

# The 2018 Employment Law Year in Review

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# Supreme Court Roundup

# Digital Realty Trust, Inc. v. Somers



- ◆ Writing for a unanimous court, Justice Ginsburg found the Dodd-Frank anti-retaliation provision protects *only* those employees who complain directly to the SEC.
  - “‘When a statute includes an explicit definition, we must follow that definition,’ even if it varies from a term’s ordinary meaning. This principle resolves the question before us.”
- ◆ Court reversed because Somers failed to provide information to the SEC prior to his termination, he did not qualify as a Dodd-Frank “whistleblower” at the time of the alleged retaliation.
- ◆ Potential danger for employers because external report now *must* occur (in addition to bounty provisions...).

# Epic Systems v. Lewis



- ◆ Supreme Court Justice Neil Gorsuch, authored a five-justice majority opinion that found:
  - Class waivers in mandatory arbitration agreements do not violate the National Labor Relations Act.
  - Mandatory arbitration agreements must be enforced under the Federal Arbitration Act according to their terms, even if those terms include individual arbitration.
- ◆ Consolidated a trio of cases involving Epic Systems Corp., Murphy Oil USA Inc., and Ernst & Young.
- ◆ Incentive to use them as a tool for limiting their exposure to potential collective claims from workers.

# Additional Cases

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**FLSA Exemptions No Longer Construed “Narrowly.”**  
Supreme Court held that Fair Labor Standards Act gives no “textual indication” that its exemptions should be construed narrowly, and there is no reason to give them anything other than a fair, rather than narrow, interpretation. So-called “narrow construction” principle relies on flawed premise that the FLSA “pursues” a remedial purpose “at all costs.” But FLSA exemptions are as much a part of FLSA’s purpose as overtime-pay requirement. *Encino Motorcars v. Navarro* (Apr. 2018) (holding that automobile service advisers are exempt from overtime).

# Additional Cases

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**Public Sector Unions Cannot Force Non-members To Pay “Agency Fee.”** State and public sector unions may no longer extract “agency fees” from non-consenting employees. The First Amendment is violated when money is taken from non-consenting employees of a public-sector union. In 5-4 decision, the Court overruled prior precedent *Abood v. Detroit Bd. of Ed.* (1977) as “poorly reasoned,” inconsistent with the First Amendment, and leading to practical problems and abuse. *Janus v. AFSCME* (June 2018).

# Additional Cases

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**Commission Failed To Show Religious Neutrality.** Colorado Civil Rights Commission failed to review baker's objection to creating wedding cake for gay couple with religious neutrality required by the First Amendment. The Commission's public hearings evidenced open hostility to the baker's religious beliefs. Supreme Court did not reach merits of baker's refusal to create wedding cake for the couple. *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm.* (June 2018).

# Additional Cases

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**A Court (Not An Arbitrator) Decides Questions Regarding Scope and Applicability of FAA Exemptions.** Whether the Federal Arbitration Act's (FAA) Section 1 exemption applies to an arbitration agreement is a question for a court to decide first. The FAA Section 1 exemption (for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”) applies to transportation workers, regardless of whether they are classified as independent contractors or employees. *New Prime, Inc. v. Oliviera* (January 2019).



# On the horizon...

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- ◆ Other cases/topics likely for “Supreme” treatment in 2019, include:
  - **Does Title VII cover sexual orientation or gender identity discrimination?**
    - Sexual orientation teed up by Zarda (now-deceased skydiving instructor) and Bostock (Clayton County, Ga). Gender identity protections at issue with transgender funeral home worker.
  - **Can California employment law reach to other jurisdictions?**
    - *Visible shiver...*
    - Delta and United Airlines pilots and flight attendants who work mostly out of state but enter the state temporarily.
  - **Can employers use a candidate's past salary as a basis for setting their compensation when they are hired?**
    - EPA case - 9<sup>th</sup> Circuit says salary history can't qualify as a "factor other than sex" when employers make pay determinations.

# On the horizon...

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- **Can Consent to Class Arbitration Be Inferred From General Contract Language?**
  - On October 29<sup>th</sup>, Supreme Court heard arguments on whether the FAA forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based on general language in arbitration agreement when the arbitration agreement did not expressly authorize class-wide arbitration. Ninth Circuit held it does, in conflict with decisions from Third, Fifth, Sixth, Seventh and Eight Circuits. *Lamps Plus, Inc. v. Varela* (17-988).

## On the horizon...

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- **Court Refuses to Consider Whether Extended Leave Can be a Reasonable Accommodation Under ADA.**
  - The Court rejected petition for cert. following Seventh Circuit decision holding that 2-3 month leave of absence, *after* employee already exhausted available FMLA time, was not a reasonable accommodation, characterizing the ADA as an “anti-discrimination” statute not a “leave entitlement” statute. Tenth and Eleventh Circuits have adopted similar positions on extended leave under the ADA. *Severson v. Heartland Woodcraft, Inc.*

# Federal Legislation

# Non-Compete and Unfair Practice Protection

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- ◆ On April 26, 2018, Democratic legislators in the Senate and House proposed companion bills (SB 2782 and H.R. 5631) to broadly ban the use of non-compete agreements in workplaces.
  - Bills languished without further consideration.
- ◆ With Republicans losing control of the House in 2019, House Democrats may seek to revive the ban.

