THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

Editor
Nicholas Robertson

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CONTENTS

PREFACE v
Nicholas Robertson

Chapter 1 AUSTRALIA 1
John Tuck and Anthony Forsyth

Chapter 2 BELGIUM 10
Nicolas Simon

Chapter 3 BRAZIL 19
Rogério Podkolinski Pasqua

Chapter 4 CYPRUS 27
Christina Ioannou and Anna Charalambous-Katsaros

Chapter 5 HONG KONG 35
Paul Kwan and Michelle Li

Chapter 6 INDIA 46
Ajay Raghavan, Swarnima and Amulya Chinmaye

Chapter 7 ITALY 55
Francesco d'Amora and Andrea Patrizi

Chapter 8 JAPAN 67
Nobuhito Sawasaki

Chapter 9 LUXEMBOURG 77
Philippe Schmit

Chapter 10 MEXICO 89
Hugo Hernández-Ojeda Alvírez, Isabel Pizarro Guevara and María Regina Torrero Ordaz

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Chapter 11 PORTUGAL....97
André Pestana Nascimento and Susana Bradford Ferreira

Chapter 12 RUSSIA....106
Elena Kukushkina, Georgy Mzhavanadze and Nina Mogutova

Chapter 13 SLOVENIA....116
Ljuba Zupančič Čokert

Chapter 14 SOUTH AFRICA....124
Ross Alcock and Peter le Roux

Chapter 15 SPAIN....133
Jesús David García Sánchez

Chapter 16 SWEDEN....141
Jessica Stålhammar

Chapter 17 TURKEY....150
Irmak Dirik Erunsal, Sezin Akoglu Duzenli and Melis Buhan

Chapter 18 UNITED KINGDOM....160
Nicholas Robertson

Chapter 19 UNITED STATES....173
Andrew S Rosenman

Appendix 1 ABOUT THE AUTHORS....183
Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS....195

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PREFACE

I qualified as an employment lawyer 30 years ago and have practised as an employment lawyer since the day I qualified. One of the benefits of reaching my 30th anniversary is being able to look back and see how trends have appeared over time and have shaped the advice needed by employers, and consequently the expectations of employment and human resources (HR) advisers and lawyers.

When I started, employment law was almost entirely a national subject. This was the case, even though, within the European Union, there was an employment framework derived from the European Union with some common obligations and rights throughout the Member States. Over the last 15 years, that position has changed as business has become increasingly international, with operations spanning many countries, and often with supply chains spanning yet more countries. As this process developed, employers structured themselves internationally, so that legal and HR teams, among others, are set up to be able to deal with a globally mobile workforce. Similarly, employers and their in-house teams are expected to be able to deal with disputes and potential disputes across many countries, and come up with an overall approach that delivers the right results across the board and not in one country at the expense of another. The most obvious example of this may be an attempt by an employer to enforce a post-termination restriction written under the laws of one country against an employee who is based in a second country, but who may want to compete with the employer in a third country. Employment lawyers need to be able to provide this advice, and HR professionals are increasingly expected to have an appreciation of employment law and practice in other countries.

This is why, when I was approached to be the editor of this book, I thought it was very timely and important. Employers and their advisers need to be able to keep up to speed with the significant employer-related developments occurring throughout the world. Added to this is the fact that employment law is a fast-moving area with significant developments occurring every year, in all the jurisdictions covered by this book – employment law does not stand still.

I am very grateful to the contributors for their time and effort in putting this book together. Like all the best products, it has been a real team effort. I am sure this book will prove very useful both this year and in subsequent years as we continue to cover the developments in this area.

Nicholas Robertson
Mayer Brown International LLP
London
February 2018

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Chapter 19

UNITED STATES

Andrew S Rosenman[1]

I INTRODUCTION

Employers in the United States face a number of constantly evolving challenges to comply with the wide variety of laws that govern their employment arrangements. These challenges are magnified by the fact that employment relationships in the United States are not governed by a single statutory framework. Unlike many other countries, the United States has no general laws requiring an employer to have good cause for dismissal or requiring an employer to pay severance pay at the time of dismissal. The general principle is 'employment at will'. However, in place of a general obligation, the United States maintains many disparate laws that regulate employers and the employment relationship. The legal relationship between employers and their employees are governed simultaneously by federal, state and local laws, as well as common law principles. Depending on the issue, employers also must remain attuned to conflicting judicial decisions and interpretations across the country, which may further complicate their efforts to comply with applicable employment laws. While the remedies available to employees under these different employment laws frequently vary from one state or locality to another, a national or international employer generally applies uniform policies in a single country wherever possible.

