

MAYER • BROWN

# Employment Litigation & Counseling

A ROUND-UP OF 2017'S CASES AND NEW LAWS AFFECTING EMPLOYERS



# Table of Contents

<b>Introduction .....</b>	<b>2</b>
<b>January 2017.....</b>	<b>4</b>
<b>February 2017.....</b>	<b>9</b>
<b>March 2017.....</b>	<b>16</b>
<b>April 2017.....</b>	<b>21</b>
<b>May 2017 .....</b>	<b>25</b>
<b>June 2017 .....</b>	<b>29</b>
<b>July 2017 .....</b>	<b>33</b>
<b>August 2017 .....</b>	<b>36</b>
<b>September 2017 .....</b>	<b>40</b>
<b>October 2017 .....</b>	<b>44</b>
<b>November 2017 .....</b>	<b>47</b>

## Introduction

2017 saw a number of developments in employment law, including a flurry of state and local employment legislation; new court opinions on the interpretation of the Fair Labor Standards Act (FLSA) and other federal statutes (including the whistleblower provisions of the Sarbanes-Oxley Act); and the US Supreme Court's deliberation about the enforceability of employment arbitration agreements. These developments, among others, were described over the past year in Mayer Brown's monthly US Employment Litigation Round-Ups, and in this write-up, we highlight some key takeaways from 2017.

### Hiring Practices, Family Care Benefits and Minimum Wage Laws

Continuing a trend from prior years, more states and municipalities enacted legislation regulating employers' hiring practices, including prohibiting questions about prior compensation and restricting the use of credit and criminal history checks. Likewise, various jurisdictions expanded workers' rights to take family leave.

- **Questions about prior compensation and wage history.** In 2017, both New York City and California enacted laws banning private employers from asking job candidates about their salary history. This legislation tracks laws already in place in Delaware, Oregon, and Puerto Rico, as well as laws in Massachusetts and San Francisco that are due to take effect in 2018. Lawmakers in more than two dozen other states have proposed similar legislation, so this trend is likely to continue.
- **Background check laws.** California joined other states in enacting legislation that prohibits private employers from disqualifying job candidates based on their history of criminal convictions, absent an individualized assessment of a conviction's bearing on the candidate's qualifications. Washington DC enacted legislation that restricts the use of credit reports for hiring purposes, similar to the laws in several other states and municipalities, including California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, New York City, Oregon, Philadelphia, Vermont, and Washington state.
- **Family care laws.** Washington DC and Washington state enacted laws mandating paid parental leave, while California expanded its unpaid family leave law to employers of at least 20 employees. These laws come on the heels of New York state's newly effective paid family leave law. Other states and municipalities also enacted incremental family leave measures in 2017. For example, Georgia passed "kin care" legislation mandating employers with sick leave policies to allow employees to use that leave to care of sick family members.

### Federal Antidiscrimination Laws

While the US Supreme Court did not weigh in on discrimination-related employment matters in 2017, several federal appellate courts issued important employment-related decisions interpreting Title VII of the Civil Rights Act and the ADA.

- **Title VII.** In April, the Seventh Circuit became the first federal appellate court to hold that Title VII's prohibition on sex-based discrimination extends to discrimination based on sexual orientation.<sup>1</sup> The Seventh Circuit's decision came weeks after the Eleventh Circuit concluded that Title VII does *not* protect against discrimination

---

<sup>1</sup> See *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017).

based on sexual orientation,<sup>2</sup> consistent with the conclusions of most other federal appellate courts. Notably, the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ) have taken opposing stances on this issue, with the EEOC arguing that Title VII prohibits does prohibit discrimination based on sexual orientation, and the DOJ arguing the opposite.

Appellate courts also issued important decisions regarding race-based discrimination. The Second Circuit and Third Circuit held that a single racial slur could potentially form the basis for a hostile work environment claim under Title VII,<sup>3</sup> and a workplace harassment and retaliation claim under 42 U.S.C. § 1981.<sup>4</sup> Meanwhile, the Seventh Circuit affirmed dismissal of a Title VII racial harassment suit where the employer had taken timely action that was reasonably likely to prevent the harassment from occurring again—underscoring the need for employers to be proactive in addressing discrimination complaints.

- **ADA.** Several appellate courts issued opinions narrowing the scope of ADA claims based on absences from the workplace. In June, the Fifth Circuit held that, in most cases, employers have no obligation to allow open-ended or unlimited requests to work from home as a reasonable accommodation under the ADA.<sup>5</sup> The Tenth Circuit similarly held that a temporary employee was not entitled to take substantial time off work after receiving a cancer diagnosis because her physical attendance in the workplace was essential to her job.<sup>6</sup> And in September, the Seventh Circuit rejected the EEOC’s arguments that employers must accommodate definite, time-limited leaves of absence, holding that “[t]he ADA is an antidiscrimination statute, not a medical-leave entitlement.”<sup>7</sup>

## Impact of the Trump Administration

Since the beginning of the Trump administration a year ago, we have observed several changes in the executive branch’s approach to labor issues, and we expect more changes may come.

For example, in June, the Department of Labor (DOL) announced that it was reinstating the use of opinion letters, which the Obama administration discontinued in 2010. Also in June, the DOL rescinded two guidance letters that were issued during the Obama administration, including a July 2015 guidance aimed at curbing the misclassification of employees as independent contractors, and a January 2016 guidance calling for greater scrutiny of joint employment in complying with the FLSA and Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA).

Similarly, in December, the National Labor Relations Board (NLRB) overturned several rulings dating from the Obama administration, including its 2015 decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015). By overturning *Browning-Ferris*, the NLRB resurrected a narrower standard for joint-employer liability, making it more difficult to hold companies jointly liable (e.g., two affiliated entities, a franchisor and franchisee, or a contractor and subcontractor).

We can expect additional changes as more of President Trump’s nominees are appointed to key DOL and EEOC positions.

---

<sup>2</sup> See *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017).

<sup>3</sup> *Daniel v. T&M Protection Resources LLC*, No. 15-560-cv (2d Cir. Apr. 25, 2017).

<sup>4</sup> *Castleberry v. STI Group*, 863 F.3d 259 (3d Cir. 2017).

<sup>5</sup> *Credeur v. Louisiana*, 860 F.3d 785, 793 (5th Cir. 2017).

<sup>6</sup> *Punt v. Kelly Services*, 862 F.3d 1040 (10th Cir. 2017).

<sup>7</sup> *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 479 (7th Cir. 2017).

# US Employment Litigation Round-Up



## US Employment Litigation Round-Up for January 2017

27 January 2017

### Supreme Court to Resolve Circuit Split on Whether NLRA Prohibits Arbitration Agreements Containing Class Action Waivers

**Development:** On January 13, 2017, the Supreme Court granted *certiorari* in three cases involving the validity of the National Labor Relations Board's (NLRB) position that Section 7 of the National Labor Relations Act (NLRA) prohibits arbitration agreements that require employment disputes to be arbitrated on an individual basis—thereby precluding class and collective actions. The Supreme Court's ruling will resolve a circuit split that started with the *D.R. Horton* case, with the Second, Fifth and Eighth Circuits rejecting the NLRB's position and the Seventh and Ninth Circuits siding with the NLRB.

**Impact:** The three cases have been consolidated for argument. Ordinarily, a decision would be expected by the end of June, although that may depend on whether the Supreme Court, which has been operating without a ninth justice, is at full strength. Additional analysis of this issue can be found in a Mayer Brown Class Defense Blog [post](#).

---

### Fifth Circuit Allows Emotional Distress Damages in FLSA Retaliation Lawsuits

**Decision:** In a case of first impression, the Fifth Circuit held on December 19, 2016, in *Pineda v. JTCH Apartments, LLC* (No. 15-19032), that prevailing plaintiffs in retaliation cases brought under the Fair Labor Standards Act (FLSA) may recover emotional distress damages. The plaintiff sued the owner of the apartment complex where he lived to recover overtime pay for maintenance work he performed at the complex. After receiving a notice to vacate his apartment shortly after filing his FLSA claim, the plaintiff amended his complaint to add a retaliation claim. Although the plaintiff prevailed at trial on both claims, the district court refused to instruct the jury on, or allow the jury to award, emotional distress damages on the retaliation claim.

On appeal, the Fifth Circuit held that the district court erred when it refused to instruct the jury that the plaintiff could recover emotional distress damages on his retaliation claim. Noting that several other circuits allow prevailing plaintiffs to recover emotional distress damages for retaliation under the FLSA, the Fifth Circuit agreed that the "expansive" language of the FLSA allowing "such legal or equitable relief as may be appropriate" includes

the “compensation for emotional distress that is typically available for intentional torts like retaliatory discharge.” Accordingly, the Fifth Circuit remanded the case for a new trial on the plaintiff’s entitlement to emotional distress damages on his retaliation claim.

**Impact:** The Fifth Circuit joins the First, Second, Sixth, Seventh and Ninth Circuits in allowing FLSA retaliation plaintiffs to seek emotional distress damages. In addition to increasing the cost of defense by forcing the employer to investigate and litigate potentially complex and fact-intensive damages claims, the Fifth Circuit’s ruling increases the employer’s potential exposure because plaintiffs may now seek substantial emotional distress damages even when the underlying economic damages are limited.

---

## States and Municipalities Enact a Riot of Employer Rules as 2016 Draws to a Close

**Activity:** Late 2016 saw a flurry of employment legislation at the state and local levels across the country covering diverse topics ranging from the minimum wage to employer firearms policies. Some examples of notable state and local developments include the following:

- **Los Angeles’s “Ban-the-Box” Ordinance.** On December 7, 2016, Los Angeles Mayor Eric Garcetti signed a city ordinance banning some employers from asking job applicants about their criminal histories until after making a conditional offer of employment. Los Angeles joins San Francisco and New York in passing similar laws aimed at eliminating discrimination in the hiring process based on an applicant’s criminal record. Los Angeles’s ordinance took effect on January 22, 2017.
- **Ohio’s Minimum Wage Preemption and Firearms Legislation.** On December 19, 2016, Ohio Governor John Kasich signed a bill prohibiting the state’s municipalities from raising the minimum wage above the state rate, which increased from \$8.10 to \$8.15 per hour on January 1, 2017. The law, passed in response to a scheduled vote in Cleveland to increase the local minimum wage to \$15 an hour by 2020, became law along with bans on other proposed local restrictions on employers. About 22 states have passed similar preemption laws. On the same day, Governor Kasich also signed a bill prohibiting employers from restricting their employees from keeping permitted concealed-carry firearms in their vehicles while parked in employer parking lots. (Employers may still ban firearms in employer buildings.) Both laws are slated to take effect 90 days after the governor’s signature.
- **New York’s Revised Overtime and Minimum Wage Regulations.** On December 29, 2016, the New York State Department of Labor adopted a final rule increasing the salary level at which an employer can claim an employee is exempt from the state’s overtime regulations to between \$727.50 and \$825.00 per week, depending on the employer’s size and location. The new salary thresholds went into effect on December 31, 2016. In addition, as a result of a state law approved in March 2016, new minimum wage rates also went into effect on December 31, 2016, increasing the hourly rates to between \$9.70 and \$11.00, depending on the employer’s industry and location, with increases of up to \$15.00 as early as the end of 2018.

- **Washington DC's Paid Family Leave Law.** On December 20, 2016, despite opposition from Mayor Muriel Bowser, the Washington DC Council approved by a 9-4 vote a plan to guarantee eight weeks of paid leave to new parents, six weeks of paid leave for employees to care for sick family members and two weeks of paid leave for personal sick time. The act now moves to Mayor Bowser's desk for signature or veto, after which it would move to the US Congress for final approval. Given the complexity of implementation, it is projected that the first benefits would not be paid out until some time in 2020.

**Impact:** The profusion of state and local legislation at the end of 2016 likely will continue as federal regulations and enforcement are expected to decline with the Trump administration. Companies with employees in multiple areas of the country should be vigilant about monitoring developments at the state and local levels in jurisdictions where they employ workers to make sure that they comply with the emerging patchwork of state and local laws.

---

### **Eleventh Circuit Rejects EEOC Position, Finding That ADA Reasonable Accommodation Requirements Do Not Mandate Job Reassignment of Disabled Employees**

**Decision:** On December 7, 2016, in *EEOC v. St. Joseph's Hospital, Inc.*, the Eleventh Circuit rejected the position of the Equal Employment Opportunity Commission (EEOC) that the Americans with Disabilities Act of 1990 (ADA) requires employers to reassign qualified individuals to a vacant position as a reasonable accommodation so long as the individual is minimally qualified for the position. In its decision, the Eleventh Circuit held that even disabled employees in need of a reasonable accommodation must compete with other qualified candidates for the vacancy.

In *St. Joseph's*, the plaintiff was a nurse who needed to use a cane. The cane posed a safety hazard in the psychiatric ward where she worked, so she was given the opportunity to apply for other jobs, but without any preference due to her disability. After not obtaining any other position, her employment was terminated and the EEOC brought suit on her behalf. At summary judgment, the trial court held as a matter of law that the ADA does not mandate reassignment without competition and determined that there were genuine issues of material fact as to whether the plaintiff was entitled to reassignment to specific positions. After a jury trial that resulted in a defense verdict and a court-mandated mediation that did not result in a reinstatement, the EEOC appealed the trial court's summary judgment that the ADA does not mandate reassignment. On appeal, the Eleventh Circuit concluded that the ADA does not mandate noncompetitive reassignment because the statute states that reasonable accommodations "may include," among other things, "reassignment to a vacant position," and the use of "may" implies that reassignment will be reasonable in some circumstances but not others.

**Impact:** This decision adds to the existing circuit split regarding the question whether the ADA requires reassignment without competition. The Eleventh Circuit's decision is consistent with decisions from the Fifth and Eighth Circuits but is contrary to the decisions of the Seventh, Tenth, and DC Circuits, which agree with the EEOC's position. The Sixth Circuit has held that an employee needing reasonable accommodation is not entitled to "preferential treatment" in reassignment.

## EEOC Focuses on ADA Protections for Mental Health Issues

**Development:** The Equal Employment Opportunity Commission (EEOC) recently issued a resource document explaining the rights of workers with mental health conditions under the Americans with Disabilities Act of 1990 (ADA). The guidance reminds applicants and employees that the ADA prohibits discrimination and harassment at work because of a mental health condition like depression or post-traumatic stress disorder. The guidance also explains that the ADA may require that employers provide reasonable accommodations to employees with mental health conditions, including altered break and work schedules, quiet office space, specific shift assignments, permission to work from home or unpaid leave. In a related press release, the EEOC explained that the document is “part of an ongoing series of publications providing individuals with medical conditions or work restrictions with user-friendly explanation of their rights,” while noting that EEOC charges of discrimination based on mental health conditions are on the rise.