# U.S. House Committee to Focus on Workforce Protections

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- ◆ Changed the name of committee with jurisdiction over labor matters back to the Committee on Education and Labor.
- ◆ The Committee has identified eight categories of emphasis under the banner “Putting Workers First”:
  - Wage and hour issues.
  - Worker safety and health.
  - Civil rights in employment.
  - Health care.
  - Employee benefits.
  - Collective bargaining and union membership.
  - Retirement and pensions.
  - Reauthorization of the Older Americans Act of 1965.

# State and Local Legislation

# Pay Equity Laws

Several states have recently amended their Equal Pay Laws:

- ◆ Massachusetts
- ◆ California
- ◆ Maryland
- ◆ Nebraska
- ◆ Connecticut
- ◆ New York
- ◆ New Jersey
- ◆ Washington



wiseGEEK



# Salary History...Now Taboo?

## Cannot Justify Salary

Employers **cannot consider** an employee's **prior salary**—either alone or in combination with other factors—**to justify salary differentials** between men and women for purposes of the Equal Pay Act.

-- U.S. Court of Appeals  
for the Ninth Circuit (4/9/18)

- ◆ The EEOC's position is that questions about an applicant's salary history may perpetuate compensation discrimination.
  - It forces women and, especially women of color, to carry lower earnings and pay discrimination with them from job to job.

Source: Rizo v. Yovino, (9<sup>th</sup> Cir. 4/9/18)

# Pay History Bans

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- ◆ New Orleans, LA – 01/25/17
- ◆ Puerto Rico – 03/08/17
- ◆ Oregon – 10/06/17  
(updated 1/1/19)
- ◆ NYC – 10/31/17
- ◆ Delaware – 12/04/17
- ◆ Albany County — 12/17/17
- ◆ California – 01/01/18
- ◆ New Jersey – 02/01/18
- ◆ Chicago, IL – 04/10/18
- ◆ Wisconsin – 04/18/18
- ◆ Louisville, KY – 05/17/18
- ◆ Massachusetts – 07/01/18
- ◆ San Francisco – 07/01/18
- ◆ Vermont – 07/01/18
- ◆ Westchester County, NY – 07/09/18
- ◆ Kansas City, MI – 07/26/18
- ◆ Connecticut – 01/01/19
- ◆ Hawaii – 01/01/19

# “Ban the Box” Laws (Private Sector)

## 11 State Laws

- ◆ California
- ◆ Connecticut
- ◆ Hawaii
- ◆ Illinois
- ◆ Massachusetts
- ◆ Minnesota
- ◆ New Jersey
- ◆ Oregon
- ◆ Rhode Island
- ◆ Vermont
- ◆ Washington

### NEW FORM

Summary of  
Your Rights  
Under FCRA  
Revised

**Required to Use  
9/21/18**

## 17 Local Laws

- ◆ Los Angeles, San Francisco (CA)
- ◆ District of Columbia
- ◆ Chicago (IL)
- ◆ Baltimore, Montgomery County, Prince George’s County (MD)
- ◆ Columbia, Kansas City (MO)
- ◆ Buffalo, Rochester, NYC
- ◆ Philadelphia (PA), Austin (TX)
- ◆ Portland (OR)
- ◆ Seattle, Spokane (WA)

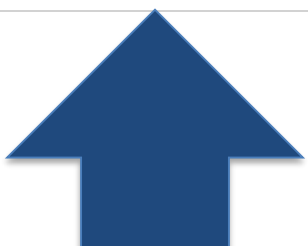
# Starting Pay...on the Rise!

## ◆ State Minimum Wage


- 13 states minimum wage is currently \$10 or higher
- 9 states will go even higher

## ◆ Ballot Initiatives

- Arkansas (\$11 by 2021)
- Missouri (\$12 by 2023)
- Michigan (\$12 by 2022)  
adopted by Legislature; may amend before effective



State	Current	Future
Arizona	\$10.50	\$12.00 by 2020
California	\$11.00	\$15.00 by 2022
Colorado	\$10.20	\$12.00 by 2020
D.C.	\$13.25	\$15.00 by 2020
Maine	\$10.00	\$12.00 by 2020
Massachusetts	\$11.00	\$15.00 by 2023
New York	\$10.40	\$12.50 by 2020
Oregon	\$10.75	\$13.50 by 2022
Rhode Island	\$10.10	\$10.50 by 2019
Washington	\$11.50	\$13.50 by 2020



Source: [NCSL](#)

# Mandatory Training

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- ◆ In the wake of the #MeToo movement, a number of states and cities enacted sexual harassment prevention legislation that included employer training requirements.
- ◆ California expanded its training requirement to all employees.
- ◆ Delaware, the District of Columbia, New York State and New York City passed laws with specific training requirements.
- ◆ There are a number of bills pending at the state level.

