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EPLI Trends, Sexual Harassment Claims, and Planning for 2019

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Best Lawyers LAW FIRM OF THE YEAR U.S.News & WORLD REPORT 2018

The pace of workplace law change and risk exposure continues to grow. Filing of Equal Employment Opportunity Commission (EEOC) and state agency charges, initiation of wrongful discharge and other lawsuits, and daily publicity about sexual harassment all contribute to the ever-faster pace of assertion of claims. This trends overview is intended to help evaluate the workplace law landscape. We would welcome the opportunity to meet with Underwriters, Claims, Product, and other EPL team members to discuss what may be in store for the remainder of this year and beyond. With the summer quickly approaching, now is a good time to put something on the calendar as we look toward planning for 2020.

Jackson Lewis attorneys have advised employers for nearly 60 years about preventive workplace policies and practices. Included in the proactive approach to problem avoidance is management education and employee communications about employers' prohibitions against sexual harassment and other workplace misconduct. Daily publicity about Hollywood, political, and other leaders engaging in sexual harassment has led to increased reports of harassment in workplaces across the country and increased filing of claims. Jackson Lewis attorneys can assist your insureds by conducting in-person anti-harassment training or webinars for management team members. If you would like to discuss management education programs, policy development, or employee communications, please contact a Jackson Lewis attorney.

TABLE OF CONTENTS

Pay Equity Lawsuits: The Next Wave of Litigation?

Employers should review pay practices in light of recent trends toward enhanced pay equity laws, accompanied by a noticeable increase in pay equity suits brought by both agencies and private attorneys. In the last few years, a number of states (including California, Maryland, Massachusetts, New York, and Oregon) implemented pay equity legislation imposing stricter standards on employers and lessening the burden for plaintiffs alleging wage discrimination. The impact of these new laws – as well as an increased national focus on compensation discrimination – is being seen now. High-profile pay equity cases have been brought against Chadbourne & Parke, Pratt Library, Carolinas HealthCare System, and others. There seems to be heightened focus on the technology industry, in particular, with several pay equity suits – including putative class action pay equity suits – brought against major multi-national internet and technology companies, computer software and consumer technology companies, semiconductor and telecommunications equipment companies, and more. Further, the Office of Federal Contract Compliance Programs (OFCCP) has brought two administrative actions alleging pay equity discrimination, against a major American computer technology corporation and a large data technology and risk solutions company. The action against the data technology and risk solutions company was resolved for a settlement of $1.2 million, including future salary adjustments.

A more recent analysis from the National Women's Law Center shows the gender wage gap remains pervasive. In lower wage jobs, women make 71 cents for every dollar paid to men. Even in higher wage jobs, women make 74 cents for every dollar paid to men in the same occupations. The high-wage jobs include lawyers and engineers. According to the report, female physicians make 66 cents on the dollar compared to men.

On September 27, 2017, the EEOC filed three lawsuits in the D.C. metro area, alleging that a major Washington, D.C. university, the National Association for the Education of Young Children, and

Vador Ventures Inc. paid women workers less than similarly-situated male counterparts, indicating that, at least for now, pay discrimination will continue to be a focus for the EEOC. To that end, Acting EEOC Chairwoman Victoria Lipnic has recently stated that the EEOC "remains committed to strong enforcement of our federal equal pay laws."

Medical Marijuana

The already complicated landscape for employers who conduct drug testing for marijuana continues to get more complicated. The New York City Council passed a law on April 9, 2019, that will prohibit employers from conducting pre-employment drug testing for marijuana. The law is expected to be signed by the mayor and will take effect one year later. This law is the first of its kind in the United States. It contains a number of exceptions for employees who work in certain types of "safety-sensitive" jobs, such as police officers, commercial motor vehicle drivers, certain types of construction and maintenance workers, individuals who work with children, medical patients or vulnerable person, among others.