Shortly after issuing this resource document, the EEOC finalized regulations requiring all federal agencies to set as benchmarks that 12 percent of their workforce will consist of individuals with disabilities and 2 percent will be individuals with “targeted” or severe disabilities such as blindness, deafness and psychiatric disabilities. The regulations also require federal agencies to provide personal assistance services to employees who require such assistance in order to be at work or participate in work-related travel, including, for example, assistance with eating and using the restroom. In a related press release, EEOC Chair Jenny Yang said that, “[i]ncreasing employment rates for individuals with disabilities is a national priority for the federal government.”

**Impact:** These developments at the EEOC signal that disability discrimination will be an ongoing area of focus for the agency. Employers should review their disability and reasonable accommodation policies and practices to ensure that they comply with the most recent pronouncements from the EEOC.

---

## California Supreme Court Rules That On-Call Rest Periods Are Not Permissible

**Decision:** In *Augustus, et al. v. ABM Security Services, Inc.*, security guards filed a putative class action against their employer, claiming that it had failed to provide them with uninterrupted rest periods as mandated by California law because they were required to keep their radios and pagers on during rest breaks, to remain vigilant, and to respond to emergencies. The trial court awarded a class of more than 14,000 guards approximately \$90 million in damages for missed meal period premiums. The court of appeal reversed the decision, ruling that on-call rest periods do not violate California law.

A split California Supreme Court disagreed, holding that “state law prohibits on-duty and on-call rest periods. During rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time.” The Court explained that “a rest period means an interval of time free from labor, work, or any other employment-related duties.” Accordingly, an employer cannot meet its rest period obligations by requiring employees to remain on-call because the employee is forced to remain “vigilant[] and at the ready,” which indicates a “broad and intrusive degree of control.” The Court explained that its ruling does not



circumscribe “an employer’s ability to reasonably reschedule a rest period when the need arises.” Indeed, if a rest period is interrupted, an employer can provide another rest period to replace one that was interrupted or pay the premium for the missed rest break, but such interruptions “should be the exception rather than the rule.” In sum, California law requires employers to “relinquish any control over how employees spend their [rest] break time, and relieve their employees of all duties—including the obligation that an employee remain on call” because “[a] rest period, in short, must be a period of rest.”

**Impact:** The Court’s decision resolves ambiguity regarding the requirements of California’s rest period statutes and provides employers with more clarity regarding their obligations to employees. Because the decision likely presents significant practical challenges for many employers, particularly those in industries where employees must be able to quickly respond to emergencies, some creativity will be needed to ensure both compliance with the law and public safety at the same time.

---

### **New I-9 Form Takes Effect**

**Development:** Effective January 22, 2017, employers must use the revised version of Form I-9, Employment Eligibility Verification, released by the US Citizenship and Immigration Services (USCIS) in November 2016. Among other modifications, the revised, online form contains pop-up informational icons and error-checking capabilities.

**Impact:** Employers should keep in mind that despite the form’s new electronic capabilities, they are still required to keep hard copy signed and dated forms. Additional information about the new Form I-9 will be presented at Mayer Brown’s upcoming webinar *USCIS I-9 Form for Employment Eligibility Verification: What You Need to Know*.

If you have any questions about the matters addressed in this issue, please contact the authors [Grant Miller](#), [Richard Nowak](#), [Andrea Weiss](#), [Ruth Zadikany](#) or [Lori Zahalka](#) or the US Employment practice chairs [Marcia Goodman](#) or [John Zaines](#).

Learn more about our [Employment Litigation & Counseling](#) and [ERISA Litigation](#) practices.

Visit us at [mayerbrown.com](http://mayerbrown.com).

# US Employment Litigation Round-Up



## US Employment Litigation Round-Up for February 2017

15 March 2017

### **Ninth Circuit Holds That Including Liability Waiver in Background Check Disclosure Violates FCRA**

**Decision:** In *Syed v. M-I, LLC*, a case of first impression in the federal courts of appeals, the US Court of Appeals for the Ninth Circuit determined that a prospective employer willfully violates the Fair Credit Reporting Act (FCRA) when it procures a job applicant's consumer report after including a liability waiver in the same document as the statutorily mandated disclosure that the employer will procure the applicant's consumer report. The FCRA requires entities that want to obtain a consumer report for employment purposes make a "clear and conspicuous disclosure" in writing in a document that "consists solely of the disclosure" that a consumer report may be obtained for employment purposes. 15 U.S.C. § 1681b(b)(2)(A). The court reasoned that FCRA's use of the word "solely" was unambiguous and, therefore, the employer's inclusion of a liability waiver in the same document as the disclosure violated the statute. The court also held that the employer's violation was willful as a matter of law because the terms of the statutory provision at issue were not subject to a range of plausible interpretations but rather unambiguously barred the employer's interpretation that including a liability waiver was permissible. Accordingly, the court reasoned, the employer acted recklessly in including the waiver in the same document as the disclosure and a finding of willfulness was warranted.

**Impact:** Although the Ninth Circuit is the first federal appeals court to rule on FCRA's stand-alone disclosure requirement, employers inside and outside the Ninth Circuit should review their FCRA consumer report disclosure forms—whether in paper or online form—to ensure that they do not contain any extra language. This is particularly important given the Ninth Circuit's ruling that, as a matter of law, violation of the stand-alone disclosure requirements is willful. A finding of willfulness allows plaintiffs to recover statutory damages ranging from \$100-\$1,000 and punitive damages. Accordingly, successful class actions alleging willful FCRA violations can result in large damage awards.

---

### **Fourth Circuit Establishes New Joint Employer Test Under the FLSA**

**Decision:** In *Salinas v. Commercial Interiors, Inc.*, employees of a construction subcontractor filed a putative class action for unpaid overtime wages against the project's general contractor. The district court entered summary judgment in favor of the general contractor, holding that it was not the putative class members' employer and thus not liable.

The US Court of Appeals for the Fourth Circuit reversed, finding the general contractor liable for overtime wages because the contractor and subcontractor were not “completely disassociated” and therefore “jointly employed” the subcontractor’s employees. The appellate court articulated a two-step framework for determining whether two entities are joint employers, one that focuses on the relationship between the two putative employers: “courts must first determine whether two entities should be treated as joint employers and then analyze whether the worker constitutes an employee or independent contractor of the combined entity.” The first step of the framework determines “whether a purported joint employer shares or codetermines the essential terms and conditions of a worker’s employment” by considering (1) whether the two employers jointly determine, share or allocate the power to direct, control or supervise the workers; (2) whether the employers determine, share or allocate the power to hire or fire the workers or modify their terms or conditions of employment; (3) the degree of permanency and duration of the relationship between the two entities; (4) whether through shared management or ownership interest, one employer controls, is controlled by or is under common control of the other; (5) whether the work is performed on the premises owned or controlled by one or more of the joint employers; and (6) whether the two entities jointly determine, share or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll, providing workers’ compensation insurance, paying payroll taxes or providing the facilities, equipment or tools necessary to complete the work.

Applying these factors to the relationship between the contractor and subcontractor in *Salinas*, the appellate court determined that the two entities were joint employers as a matter of law. For its holding, the court relied upon the facts that plaintiffs performed nearly all of their work on the contractor’s jobsites; that the contractor provided the workers tools and other equipment necessary for their work; that the contractor actively supervised the plaintiffs’ work on a daily basis by having foremen walk the jobsite and check the plaintiffs’ progress; that the contractor required the plaintiffs to sign in and out with the contractor’s foremen upon reporting to and leaving the jobsite each day; that the contractor’s foremen told certain plaintiffs to work additional hours or additional days; that the plaintiffs wore labels and work clothes bearing the contractor’s name while working on the contractor’s sites; and that the subcontractor’s supervisors instructed the plaintiffs to tell anyone who asked that they worked for the contractor.

**Impact:** The Fourth Circuit’s expansive new joint employer test is less favorable to employers than tests articulated by other circuits. Employers in the Fourth Circuit should evaluate their relationships with staffing agencies, subcontractors, independent contractors and other entities with which they share workers to assess whether they could be deemed joint employers under this new test and should monitor the practices of those entities to ensure that they comply with applicable wage and hour laws.

---

### **Third Circuit Holds That ADEA Disparate Impact Claim Is Cognizable Based on Discrimination Against Subset of Protected Group**

**Decision:** On January 10, 2017, in *Karlo v. Pittsburgh Glass Works, LLC*, the US Court of Appeals for the Third Circuit held that a disparate impact case under the Age Discrimination in Employment Act (ADEA) may be based on discrimination against a subset of the protected group. The plaintiffs were former employees, all over the age of 50, whose employment was terminated as part of a staff reduction. They produced evidence that their former employer’s reduction in force policy disproportionately impacted employees older than 50. Because the policy favored ADEA-protected

employees between the ages of 40 and 49, adding those younger individuals into the statistical analysis masked the statistical evidence of a disparity. In awarding summary judgment to the defendant, the district court held that “plaintiffs’ fifty-and-older disparate-impact claim is not cognizable under the ADEA” and that the statistical evidence did not support an age discrimination claim based on the reduction in force policy’s impact on the entire class of protected employees (i.e., those over 40 years of age).

The Third Circuit reversed the district court’s summary judgment ruling in substantial part, holding that the 50-and-older subgroup claim was cognizable. In doing so, the appellate court relied on the fact that the ADEA makes it unlawful for an employer to adversely affect an employee's status “because of such individual's age.” The Third Circuit reasoned that the statutory language supports subgroup claims because (1) the focus is on age as the relevant protected trait and evidence that a policy disfavors older-than-50 individuals is probative of whether there is disparate impact based on age, and (2) the right to not be discriminated against on the basis of age is a personal rather than collective one.

**Impact:** The Third Circuit’s decision on this issue conflicts with decisions in the Second, Sixth and Eighth Circuits. The Third Circuit panel noted this conflict but determined that the policy considerations used to support the decisions in other circuits were not persuasive. Thus, employers with workers in the Third Circuit must now conduct more nuanced analyses when considering workforce reductions or the implementation of systemic employment policies in order to ensure their actions do not disparately impact sub-groups of age-protected workers.

---

## **President Trump’s Recent Labor-Related Nominations and Appointments**

President Donald Trump made several nominations and appointments in recent weeks that have the potential to shape the legal landscape for employers in the coming years.

### ***Secretary of Labor: Alexander Acosta***

On February 16, 2017, President Trump nominated Alexander Acosta for secretary of labor. Acosta currently is the chairman of the board of U.S. Century Bank and the dean of Florida International University’s law school. Acosta previously served as a member of the National Labor Relations Board, as assistant attorney general for the Civil Rights Division of the US Department of Justice, and as United States Attorney for the Southern District of Florida. Acosta is also a former law clerk to Supreme Court Justice (then Third Circuit Judge) Samuel Alito. If Acosta is confirmed, he would be the first Hispanic to serve in President Trump's cabinet.

**Potential Impact:** Although Acosta has ties to conservative groups such as the Ethics and Public Policy Center and the Federal Society, he has publicly defended the civil rights of Muslim Americans in his capacity as assistant attorney general and as dean of Florida International University’s law school. Additionally, several prominent labor unions have publicly supported Acosta’s nomination. Given his background and the support Acosta has garnered, it remains an open question whether the Department of Labor will continue its aggressive approach to protecting workers through new rules and enforcement actions with Acosta at the helm.

***Acting Chair of the EEOC: Victoria Lipnic***

On January 25, 2017, President Trump appointed current Equal Employment Opportunity Commission (EEOC) Commissioner Victoria Lipnic to serve as acting chair of the EEOC. Lipnic is currently serving her second term as EEOC commissioner, having been first nominated by former President Barack Obama and confirmed by the Senate in April 2010 and reconfirmed for a second term in November 2015. Before joining the EEOC, Lipnic was the assistant secretary of labor for employment standards from 2002-2009. In that role, Lipnic oversaw the Wage and Hour Division, the Office of Federal Contract Compliance Programs (OFCCP), the Office of Workers' Compensation Programs and the Office of Labor Management Standards.

**Potential Impact:** Lipnic is a Republican but was appointed by a Democratic president to serve as EEOC commissioner and has worked closely with her Democratic colleagues. Lipnic has yet to indicate whether under her leadership the EEOC will press forward with its use of new EEO-1 reports, set to take effect in March 2018, that would require employers to report detailed compensation data. In this regard, it is notable that while Lipnic was assistant labor secretary, the OFCCP issued the first regulations to evaluate compensation discrimination. During her tenure with the EEOC, Lipnic was one of two commissioners who voted against the EEOC's July 2015 decision that sexual orientation discrimination is prohibited gender discrimination under Title VII of the Civil Rights Act of 1964. She also voted against the EEOC's pregnancy discrimination guidance issued in July 2014.

***Acting Chair of the NLRB: Philip A. Miscimarra***

On January 26, 2017, President Trump named current National Labor Relations Board ("NLRB" or "the Board") member Phillip A. Miscimarra acting chairman of the NLRB. Miscimarra replaces former Chairman Mark Gaston Pearce, a Democrat who will continue to serve as a member of the Board. Miscimarra has been a member of the NLRB since August 2013, when he was nominated by former President Obama and confirmed by the Senate. Before joining the NLRB, Miscimarra was a senior fellow at the University of Pennsylvania's Wharton Business School and previously practiced employment law in Chicago.

**Potential Impact:** Miscimarra remains the lone Republican nominee on the Board. Miscimarra has routinely criticized Board decisions he deems as overly hostile to business, including the 2011 Specialty Healthcare decision (changing the standing for evaluating proposed bargaining units to make it easier for micro units to organize), the 2012 D.R. Horton decision (holding that arbitration clauses prohibiting class or collective actions are unenforceable) and the 2015 Browning-Ferris Industries decision (revising the standard for evaluating joint employer liability). There currently are two vacancies on the Board and the remaining two Board members are Democrats whose terms expire in 2018 and 2019. Accordingly, while Miscimarra's appointment will not have an immediate impact on recent NLRB decisions, the selection signals the Trump administration's plans to guide the NLRB back to being more employer-friendly as current Board members finish their terms and new members are appointed.