## D.C. Mandatory Training

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- ◆ Tipped Wage Workers Fairness Amendment Act of 2018
  - Signed by the District of Columbia's mayor on October 23, 2018; effective as of December 13, 2018.
  - Reverses repeal of the tip credit passed by voters.
- ◆ Requires businesses that employ tipped employees to provide sexual harassment prevention training.
  - Required certification of compliance to the DCOHR.
- ◆ Annual in-person training for managers of tipped workers regarding District's Wage Theft Prevention Act. Must provide the opportunity to attend training to employees too.
  - Annual certification to DOES.

# Disclosing Sexual Harassment in the Workplace Act of 2018 (Maryland)

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- ◆ Except as prohibited by federal law, any provision in an employment contract, policy, or agreement that waives any “substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment” is null and void.
  - Possible FAA preemption.
  - Possible prohibition of other types of provisions commonly included in employee agreements (jury waivers, statute of limitations restrictions, limitations on remedies).
- ◆ Requires employers with at least 50 employees (in MD?) to complete a survey disclosing the number of sexual harassment settlements in which the employer has entered.

# Paid Leave Laws (Private Sector)

## 10 State Laws

- ◆ Arizona
- ◆ California
- ◆ Connecticut
- ◆ Maryland (2/11/18)
- ◆ Massachusetts
- ◆ New Jersey (10/29/18)
- ◆ Oregon
- ◆ Rhode Island (7/1/18)
- ◆ Vermont
- ◆ Washington (1/1/18)

Source: [NCSL](#)

## 20 Local Laws

- ◆ Berkley, Emeryville, Los Angeles, Long Beach, San Diego, San Francisco, Santa Monica, Oakland (CA)
- ◆ Chicago, Cook County (IL)
- ◆ Montgomery County (MD)
- ◆ Minneapolis, St. Paul (MN)
- ◆ New York City, Washington D.C.
- ◆ Philadelphia (PA)
- ◆ SeaTec, Seattle, Spokane, Tacoma (WA)



# Maryland Paid Sick Leave

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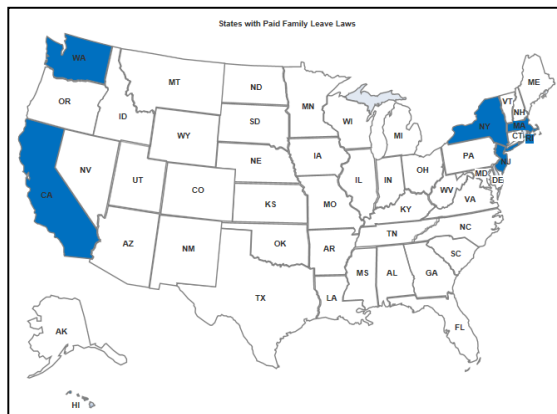
- ◆ Maryland businesses with at least 15 employees in Maryland to offer *paid* sick and safe leave.
- ◆ Smaller businesses must provide *unpaid* sick and safe leave.
- ◆ Up to 40 hours of paid leave a year:
  - Leave accrual at the rate of one hour for every 30 hours worked or award the entire 40 hours at the beginning of each year.
  - Carryover up to 40 hours of paid leave a year.
  - Employers can cap use of paid leave at 64 hours per year.
- ◆ Sick and safe leave to:
  - Care for the physical or mental health of the employee or a family member;
  - Take maternity or paternity leave; or
  - Obtain relief in response to domestic or sexual assault of the employee or a family member.

# Paid Family Leave – State Laws



## Current Laws

- ◆ 4 States (California, New Jersey, New York, and Rhode Island) currently provide for paid family medical leave administered through temporary disability programs



## Coming in 2019

- ◆ State of Washington and D.C. (contributions begin in 2019, and benefits in 2020)
- ◆ Massachusetts (contributions begin in 2019, and benefits in 2021)

- ◆ Hawaii is studying a paid family leave program with proposed legislation due in 2019.

# Legislation Pending in Virginia

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- ◆ Minimum wage increases to \$8.00/hour or \$9.00/hour on July 1, 2019.
- ◆ Paid family and medical leave.
- ◆ Prohibiting inquiries into wage or salary history.
- ◆ Virginia Equal Pay Act.

# Cybersecurity and Privacy

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- ◆ On the heels of the EU's General Data Protection Regulation (GDPR), states have begun reassessing their data privacy protection regulations:
  - California Consumer Privacy Act (June 2018)
  - Vermont (May 2018)
  - Colorado (September 2018)
  - Ohio Data Protection Act (November 2018)
  - In 2019, similar state data privacy protection initiatives will be introduced.

# Non-Compete and Unfair Practice Protection

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- ◆ Massachusetts non-compete law requires the payment of garden leave pay or some other mutually-agreed upon consideration.
  - Additional structural and procedural requirements.
- ◆ Utah amendment to existing legislation to limit the enforcement of non-competes against employees in the broadcasting industry.
- ◆ Idaho amendment repealed rebuttable presumption of irreparable harm if an employer sought injunctive relief against a “key employee” or “key independent contractor” and the court found a violation of the non-compete.

