries listed in Appendix A to 29 CFR 1904.41
    - See : <https://www.osha.gov/laws-regs/regulations/standardnumber/1904/1904.41AppA>

# OSHA's Enforcement Heads Tout Their Pursuit of Workplace Safety

- Solicitor of Labor and OSHA: we aren't backing off from taking actions against safety and health violations
- 2019: site specific targeting program re-introduced
  - 3000 worksites on the list
  - Above average injury and illness rates or failure to file OSHA annual injury and illness summaries



# Safety Inspections Would Increase Under OSHA Spending Plan

- OSHA projects a 3.5% percent boost in 2020 over fiscal year 2018 inspections: 33,133 Inspections projected
- NOTE: Inspections of construction sites would account for about 50% of the fiscal 2020 visits according to OSHA's budget proposal



# General Department of Labor Developments



# DOL Adjusts Civil Money Penalties for FLSA, FMLA, and OSHA Violations



- Effective January 25, 2019
- FLSA: Maximum Penalty for repeat and willful increases from \$1964 to \$2014. Per employee affected
- FMLA Posting Requirement: Maximum penalty increases from \$169 to \$173
- OSHA maximum penalty for Serious, Other Than Serious, and posting violations increases from \$12,934 to \$13,260 for each violation
  - Same increase for failure to abate violations
  - Minimum and maximum penalties for willful violations increase from \$9,239 to \$9,472, and from \$129,336 to \$132,598
  - Maximum penalty for repeat violations increase from \$129,336 to \$132,598



# Dems Demand Secretary of Labor's Resignation



- Based on federal judge ruling that he and other prosecutors violated the law in hatching a plea deal with Miami hedge fund manager Jeffrey Epstein on teen sex trafficking charges
- Acosta was lead federal prosecutor for South Florida when he and state prosecutors reached a deal with Epstein's lawyers, allowing Epstein to avoid prosecution for federal sex trafficking charges related to an alleged sex ring in his Florida home. He served 13 months in prison on state prostitution charges.
- It appears to be more of the same in Dems efforts to remove all Republicans from public office
- Acosta says he welcomes a DOJ probe

# Top DOL Official Resigns After White House Probe

- Nicholas Beale, Secretary Acosta's right hand man, left DOL on May 31, 2019, after a White House investigation revealed that he mistreated staff, and misled administration personnel about progress on DOL policies and actions
- His replacement, Molly Conway, announced last week, on July 1, that she will also be leaving shortly



# Federal Contractor Poster Updated With Minor Changes—May 28, 2019

- NLRA Rights Poster required to be posted by federal contractors and subcontractors has been slightly modified
- New phone number to reach the NLRB, as well as contact information for individuals who are deaf or hard of hearing.
- Find the updated poster at <https://www.dol.ov/olms/regs/compliance/EO13496>



# Organized Labor Developments



# Union Negotiated Pay Hikes Bolt to Post-Recession High

- In 2018 the average first year wage increase was 3.4%
- This was substantially higher than the 2.7% first year wage increase in 2017.



# Union Negotiated First Year Wage Increases Up in 2019

- So far in 2019, as of July 1, 2019 reported first year wage increases average 3.3%
- Better than the 2018 average at this time last year, which was 3.1%

Salaries Employment Health Grievance Protection Law  
**COLLECTIVE BARGAINING**  
Process Negotiation Agreement Productive  
Working Hours Terms Rules Employer Union Wages Group  
Overtime Safety Establish Cost

Issues Healthcare Cost  
Representative Employment  
Limits Work Fair Salary  
Regulate Contract Participate

# Union Membership Down From Last Year According to BLS

- Overall percentage of American workers who belonged to a union in 2018 was 10.5%, down from 10.7% in 2017.
- In the private sector, only 6.4% of American workers belonged to a union in 2018 compared to 6.5% in 2017.
- Construction—17.1%



# Green New Deal Not Supported Some Members of Organized Labor

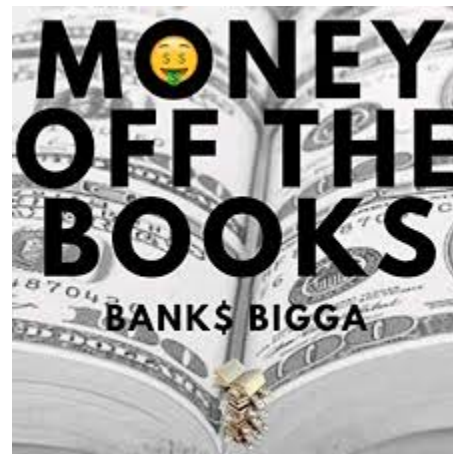
- LIUNA: The Green New Deal “is exactly how not to win support for critical measures to curb climate change”.
- Shift to renewable energy is a move away from an industry with union jobs.





# Carpenters Union Accuses Construction Industry of “Blatant Tax Fraud”

- According to Carpenters, the Construction industry costs taxpayers \$2.6 Billion a year by paying workers off the books and misclassifying workers as independent contractors
- Allegedly, there is an increase in contractors using labor brokers who pay construction workers off the books



# Bernie Sanders Campaign Recognizes Unionization of Its Staff

- A first in the history of presidential campaigns
- Majority of staff signed cards with UFCW Union, and campaign agreed to recognize the union



# Miscellaneous Tips and Homework

# Arbitration Tactics Can Backfire—Know the Advantages and Disadvantages of Same

- Epic Systems ruling by Supreme Court prompted many employers to adopt class action waivers in their arbitration agreements
- It can work, but keep in mind that the result may be that you will wind up defending numerous individual arbitrations, which can be very costly
- See Uber case
  - 12,501 drivers filed for arbitration
  - Cost for Uber to just initiate the proceedings with a required \$1500 filing fee would be \$18.7M

# Some TIPS on Employment Law Compliance

- 1. Update your employee handbook, with recognition of NLRB's new favorable attitude about rules
- 2. Implement an aggressive harassment prevention program, with buy in from upper management
- 3. Be aware of the employment laws of each state you do business in, or suffer the consequences
- 4. Comply with FMLA and train your supervisors to delegate these issues to subject matter experts
- 5. Review your arbitration agreement to ensure it complies with the many developments in this area in the last year
- 6. Train your supervisors on do's and don'ts of basic employment law
- 7. Know FLSA basics
- 8. Train your supervisors on basics of ADA—and make them work with HR on all issues
- 9. Understand how to deal with political discussions in the workplace—it will heat up
- 10. Develop a comprehensive workplace violence program

THE END

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