## **Seventh Circuit Strikes Down Employee’s Racial Harassment Suit Based on Employer’s Timely and Reasonable Steps to Address Complaints**

**Decision:** In *Cable v. FCA US LLC*, an employee filed suit for racial harassment under Title VII of the Civil Rights Act of 1964, alleging claims of a hostile work environment and retaliation based on five purported incidents of harassment. The district court granted the employer’s motion for summary judgment, holding, *inter alia*, that the employee could not establish a basis for employer liability where the alleged harasser was not the employee’s supervisor and the employer had taken timely action that was reasonably likely to prevent the harassment from recurring.

The US Court of Appeals for the Seventh Circuit affirmed, holding that the employee’s supervisor had immediately taken action to address the alleged incidents of discrimination by speaking with the perpetrator and advising him to correct his behavior, thereby promptly stopping the conduct from recurring, and by interviewing the employee’s co-workers regarding the incident. The Seventh Circuit explained that “[i]t would push the role of deterrence too far to blame [the employer] for a response which [was] within the realm of reasonableness at the time that [the employee had] reported” the discriminatory incident.

**Impact:** This case reaffirms the importance of employers being proactive in addressing complaints of hostile or discriminatory behavior in the workplace. Properly addressing a complaint can insulate an employer from liability for discriminatory conduct, even if the employer’s efforts to prevent the discriminatory conduct are not initially successful. It is therefore important for employers to have a well-formulated policy in place concerning action to be taken in the event that an employee lodges a discrimination, harassment or retaliation complaint—and to adequately train their workforce regarding that policy—to ensure that managers and supervisors promptly and effectively investigate and address the complaint.

---

## **New York’s Governor Signs Executive Orders Intended to Eliminate Wage Gap**

**Executive Orders:** On January 11, 2017, New York Governor Andrew Cuomo signed two executive orders intended to reduce the wage gap between men and women in New York.

Executive Order 161 prohibits all state entities from requesting or requiring an applicant to disclose his or her previous compensation or prior wage history until after a conditional offer of employment with compensation has been made. The order also provides that if a state entity is already in possession of an applicant’s prior compensation, it may not rely on such information in determining the applicant’s salary unless required by law or a collective bargaining agreement.

Executive Order 162 requires state agencies and authorities to include a provision in all state contracts, agreements and procurements that requires state contractors (and subcontractors) to provide a detailed workforce utilization report including equal employment opportunity information (i.e., race, gender and age) as well job title and salary for every employee working on the state contract.

The Governor’s Office of Employee Relations will provide training on the new executive orders and is also charged with monitoring employers to ensure compliance.

**Impact:** The new executive orders and Governor Cuomo’s signing of the comprehensive Women’s Equality Act in 2015 have strengthened pay protections for women employees and are examples of New York continuing to take a lead role in expanding protections for workers beyond those required by federal law. Accordingly, New York employers should carefully review their existing policies regularly to ensure that they comply with evolving state and local requirements.

---

### **Third Circuit Holds Employer’s Honest Belief of Employee FMLA Leave Misuse Is Sufficient to Defeat Retaliation Claim**

**Decision:** On January 31, 2017, in *Capps v. Mondelez Global, LLC*, the US Court of Appeals for the Third Circuit held that an employer’s honest belief that its employee misused Family Medical Leave Act (FMLA) leave time suffices to defeat an FMLA retaliation claim. The plaintiff suffered from periodic flare-ups of severe pain in connection with a medical condition. He was certified to take intermittent FMLA leave, and his healthcare certification form stated that he required “full bedrest” when experiencing flare-ups. On a day that he was scheduled to work, the employee called his employer to inform it that he would be taking a day of FMLA leave because he was experiencing leg pain. At approximately 6:00 p.m. that evening, he met friends at a local bar where he consumed alcohol. On his way home, he was arrested for driving under the influence (DUI) and was released from jail the following morning. The plaintiff was scheduled to work at 1:00 p.m. that day but once again called his employer to state that he would be using another day of FMLA leave because of leg pain.

Several months later, the employer learned through the local newspaper that the employee had been convicted of DUI. After investigating and determining that the employee used FMLA leave on the relevant dates and also on dates when the court docket indicated that he had court appearances, the company terminated his employment for violation of the company’s FMLA and Dishonest Acts policies. The employee then brought claims for FMLA interference and retaliation, as well as for violations of the Americans with Disabilities Act.

The Third Circuit affirmed the district court’s grant of summary judgment to the employer. With regard to the plaintiff’s FMLA retaliation claim, the appellate court relied for its holding on evidence from the employer that it held an honest belief that the employee had misused his FMLA leave, including its investigation of the docket in the plaintiff’s DUI court case. The Third Circuit held that the employee was unable to establish that the employer had a retaliatory intent or that the employee was denied a benefit to which he was entitled under FMLA.

**Impact:** The Third Circuit’s adoption of the honest belief rule in FMLA retaliation cases provides employers in that jurisdiction another way to protect against FMLA leave abuse. However, employers are advised to appropriately investigate and document suspicions of such abuse so that their honest belief defense is well supported with concrete evidence. It also is advisable for employers, where possible, to delay taking adverse action or denying leave based on suspicions of abuse until those suspicions have been adequately investigated and confirmed in order to help insulate the employer against FMLA retaliation or interference claims. This case also underscores the importance of policies providing for discipline or termination when employees provide false information in support of a request for leave.

If you have any questions about the matters addressed in this issue, please contact the authors [Grant Miller](#), [Richard Nowak](#), [Andrea Weiss](#), [Ruth Zadikany](#) or [Lori Zahalka](#) or the US Employment practice chairs [Marcia Goodman](#) or [John Zaines](#).

Learn more about our [Employment Litigation & Counseling](#) and [ERISA Litigation](#) practices.

Visit us at [mayerbrown.com](http://mayerbrown.com).



## US Employment Litigation Round-Up



### US Employment Litigation Round-Up for March 2017

06 April 2017

#### **Eleventh and Seventh Circuits Split on Extension of Federal Prohibition on Sex-Based Discrimination to Sexual Orientation**

**Decision:** On March 10, 2017, in *Evans v. Georgia Regional Hospital*, an Eleventh Circuit panel held in a 2-1 decision that Title VII's prohibition of sex-based discrimination does not prohibit discrimination on the basis of sexual orientation. Plaintiff Jameka Evans had alleged that Title VII protected her from discriminatory harassment and firing based on, first, her sexual orientation and, second, her gender nonconformity.

Judge Jose Martinez, writing for the majority, found that binding precedent compelled the panel to conclude that Title VII's prohibition on sex-based discrimination did not extend to sexual orientation. Following the lead of other courts, however, the panel found that gender nonconformity was a separate, and potentially viable, ground for a discrimination claim under Title VII and remanded the case with instructions to allow the plaintiff leave to amend her complaint to attempt to state a claim on that theory. In a concurring opinion, Judge William Pryor emphasized the distinctions between sexual orientation and gender nonconformity claims, arguing that someone who experiences one does not necessarily experience the other. Judge Robin Rosenbaum dissented, arguing that Title VII does cover sexual orientation, because one who experiences discrimination on the basis of sexual orientation necessarily experiences discrimination on the basis of gender nonconformity.

Only a few weeks later, on April 4, the Seventh Circuit ruled in an 8-3 *en banc* decision that Title VII does protect sexual orientation. In the case *Hively v. Ivy Tech Community College*, Plaintiff Kimberly Hively had alleged that the defendant community college did not hire her as a full-time professor because she is a lesbian. Judge Diane P. Wood, writing for the majority, found that US Supreme Court precedent, "as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex," allowed the panel to overrule previous circuit authority. In a concurring opinion, Judge Richard Posner acknowledged that the Seventh Circuit's decision would broaden the contours of Title VII as it was originally intended, but concluded that a broader interpretation was necessary given expanding societal concepts of sex and gender. The dissenting opinion, authored by Judge Diane Sykes, argued that the court was usurping Congress's constitutional authority and rewriting the statute.

**Impact:** While debate continues over the proper scope of Title VII’s prohibition of sex-based discrimination, the momentum appears to be building for greater protection for LGBT employees. The Seventh Circuit’s landmark *en banc* decision made it the first circuit court to find that Title VII protects sexual orientation. But the Seventh Circuit panel decision that it reversed and a recent Second Circuit panel decision reaching a similar conclusion both expressed misgivings about their circuits’ binding precedent. In addition to those prior circuit-level opinions, the US Equal Employment Opportunity Commission (EEOC) has taken a formal position that Title VII does prohibit sexual orientation discrimination. Several lower courts have taken the position as well. In addition, the laws of many states and localities expressly prohibit discrimination on the basis of sexual orientation. The Seventh Circuit *en banc* decision breaks new ground in federal law, but it may prove to be an incremental step in a groundswell of activity with the potential to reshape the prevailing interpretation of Title VII.

---

### **California Court of Appeal Requires Separate Rest Period Compensation for Commissioned Employees**

**Decision:** In *Vaquero v. Stoneledge Furniture LLC*, the California Court of Appeal held that employees who are paid solely on commission are entitled to separate compensation for rest periods mandated by California law and that employers violate this requirement by paying employees a guaranteed minimum hourly rate as an advance on commissions earned in later pay periods.

Under Stoneledge’s commission plan, sales associates were paid on a commission basis. The plan guaranteed sales associates “minimum pay” of at least \$12.01 per hour in commission in any pay period. If associates did not earn the “minimum pay,” Stoneledge paid the associate a “draw” against future commissions. The commission plan did not provide separate compensation for any non-selling time, such as time spent in meetings, in training and during rest periods. The sales associates, however, recorded this non-selling work time in an electronic timekeeping system. Two former employees filed a putative class action against Stoneledge alleging that the commission plan failed to provide paid rest periods as required under California law. The trial court granted Stoneledge’s motion for summary judgment on that claim and held that Stoneledge’s payment system specifically accounted for all hours worked and guaranteed that employees would be paid more than \$12 per hour for those hours.

The court of appeal reversed, explaining that California law requires employers to separately compensate employees for rest periods if an employer’s compensation plan does not already include a minimum hourly wage for such time and that this requirement applies to “any . . . compensation system that does not separately account for rest breaks and other nonproductive time,” including those for commissioned employees and employees paid by piece rate. The court of appeal went on to hold that Stoneledge’s commission plan did not allow employees to earn wages during rest periods because the formula it used to determine commissions did not include any component that directly compensated sales associates for rest periods. Rather, Stoneledge merely multiplied sales associates’ weekly sales by an applicable commission rate and paid that amount if it exceeded the minimum contractual rate. Sales associates falling into this category received the same amount of compensation regardless of whether they took rest breaks. For sales associates whose commission did not exceed the minimum rate in any given week, the company clawed back (by deducting from future paychecks) wages advanced to compensate for hours worked, including rest periods. The advances or draws against future commissions were not compensation for rest periods but rather, according to the court, “interest-free

loans.” The court of appeal stated that “taking back money paid to the employee effectively reduces either rest period compensation or the contractual commission rate, both of which violate California law.” Accordingly, the court of appeal held that Stoneledge’s commission plan did not separately compensate sales associates for rest periods as required by California law and that the trial court erred in granting it summary judgment.

**Impact:** This decision is the latest in a line of California cases in federal and state court holding that employers who use an alternative compensation scheme, such as compensation on a piece-rate only basis, must directly compensate employees for rest periods. This case is significant, however, because it is the first case to extend this reasoning to commission compensation plans. As a result, employers who use alternative compensation arrangements, including commission-based plans, should take this opportunity to evaluate their policies and practices against California’s most recent pronouncements on rest break requirements, as well as its minimum wage and overtime requirements.

---

### California District Court Holds That McDonald’s Is Not a Joint Employer with its Franchisee

**Decision:** On March 10, 2017, in *Salazar et al v. McDonald’s Corp., et. al.*, Case No. 3:14-cv-209, the Northern District of California held that, under California law, joint employer status cannot be based on an “ostensible” (as opposed to actual) agency relationship. The court thus resolved a question that it had left open in a prior summary judgment ruling in the case.

In *Salazar*, the plaintiffs sought to hold McDonald’s Corp. and McDonald’s USA LLC (collectively “McDonald’s”) liable for alleged violations of California wage laws at one of its Bay Area franchisee’s restaurants. They argued that McDonald’s was their joint employer together with the franchisee. The court had previously granted partial summary judgment to McDonald’s, holding that it did not “suffer or permit” plaintiffs to work or otherwise “engage” plaintiffs, nor did it directly or indirectly control the terms of their employment. However, the prior order left open whether, under California law, McDonald’s might be deemed a joint employer on the basis of an “ostensible” (or apparent) agency relationship between McDonald’s and the local franchisee. The court’s March 10 ruling answered that question in the negative, holding that ostensible agency is not a valid theory upon which to base joint employer status.

The decision turned on the definition of “employer” in the California Industrial Welfare Commission’s Wage Order 5-2001. The wage order defines an employer as one who “directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.” The plaintiffs argued that the phrase “through an agent” meant that McDonald’s could be deemed their joint employer if there was an ostensible agency relationship between McDonald’s and the local franchisee, even if there was no actual agency relationship. The court rejected this interpretation, noting that the wage order still requires that an employer “exercise control” over the workplace environment (which McDonald’s did not do). Even if the local franchisee was McDonald’s ostensible agent, the court determined that could not alone turn McDonald’s into a joint employer under California law.

**Impact:** The law of joint employer status has seen significant development in recent years. The National Labor Relations Board’s (NLRB) 2015 decision in *Browning Ferris Industries of California*, 362 N.L.R.B. No. 186 (Aug. 27, 2015), rejected the “direct and immediate” control test, holding that even the exercise of “indirect control” could support a finding of

joint employer status. That decision on its own creates added risk for franchisors who want to impose (and maintain) quality standards on their local franchisees but without assuming the attendant liabilities that the franchise model is in part designed to avoid. The plaintiffs' theory in *Salazar* threatened a massive expansion of joint employer status well beyond that contemplated by *Browning Ferris*: even *appearing* to have an agency relationship with the local franchisee could form the basis for joint employer status. Although the plaintiffs claimed that they were merely seeking to apply well-worn agency principles, the court recognized that California law could not be construed so expansively.

---

## **Ninth Circuit Holds in Favor of Arbitration, Finding Unconscionable and Unlawful Provisions Severable**

**Decision:** In *Poublon v. C.H. Robinson Co., et al.*, the Ninth Circuit reversed a decision by the District Court for the Central District of California that a dispute resolution clause in C.H. Robinson's incentive bonus agreement was unenforceable and held that the unenforceable portions of the contract could be severed without affecting the agreement's overall validity.