# Non-Compete and Unfair Practice Protection

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- ◆ Importantly, for 2019, legislatures continue to pursue non-compete reform initiatives in:
  - New Jersey
  - New Hampshire
  - Pennsylvania
  - Vermont
  - New York City

# EEOC Developments

# EEOC ... awaiting on Senate Confirmation

## Democrats



**Chai Feldblum (D)**  
Commissioner  
term ended **7/1/18**



**Charlotte Burrows (D)**  
Commissioner  
term ends **7/1/19**



**Victoria Lipnic (R)**  
Acting Chair  
term ends **7/1/20**

## EEOC General Counsel

*Sharon Fast Gustafson*  
*Nominated*

## Republicans

**Janet Dhillon (R)**  
Nominated for  
term ending **7/1/22**  
Awaiting Senate vote

General Counsel  
Burlington Stores  
US Airways  
JCPenney

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**Daniel Cade (R)**  
Nominated for  
term ending **7/1/21**  
Awaiting Senate vote

West Point Graduate  
Wounded in Iraq, amputee  
M.P.A. Ph.D.  
Bush White House staff

Source: EEOC



# Discrimination/EEOC Trends

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- ◆ The EEOC projects that nearly 87,000 employment discrimination charges will have been filed in FY 2018
  - In 2017, race and retaliation charges were the most frequent allegations, followed by disability, sex, age, national origin, and religious discrimination.
- ◆ In FY 2017, the EEOC secured \$356.6 million for victims of employment discrimination through mediation, conciliation, and settlement, and \$42.4 million through litigation.
- ◆ In FY 2017, the EEOC filed 184 merit lawsuits (more than double the number of suits filed in FY 2016).

# EEOC and the ADA Surge

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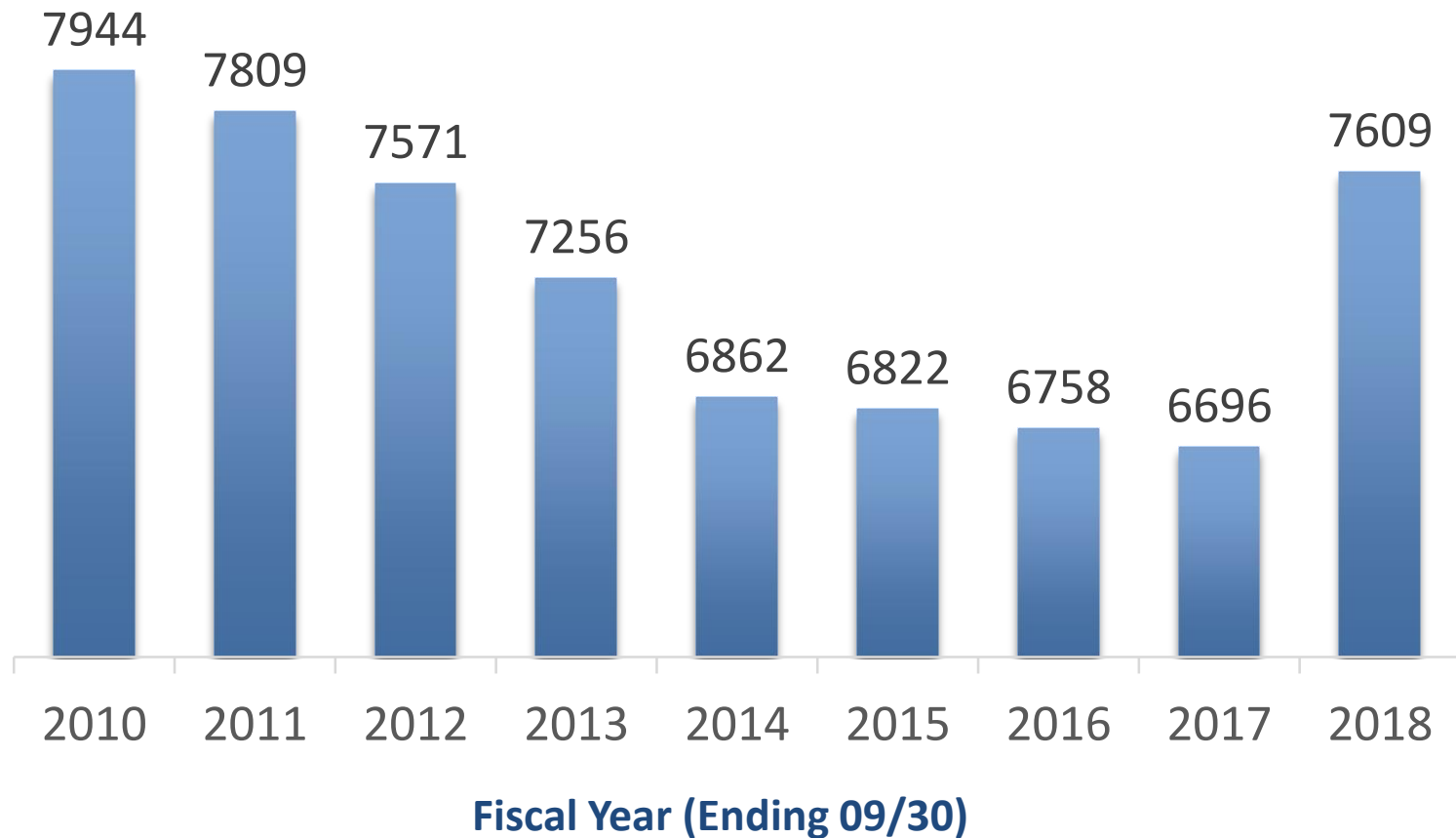
- ◆ Growth of ADA Claims.
  - In 1997, there were 18,108 charges filed with the EEOC involving disability claims.
  - In 2017, there were 26,838 charges filed with the EEOC involving disability claims.
    - 31.9% of all charges filed, resulting in \$135.2 million in monetary benefits paid by employers.
- ◆ EEOC had 184 Merit Filings in FY2017 – 77 were ADA-related.
- ◆ Multiple systemic investigations arising from maximum leave policies, failure to document the interactive process and inconsistencies in investigations..