Additionally, courts continue to rule against employers in drug testing cases involving medical marijuana cases. For example:

a. A New Jersey appellate court held that a disabled employee may sue his former employer under the New Jersey Law Against Discrimination (NJLAD) for alleged discrimination based on the employee's use of medical marijuana. *Wild v. Carriage Funeral Holdings, Inc., et al.*, No. A-3072-17T3 (N.J. App. Div. Mar. 27, 2019). Although the New Jersey Compassionate Use Medical Marijuana Act (NJCUMMA) does not prohibit employment discrimination based on medical marijuana use, the court held that the NJCUMMA does not immunize "employers from obligations already imposed elsewhere [such as under the NJLAD]."

b. The Ninth Circuit Court of Appeals refused to dismiss a medical marijuana-using applicant's disability discrimination claim because he did not state that he actually used marijuana at the time of his interview — even though he provided a copy of his medical marijuana card – and was not subjected to a drug test. *Kamakeeaina v. Armstrong Produce, Ltd.,* 2019 U.S. Dist. LEXIS 50863 (9th Cir. Mar. 22, 2019).

c. A Delaware state court held that a medical marijuana user may proceed with a lawsuit against his former employer after his employment was terminated due to a positive post-accident drug test result for marijuana. *Chance v. Kraft Heinz Foods Co.*, C.A. No. K18C-01-056 NEP (Del. Super. Ct. Dec. 17, 2018). The plaintiff relied on the anti-discrimination provision of the state's medical marijuana law, while the employer argued that federal law preempted the state law because, under the federal Controlled Substances Act, marijuana is illegal. The court, however, stated that the Controlled Substances Act "does not make it illegal to employ someone who uses marijuana, nor does it purport to regulate employment matters within this context." The court further stated that the anti-discrimination provisions of the state medical marijuana law do not pose an obstacle to the objectives of Congress and do not require employers to participate in illegal activity. Rather, the state medical marijuana law only prohibits employers from discriminating against employees based upon medical marijuana use. The court therefore rejected the employer's preemption argument. In addition, the court held that a private right of action is implied in the Delaware medical marijuana law.

d. In *Noffsinger v. SSC Niantic Operating Co., LLC, d/b/a Bride Brook Nursing & Rehab. Ctr.*, No. 3:16-cv-01938, 2018 U.S. Dist. LEXIS 150453 (D. Conn. Sept. 5, 2018), a federal court held that refusing to hire a medical marijuana user who tested positive on a pre-employment drug test violates the state's medical marijuana law. The court granted summary judgment to the applicant on her claim for employment discrimination, but declined to award her attorneys' fees or punitive damages. The employer argued that the federal Drug-Free Workplace Act barred it from hiring the applicant because that law prohibits federal contractors from allowing employees to use illegal drugs. Marijuana is illegal under federal law. The court rejected that argument because the Drug-Free Workplace Act does not require drug testing and does not regulate employees who use illegal drugs outside of work while off-duty. Similarly, the court rejected the argument that hiring the applicant would violate the False Claims Act, holding that it would not defraud the federal government to hire an employee who uses medical marijuana outside of work while off-duty. The employer also argued that it did not discriminate against the applicant based on her *status* as a medical marijuana user, but rather, it relied on the positive drug test result. The court dismissed this argument because it would render a medical marijuana user's protection under the statute a nullity.

Employers (including federal contractors) should not rely solely on federal law or their status as a federal contractor when making employment decisions with regard to applicants and employees who use medical marijuana. Courts in Arizona, Connecticut, Delaware, Massachusetts, Rhode Island, and other states will enforce state laws against discrimination with regard to medical marijuana use.

#MeToo and the Surge in EEOC Charges

In October 2018, the EEOC unveiled its preliminary data on sexual harassment for its 2018 fiscal year showing how the growth of the #MeToo movement has attributed to a spike in charges with the agency. The agency's fiscal year ran from October 2017 (which, coincidentally, is the same month the Harvey Weinstein scandal came to a head) through September 30, 2018. The EEOC noted there was a 50% jump from the number of sexual harassment cases the agency filed the prior fiscal year. Further, the EEOC recovered $70 million for sexual harassment victims in 2018, almost $25 million more than it recovered in FY 2017. According to the agency's data, workers alleging they were victims of sexual harassment increased 12% from the prior year. This 12%-increase represents the first time this decade there has been an increase in sexual harassment charges received by the EEOC.