Poublon signed the agreement at issue in December 2011. The agreement included a dispute resolution clause requiring that any claims the employee might raise against the employer be mediated or arbitrated but allowing any claims brought by the company against the employee to proceed in court. The clause also prohibited class, collective and representative actions and contained a provision allowing any parts of the clause that were found to be illegal or void to be severed from the rest of the agreement without affecting its overall validity.

The company terminated Poublon's employment in early 2012. Shortly thereafter, she filed a class action alleging that she and others similarly situated were improperly classified as overtime-exempt employees. Poublon also asserted a claim under California's Private Attorneys General Act (PAGA). The district court denied CH Robinson Co.'s motion to stay proceedings, compel arbitration of claims arising out of Poublon's employment, and dismiss the class and representative claims, holding that the dispute resolution clause was not enforceable.

The Ninth Circuit reversed and held that although the portion of the dispute resolution clause that permitted the company, but not Poublon, to seek resolution of its claims in court was unconscionable, the "provision can be extirpated without affecting the remainder of the paragraph and is collateral to the main purpose of the contract, which is to require arbitration of disputes." The appellate court further held that the contract provision prohibiting class and collective actions was not substantively unconscionable but nonetheless was unenforceable under California and Ninth Circuit law to the extent that it prevented Poublon from bringing a representative PAGA action. The court held that clause, too, "could be limited without affecting the remainder of the agreement." The Ninth Circuit rejected a number of other procedural and substantive unconscionability challenges to the agreement that Poublon raised, including challenges to the agreement's confidentiality, sanctions and unilateral modification provisions as well as a challenge to the agreement's limitations on discovery.

**Impact:** The decision provides the Ninth Circuit's most recent word on the enforceability of many aspects of arbitration agreements in the employment context. Notably, however, the Ninth Circuit did not give any guidance as to the way in which the plaintiff's representative PAGA claim should proceed, including whether it should be stayed pending

resolution of the employee's individual wage claims in arbitration or arbitrated in the same forum with the individual claims. Thus, how the district court and the parties proceed with Poulbon's PAGA claim may be of interest to employers faced with similar scenarios. Moreover, to the extent that businesses are concerned with the possibility of arbitrating PAGA claims, they should assess whether their arbitration agreements are drafted to account for the Ninth Circuit's most recent decisions in this area.

---

## **US Supreme Court Articulates Deferential Standard for EEOC Subpoena Enforcement Review**

**Decision:** The US Supreme Court recently ruled in *McLane Co. Inc. v. Equal Employment Opportunity Commission* that appellate courts should use a deferential standard to review trial courts' decisions on whether to enforce US Equal Employment Opportunity Commission (EEOC) subpoenas. The Ninth Circuit decision at issue had reversed a trial court's refusal to enforce an EEOC subpoena seeking "pedigree information" (i.e., names, Social Security numbers and telephone numbers) for all individuals subjected to the job testing that formed the basis for the plaintiff's discrimination charge. In so holding, the Ninth Circuit used a *de novo* standard of review, contrary to the standard of review used by all other circuit courts of appeal to have addressed the issue. The Supreme Court held that the Ninth Circuit should instead have reviewed the trial court's ruling for abuse of discretion. Noting the longstanding practice for appellate courts to review district court decisions on the enforcement of administrative subpoenas for abuse of discretion, the Supreme Court explained that "Congress amended Title VII to authorize EEOC subpoenas against this uniform backdrop of deferential appellate review, and today, nearly every court of appeals reviews a district court's decision whether to enforce an EEOC subpoena for abuse of discretion. This 'long history of appellate practice' ... carries significant persuasive weight." Additionally, basic principles of institutional capacity counseled in favor of deferential review. "In the mine run of cases, the district court's decision whether to enforce a subpoena will turn either on whether the evidence sought is relevant to the specific charge before it or whether the subpoena is unduly burdensome in light of the circumstances. Both tasks are well suited to a district judge's expertise."

**Impact:** Given the Supreme Court's announcement of this deferential review standard, district courts' decisions concerning the enforceability of EEOC subpoenas are more likely to withstand challenges on appeal. The Court also provided, in *dicta*, guidance concerning the analytical framework with which the district court can evaluate the enforceability of EEOC subpoenas. For example, the Court explained that "[t]he decision whether evidence sought is relevant requires the district court to evaluate the relationship between the particular materials sought and the particular matter under investigation—an analysis 'variable in relation to the nature, purposes and scope of the inquiry.'" It further noted that "the decision whether a subpoena is overly burdensome turns on the nature of the materials sought and the difficulty the employer will face in producing them."

If you have any questions about the matters addressed in this issue, please contact the authors [Corwin J. Carr](#), [Grant Miller](#), [Richard Nowak](#), [Andrea Weiss](#), [Ruth Zadikany](#) or [Lori Zahalka](#) or the US Employment practice chairs [Marcia Goodman](#) or [John Zaimes](#).

Learn more about our [Employment Litigation & Counseling](#) and [ERISA Litigation](#) practices.

Visit us at [mayerbrown.com](http://mayerbrown.com).

# US Employment Litigation Round-Up



## US Employment Litigation Round-Up for April 2017

04 May 2017

### **Ninth Circuit: Employers Cannot Condition Reinstatement on Verification of Immigration Status**

**Decision:** On April 7, 2017, a unanimous Ninth Circuit Court of Appeals panel in *Santillan v. USA Waste of California, Inc.*, No. 15-55238, revived an age discrimination and retaliation lawsuit filed by garbage truck driver Gilberto Santillan. USA Waste had employed Santillan for 32 years when it decided to terminate him due to alleged disciplinary issues. Santillan filed a formal grievance under the governing collective bargaining agreement challenging his termination. The company settled the grievance and agreed to reinstate Santillan's employment, provided he passed a drug test, a physical exam and a criminal background check, and that he furnish documentation showing that he was eligible to work in the United States under the Immigration Reform and Control Act of 1986 (IRCA). Santillan passed the drug test, physical exam and criminal background check, but when he reported to work on the day of his return, he was unable to provide the requisite information for the federal government's I-9 employment eligibility verification form. After USA Waste refused to reinstate Santillan, he filed a civil suit, alleging wrongful termination based on age discrimination and retaliation. The district court granted summary judgment on both claims, holding that USA Waste had a legitimate, non-retaliatory reason for terminating Santillan's employment—namely, that he did not provide the necessary IRCA documentation.

The Ninth Circuit reversed the district court's grant of summary judgment, holding that USA Waste could not rely upon Santillan's inability to provide the requested documentation to rebut the presumption of discrimination and retaliation established by Santillan's *prima facie* case. The court reasoned first that the IRCA specifically exempted Santillan from having to provide the employment eligibility documents because he was a continuing employee who was being reinstated, rather than a new employee. The court further explained that conditioning Santillan's reinstatement upon proof of his immigration status in the settlement agreement contravened California public policy, which provides that "[a]ll protections, rights, and remedies available under state law ... are available to all individuals regardless of immigration status..." (emphasis added).

**Impact:** This decision serves as an important reminder about the circumstances under which employers can require employees to verify their eligibility to work in the United States. It also highlights the importance of ensuring that conditions placed on reinstatement of employment comply with the public policies of the relevant jurisdiction.

## Two Federal Appellate Courts Uphold Classification of Taxicab and Black Car Drivers as Independent Contractors

**Decisions:** On March 27, 2017, the Ninth Circuit Court of Appeals affirmed a district court’s grant of summary judgment in favor of AAA Cab Service, Inc., finding that the taxi company had properly classified the Phoenix airport cab driver plaintiffs as independent contractors under the Fair Labor Standards Act (FLSA) and Arizona law. *Iontchev, et al. v. AAA Cab Service, Inc., et al.*, No. 15-15789. Applying the “economic realities” test under the FLSA, the court concluded that the drivers were not economically dependent on AAA Cab because their leasing of taxicabs to earn a profit supported the conclusion that they were in business for themselves. In addition, the court found that AAA Cab exercised minimal control over how the drivers performed their work because it did not maintain attendance logs, did not set the drivers’ work schedules and did not require them to spend a certain number of hours at the airport. Rather, the drivers simply paid a flat leasing fee for their taxicabs and would then individually decide to work as much or as little as they wanted.

Reaching the same conclusion in a similar case, the Second Circuit Court of Appeals in *Saleem v. Corporate Transportation Group, Ltd. (CTG)*, No. 15-88, on April 16, 2017, affirmed the district court’s grant of summary judgment in favor of CTG and held that New York City-area black car drivers were properly classified as independent contractors under the FLSA and New York law. Also applying the “economic realities” test, the court concluded that the drivers were in business for themselves because they were permitted to work for direct competitors, they had to make significant capital expenditures to purchase a franchise and a vehicle to work in CTG’s system and they could choose when and how many hours they would work. Accordingly, even though the court recognized several indicia of an employment relationship—including that the drivers had to follow a CTG rulebook, CTG set fare rates and the drivers relied on CTG’s dispatch system—the court ultimately concluded that the majority of factors supported its determination that the drivers were independent contractors.

**Impact:** While both AAA Cab and CTG successfully established that their drivers were independent contractors, the decisions may be limited to the specific factual circumstances of those cases. Indeed, the Second Circuit emphasized that its decision should be read narrowly and warned that “[i]n a different case, and with a different record, an entity that exercised similar control over clients, fees and rules enforcement in ways analogous to CTG might well constitute an employer within the meaning of the FLSA.” Accordingly, while these decisions reflect the willingness of courts to uphold an independent contractor classification, all factors in the “economic realities” test will be considered in determining whether workers can lawfully be classified as independent contractors.

---

## New Legislation in New York City and Washington DC Prohibits Certain Pre-Employment Inquiries

**New York:** On April 5, 2017, the New York City Council passed an amendment to the New York City Human Rights Law that generally bans, with limited exceptions, New York City public and private employers from inquiring about a job applicant’s salary history during the hiring process or relying on a job applicant’s salary history in determining the applicant’s salary, benefits or other compensation unless the applicant discloses that information voluntarily and without prompting. The law is aimed at remedying historical pay discrepancies for women and minorities and provides penalties

for “intentional malicious violations” ranging up to \$250,000. New York City Mayor Bill de Blasio is expected to sign the bill, and the new law will go into effect 180 days thereafter.

Similar laws have been passed in Massachusetts (effective July 1, 2018) and Philadelphia (set to take effect in May 2017, though the law currently is the subject of a US Chamber of Commerce lawsuit aimed at blocking its implementation) and are under consideration in the US House of Representatives, San Francisco, Washington DC and various states.

**Washington DC:** On a related note, on March 17, 2017, the Fair Credit in Employment Amendment Act went into effect in Washington DC. This law amends the city’s Human Rights Act to prohibit employers from asking applicants, interns or employees to submit their credit information, either during the hiring process or during the course of employment. (There are exceptions for inquiries in connection with certain public employment positions, positions subject to security clearance requirements, positions at financial institutions that involve access to personal financial information, and for inquiries otherwise required by law or court order). The law also prohibits employers from taking any action based on credit information if it is disclosed by the applicant or employee. This law will allow fines of up to \$5,000 per violation. Several other states and municipalities limit the use of credit information in employment, including New York City, Chicago and Cook County, Illinois.

**Impact:** These laws are two recent examples of employment-related legislation enacted at the local level. With this increased legislative activity, it is important for employers to keep abreast of developments in all local jurisdictions in which they have employees.

New York City and Washington DC laws, for example, will likely require changes to the way that employers conduct their hiring processes. Questions about salary history and credit information should be removed from application materials, and human resources employees and others who participate in the hiring process should be retrained to ensure compliance with these laws. The restrictions in these laws should also be communicated to recruiters, search firms and other third parties acting on behalf of employers.

---

## **California’s Fair Employment and Housing Council Finalizes New Regulations Regarding the Use of Criminal History in Employment Decisions**

**Regulation:** California’s Fair Employment and Housing Council (FEHC) recently finalized and adopted new regulations restricting employers’ use of job applicants’ or employees’ criminal histories under the state’s Fair Employment and Housing Act (FEHA). Under the new regulations, employers may not use or consider a job applicant’s or employee’s criminal history when making an employment decision (such as hiring, promotion, training, discipline, layoff or termination) if doing so would have an adverse impact on a protected class (such as gender, race or national origin). Applicants and employees bear the initial burden to demonstrate that an employer’s decision has an adverse impact, after which the employer may show that the decision is (a) job-related; and (b) consistent with a business necessity. To meet this high standard, the employer must show that the decision is appropriately tailored by reference to several factors, including (1) the nature and gravity of the offense or conduct, (2) the passage of time and (3) the nature of the position held or sought. The employer’s defense only establishes a presumption, which the employee or applicant can



rebut by showing that a less discriminatory alternative exists to meet the employer's business necessity. The new regulations also require notice to the applicant or employee prior to an adverse decision based on criminal history, plus an opportunity to address any factual inaccuracies, and list certain types of criminal history that employers may never consider. The regulations are set to take effect on July 1, 2017.

**Impact:** Like the "ban the box" initiatives in California cities including Los Angeles and San Francisco, which restrict certain employers' use of criminal histories in the job application process, the new regulations signal an effort to eliminate discrimination based on an applicant's or employee's criminal history. Moreover, the California legislature is considering AB 1008, a bill that would codify substantially similar rules. In light of these efforts to restrict the use of criminal histories of job applicants and employees, employers should consider their current policies and practices and ensure that, if the policies and practices are necessary, they are appropriately tailored.

If you have any questions about the matters addressed in this issue, please contact the authors [Lori Zahalka](#), [Grant Miller](#), [Richard Nowak](#), [Ruth Zadikany](#) or the US Employment practice chairs [Marcia Goodman](#) or [John Zaines](#).

Learn more about our [Employment Litigation & Counseling](#) and [ERISA Litigation](#) practices.

Visit us at [mayerbrown.com](http://mayerbrown.com).