# Other Employment Litigation Trends

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- ◆ Projection: 12,000 employment litigation lawsuits will have been filed in FY 2018.
  - Wage and hour lawsuits have slowed recently, but have increased 60% since 2007.
  - ADA lawsuits have doubled in the last decade.
  - FMLA lawsuits have tripled in the past 5 years.

# EEOC - Sexual Harassment Charges Filed



# Effects of the #MeToo Movement: Litigation

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- ◆ On October 4, 2018, the EEOC released its preliminary report of sexual harassment data in FY 2018 so far:
  - The EEOC has filed 66 harassment lawsuits.
  - 41 of these lawsuits involved sexual harassment (more than a 50% increase in similar lawsuits from FY 2017).
  - EEOC Charges alleging sexual harassment increased by over 12%.
    - Reasonable cause findings increased to 1,200 (from 970 in FY 2017).
- ◆ Lawsuits are up 50%.
- ◆ So far, the EEOC has secured approximately \$70M for sexual harassment victims (both through litigation and mediation/settlement).
  - In total, the EEOC secured \$47.5M in FY 2017.
  - 500 successful conciliations so far (348 in FY 2017).

# EEOC Task Force Study Take-Aways

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1. Workplace harassment remains a consistent problem.
2. Workplace harassment too often goes unreported.
3. There are compelling business reasons to prevent/stop harassment.
4. It starts at the top – leadership and accountability are critical.
5. Training must change.
6. New and different approaches to training must be explored.
7. It's on all of us to stop workplace harassment.

# EEOC Issues Awaiting New Commissioners



## Wellness Rules

**Vacated Effective  
1/1/19 by Court**



## EEO-1 Report

**2018 Report due  
5/31/19**



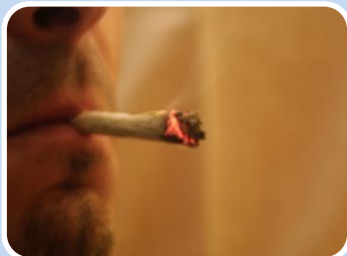
## Civility Rules

**Working with  
NLRB**

# Substance Abuse In The Workplace: Medical Marijuana And Beyond



# Marijuana...Reaching new “highs”!



## Support for Legalization at New High

- 61-63% support legalization (Gallup, Pew, CBS, Quinnipiac)
- Nearly half have “tried” marijuana



## More States Legalize Marijuana

- 10 states have recreational marijuana laws
- 32 states have medical marijuana laws



## Bipartisan Support to Defer to States

- Congressional budget rider on medical marijuana
- STATES Act has Congressional/Trump support

# Marijuana – Illegal, right...

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- ◆ Marijuana is still *illegal* under federal law
  - However, in June 2018, the FDA approved, for the first time, a prescription drug made from cannabidiol (CBD), a component of marijuana, to treat two rare and serious types of epilepsy.
  - In September, the DEA classified the drug as a Schedule V controlled substance, the lowest level of the Controlled Substances Act (meaning the drug has a low potential for abuse).
- ◆ As of December 31, 2018, only *four* states (Idaho, Kansas, Nebraska and South Dakota) have not yet legalized CBD products or some other form of marijuana.
- ◆ 32 states and the District of Columbia have legalized medical marijuana (Oklahoma, Missouri and Utah passed medical marijuana laws in 2018).
- ◆ Recreational marijuana now is legal in 10 states and the District of Columbia, with Michigan and Maine passing recreational marijuana laws in 2018.