Determining which federal laws govern an employer's workplace typically requires, at minimum, an analysis of the employer's size and the locations where its employees work. For example, one of the most commonly invoked federal employment laws – Title VII of the Civil Rights Act of 1964[2] (Title VII) – prohibits employment discrimination based on race, colour, religion, sex or national origin, and typically applies nationwide to all employers with 15 or more employees. Similarly, the Americans with Disabilities Act[3] (ADA) – which includes provisions generally prohibiting employment discrimination on the basis of physical or mental disabilities – also applies to employers with 15 or more employees. The federal Age Discrimination in Employment Act[4] (ADEA), however, generally applies to employers with 20 or more employees.

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1 Andrew S Rosenman is a partner in the Chicago office of Mayer Brown LLP. The author gives special thanks to Marcia Goodman, co-chair of Mayer Brown's labour and employment law practice group, for her helpful guidance on this chapter.

2 42 U.S.C. §§ 2000e et seq.

3 42 U.S.C. §§ 12101 et seq.

4 29 U.S.C. §§ 621 et seq.

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There also are many federal statutes that require other types of analyses to determine their application to the workplace.[5] For example, the federal Family and Medical Leave Act[6] (FMLA), which generally provides up to 12 weeks of unpaid leave for qualified family and medical reasons for oneself or for a family member, applies only if the employer has at least 50 employees within a 75-mile radius of the location where the employee works. The Fair Labor Standards Act (FLSA), which generally establishes a federal minimum wage along with record-keeping requirements, child labour restrictions and certain eligibility standards and exemptions regarding payment for overtime work, depends not on a specified number of employees. Instead, an employer is subject to the FLSA if its annual gross volume of sales made or business done is at least $500,000.[7] As a practical matter, the FLSA applies to the overwhelming majority of employers in the United States

In addition to these and many other federal employment laws and administrative regulations, states and cities also have the power to enact their own employment laws. The overwhelming majority of the 50 states have done just that, in many instances expanding the obligations on employers above and beyond the scope of federal employment laws. To make matters even more complex for employers, cities and counties are passing, with increasing frequency, ordinances and regulations that impose further obligations on employers in the United States. One illustrative example of this trend is minimum wage laws. Although the FLSA has, for many years, imposed a general federal minimum wage of $7.25 per hour,[8] more than half of the states have historically established higher minimum wage requirements that apply to employees working in that state. In recent years, an increasing number of the largest cities and the most expensive cities have raised the bar even further with higher minimum wages of their own, with variations sometimes dependent upon the size of the employer's local workforce.

In sum, employers with employees who are located in the United States, particularly larger employers with workplaces located across the country, must be especially vigilant to ensure that they have both a national perspective and a good understanding of the numerous state and municipal employment laws that govern their workplaces.

II PROCEDURE

Much like the many employment laws that govern the workplace, there also are a variety of procedures available for resolution of employment-related disputes. Of course, many disputes are resolved by the parties through compromise agreements without the need for litigation. The United States does not maintain separate labour courts. When a dispute is not resolved by compromise, the employee typically files a complaint in a federal or state court. In many cases, a jury trial is available. For certain types of matters, the dispute between an employer and employee must be presented to a federal, state or local agency tasked with administering specific employment laws. Parties to employment disputes also frequently

5 It would be impracticable to try to address, in a single chapter, all applicable federal employment laws in the United States, so we have limited the discussion here to some of the most commonly analysed and frequently litigated statutes.

6 29 U.S.C. §§ 2601 et seq.

7 29 U.S.C. §§ 201 et seq.

8 29 U.S.C. § 203.

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resolve them through arbitration tribunals when the parties have agreed to arbitrate, which most typically occurs in employment agreements requiring arbitration or through collective bargaining agreements.

The Equal Employment Opportunity Commission (EEOC) is the federal agency tasked with administering and enforcing federal civil rights laws prohibiting workplace discrimination. Certain federal statutes, such as Title VII, the ADA and ADEA, include mandatory procedures that require employees to exhaust certain administrative procedures at the EEOC or, where applicable, parallel state agencies before proceeding with lawsuits in federal court.