# US Employment Litigation Round-Up



## US Employment Litigation Round-Up for May 2017

9 June 2017

### Ninth Circuit Confirms That Prior Salary Alone Can Justify Pay Disparities between Genders

**Decision:** On April 27, 2017, a unanimous Ninth Circuit Court of Appeals panel in *Aileen Rizo v. Jim Yovino*, No. 16-15372, vacated a district court's ruling that prior salary alone cannot be used as a "factor other than sex" sufficient to establish an affirmative defense to a claim of pay inequity under the federal Equal Pay Act ("Act"). In *Rizo*, the plaintiff, a math consultant, sued the defendant county office of education ("County") for, among other things, a violation of the Act after she learned that the County paid her less money than it paid to her male colleagues. The County conceded that it did in fact pay the plaintiff less than male math consultants but asserted as an affirmative defense that the disparity was a result of a factor other than sex, namely that math consultants' salaries were based on the compensation they received from their previous employers. The district court denied the County's summary judgment motion based on this affirmative defense, holding that prior salary alone can never qualify as a "factor other than sex" because "a pay structure based exclusively on prior wages is so inherently fraught with the risk that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand even if motivated by a legitimate non-discriminatory business purpose."

The Ninth Circuit disagreed, holding that under *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982), prior salary alone can in fact be a "factor other than sex" under the Act if the defendant can show that its use of prior salary was reasonable and effectuated a business policy. The panel remanded the case to the district court for evaluation of the County's asserted business reasons for its use of prior salary alone to determine math consultants' compensation and determination of whether the County used prior salary reasonably in light of those stated purposes as well as its other practices.

**Impact:** This decision deepens the existing circuit split on the issue of whether prior salary alone is a "factor other than sex" for purposes of an affirmative defense to claims made under the Act. The Fifth, Tenth and Eleventh Circuits have ruled differently than the Ninth Circuit on this issue, holding that the Act bars employers from using salary history as the sole justification for a pay disparity. The Seventh Circuit has held that salary history could be a "factor other than sex," but it criticized the *Kouba* court for directing judges to weigh employers' business justifications for policies that set compensation based on employees' prior salaries. Given this circuit split, it is important for employers to stay abreast of the developments under Act, particularly if the Supreme Court decides to review the issue.

At the same time, state and local laws that specifically limit or prohibit employers' use of salary history in compensation decisions have proliferated, further underscoring the changing landscape concerning how pay equity is measured. For example, California state law bars private employers from using salary history as the only justification for a pay disparity. Additionally, Massachusetts, New York City, the District of Columbia and Philadelphia are among a number of jurisdictions that have laws barring employers from asking job applicants about their salary history, aiming to increase pay equity.

---

### **DC Circuit Affirms NLRB's Ruling That Employer's Restrictive Covenants Violate NLRA**

**Decision:** In *Minteq Int'l Inc. v. NLRB*, No. 16-1276 (D.C. Cir. Apr. 28, 2017), a panel of the U.S. Court of Appeals for the DC Circuit held that an employer's use of a noncompetition and nonsolicitation agreement was a mandatory subject of collective bargaining and, further, that the agreement violated employees' right to engage in concerted activity under the National Labor Relations Act (NLRA). In 2012, Minteq, a unionized employer, implemented a noncompete and confidentiality agreement for all new employees. The agreement prohibited employees from working for competitors, soliciting customers or suppliers to terminate their relationships with Minteq, or disclosing confidential information. The agreement also stated that it was not intended to affect the employees' at-will employment status. Following threatened enforcement of the noncompete against a former employee, the union filed an unfair labor practice charge claiming that (i) Minteq violated the NLRA by unilaterally implementing the agreement and (ii) the terms of the noncompete interfered with employees' rights to engage in concerted activity for their mutual aid and protection under NLRA Section 7. The NLRB found for the union on both claims, and Minteq appealed.

The DC Circuit held that Minteq had violated the NLRA by unilaterally implementing the noncompete agreement. It reasoned that because the agreement "effectively imposed a cost in lost economic opportunities on employees" and so had "a clear and direct economic impact on employees," it was a mandatory subject of collective bargaining and could not be unilaterally imposed.

The DC Circuit further held that the terms of the noncompete violated Section 8(a)(1) of the NLRA, which prohibits employment practices "that would reasonably tend to chill employees in the exercise of their statutory rights." Specifically, the court held that the nonsolicitation language would interfere with the employees' right to encourage boycotts in support of labor disputes. Further, the at-will language was held to contradict the collective bargaining agreement's requirement that nonprobationary employees could be discharged or disciplined only for "just cause" and so interfered with the employees' statutory rights. According to the DC Circuit, even if Minteq had properly bargained with the union over the noncompete, these clauses would have violated the NLRA.

**Impact:** *Minteq* suggests that unionized employers cannot unilaterally impose noncompete agreements or other restrictive covenants without going through the collective bargaining process. More broadly, however, *Minteq* represents a potential threat to *all* employers, as Section 8(a)(1) of the NLRA applies to employers generally, not just those with unionized workforces. At its broadest, *Minteq* might indicate that traditionally "boilerplate" language in noncompete agreements violates federal labor laws. To the extent that *Minteq* represents a trend,

employers should consider reviewing noncompete agreements (and other restrictive covenant agreements) to modify language that could be construed to inadvertently limit protected activities.

---

### **Florida & Texas Enact Laws Classifying Rideshare Drivers as Independent Contractors**

**Legislation:** On May 9, 2017, Florida Governor Rick Scott signed into law HB 221, which ensures that almost all rideshare drivers in Florida are properly classified as independent contractors under Florida state law. Consistent with the organizational practices of many rideshare companies, rideshare drivers in Florida will be independent contractors under the new law if four basic conditions are met: (1) they are not required to work specific hours; (2) they are permitted to work for other rideshare companies; (3) they may engage in another occupation or business; and (4) the rideshare company and the driver agree in writing that the driver is an independent contractor. In addition, the new law requires rideshare companies to carry insurance to cover injuries and property damage, conduct certain criminal background checks on drivers and adopt certain non-discrimination policies. The law takes effect on July 1, 2017.

Subsequently, on May 29, 2017, Texas Governor Greg Abbott signed a similar law applying to ridesharing companies. Under the Texas law, which preempts any local ordinances in Texas that had previously regulated ridesharing businesses, rideshare drivers will be independent contractors provided that: (1) they are not required to work specific hours; (2) they are permitted to work for other ridesharing services; (3) they can engage in any other occupation or business they desire; and (4) the territory in which they are allowed to provide rides is not limited by the ridesharing service. The law became effective upon its signing.

**Impact:** These new laws directly address the ongoing debate about a third category of employment for the so-called “gig economy.” They are a significant victory for rideshare companies, which in recent years have been the target of class action lawsuits alleging that they have misclassified their drivers as independent contractors and failed to pay them appropriate wages under state and federal law. Rideshare companies will now be able to rely on the statutes to demonstrate that they have properly classified their employees under Florida and Texas law.

---

### **Georgia Becomes Latest State to Pass “Kin Care” Law for Employees**

**Law:** On May 8, 2017, Georgia Governor Nathan Deal signed SB 201 into effect, requiring private employers with more than 25 employees to allow employees who work 30 hours or more in a week but do not have the option to participate in a stock ownership plan to use accrued sick leave to care for immediate family members. Importantly, the new law (and Georgia law generally) does not require employers to provide sick leave to their employees. Instead, the new law requires employers who already provide sick leave to allow their employees to use their accrued sick leave for an additional purpose. The law allows employers to cap the time that an employee uses to care for a sick family member at five days. It is set to take effect on July 1, 2017, and will phase out on July 1, 2020, if not extended.

**Impact:** Georgia is the latest in a line of states—including California, Illinois, Maryland and Washington—to pass laws allowing employees to use accrued sick leave to care for immediate family members. Sick leave laws affirmatively requiring employers to provide with employees with sick leave have been passed by states such as Arizona, California,

Connecticut, Massachusetts, Oregon, Vermont and Washington. In addition, cities such as Los Angeles, San Francisco, New York City, and the District of Columbia have passed sick leave laws with varying amounts of coverage. National employers with employees in multiple jurisdictions should monitor the emerging patchwork of sick leave laws and consider any additional steps necessary to stay in compliance.

---

## **Second Circuit Rejects Argument That a Single Use of a Racial Epithet Could Not Create a Hostile Work Environment**

**Decision:** In *Daniel v. T&M Protection Resources LLC*, No. 15-560-cv (2d Cir. Apr. 25, 2017), the Second Circuit Court of Appeals held that a supervisor's one-time use of a racial slur (in this case the "n-word") directed at a subordinate could potentially form the basis of a claim for a hostile work environment under Title VII of the Civil Rights Act of 1964. In so holding, the Second Circuit vacated a grant of summary judgment by a Southern District of New York court, rejecting the district court's interpretation of the Second Circuit's decision in *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) as eliminating the possibility that a one-time use of a racial slur could support a hostile work environment claim. The Second Circuit reiterated that *Schwapp* "did not foreclose the possibility that the one-time use of a severe racial slur could, by itself, support a hostile work environment claim when evaluated in the cumulative reality of the work environment." The panel declined, however, to "confront the issue of whether the one-time use of the slur '[expletive deleted]' by a supervisor to a subordinate can, by itself, support a claim for a hostile work environment" and emphasized that its holding was simply that the district court improperly relied on the Second Circuit's precedents when it rejected this possibility as a matter of law. The panel remanded the case to the district court for reconsideration.

**Impact:** This ruling underscores the difficulty of winning summary judgment for the employer when there is any use of racially derogatory language, as well as the need to properly investigate all claims of a hostile work environment, especially those alleging even a one-time use by a supervisor of a racial slur or other derogatory language. Further, employers should be able to demonstrate they regularly provide comprehensive training to inform all employees that any racially offensive language in the workplace is unacceptable.

If you have any questions about the matters addressed in this issue, please contact the authors [Lori Zahalka](#), [Corwin Carr](#), [Grant Miller](#), [Richard Nowak](#), or the US Employment practice chairs [Marcia Goodman](#) or [John Zaines](#).

Learn more about our [Employment Litigation & Counseling](#) and [ERISA Litigation](#) practices.

Visit us at [mayerbrown.com](http://mayerbrown.com).

# US Employment Litigation Round-Up



## US Employment Litigation Round-Up for June 2017

14 July 2017

### Second Circuit Upholds Prohibition on Workplace Recordings

**Decision:** In *Whole Foods Marketing Group, Inc. v. NLRB*, No. 16-0002 (2d Cir. June 1, 2017), the US Court of Appeals for the Second Circuit affirmed a National Labor Relations Board (NLRB) decision that Whole Foods’ policy prohibiting its employees from recording staff meetings or other workplace conversations without prior supervisor approval or the consent of each party involved violated the National Labor Relations Act (NLRA). Whole Foods’ policy was motivated by a concern that employees’ “expression of views” might be chilled out of fear that they might be secretly recorded.

In 2015, the NLRB found that Whole Foods’ policy violated Section 8(a) of the NLRA, which prohibits employers from “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of” their rights under Section 7 of the NLRA (which generally relates to employees’ unionization and collective-action rights). The NLRB reached this conclusion despite the fact that Whole Foods’ policy did not explicitly restrict any activities protected by Section 7 and was not promulgated in response to any protected activities. The NLRB found that employees might reasonably construe the policy to prohibit protected activity because surreptitious recording *sometimes* constitutes protected activity, and there was no “overriding employer interest” justifying the infringement on employees’ Section 7 rights.

The Second Circuit, in upholding the NLRB’s ruling as reasonable, noted that the sweeping nature of Whole Foods’ policy might reasonably cause an employee to think that it prohibited even protected recording activity. The court further indicated, however, that a more narrowly tailored policy—one that was “limited to controlling those activities in which employees are not acting in concert”—might have passed muster.

**Impact:** A “viral” video or audio recording by an employee—often presented out of context for maximum effect—can damage an employer’s business. As a result, employers might reasonably seek to institute similar anti-recording policies. Following the Second Circuit’s ruling, however, employers must be cautious and ensure that their policies are narrowly drawn so that they do not cover situations in which employees are “acting in concert” in the exercise of their Section 7 rights.

The NLRB’s opinion suggested that a more expansive policy might be permissible where there is an “overriding employer interest.” Hospitals or financial institutions, for example, might be permitted to implement more expansive anti-

recording policies in order to preserve the confidentiality of medical or financial information. Even in such cases, however, employers should ensure that their policies are tailored to those overriding interests.

---

### **New York State's Family Leave Law: Key Differences from the FMLA**

Though large employers are already likely to be familiar with the requirements of the federal Family Medical Leave Act (FMLA), New York State's new family leave legislation, the Paid Family Leave policy (PFL), has important differences of which employers should be aware, particularly because complying with the FMLA will not in all cases ensure compliance with the PFL. New York employees can begin using their new PFL benefits on January 1, 2018, and employers began payroll deductions to fund those new benefits on July 1, 2017. It is therefore important that employers quickly become familiar with New York's legislation to master the new requirements that it will impose. Key differences between the PFL and the FMLA include:

- **Coverage:** The PFL applies to all businesses that are not sole proprietorships, whereas the FMLA only applies to employers with 50 or more employees within a certain geographic scope.
- **Eligibility:** The PFL's benefits apply to employees who have worked for their employers for 26 consecutive weeks, if full time, or 175 total days, if part time. The FMLA has a different eligibility standard: it only applies to employees who have worked for their employer for 12 months and worked at least 1,250 hours in the preceding 12 months.
- **Compensation:** Under the PFL, employees are eligible for *paid* leave. The duration of that leave and the amount of payment will gradually increase through 2021. When the law becomes effective in 2018, eligible workers will be entitled to 8 weeks of paid leave at the lesser of 50 percent of their weekly wage or 50 percent of the state average weekly wage. By 2021, eligible employees will be entitled to paid leave for 12 weeks at the lesser of 67 percent of their weekly salary or 67 percent of the then-applicable state average weekly wage. The FMLA, by contrast, provides only for 12 weeks of unpaid leave.
- **Qualifying Leaves:** The FMLA only covers childbirth or a serious medical condition experienced by a family member who is a parent, child or spouse of the employee. The PFL, on the other hand, applies to a broader range of family members, including domestic partners, in-laws, grandparents and grandchildren, and allows leave for bonding with a new child or a newly adopted child. However, the PFL is in one way narrower in its scope than the FMLA: the PFL does not cover leave for the employee's own medical condition. However, employees experiencing medical conditions, including childbirth, will in many cases still be eligible for FMLA (depending on the size of their employer) and would then be eligible to tack on additional PFL leave for qualifying family members after FMLA leave has been used.
- **Paying for the Program:** Unlike leave under the FMLA, PFL leave will be funded through employee payroll deductions, which began on July 1, 2017. The New York State Department of Financial Services has issued guidelines regarding maximum wage withholdings to fund this program.