# The SUPPORT Act

- ◆ Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT Act)
  - In November 2018, Congress overwhelmingly passed, and President Trump signed into law, sweeping legislation to address the opioid epidemic.
  - Expands access, prevention and treatment for persons with opioid dependence or substance use disorders (SUDs).
- ◆ Recovery Kickback Prohibition
  - A critical component of the SUPPORT Act is the Recovery Kickback Prohibition, applied broadly to any healthcare benefit program, public or private.
  - The Prohibition is more narrow than the Federal Anti-Kickback Statute, which applies only to referrals and services of certain types of entities (namely, recovery homes, clinical treatment facilities, and laboratories as defined in the statute).
  - Both laws make it a crime to offer, pay, solicit or receive remuneration in connection with referrals of patients to certain healthcare providers/facilities.
  - A violation of the Recovery Kickback Prohibition can result in a fine of not more than \$200,000, imprisonment for not more than 10 years or both for each occurrence.

# Drug Testing Update

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- ◆ OSHA clarified:
  - It does not prohibit post-incident drug and alcohol testing to investigate an incident that harmed or could have harmed employees.
  - It also stated that employers should test all employees whose conduct could have caused or contributed to the incident, not just those who reported injuries.

# Department of Transportation (DOT) Update

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- ◆ The SUPPORT Act also requires HHS to determine whether a revision of the Mandatory Guidelines for Federal Workplace Drug Testing Programs to include fentanyl or any other drug is justified.
- ◆ Additionally, HHS was required to report to Congress on the status of scientific and technical guidelines for hair testing by December 25, 2018, and will report every year thereafter, until HHS publishes a final notice of guidelines for hair testing.
- ◆ The law also requires the Secretary of HHS to publish a final notice of the Mandatory Guidelines for Federal Workplace Drug Testing Programs using Oral Fluid by December 31, 2018.
- ◆ DOT-regulated employers should look for updates on hair and oral fluid testing in the coming months.

# Medical Marijuana – CT Fed goes a new way...

- ◆ ***Noffsinger v. SSC Niantic Operating Co., LLC*, No. 3:16-cv-01938, 2018 U.S. Dist. LEXIS 150453 (D. Conn., Sept. 5, 2018)**
  - Conditional offer of employment was rescinded when applicant tested positive for marijuana, despite the fact she had disclosed medical usage, legal under CT law.
  - Applicant claimed violation of anti-discrimination provision, “no employer may refuse to hire a person . . . solely on the basis of such person’s status as a qualifying patient.”
  - Summary judgment for Plaintiff (but no attorneys’ fees or punitive damages). Court found:
    - CT law is not preempted by federal law including the ADA.
    - Can’t say relying on drug test, not cardholder status.
    - No FCA claim for employee’s off-duty marijuana use.



# NLRB Developments

# NLRB Members

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**Marvin Kaplan (R)**  
Member  
term ends 8/27/20