In contrast, many state laws that prohibit employment discrimination do not require exhaustion of administrative procedures as a condition of filing a lawsuit. Employees in those states therefore can file a lawsuit in court almost immediately after an adverse employment action, such as the termination of their employment. The statutes of limitations under state employment laws are also, in many instances, far more favourable for employees than under federal law and also allow plaintiffs to seek substantially greater damages than may be available under federal law.

In addition to pursuing their own individual claims, employees also can seek to proceed with mass, class or collective action cases on behalf of one or more classes of similarly situated employees. Depending on the specific claims that are made and the types of relief that a plaintiff seeks, such actions typically proceed as opt-out or opt-in class actions in those cases where the court determines that the requirements for class certification have been satisfied. In an opt-out employment case, all similarly situated employees who are included as part of the court-certified class are bound by the court's final judgment unless they have specifically opted out by the court-ordered deadline. An opt-in employment case, on the other hand, requires each employee who may be interested in joining the lawsuit to file a consent form expressing an intention to do so. In some circumstances, such as wage and hour lawsuits brought concurrently under federal and state law, a case may include both opt-out and opt-in classes.

III TYPES OF EMPLOYMENT DISPUTE

There are many types of employment-related claims that individuals can bring under federal, state and local employment laws in the United States. Such claims arise out of all aspects of the employment relationship, including hiring, firing, promotions, disciplinary actions, pay-related claims and employment contracts. While this chapter cannot cover every available theory of employment-related disputes, three types of lawsuits that are commonly filed are lawsuits claiming discrimination or harassment, unlawful retaliation or wage and hour violations.

Allegations of discrimination or harassment under federal law are typically based on one or more of the following protected categories: age, race, colour, religion, sex, national origin and physical or mental disability. There are many other protected categories under federal and state anti-discrimination laws, such as sexual orientation, pregnancy, ancestry, gender identity, citizenship status, genetic information, marital status, military or veteran status and immigration status. In addition to allegations involving discrimination, employment claims often include allegations of sexual harassment or harassment based on any of the protected categories.

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Retaliation claims also are a frequent subject of litigation in the United States. Many federal, state and local statutes that proscribe discrimination also have provisions explicitly prohibiting retaliation against employees for exercising their rights under those statutes (or associating with others). Many federal and state statutes also provide protection from retaliation by employees who act as corporate whistleblowers. There are also several other types of retaliation claims that employees routinely pursue. For example, many states permit claims of wrongful discharge in violation of public policy (such as retaliation for refusing to commit an illegal act or for exercising a legal right).

Wage and hour claims, whether filed individually or as class or collective actions, are another frequently litigated subject in US courts. Wage and hour lawsuits under the FLSA or state law frequently include claims by employees for overtime pay, missed or interrupted meal and rest periods, and for the alleged misclassification of employees as exempt from federal and state overtime requirements. Here too, wage and hour requirements and statutes vary widely. In addition to different minimum wage laws from one state or city to another, some states and cities impose other requirements for employees who work there. The state of California, for example, generally requires employers to pay different rates of overtime to eligible employees who work more than 8 or 12 hours in a day, regardless of how many hours they may work in a week.[9] The federal FLSA, in contrast, only requires overtime pay for eligible employees who work in excess of 40 hours in a working week.[10]

IV YEAR IN REVIEW

We discuss below four of the most significant employment law developments in 2017. First, a federal court blocked former President Barack Obama's effort to extend overtime pay eligibility to millions more workers, a decision that President Trump's administration appears to be in no rush to overturn. Second, federal courts reached diametrically opposite conclusions about the scope of protection for sexual orientation discrimination under Title VII. Third, the Supreme Court heard argument and is soon expected to decide a closely watched trio of cases involving whether an employer can force employees to forego the right to pursue class action claims through waiver provisions set out in the employer's arbitration agreements with its employees. Finally, the Supreme Court also resolved a split among federal appellate courts involving the scope of protection for internal whistleblowers under the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank).

i A halt to Obama-era overtime rule changes

In 2017, a federal judge in Texas stopped the effort by former President Obama's administration to substantially expand the scope of employees who would be eligible for overtime pay under the FLSA. During the Obama administration, the US Department of Labor finalised a proposed rule that would have nearly doubled the minimum required salary – from $23,600 to $47,476 per year – for an employee to qualify for certain exemptions from the FLSA's overtime pay requirements. The rule also would have increased the minimum threshold for highly compensated workers as well. The proposed rule therefore would have

9 Cal. Labor Code § 510(a).

10 29 U.S.C. § 207(a).