Employers with a workforce in New York are encouraged to seek the advice of counsel, insurers, human resources specialists and other trusted advisors to ensuring that their policies and practices are in compliance with the PFL.

---

### **Ninth Circuit Rules That Outside Attorneys Can Be Liable for Retaliation under the FLSA**

**Decision:** In *Arias v. Raimondo*, No. 15-16120 (9th Cir. June 22, 2017), the US Court of Appeals for the Ninth Circuit ruled that an undocumented worker can pursue retaliation claims under the Fair Labor Standards Act (FLSA) against his former employer's attorney for arranging to have him deported after he filed a wage-and-hour lawsuit. The employer's attorney arranged for US Immigration and Customs Enforcement officers to take plaintiff Arias into custody at a scheduled deposition for a wage-and-hour lawsuit Arias had filed against his employer and to then have Arias deported.

The Ninth Circuit held that the anti-retaliation provision in FLSA Section 215(a)(3) does not require that a defendant be the plaintiff's employer. The FLSA prohibits any "person" from retaliating, and "person" includes "legal representative" under the statute. The court also explained that "[t]he scope of the [FLSA's] anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." The court clarified that its interpretation of the FLSA is limited to retaliation claims under Section 215(a)(3) and "does not make non-actual employers like [attorneys] liable in the first instance for any of the substantive wage and hour economic provisions listed in the FLSA."

**Impact:** This decision provides additional protection from retaliation for undocumented workers, who are often afraid to file claims against their employers for wage-and-hour violations. It also puts employers and their attorneys on notice that retaliatory litigation tactics can have significant consequences, including additional litigation.

---

### **Department of Labor Withdraws Obama-Era Guidance Letters Regarding Employee Misclassification and Joint Employment**

**Development:** On June 7, 2017, the US Department of Labor (DOL) announced its withdrawal of two guidance letters issued during the Obama administration. The first, a letter issued in July 2015, was aimed at curbing the misclassification of employees as independent contractors. That document stated that most workers are employees under the broad definition of "employment" contained in the Fair Labor Standards Act (FLSA) and noted the potential ramifications of improper classification, such as not being paid minimum wage and overtime. The document also noted that correct classification has "critical implications" for the legal protections that workers receive, particularly low-wage workers.

The second letter was issued in January 2016 and provided guidelines for when companies are considered joint employers for the purpose of complying with the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA). The letter called for greater scrutiny of arrangements through which multiple companies might jointly employ workers.



In announcing the decision to withdraw the letters, the DOL said its decision “does not change employers’ legal responsibilities” under the FLSA and the MSAWPA and that the DOL “will continue to fully and fairly enforce all laws within its jurisdiction.”

**Impact:** The DOL’s decision to rescind these guidance documents does not affect or change controlling judicial decisions at the state or federal level on the subjects of employee classification and joint liability. The DOL’s actions may, however, signal that the current administration’s goals include reversal of federal guidance that it views as infringing on employer flexibility with regard to the structure of its workforce.

If you have any questions about the matters addressed in this issue, please contact the authors [Lori Zahalka](#), [Corwin Carr](#), [Ruth Zadikany](#) or the US Employment practice chairs [Marcia Goodman](#) or [John Zaines](#).

Learn more about our [Employment Litigation & Counseling](#) and [ERISA Litigation](#) practices.

Visit us at [mayerbrown.com](http://mayerbrown.com).

## US Employment Litigation Round-Up



### US Employment Litigation Round-Up for July 2017

09 August 2017

#### **Ninth Circuit Says Mortgage Underwriters Are Not Exempt from FLSA Overtime Requirements**

**Decision:** On July 5, 2017 in *McKeen-Chaplin v. Provident Savings Bank*, the US Court of Appeals for the Ninth Circuit held that mortgage underwriters are not properly classified as exempt under the Fair Labor Standards Act (FLSA) and that they are thus entitled to overtime compensation for hours worked in excess of 40 per week. In doing so, the Ninth Circuit joined the Second Circuit, and parted with the Sixth Circuit, in finding that the mortgage underwriters' primary job duty did not relate to their employer bank's management or general business operations, making the administrative employee exemption inapplicable.

**Impact:** The Ninth Circuit's decision deepens the split among the circuits regarding the proper classification of mortgage underwriters, an often litigated issue. Accordingly, employers of mortgage underwriters across the country should keep up with the current developments in this space.

---

#### **California High Court Grants PAGA Plaintiffs Broad Discovery Rights at Outset of Litigation**

**Decision:** The California Supreme Court has ruled that plaintiffs who file representative actions under California's Private Attorneys General Act of 2004 (PAGA) can seek the names and contact information of other employees in discovery prior to demonstrating any good cause or proving up the underlying merits of their case. In *Williams v. Superior Court* (Super. Ct. No. BC503806, July 13, 2017), the Court explained that, while individual cases may present a basis to limit or postpone a representative plaintiff's access to contact information, the default position is that such information may be sought immediately and that employee privacy rights do not prohibit disclosure of their names and contact information in discovery or require plaintiffs to demonstrate a compelling need for the information.

**Impact:** The Court's decision will make it more difficult for employers to resist providing employee names and contact information to plaintiffs early on in PAGA and class action cases, which may increase the cost of litigation. Employers can still make a showing of an undue burden in providing the information or can attempt to employ the *Belaire-West* process to allow employees to opt out of having their information provided in a lawsuit. However, the Court's pronouncement

that plaintiffs are “presumptively entitled” to the information will make it more likely that plaintiffs will prevail in obtaining the information.

---

### **Massachusetts Supreme Judicial Court Allows Medical Marijuana Users to Pursue Disability Discrimination Claims**

**Decision:** On July 17, 2017, the Massachusetts Supreme Judicial Court revived the claims of an advertising business’s employee and ruled that employees can sue for disability discrimination under state law if they are fired or otherwise disciplined for using medical marijuana. *Barbuto v. Advantage Sales & Marketing LLC & Joanne Meredith Villaruz*, Case No. SJC-12226. The Court held that because the use and possession of medical marijuana is permitted under Massachusetts law, employers must make an exception to their drug policies and permit an employee to use medical marijuana as a reasonable disability accommodation if alternative medications would be less effective. The Court explicitly rejected the employer’s argument that medical marijuana use is a *per se* unreasonable accommodation because it violates federal law, emphasizing that “[t]he only person at risk of federal criminal prosecution . . . is the employee.”

**Impact:** Although the Court overturned the dismissal of the employee’s disability discrimination claims, it emphasized that it was not ruling on the merits of those claims. Rather, the court explained that the employer would have the opportunity to show that allowing medical marijuana use as an accommodation would impose an undue hardship on its business. Despite this caveat, the Court’s ruling may have broad repercussions because it affirmatively recognizes disability protections relating to medical marijuana use even though such protections are not included in the state’s recently enacted medical marijuana laws. Given the Court’s ruling, employers in states where medical marijuana is legal should review their drug policies and their practices for disability accommodations to correctly account for the possibility that medical marijuana users may be entitled to accommodations that would permit them to continue use of medical marijuana while performing their job, if allowing such an accommodation would not impose an undue hardship.

---

### **Tenth Circuit Holds ADA Does Not Entitle Temporary Employee Diagnosed with Cancer to Leave of Absence**

**Decision:** In *Punt v. Kelly Services, et al.*, No. 16-1026 (July 6, 2017), the US Court of Appeals for the Tenth Circuit affirmed a summary judgment award in favor of two companies in an Americans with Disabilities Act suit brought by a temporary employee. The plaintiff’s assignment by a staffing agency to work as the receptionist for another business was terminated after she missed a significant amount of work while being tested for breast cancer and informed the staffing agency that, due to her cancer, she needed to take a full week plus an additional unknown amount of time off for more tests, appointments and radiation treatments. The panel determined that the employee’s request was not a “plausibly reasonable accommodation.”

**Impact:** Noting that the determination of whether a requested accommodation is reasonable must be made on the facts of each case, taking into consideration the particular individual’s disability and employment position, the Tenth Circuit

based its decision in this case on the temporary nature of the plaintiff's work assignment, evidence that the plaintiff's position as a receptionist made her physical presence at the workplace essential and the fact that the extent of the leave that would be necessary was uncertain. Employers should keep these factors in mind when making decisions about accommodations requested by employees, in addition to the court's guidance that physical attendance in the workplace is itself an essential function of most jobs and that an employee's request to work from home for an unknown duration is, as a matter of law, unreasonable if the employer has decided that physical presence at the workplace is an essential function of the position.

---

### **Fifth Circuit Holds That Regular Attendance Is an Essential Function of Most Jobs**

**Decision:** In *Credeur v. State of Louisiana*, No. 16-30658 (June 23, 2017), the US Court of Appeals for the Fifth Circuit held that in most cases employers do not have an obligation to allow open-ended or unlimited requests to work from home as a reasonable accommodation under the Americans with Disabilities Act (ADA). The court reasoned that "regular work-site attendance is an essential function of most jobs." The Fifth Circuit also emphasized that courts should "give greatest weight to the employer's judgment" when determining the essential functions of a job.

**Impact:** Beyond establishing that for employers in the 5th Circuit, indefinite work from home arrangements generally are not reasonable accommodations under the ADA, this case also serves as a reminder that employers should regularly review their job descriptions to ensure that they set forth all essential functions for each position, including regular attendance at the workplace where appropriate.

---

### **Third Circuit Holds That Single Slur Can Sustain Federal Workplace Harassment or Retaliation Claim**

**Decision:** On July 14, 2017, the US Court of Appeals for the Third Circuit held in *Castleberry v. STI Group*, No. 16-3131, that a plaintiff need only show that workplace harassment or retaliation was severe *or* pervasive—not both—to sustain a claim under federal law. Under that standard, the Third Circuit continued, even a single use of a racial epithet can suffice to state a claim. The Third Circuit reversed the district court's dismissal of the plaintiffs' complaint, thus reviving their claims that they were terminated after reporting an incident where a supervisor told them, when explaining a work assignment, that they would be fired if they "[N-word]-rigged" the job.

**Impact:** The Third Circuit's decision provides a more lenient standard for employees alleging harassment or retaliation and emphasizes the need for employers to provide training for all employees to avoid even isolated incidents of harassment in the workplace.

If you have any questions about the matters addressed in this issue, please contact any of the authors, [Lori Zahalka](#), [Corwin Carr](#), [Grant T. Miller](#), [Richard E. Nowak](#), [Andrea Maldonado Weiss](#) or [Ruth Zadikany](#), or one of the US Employment practice chairs, [Marcia Goodman](#) or [John Zaimes](#).

Learn more about our [Employment Litigation & Counseling](#) and [ERISA Litigation](#) practices.

## US Employment Litigation Round-Up



### US Employment Litigation Round-Up for August 2017

15 September 2017

#### Seventh Circuit Issues Ruling on Concrete Injury and Article III Standing in FCRA Action

**Decision:** On August 1, 2017, in *Groshek v. Time Warner Cable Inc.* (Case No. 16-3355), the US Court of Appeals for the Seventh Circuit held that the plaintiff job applicant failed to allege facts demonstrating a real, concrete appreciable risk of harm resulting from Time Warner’s alleged violation of the Fair Credit Reporting Act (FCRA). The plaintiff alleged that when he applied for a job with Time Warner, the company’s disclosure that it intended to obtain a consumer report about him violated FCRA because it did not appear in a stand-alone document but rather included extraneous information such as a liability release. In holding that the plaintiff lacked Article III standing to pursue his claim, the court rejected the plaintiff’s arguments that he suffered concrete informational and privacy injuries, noting that Time Warner did not withhold any information from the plaintiff and, because the plaintiff admitted that he signed the disclosure form, he could not maintain that he suffered an injury to his privacy. The court concluded that the plaintiff presented “no factual allegations plausibly suggesting that he was confused by the disclosure form or the form’s inclusion of a liability release, or that he would not have signed it had the disclosure complied with [FCRA].”

**Impact:** The Seventh Circuit’s recognition that a mere procedural violation of FCRA, without more, is not a concrete injury provides an important opportunity for employers to establish a defense against a plaintiff’s Article III standing. Further, the court’s rejection of the plaintiff’s argument that a bare procedural violation can constitute a sufficiently concrete informational or privacy injury provides employers in the Seventh Circuit with a significant defense to FCRA claims.

---

#### NLRB Upholds Employer Confidentiality Policy

**Decision:** On August 14, 2017, in an unexpected decision, the National Labor Relations Board (“NLRB” or “Board”) upheld an employer’s confidential information policy. In *Macy’s, Inc.*, 365 NLRB No. 116 (2017), the Board unanimously held that Macy’s confidentiality policy, which prohibited employees from divulging marketing plans, pricing strategies, social security and credit card numbers, and other confidential information, did not reasonably “chill” employees in the exercise of their right to engage in protected concerted activity under Section 7 of the National Labor Relations Act (NLRA). The Board emphasized that the NLRA does not protect employees who divulge information that their employer

lawfully may conceal and that sensitive information like social security and credit card numbers would be of no valid use to an employee in appealing to customers regarding employees' work-related concerns.

**Impact:** Given the substantial number of workplace policies that the NLRB has struck down in recent years, the Board's decision was welcomed by employers. While the employees and the NLRB's general counsel argued that Macy's policy was overbroad in light of recent Board precedent, the Board found that Macy's policy specifically defined the confidential information to which it applied and could not be reasonably construed to prohibit protected Section 7 activity. Given the Fifth Circuit's recent ruling reversing the Board's decision and upholding a policy requiring employees to maintain a positive work environment in *T-Mobile, Inc. v. NLRB*, No. 16-60284 (5th Cir. July 15, 2017), and the likely confirmation of additional Republican nominees to the Board in the near future, this decision may be the start of a trend.