**William Emanuel (R)**  
Member  
term ends 8/27/21



**John Ring (R)**  
Chairman  
term ending 12/16/22



**Mark Gaston Pearce (D)**  
Member  
**term ended 8/27/18**

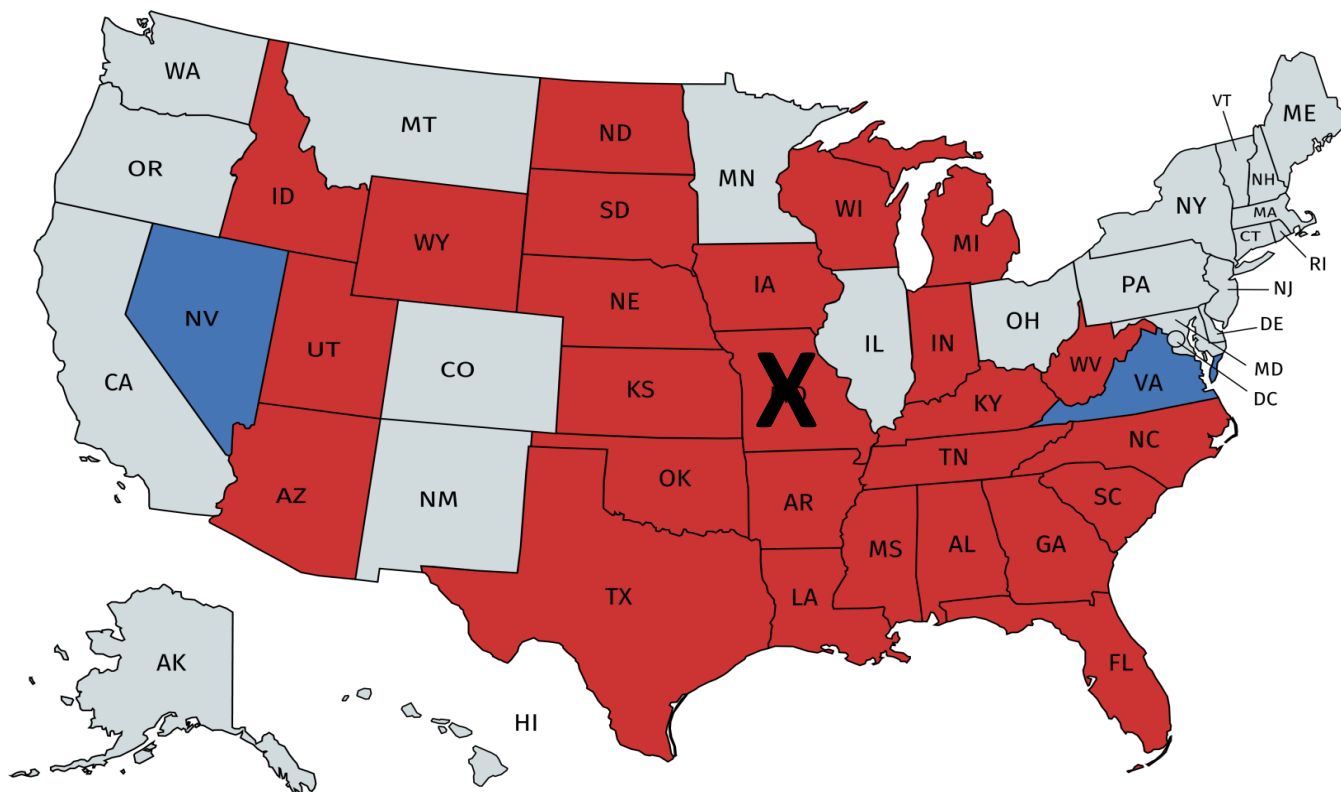


**Lauren McFerran (D)**  
Member  
term ends 12/16/19



# Right-to-Work Laws

- ◆ 27 States have RTW laws, including 5 states since 2012
- ◆ Missouri's RTW law overturned by voters on August 7, 2018



# On the Horizon...



## Union Election Rules

- Hikes in starting pay
- Referral bonus, hiring bonus



## Employee Use of Employer E-Mail

- Board to consider overturning 2014 case
- EEs with access have presumptive right to use



## Joint Employer Rules

- Board proposed new rules on joint-employers
- 2015 Browning-Ferris decision on appeal

Source: NLRB

# Agency Leadership

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- ◆ NLRB General Counsel Peter Robb identified a number of Obama-era Board precedents he would like to ask the NLRB to overturn:
  - *Purple Communications, Inc.*, 361 NLRB 1050 (2014), allowed employees to use employer email systems for NLRA Section 7 purposes during non-working time.
  - On August 1, 2018, the Board invited briefs on whether the Board should adhere to, modify or overrule *Purple Communications*.
  - The Board also asked whether the standard should apply to computer resources beyond email systems, including instant messages, text messages, posts on social media and the like.
- ◆ The NLRB will engage in rulemaking to change the “quickie election” rule, issue by issue, rather than taking on the entire rule at once.

# Agency Leadership

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- ◆ The NLRB has remanded at least 40 workplace rules cases to its ALJs for analysis under *Boeing Co.*, 365 NLRB 154 (2017).
  - In *Boeing*, the Board held that determining whether an employer rule is unlawful involves a balancing test that measures the rule's impact on employee rights against an employer's legitimate business interests in maintaining the rule.
  - The Board created a three-tiered rule classification system:
    - "Category 1" rules are those the Board has specifically designated as lawful;
    - "Category 2" rules are those that require individualized scrutiny to determine their legality; and
    - "Category 3" rules are those specifically designated by the Board as unlawful.
  - Any new decisions will provide employers with clear examples of what employee conduct they can and cannot prohibit or limit through workplace rules under the new standard.

# Joint Employer Proposed Rule

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- ◆ Prior administration prioritized expansion when two or more affiliated businesses are responsible for the same workers.
- ◆ The NLRB released a proposed rule on the standard for determining joint-employer status—in 2<sup>nd</sup> attempt to overturn Obama-era expansion of joint-employer status.
- ◆ Under proposal, entities will be considered “joint-employers” under the NLRA *only if* there is proof that one entity actually has exercised control over the essential employment terms of another entity’s employees (such as hiring, firing, discipline, supervision and direction).
- ◆ Under the proposed rule, proof of indirect control, contractually-reserved control that has never been exercised, or control that is “limited” are not sufficient to establish joint-employer relationship.

# Legality of Arbitration Agreements

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- ◆ The Supreme Court's 2018 decision in *Epic Systems* determining that class or collective action waivers in employment arbitration agreements are lawful did not end all controversies involving these waivers.
- ◆ In several cases before it, the NLRB will determine whether the arbitration agreements independently violate Section 8(a)(1) of the NLRA because they interfere with employees' ability to access the Board.

# Employee Complaints

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- ◆ Individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun “we.”
- ◆ Overturned precedent which held “as a rule of law” that a complaint made by an employee in a group setting was, *per se*, concerted activity.
- ◆ Established five-factor test for determining whether there is a reasonable inference that in making a statement at a meeting, in a group setting, or with other employees present, the employee was seeking to initiate, induce, or prepare for group action

*Alstate Maintenance, LLC*, 367 NLRB No. 68 (Jan. 11, 2019)

# Department of Labor Developments



# Regulatory Activity

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- ◆ Significant efforts to unwind Obama Administration activities and priorities.
- ◆ Changes to salary basis test threshold.
  - Obama Administration proposal dead.
  - Expect new proposal by Trump Administration.
- ◆ Enforcement activities have lessened.
  - Still recovered a record \$304 million in wages in FY2018.
- ◆ More focused on compliance than enforcement.
  - Started issuing Opinion Letters again.
  - Office of Compliance Initiatives.
- ◆ Held 3,643 educational outreach events in FY2018.