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expanded overtime pay coverage to millions of white-collar workers by making it more difficult for employers to establish that the affected workers would fall within the FLSA's statutory exemptions.

Dozens of states and business groups filed a lawsuit challenging the rule. In November 2016, a Texas federal judge issued a preliminary injunction blocking the Department of Labor, on a nationwide basis, from implementing the rule.[11] In August 2017, the judge granted summary judgment in favour of the plaintiffs and entered an order that invalidated the Department of Labor's rule in its entirety.[12] The court explained that the Department of Labor had exceeded its authority by creating a rule 'that makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties'.[13] In October 2017, the Department of Labor, now with oversight by the Trump administration, appealed that decision to the US Court of Appeals for the Fifth Circuit.[14] However, the Department of Labor also issued a contemporaneous news release that it would request that the Fifth Circuit stay the appeal while the Department 'undertakes further rulemaking to determine what the salary level should be'.[15] In November 2017, the Fifth Circuit subsequently granted the Department of Labor's unopposed request to stay the appeal pending the outcome of the new rulemaking.[16] It is not clear when the further rulemaking will take place during the Trump administration, if at all.

ii The status of sexual orientation discrimination under federal law

Sexual-orientation discrimination is not listed as an explicit prohibition under federal law, even though many states and cities have prohibited sexual orientation discrimination. For years, courts interpreting federal law have debated whether existing federal law under Title VII, which explicitly prohibits only discrimination based on 'sex', should be interpreted broadly as prohibiting discrimination based on sexual orientation.

A group of cases decided in 2017 highlighted a deepening conflict on this point among federal courts – and even federal agencies. In March 2017, the US Court of Appeals for the Eleventh Circuit, following its prior precedent as well as earlier decisions by other federal courts, held in a 2 : 1 decision that discrimination based on sexual orientation is not a viable claim under Title VII.[17] The majority also held, however, that the plaintiff could re-plead her claim for 'gender non-conformity' because discrimination based on gender non-conformity is actionable under Title VII's prohibition of discrimination on the basis of sex.[18] The dissenting judge rejected the majority's analysis that sexual orientation is not a protected category under Title VII, arguing instead that sexual-orientation discrimination is equivalent to discrimination because of sex:

> *Plain and simple, when a woman alleges, as [plaintiff] has, that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she*

11 *State of Nevada v. U.S. Department of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016).

12 *State of Nevada v. U.S. Department of Labor*, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).

13 Id. at *8.

14 Case No. 17-41130.

15 https://www.dol.gov/newsroom/releases/osec/osec20171030.

16 Case No. 17-41130, Document: 00514226422.

17 *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017).

18 Id. at 1253-54.

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> *failed to conform to the employer's image of what women should be – specifically, that women should be sexually attracted to men only. And it is utter fiction to suggest that she was not discriminated against for failing to comport with her employer's stereotyped view of women. That is discrimination 'because of [. . .] sex', 42 USC Section 2000e-2(a)(1) and it clearly violates Title VII.*[19]

Approximately three weeks after the Eleventh Circuit's decision, the full US Court of Appeals for the Seventh Circuit broke from prior precedent and became the first federal appellate court in the United States to hold that Title VII proscribes discrimination on the basis of sexual orientation.[20] The Seventh Circuit, taking a 'fresh look' at the issue of sexual-orientation discrimination under Title VII, held in an 8:3 decision that 'discrimination on the basis of sexual orientation is a form of sex discrimination'.[21] The majority opined that it would require 'considerable calisthenics to remove the "sex" from "sexual orientation"' and emphasised that its decision to break free from prior precedent on the same issue was informed by several decades of case law developments at the Supreme Court since the passage of Title VII in 1964. The majority explained: 'The logic of the Supreme Court's decisions, 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, persuade us that the time has come to overrule our previous cases that have endeavoured to find and observe that line.'[22]