---

### **District Court Orders EEOC to Reconsider Wellness Program Regulations**

**Decision:** On August 22, 2017, the federal district court for the District of Columbia ordered the Equal Employment Opportunity Commission (EEOC) to reconsider two regulations relating to the financial incentives that employers can offer to employees for participating in employer-sponsored "wellness" programs. The Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) prohibit employers from requiring employees to provide medical or genetic information. Prior to 2016, the EEOC had taken the position that the ADA and GINA prohibited employers from offering wellness program financial incentives if the program also required employees to provide medical or genetic information. According to the agency, such financial incentives were "coercive" and so rendered the disclosures involuntary. In 2016, the EEOC promulgated new regulations revising its interpretation of when disclosures of medical or genetic information were voluntary and allowing employers to provide incentives in connection with wellness programs that required the disclosure of ADA- or GINA-protected information, subject to certain limitations. The American Association of Retired Persons (AARP) filed suit challenging these regulations. The court ruled that the EEOC had failed to adequately explain and support the revised regulations and so held the regulations invalid, remanding to the EEOC for reconsideration of the regulations. The court declined to vacate the rules for the time being to avoid "disruption and confusion." *AARP v. EEOC*, 16-cv-2113 (D.D.C. Aug. 22, 2017)

**Impact:** For now, the EEOC's regulations remain in effect so wellness programs designed in reliance on them will be found to comply with the ADA and GINA. However, employers should continue to monitor developments in this area as the EEOC reconsiders its regulations because the EEOC may revise its view on the propriety of financial incentives associated with wellness programs.

---

### **Ninth Circuit Holds That Labor Code Prohibits Six Consecutive Days of Work Only within Set Workweek**

**Decision:** On August 3, 2017, in a published opinion, the US Court of Appeal for the Ninth Circuit affirmed dismissal of a proposed class action against Nordstrom Inc. in *Mendoza et al. v. Nordstrom Inc. et al.*, case number 12-57130. Employees Christopher Mendoza and Meagan Gordon claimed that Nordstrom required some of its employees to work

more than six consecutive days in a row in violation of California Labor Code sections 551 and 552. The Ninth Circuit, following guidance from the California Supreme Court on three certified questions, held that the labor code prohibited employers from requiring their employees to work more than six consecutive days only during a set workweek, not any six days in a row. On stipulated facts, neither of the lead plaintiffs worked more than six days in any one workweek, so dismissal was warranted.

**Impact:** While the Ninth Circuit’s decision, and the California Supreme Court opinion on which it is based, provide some much needed clarity on the application of the day of rest requirement, employers likely will continue to see actions arising out of the requirement when appropriate class representatives can be found. California employers therefore should ensure that their scheduling policies comply with Labor Code sections 551 and 552.

---

### **California Court of Appeal Upholds Car Dealership’s Arbitration Clause over the California DLSE Process for Unpaid Wages**

**Decision:** On August 21, 2017, in *Oto, LLC v. Ken Kho*, the California Court of Appeal for the First Appellate District (Court of Appeal) upheld a mandatory arbitration agreement, reversing the trial court’s determination that the agreement was substantively unconscionable because it deprived the employee of the advantages of a relatively quick, inexpensive method for resolving wage claims using the California Labor Commissioner’s hearing procedure without providing an accessible and affordable alternative. The plaintiff auto mechanic signed an “Employment At-Will and Arbitration” agreement three years into his employment. The agreement was drafted in seven-point font in one long and dense paragraph and called for the parties to agree to arbitrate their disputes before a retired superior court judge under ordinary pleading, discovery and evidence rules. After signing the agreement, the employee filed a wage claim with the California Division of Labor Standards Enforcement (DLSE). In response, the employer filed a petition to compel arbitration in court. The Court of Appeal upheld the arbitration agreement because it was not both procedurally *and* substantively unconscionable. The court held that the arbitration agreement was procedurally unconscionable to an “extraordinarily high” degree because it was presented to the employee years after his employment commenced on a take-it-or-leave-it basis and because it contained legalistic language that was set in a small font within a single block. However, the agreement was not *substantively* unconscionable because the arbitration clause was not one-sided and did not overly favor the dealership given that all claims between the parties were subject to arbitration, and the employer would pay for the arbitration.

**Impact:** The Court of Appeal’s opinion will be helpful to employers seeking to arbitrate wage claims brought before the DLSE. The court’s decision also reinforces the need for employers to confirm that both the manner in which arbitration agreements are drafted and presented to employees is fair and enforceable. Given the ever-changing legal landscape in this area, employers should regularly review and revise their arbitration agreements to reflect the recent case law, which often, as here, provide concrete guidance on what type of language and substantive provisions are enforceable.

If you have any questions about the matters addressed in this issue, please contact any of the authors, [Lori Zahalka](#), [Corwin Carr](#), [Grant T. Miller](#), [Richard E. Nowak](#) or [Ruth Zadikany](#), or one of the US Employment practice chairs, [Marcia Goodman](#) or [John Zaines](#).

Learn more about our [Employment Litigation & Counseling](#) and [ERISA Litigation](#) practices.

Visit us at [mayerbrown.com](http://mayerbrown.com).



# US Employment Litigation Round-Up



## US Employment Litigation Round-Up for September 2017

12 October 2017

### Texas District Court Invalidates Obama-Era DOL Overtime Rule

**Decision:** On August 31, 2017, the federal court for the Eastern District of Texas invalidated an Obama-era overtime rule issued by the US Department of Labor (DOL) that had increased the minimum salary needed to qualify for the “white collar” exemption from overtime rules. The minimum salary had been increased under the rule from \$23,600 per year to just over \$47,000 per year. In addition, the rule increased the salary threshold for highly compensated workers from \$100,000 to about \$134,000. The case consolidated lawsuits brought by 21 states and dozens of business groups, and the court ruled that the “significant increase” in the salary threshold was simply too high, effectively substituting a “salary-level” test for the test intended by Congress, which looks at an employee’s job duties.

**Impact:** Following the court’s ruling, the Trump administration is expected to propose a more modest increase in the salary threshold or to redefine the “duties” test that employees must meet to qualify for the exemption. Employers should monitor future developments at the DOL, which may require employers to review the status of their exempt and nonexempt employees.

---

### Department of Labor Holds That SOX Whistleblower Provision Applies Extraterritorially

**Decision:** On August 29, 2017, the Administrative Review Board (ARB) of the US Department of Labor (DOL) held in *Blanchard v. Exelis Systems Corp.* (ARB No. 15-031, ALJ No. 2014-SOX-20) that the whistleblower provisions of the Sarbanes-Oxley Act of 2002 (SOX) apply to conduct that occurs outside the United States. Gary Blanchard was a US national hired by Exelis Systems Corp. to work as a security supervisor under a contract that Exelis held with the US Department of Defense (DOD) at the Bagram Air Force Base in Afghanistan. Blanchard reported to Exelis human resources personnel at both the base and at the company’s Colorado offices allegations that his supervisors engaged in violations of DOD security policy and mail and wire fraud at the base. Shortly after Blanchard made these reports, an Exelis supervisor interrogated and threatened him, held him against his will and demoted him. Three months later, Exelis terminated Blanchard’s employment.

Blanchard filed a complaint with the Occupational Safety and Health Administration (OSHA) for violation of SOX's whistleblower protection provision. OSHA, and subsequently a DOL administrative law judge, concluded that SOX did not protect Blanchard because the statute did not extend extraterritorially. The ARB reversed, finding clear indications in the statute that Congress intended it to apply extraterritorially. Those indications include the fact that the whistleblower provision extends to "foreign private issuers" that are subject to US securities laws because they elected to trade in the United States and that SOX's anti-retaliation provision incorporates extraterritorial statutes into its protected activity provisions.

The ARB was careful to note that its holding did not extend to all foreign conduct of publicly traded foreign companies: "The misconduct of a foreign issuer/employer under the statute must still 'affect in some significant way' the United States." Blanchard had alleged "significant domestic connections" involving a US-based corporation submitting false claims to the US government involving US security and military operation on a US air force base and violations of domestic law, not the law of another foreign country.

**Impact:** This decision clarifies that SOX will apply extraterritorially so long as the reported misconduct affects the United States in "some significant way" and thus exposes certain employers to greater liability. (SOX is more troublesome than the False Claims Act, which has a higher causation standard, a materiality requirement and a narrower scope of adverse employment actions than SOX.) However, that limitation may provide a significant defense against application of SOX to international companies whose only connection is that they have stock that is publicly traded on a US exchange.

---

## **Ninth Circuit Rejects Department of Labor's FLSA Tip Credit Regulation, Creating Split with Eighth Circuit**

**Decision:** On September 6, 2017, in *Marsch v. J. Alexander's*, No. 15-15791, the US Court of Appeals for the Ninth Circuit rejected the US Department of Labor's (DOL) interpretive guidance on paying employees who earn tips the federal minimum wage for non-tipped work.

The Fair Labor Standards Act (FLSA) creates a special rule that allows employers to pay a "tipped employee" a reduced hourly wage if the employee "customarily and regularly receives more than \$30 per month in tips." In other words, employers can use the employee's tips as a credit toward the \$7.25 federal minimum wage. The *Marsch* case addressed a situation in which the employee worked a dual job (as both a server, for which he earned tips, and a janitor, for which he did not.) In 2016, the DOL provided guidance (the "80/20 rule") that the tip credit may not be taken for time spent by the employee on non-tipped duties, even if they are related to the tipped task, if the employee spends more than 20 percent of the hours worked performing these related duties. Accordingly, if a server spent more than 20 percent of his time on non-tipped tasks, such as making coffee, toasting bread and washing dishes, a tip credit would not apply to time spent performing those tasks.

The Ninth Circuit rejected the DOL's guidance, holding that it was both inconsistent with the FLSA and attempted to "create a de facto new regulation," noting that the "dual jobs regulation is concerned with when an employee has two [distinct] jobs, not with differentiating between tasks within a job." Thus, "if the employer has hired a person for one job

(such as waitress or counterman), but that job includes a range of tasks not necessarily directed towards producing tips, the person is still considered a tipped employee engaged in a single job.” In so ruling, the court expressly disagreed with the US Court of Appeals for the Eighth Circuit’s 2011 decision in *Fast v. Applebee’s International, Inc.*, which had deferred to the DOL’s guidance.

**Impact:** The Ninth Circuit’s decision marks a significant victory for employers who utilize the FLSA’s tip credit. Based on the court’s ruling, the 80/20 rule that essentially required employers to track and account for the time employees spend on tipped versus untipped tasks is inapplicable to employers in the Ninth Circuit. Nonetheless, employers must still assess whether their tipped employees have two different “jobs” or whether they are merely performing tasks associated with one job. If an employee spends a significant amount of time on non-tip-generating jobs, such as washing dishes, the employee may still claim that he has dual jobs (as a server and a dishwasher) and that a tip credit would not be applicable to the non-tipped job. Furthermore, given the split between the Eighth and Ninth Circuits, employers should tread carefully in this area.

---

### **Seventh Circuit Holds That Long-Term Leaves of Absence Are Not Reasonable Accommodations Required by the ADA**

**Decision:** On September 20, 2017, the US Court of Appeals for the Seventh Circuit held in *Severson v. Heartland Woodcraft, Inc.*, No. 15-3754, that “a long-term leave of absence cannot be a reasonable accommodation” under the Americans with Disabilities Act (ADA). The Equal Employment Opportunity Commission (EEOC) argued in *Severson* that a long-term leave qualifies as a required reasonable accommodation under the ADA when the leave is of a definite, time-limited duration; requested in advance; and likely to enable the employee to perform the essential functions of his job when he returns. The Seventh Circuit disagreed, ruling that “[t]he ADA is an antidiscrimination statute, not a medical-leave entitlement” and that an “[i]nability to work for a multi-month period removes a person from the class protected by the ADA.” The court also noted, however, that “intermittent time off or a short leave ... may, in appropriate circumstances, be analogous to a part-time or modified work schedule.”

**Impact:** Employers in Illinois, Indiana and Wisconsin now have a strong basis to argue that they are not required to accommodate employees with long-term leaves of absence under the ADA. However, employers should nonetheless exercise caution and stay apprised of any developments in this area because the EEOC’s position has not changed and courts in other jurisdictions have previously reached differing conclusions on this issue.

---

### **Third Circuit Holds That Claims for Title VII and ADA Violations Cannot Be Brought under Section 1983**

**Decision:** In *Williams v. Pennsylvania Human Relations Commission*, No. 16-4383 (3d Cir. Aug. 30, 2017), the US Court of Appeals for the Third Circuit held that civil rights claims for violations of Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA) cannot be brought under 42 U.S.C. § 1983 (Section 1983) because both Title VII and the ADA have their own “comprehensive remedial schemes” which “forestall” Section 1983 suits. Section 1983 allows litigants to sue state and federal actors and entities (or those acting on their behalf) for alleged civil rights

violations. However, since section 1983 does not include any of the administrative exhaustion prerequisites that a litigant must satisfy prior to filing suit under Title VII or the ADA, the Third Circuit reasoned that allowing such claims to proceed under Section 1983 would allow litigants to avoid those procedural requirements.

**Impact:** The Third Circuit joined the Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits, which have each previously ruled similarly as to Title VII claims, and the Seventh, Eighth, Ninth and Eleventh Circuits, which have each previously ruled similarly as to claims under the ADA.

If you have any questions about the matters addressed in this issue, please contact any of the authors, [Lori Zahalka](#), [Corwin Carr](#), [Grant T. Miller](#), [Richard E. Nowak](#) or [Ruth Zadikany](#), or one of the US Employment practice chairs, [Marcia Goodman](#) or [John Zaines](#).

Learn more about our [Employment Litigation & Counseling](#) and [ERISA Litigation](#) practices.

Visit us at [mayerbrown.com](http://mayerbrown.com).

# US Employment Litigation Round-Up



## US Employment Litigation Round-Up for October 2017

17 November 2017

### Tenth Circuit Reverses DOL Administrative Review Board and Dismisses Whistleblower Complaint

**Decision:** On October 17, 2017, the US Court of Appeals for the Tenth Circuit overturned the US Department of Labor Administrative Review Board's (ARB) decision that Cypress Semiconductor retaliated against a former employee for complaining that the company was unlawfully withholding information about its alternative compensation plan (*Dietz v. Cypress Semiconductor Corp.*, Nos. 16-1209 & 16-1249). In March 2016, the ARB upheld an Administrative Law Judge's finding that the employee had been constructively discharged in violation of Sarbanes-Oxley because his complaints reflected his reasonable belief that the company engaged in mail and wire fraud by withholding information about its alternative compensation plan. In a strongly worded opinion, the Tenth Circuit vacated the ARB's decision. The court emphasized that the federal mail and wire fraud statutes require "a conscious objective to deprive the victim of property" and the employee's proffered evidence was "woefully inadequate to support any belief that [the company] committed a fraud in order to deprive the employees of their property." Accordingly, because the employee failed to establish that he had made his complaints with a reasonable belief that the company had committed mail or wire fraud, his complaints were not protected activity under Sarbanes-Oxley.