# Opinion Letters Are Back

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- ◆ Opinion letters represent official statements of DOL policy.
  - **FLSA2018-18:** Compensable vs. non-compensable time under the FLSA when an employee travels for work beyond routine commuting, particularly if the employee purportedly does not have regular work hours.
  - **FLSA2018-25:** What constitutes a “reasonable relationship” between a guaranteed weekly salary and the amount actually earned when an exempt employee is paid additional amounts for hours worked beyond the relevant standard workweek.

# Tip Pooling

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- ◆ March 2018 FLSA amendment prohibiting employers from keeping tips received by its employees for any purposes.
  - Expressly rescinded regulations disallowing the sharing of tips between traditionally tipped and typically non-tipped employees.
- ◆ The first full opportunity to ascertain whether the amendment will result in significant changes by employers, particularly those in the restaurant and hospitality industries, will likely be in 2019.

# Affirmative Action and Federal Contractors

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- ◆ Significant changes in leadership.
  - Craig E. Leen became director of the OFCCP in 2018. Leen previously had served as Senior Advisor to Alexander Acosta, the Secretary of Labor.
- ◆ New directives (transparency, certainty, efficiency).
  - abbreviated, more frequent OFCCP audits, focused on identifying indicators of systemic discrimination
  - opportunity to voluntarily remedy compliance deficiencies found in establishment-based compliance evaluations
  - begin issuing opinion letters

# Affirmative Action and Federal Contractors

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- ◆ Publicly disclosed details regarding audit-selection process.
  - Prioritizing establishments with higher employee counts.
  - Criteria to regulate the number of establishments and types of audits assigned to the district offices.
- ◆ Created a standardized approach to request extensions in connection with its scheduling letters.
  - 30-day extension for the submission of supporting data in connection with a contractor's affirmative action program if:
    - The contractor requests the extension prior to the initial 30-day due date for the AAP; and
    - The contractor timely submits its basic AAPs within the initial 30-day period after receiving the scheduling letter and itemized listing.



# Immigration

# Immigration

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- ◆ In June 2018, the U.S. Supreme Court held that President Trump's Proclamation No. 9645, known as "Travel Ban 3.0," could stand.
- ◆ I-9 Audits and Raids
  - ICE reported that worksite investigations surged in FY 2018 by 300 to 750 percent over FY 2017.
  - In 2018, Homeland Security Investigations (HSI), one of three operational directorates in ICE, "opened 6,848 worksite investigations compared to 1,691 in FY 17; initiated 5,981 I-9 audits compared to 1,360; and made 779 criminal and 1,525 administrative worksite-related arrests compared to 139 and 172, respectively . . ."

# DACA (Deferred Action for Childhood Arrivals)

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- ◆ DACA remains in effect due to various court orders, but Congress has yet to pass any legislation to permanently protect “the Dreamers” from deportation.
- ◆ In November, the Ninth Circuit Court of Appeals ruled against the Trump Administration and upheld the nationwide injunction in *Regents of University of California v. DHS*, ending the Administration’s efforts to terminate the program, for now.
- ◆ The Administration had previously asked the U.S. Supreme Court to take up this case on direct review, and now that the Ninth Circuit has ruled, it may.



# TPA (Temporary Protected Status)

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- ◆ TPS allows individuals to remain in the U.S. because of disease, natural disaster or conflict in their home country.
- ◆ More than 330,000 nationals from 10 countries have been granted TPS.
- ◆ In 2018, DHS announced the termination of TPS status for individuals from most of those countries, including El Salvador, Haiti, Nicaragua and Sudan.
- ◆ Due to a court order, individuals from those countries may get a reprieve. DHS has automatically extended Employment Authorization Documents (EADs) for certain of those individuals.

# 2018: Five Takeaways

## 2018 Issues to Monitor (as of 1/31/18)

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1. Federal sexual harassment laws will not change, but states/localities will respond to #MeToo.
2. State and local legislation will continue to be where the action is.
3. There will be more decisions that impact NLRB enforcement.
4. On immigration, expect increased H1B scrutiny and heightened enforcement to impact labor force.
5. Federal court treatment of sexual orientation/gender identity discrimination will remain in flux.

# 2019: Five Issues to Monitor

## 2019 Issues to Monitor

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1. Additional decisions on sexual orientation and gender identity discrimination.
2. Pushback on ADA leave as a reasonable accommodation.
3. Additional states and cities enacting sexual harassment prevention legislation including employer training requirements.
4. New wave of litigation stemming from OIG investigations.
5. Additional local wage and hour litigations.

# Thank You



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