The three dissenting judges criticised the majority's opinion (as well as that of concurring judge Richard Posner) for deploying a 'judge-empowering, common-law decision method that leaves a great deal of room for judicial discretion. [. . .] Neither is faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is a statutory amendment courtesy of unelected judges.'[23] Thus, the dissenters added, it was inappropriate for the majority to infuse the meaning of 'sex' in Title VII with what the dissent viewed as a new meaning for that word, or to update it to respond to changed social, economic or political conditions regarding sexual orientation.[24]

In December 2017, the Supreme Court declined to hear the Eleventh Circuit's decision.[25] While the Supreme Court therefore has let stand, for now, the circuit split between the Seventh and Eleventh Circuits, the issue of Title VII's application to claims of sexual orientation may proceed back to the Supreme Court in the near future. In April 2017, a three-judge panel of the US Court of Appeals for the Second Circuit declined a homosexual plaintiff's request to address whether a trial court improperly dismissed his claim for sexual-orientation discrimination under Title VII.[26] However, the full Second Circuit granted rehearing of the case, heard oral argument from the parties in September 2017 and took the case under advisement.[27] Given the existing circuit split on the issue, it is quite possible that another petition for certiorari to the Supreme Court will follow after the full Second Circuit issues its decision, which is expected sometime in 2018.

19 Id. at 1261-73 (Rosenbaum, J., dissenting).

20 *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017).

21 Id. at 341.

22 Id. at 350-51.

23 Id. at 360 (Sykes, J., dissenting).

24 Id.

25 *Evans v. Georgia Regional Hospital*, No. 17-370, 2017 WL 4012214 (U.S. Dec. 11, 2017).

26 *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017).

27 Case No. 15-3775.

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One particularly interesting aspect of the debate over whether Title VII prohibits discrimination on the basis of sexual orientation is that two federal agencies have taken opposite positions on the issue. The EEOC has repeatedly advocated in recent years that Title VII's prohibition of sex discrimination encompasses sexual-orientation discrimination. According to the EEOC, 'sexual orientation is inherently a "sex-based consideration", and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII'.[28] The EEOC also has had some success in federal court in pressing that agenda.[29] In contrast, the US Department of Justice filed an amicus brief in July 2017 in the Second Circuit case in which the Department of Justice stated that 'the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade'.[30]

iii Class action waivers in arbitration agreements

One of the most closely watched employment cases in 2017 was a trio of consolidated actions involving class action waivers at the US Supreme Court. The trio of cases present the question of whether an employer may require its employees to waive, as a condition of their employment, the right to pursue class actions by including class action waiver provisions in the employer's arbitration agreements with its employees.[31]

The enforceability of class arbitration waivers has sharply divided the federal appellate courts. Several of those courts have held that arbitration agreements are presumptively valid under the Federal Arbitration Act (FAA).[32] Those courts have relied on the Supreme Court's repeated description of the FAA as 'a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary', such that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration'.[33] The Supreme Court also has opined that the FAA 'establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'.[34] These courts have concluded that the FAA's presumption favouring arbitration supersedes the National Labor Relations Act (NLRA), a law passed by Congress that, among other things, provides rights to employees to bargain collectively and to engage in concerted activity.[35]

In contrast, other federal appellate courts have adopted the long-standing position of the National Labor Relations Board (NLRB) and concluded that it is unlawful for an employer to require an employee to waive the right to proceed on behalf of a class of employees because

28 *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, p. 6 (July 15, 2015).

29 *U.S. EEOC v. Scott Medical Health Center, P.C.*, 217 F. Supp. 3d 834, 839–40 (W.D. Pa. 2016) (denying a motion to dismiss: 'The Court sees no meaningful difference between sexual orientation discrimination and discrimination "because of sex". The Supreme Court has consistently applied a broad interpretation of the "because of sex" language in Title VII. Incremental changes have over time broadened the scope of Title VII's protections of sex discrimination in the workplace.')

30 Case No. 15-3775, Dkt. No. 417, p. 9.

31 *Epic Systems Corp. v. Lewis* (Case No. 16-285), *Ernst & Young LLP v. Morris* (Case No. 16-300) and *National Labor Relations Board v. Murphy Oil USA, Inc.* (Case No. 16-307).

32 *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

33 *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

34 Id. at 24-25.

35 29 U.S.C. §§ 151-169.