**Analysis:** Sarbanes-Oxley protects whistleblower activity only when an employee "reasonably believes" that his or her employer has engaged in certain enumerated federal offenses. While an employee does not need to prove that every element of the alleged offense was actually satisfied, the employee must show that the at-issue complaint was based on a reasonable belief that an enumerated offense occurred or was occurring. In vacating the ARB decision, the Tenth Circuit emphasized that the facts known to the employee—including that the company provided training and explanations of its alternative compensation plan before implementing it—could not "reasonably be squared" with the elements of mail or wire fraud. Given the broad scope of Sarbanes-Oxley and other similar whistleblower protection statutes, employers should exercise caution to avoid unlawfully retaliating against an employee who makes a whistleblower complaint. However, the *Dietz* decision makes clear that Sarbanes-Oxley does not protect every employee who complains about any violation of the law. Rather, the employee must reasonably believe that the company's activity constitutes a violation of the alleged offense being reported for the complaint to qualify as protected activity.

### **Third Circuit Rules That Short Rest Breaks Are Compensable Time under the FLSA**

**Decision:** On October 13, 2017, the US Court of Appeals for the Third Circuit ruled that the Fair Labor Standards Act (FLSA) requires employers to compensate workers for breaks that are less than 20 minutes in duration. In *Department of Labor v. American Furniture Systems, Inc.*, the employer implemented a policy under which nonexempt employees could log off of their computers and take breaks whenever they chose and for any length of time. However, if the employees were logged off their computers for more than 90 seconds, they were not paid for the break time. The Third Circuit held that the “log off” times were “clearly ‘breaks’ to which the FLSA applies” and that employers cannot “circumvent [the FLSA’s] remedial mandates by disguising a break policy as ‘flexible time.’” Relying on 29 C.F.R. § 785.18, which requires that employers compensate employees for breaks lasting between five and 20 minutes, the court rejected the employer’s argument that its employees used the time when they were logged off solely for their own benefit, thereby rendering it non-compensable, and further refused to engage in a fact-specific inquiry to determine whether a given break is intended to benefit the employer or employee.

**Impact:** The Third Circuit is the first circuit court to weigh in on this issue. Based on the court’s guidance, employers should review their compensation policies and procedures to ensure that their employees’ pay is not docked when they take short breaks that last up to 20 minutes.

---

### **District Court Denies Request for Preliminary Injunction Because Employer Did Not Adequately Protect Its Confidential Information**

**Decision:** On October 3, 2017, a district court in the Eastern District of New York denied a cookware and kitchenware company’s request for a preliminary injunction under the Defend Trade Secrets Act (DTSA) prohibiting its former salesperson from using customer contact lists, designs and marketing strategies that the salesperson sent from his work computer to his personal email account right before his termination. In *Art and Cook, Inc. v. Haber* (No. 17-cv-1634), the court denied the company’s request for a preliminary injunction because it had failed to demonstrate a likelihood of success on the merits of its DTSA claim. The court determined that the customer lists were little more than a compilation of publically available information and therefore could not be a trade secret. Turning to the product designs and marketing strategies, the court recognized that such information is “the sort of business information that the DTSA was designed to protect” but that the company could not show that it took reasonable measures to keep the information secret. Among the facts that the court found significant for its ruling were the company not requiring the salesperson to sign a non-compete and failing to ask him to sign a non-disclosure agreement until approximately three years after he was hired. Further, the company continued to employ him for two more years after he refused that request and took no steps during that time to limit his access to its sensitive proprietary information. The court found that the company’s other steps to secure its information, including using a password-protected server and password-protected folders, were inadequate given the company’s others failures.

**Impact:** This decision underscores the importance of restrictive covenants and confidentiality agreements in protecting employers’ trade secrets and other confidential information, regardless of other security measures in place to protect sensitive data.

---

## Tenth Circuit Holds That Employers Must Show Irreparable Harm to Obtain Preliminary Injunction in Trade Secrets Dispute

**Decision:** On October 30, 2017, the US Court of Appeals for the Tenth Circuit clarified its standard for granting a preliminary injunction in a case involving a trade secrets dispute. In a unanimous opinion by Judge Scott M. Matheson, Jr., the Tenth Circuit panel reversed a district court order granting a preliminary injunction in favor of First Western Financial Inc. The order barred Kenneth Malamed—the founder of an investment firm acquired by First Western—from soliciting First Western’s clients after he was terminated. The district court held that First Western need not show irreparable harm because the conduct at issue—misappropriating the company’s client list—was a violation of trade secrets law. Thus, even though First Western could be financially compensated for any lost clients, and thus lacked irreparable harm, the district court determined that a preliminary injunction was warranted. The Tenth Circuit disagreed, holding that the company must indeed demonstrate irreparable harm because the governing statutes—the Defend Trade Secrets Act and Colorado Uniform Trade Secrets Act—do not provide for a presumption of irreparable harm.

**Impact:** The Tenth Circuit’s holding clarifies the standard for obtaining a preliminary injunction in a trade secrets misappropriation case. As a result, companies will find it more difficult to prevent the actual use of misappropriated trade secrets moving forward, at least in the absence of showing irreparable harm. However, the decision leaves intact companies’ ability to recover financial compensation for misappropriation, a less desirable result for companies that want to avoid the greater cost and risk that financial recovery entails.

If you have any questions about the matters addressed in this issue, please contact any of the authors, [Lori Zahalka](#), [Corwin Carr](#), [Grant T. Miller](#), [Richard E. Nowak](#) or [Ruth Zadikany](#), or one of the US Employment practice chairs, [Marcia Goodman](#) or [John Zaines](#).

Learn more about our [Employment Litigation & Counseling](#) and [ERISA Litigation](#) practices.

Visit us at [mayerbrown.com](http://mayerbrown.com).

## US Employment Litigation Round-Up



### US Employment Litigation Round-Up for November 2017

15 December 2017

#### **Ninth Circuit Holds That FLSA's Minimum Wage Requirement Applies to Weekly Per-Hour Average**

**Decision:** On November 15, 2017, the Ninth Circuit Court of Appeals adopted the views of the US Department of Labor (DOL) and the Second, Fourth, Eighth, and DC Circuits by holding that the hourly minimum wage requirement of the Fair Labor Standards Act (FLSA) applies to workers' weekly per-hour average pay and not to actual per-hour pay (*Douglas v. Xerox Business Services LLC*, No. 16-35425). Affirming the district court's grant of summary judgment to Xerox, the appellate court agreed that the company did not owe a conditionally certified class of workers back pay for specific hours they may have worked at sub-minimum wage levels because their weekly per-hour average pay exceeded the minimum wage. Although the court noted that the FLSA does not specify whether minimum wage should be calculated on a per-week or per-hour basis, it found "instructive" that the DOL interprets the "workweek" as the "standard period of time over which wages may be averaged to determine whether the employer has paid [the minimum wage]."

**Impact:** The Ninth Circuit's decision is consistent with those of every federal Court of Appeals that has addressed the hourly minimum wage requirement. In dismissing the plaintiffs' minimum wage claims, the court explained that "[w]e favor consistency because businesses subject to the FLSA, like Xerox, often operate in multiple jurisdictions" and "[t]o upset those practices by imposing different requirements in different jurisdictions would be burdensome and impractical." While the Supreme Court has not weighed in on this issue, given the uniformity among the DOL and multiple Courts of Appeals, employers can continue to apply, with some confidence, a weekly per-hour average in any jurisdiction where they are subject to the FLSA's minimum wage requirement while monitoring any future legal developments.

---

#### **California Court of Appeal Holds Employer Potentially Liable for Failure to Prevent Sexual Assault of Employee by Trespasser**

**Decision:** On October 26, 2017, the California Court of Appeal held that an employer hotel could be held liable under the Fair Employment and Housing Act (FEHA) for the sexual harassment of an employee who was raped by a non-employee trespasser on the employer's premises (*M.F. v. Pacific Pearl Hotel Management LLC*). Prior to the assault, the trespasser had aggressively propositioned other employees on the employer's premises, and the hotel's management had been



aware of the trespasser's presence on the property and that he had propositioned other employees. The court held that if plaintiff's allegations were true, they were sufficient to establish that the employer knew or should have known of the danger posed by the trespasser to its employees and that the employer had a duty to protect the plaintiff from the trespasser's conduct. The court further noted that as long as the employee could state a claim under FEHA, the workers' compensation exclusivity doctrine does not bar her claims under FEHA.

The court rejected the hotel's claim that it was not responsible to the plaintiff under FEHA because the initial harassment was not directed at her, noting that the employer had received reports and knew that the nonemployee's conduct placed employees at risk of sexual harassment. The court explained: "[T]he more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims."

**Impact:** The California Court of Appeal's decision highlights the importance of employers acting promptly in investigating and eliminating potentially dangerous or harassing behavior on their premises, whether by employees or non-employees. Employers should have policies and procedures in place that address workplace hazards and should ensure that employees understand their role in acting swiftly and efficiently to address such issues. As demonstrated by the *M.F.* case, liability for harm arising from workplace hazards, including sexual assault in the workplace, is not limited to workers' compensation.

---

### **NLRB Judge Determines Home Improvement Store Delivery Drivers Are Independent Contractors**

**Decision:** On December 17, 2017, a National Labor Relations Board (NLRB) Administrative Law Judge (ALJ) issued a decision in *Menard Inc., and Local 153, Office & Professional Employees International Union, AFL-CIO*, holding that Menard's delivery drivers were properly classified as independent contractors, notwithstanding the fact that Menard exercised some degree of control over the drivers and even undertook certain quality control efforts. Following a detailed analysis of Menard's contractual arrangements with the drivers, and evidence of the actual course of performance, the ALJ concluded that "[o]nly one factor – the level of skill required – weighs in favor of employee status [but] [t]hat factor is outweighed by the many factors favoring independent contractor status."

**Impact:** Several recent NLRB decisions have determined that workers are employees rather than independent contractors. For employers, this recent decision is a welcome reprieve from that trend. Moreover, the ALJ's detailed analysis should prove a useful guide for employers who want to ensure that their independent contractor determinations are upheld. Menard's carefully structured agreements gave them just enough control and supervisory authority to ensure a good customer experience but without converting the drivers into employees. That has been a difficult needle to thread the past few years.

---

### **Sixth Circuit Cautions Against Overreliance on DOL Opinion Letters**

**Decision:** On November 20, 2017, the Sixth Circuit Court of Appeals held that an employer had not established its good faith defense under the Fair Labor Standards Act (FLSA) notwithstanding the employer's claim that it acted in reliance on

a 2005 Department of Labor (DOL) opinion letter (*Perry v. General Partner*, Case No. 16-1010). The employer had classified various recruiting, staffing management and sales personnel as exempt, relying on a 2005 DOL opinion letter which stated that staffing managers were generally exempt under the administrative exemption. The court held, however, that the employees at issue had substantially different roles and responsibilities than those discussed in the DOL letter, notwithstanding other more general similarities. The employer's classification was, therefore, not "in conformity with" the 2005 opinion letter, as required to establish the FLSA's good faith reliance defense.

**Impact:** The Sixth Circuit's ruling cautions employers to read DOL opinion letters narrowly and to conduct a careful analysis of the employees at issue before deciding that an opinion letter authorizes the employer's decision to classify employees as exempt.

---

### **Employer Settles EEOC's Challenge to Its Return to Work Policy for \$9.8 Million**

**Update:** In *Equal Employment Opportunity Commission v. American Airlines, Inc. and Envoy Air Inc.*, the Equal Employment Opportunity Commission (EEOC) challenged American Airlines' "100% return-to-work policy" that required employees to return to work from an absence without any restrictions as violating the Americans with Disabilities Act (ADA). Among the other charges, the EEOC said that the airline did not provide intermittent leave as an accommodation and did not provide a stool behind a ticket counter to accommodate an employee with a standing restriction, both in violation of the ADA. American Airlines settled the lawsuit by entering a consent decree under which the EEOC will hold a \$9.8 million unsecured claim in the airline's bankruptcy proceeding and American Airlines agrees to pay a maximum of \$150,000 in settlement administration costs. Other provisions of the consent decree include a promise from the airline to end the challenged policy, refrain from engaging in any discriminatory or retaliatory practices, engage in the interactive process with employees who request a reasonable accommodation under the ADA, and provide ADA training to employees.

**Impact:** The EEOC's lawsuit serves as a reminder to employers that their return to work policies must take into account the ADA's mandate that employers provide reasonable accommodations to disabled employees unless doing so would cause significant difficulty or expense for the employer. It also highlights that this issue remains an EEOC enforcement priority. Accordingly, employers should regularly review their policies and practices to ensure they comply with federal and state reasonable accommodation requirements. Employers are also well-advised to train their managers and human resources staff regarding the ADA's reasonable accommodation provisions and how to ensure that they engage in the interactive process with disabled employees who request such accommodations.

---

### **US Senate Confirms Peter Robb as the Next NLRB General Counsel**

**Update:** On November 8, 2017, the US Senate confirmed President Donald Trump's nominee, Peter Robb, as general counsel of the National Labor Relations Board ("NLRB" or "Board") by a party line vote of 49-46. Robb previously served as chief counsel to then-NLRB member Robert Hunter before spending more than 20 years in private practice as a

management-side labor attorney. Robb replaces outgoing General Counsel Richard Griffin, whom former President Barack Obama appointed to a four-year term in 2013.

**Impact:** The confirmation of Robb is likely to accelerate the Republican-controlled NLRB's anticipated agenda of overturning a number of Obama-era Board decisions that expanded workers' rights. During the Obama administration, the Democratic-controlled NLRB took an expansive view of the National Labor Relations Act's workplace protections on a variety of issues, including joint employer status, arbitration agreements, social media usage and class action waivers. As general counsel, Robb will have the ability to not only shift the internal policy at the NLRB back to a more employer-friendly focus, he will also be able to submit cases to the Board that will present opportunities to overturn the prior Board's pro-labor decisions under President Obama.

If you have any questions about the matters addressed in this issue, please contact any of the authors, [Lori Zahalka](#), [Corwin Carr](#), [Grant T. Miller](#), [Richard E. Nowak](#) or [Ruth Zadikany](#), or one of the US Employment practice chairs, [Marcia Goodman](#) or [John Zaines](#).

Learn more about our [Employment Litigation & Counseling](#) and [ERISA Litigation](#) practices.

Visit us at [mayerbrown.com](http://mayerbrown.com).