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such an agreement runs afoul of employees' rights to engage in concerted activity under the NLRA.[36] The US Court of Appeals for the Sixth Circuit explained why the FAA, in its view, would not trump the NLRA and require enforcement of a class action waiver in the employment law context:

Because the NLRA makes such a contractual provision illegal on generally applicable grounds – interference with the right to concerted activity – the FAA does not require enforcement. According to the FAA's saving clause, because any contract that attempts to undermine employees' right to engage in concerted legal activity is unenforceable, an arbitration provision that attempts to eliminate employees' right to engage in concerted legal activity is unenforceable. Paying due respect to the text of the FAA, including its saving clause, makes clear that the NLRA and the FAA are compatible.[37]

The Supreme Court heard oral argument on the trio of consolidated cases in October 2017 and is expected to issue its decision by June 2018.

iv Scope of whistleblower coverage under Dodd–Frank

Another case of keen interest to employers involved a sharp divide among federal courts regarding the scope of whistleblower protection under Dodd–Frank.[38] Congress passed Dodd–Frank in the wake of the financial crisis that began in 2008. Since that time, federal courts have reached different opinions on whether the anti-retaliation protections set out in Section 922 of Dodd–Frank extend beyond employees who report alleged violations of law to the Securities and Exchange Commission (SEC). As one court recently summarised the debate: 'In operational terms, the issue is whether an employee who suffers retaliation because he reports wrongdoing internally, but not to the SEC, can obtain the retaliation remedies provided by Dodd–Frank.'[39]

The issue is important to employers because Dodd–Frank is more favourable for employees in some respects than other federal whistleblower statutes, such as the Sarbanes–Oxley Act of 2002[40] (Sarbanes–Oxley). Unlike Sarbanes–Oxley, Dodd–Frank has a long statute of limitations, has no administrative exhaustion requirements and provides that a prevailing plaintiff may recover two times the amount of back pay otherwise owed to the individual.[41] Sarbanes–Oxley, on the other hand, permits employees to recover 'special damages', which has been interpreted to include damages for pain and suffering and emotional distress.[42] Thus, employees bringing claims as whistleblowers often seek to proceed concurrently under Dodd–Frank and Sarbanes–Oxley.

The interplay between Subsections (a) and (h) of Section 922 of Dodd–Frank has been the focus of the courts' divergence. Subsection (a), entitled 'Definitions', provides that '[t]he term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [SEC], in

36 *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6th Cir. 2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).

37 *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d at 403.

38 *Digital Realty Trust, Inc. v. Somers*, Case No. 16-1276.

39 *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 147 (2d Cir. 2015).

40 18 U.S.C. § 1514A.

41 15 U.S.C. § 78u–6(h)(1)(B)-(C).

42 18 U.S.C. § 1514A(c)(2)(C).

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a manner established, by rule or regulation, by the [SEC].'[43] Subsection (a) also specifically states that the definitions of terms contained therein 'shall apply' throughout Section 922.[44] Subsection (h) of Dodd–Frank, entitled 'Protection of whistleblowers', includes provisions prohibiting retaliation, including retaliation for 'making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002'.[45] Sarbanes–Oxley, unlike Dodd–Frank, does not contain a provision requiring an employee to report to the SEC to establish an actionable whistleblower retaliation claim.

The US Court of Appeals for the Fifth Circuit was the first federal appellate court to address the interplay between Subsections (a) and (h) of Dodd–Frank. The Fifth Circuit held that a purely internal whistleblower could not state an actionable claim under Dodd–Frank.[46] Because the definition of 'whistleblower' in Subsection (a) of Dodd–Frank requires that the complainant make a report 'to the [SEC]', the Fifth Circuit held that 'the plain language of the Dodd–Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC'.[47] The Fifth Circuit explained that '[u]nder Dodd–Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC.'[48]

A divided panel of the US Court of Appeals for the Second Circuit reached the opposite conclusion, holding 2:1 that internal whistleblowers are entitled to protection under Subsection (h) of Dodd–Frank.[49] The Second Circuit reasoned that the retaliation provisions in Dodd–Frank were ambiguous because Subsection (a) requires an employee to report to the SEC while Subsection (h), by explicitly incorporating complaints made pursuant to Sarbanes–Oxley, does not.[50] Accordingly, the Second Circuit concluded that it was appropriate to give substantial deference to the interpretation of the SEC, which, for its part, has interpreted Dodd–Frank's retaliation provision to protect internal whistleblowers.[51]

In 2017, the US Court of Appeals for the Ninth Circuit became the latest federal appellate court to address the conflict.[52] In another 2:1 decision, the Ninth Circuit held that the anti-retaliation provisions in Subsection (h) of Dodd–Frank 'should be read to provide protections to those who report internally as well as to those who report to the SEC'.[53] The Ninth Circuit also concluded that the SEC's interpretive rule that Dodd–Frank protects internal whistleblowers 'accurately reflects Congress's intent to provide broad whistleblower protections under [Dodd–Frank]. The [r]ule says that anyone who does any of the things described in subdivisions (i), (ii), and (iii) of the anti-retaliation provision is entitled to protection, including those who make internal disclosures under Sarbanes–Oxley. They are all whistleblowers.'[54]

43 15 U.S.C. § 78u-6(a)(6).
44 15 U.S.C. § 78u–6(a).
45 15 U.S.C. § 78u–6(h)(1)(A)(iii).
46 *Asadi v. G.E. Energy (USA)*, LLC, 720 F.3d 620 (5th Cir. 2013).
47 Id. at 623.
48 Id. at 625.
49 *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).
50 Id. at 155.
51 Id.
52 *Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045 (9th Cir. 2017).
53 Id. at 1050.
54 Id. at 1050-51.

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The Ninth Circuit's split decision therefore deepened the divide among federal judges about the scope of protection for whistleblowers under Dodd–Frank. The Supreme Court subsequently granted certiorari in the Ninth Circuit case. In late November 2017, the Supreme Court heard oral argument on the appeal of the Ninth Circuit's decision.

On 21 February 2018, the Supreme Court issued its decision unanimously rejecting the Ninth Circuit's analysis.[55] The Supreme Court held that Subsection (a) of Dodd–Frank 'supplies an unequivocal answer' to the question of Dodd–Frank's scope of coverage.[56] 'Courts are not at liberty to dispense with the condition – tell the SEC – Congress imposed.'[57] The Supreme Court concluded that both the text and the purpose of Dodd–Frank left no doubt that the term 'whistleblower' in Subsection (h) of the statute 'carries the meaning set forth in the section's definitional section'.[58] Accordingly, an employee is ineligible to seek relief under Subsection (h) of Dodd–Frank as a whistleblower unless the employee provided information to the SEC before the employee's termination.

V OUTLOOK AND CONCLUSIONS

In light of the Trump administration's pro-business agenda, the trend by federal employment agencies to reverse or halt employee-friendly actions by the Obama administration are likely to continue well into 2018. For example, President Trump's recent appointments of Republican members of the NLRB have led to the prompt reversal of several pro-employee decisions made by the Democratic-led NLRB during the Obama administration. Another recent example of business-friendly policy by the Trump administration occurred during the first week of January 2018, when the US Department of Labor resuscitated 17 wage-and-hour opinion letters that were issued in January 2009 at the end of former President George W Bush's administration but withdrawn when former President Obama took office a few weeks later. The newly reissued opinion letters are consistent with President Trump's pro-business agenda and address a variety of wage-and-hour issues, including interpretations on such topics as whether specific employees are exempt from the FLSA's minimum wage and overtime requirements and whether certain bonuses must be included in employees' regular rates of pay.

Moreover, President Trump's nomination and the subsequent confirmation by Congress of Justice Neil Gorsuch to the United States Supreme Court in 2017 re-established a full complement of nine Supreme Court justices. Accordingly, 2018 is likely to usher in a new round of employer-friendly decisions in cases pending at the Supreme Court. Justice Gorsuch, who is often cited as a champion of relying on the plain language of federal statutes, would seem to lean in favour of two positions advocated by employers in cases now before the Court, namely that Title VII does not protect discrimination based on sexual orientation and that Dodd–Frank does not provide a cause of action for whistleblower employees who do not report to the SEC. Despite the re-emergence of a conservative-leaning government and Supreme Court, it is likely that the trend of active private litigation by employees will continue in 2018 and coming years, with the tide of employment-related lawsuits that are filed in the United States each year continuing or even increasing, according to some predictions.

55 *Digital Realty Trust, Inc. v. Somers*, No. 16-1276, 2018 WL 987345 (U.S. 21 February 2018).

56 Id. at *8.

57 Id. at *9.

58 Id. at *10.

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Appendix 1

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