Former EEOC Commissioner Chai Feldblum noted that the agency is fully on board with playing a part in this "transformative moment in our history." The agency has taken several steps over the last year to fight all forms of workplace harassment, including conducting more than 1,000 outreach events, developing the "respectful workplaces" training seminars, and creating an internal "harassment prevention action team" to coordinate the EEOC's anti-harassment efforts. These measures, and others, are in an effort to spread the word throughout the country about what the EEOC does and the resources it has to offer.

Expanding Scope of Wage Lawsuits

An ever-growing number of wage-hour lawsuits allege that workers wrongly were denied minimum wage (especially in tip credit lawsuits or claims by low-wage workers, often in the hospitality and agricultural industries) or overtime pay (usually the result of misclassification of workers as exempt or due to off-the-clock work by non-exempt staff). The scope of wage-hour lawsuits continues to expand. Class action lawsuits increasingly allege denial of wage supplements or wage benefits claims under state or local laws that mandate paid sick days or other paid time off. As local jurisdictions become concerned about the lack of movement in the federal level, expect more states and cities to enact wage supplement laws – employers who do not comply likely will face class action lawsuits. For example, in September 2017, a major car rental company entered into a $2 million settlement agreement to settle a class action suit brought by rental car workers at the Seattle-Tacoma International Airport, who alleged failure to comply with the SeaTac minimum wage ordinance. In January 2017, Menzies Aviation agreed to a settlement of $8.18 million to resolve a class action suit brought by employees who claimed they were paid less than the SeaTac minimum wage. The ordinance requires a minimum wage of $15 hour for workers at the Seattle airport. This lawsuit is part of a wave of class actions brought beginning in February 2016, immediately after the ordinance was upheld following legal challenges. The City of Chicago recently enacted a similar ordinance, requiring airline subcontractors at O'Hare International and Midway International airports to pay employees a minimum hourly wage of $13.45, with annual increases in proportion with the Consumer Price Index.

Prevalence of litigation and public criticism of subminimum wage payments have led some restaurants to eliminate the use of tip credits. Since few restaurants have done so, the number of claims experience in the hospitality sector continues to grow.

FLSA Opinion Letters Reinstated

The Department of Labor's (DOL) Wage Hour Division (WHD) reinstated 17 opinion letters originally issued during the George W. Bush administration, but subsequently withdrawn during the Obama administration. The following four additional opinion letters were recently released:

- FLSA 2018-20: Whether time spent by employees voluntarily attending benefit fairs and undertaking wellness activities, such as biometric screening, weight-loss programs, and use of an employer-provided gym, are considered compensable working time (it is not).
- FLSA 2018-21: Whether 29 U.S.C. § 207(i), the commissioned sales employee overtime exemption, applies to a company's sales force that sells an internet payment software platform (under the facts presented, it does). This opinion letter is the first acknowledgment by the DOL of the U.S. Supreme Court's holding in *Encino Motorcars LLC v. Navarro*, 138 S. Ct. 1134 (2018),

that FLSA exemptions are to be given a "fair reading," rather than a "narrow construction," as previously applied by the Department and many courts.

- FLSA 2018-22: Whether members of a non-profit organization who serve as credentialing examination graders for one to two weeks per year, and who are not paid for their services but are reimbursed for their expenses, may properly be treated as volunteers rather than employees (under the facts presented, they may).
- FLSA 2018-23: Whether 29 U.S.C. § 213(b)(27), exempting from overtime employees who work at a movie theater establishment, likewise applies to employees who work at dining services operated by, and accessible only within, the theater (it does).

Website Accessibility Lawsuits on the Rise

In our e-commerce age, lawsuits complaining that business websites are not accessible to vision-impaired users in violation of Title III of the Americans with Disabilities Act (ADA) or state laws are on the rise. In 2016, over 240 lawsuits – the majority of them class actions – were filed against companies alleging violations of the ADA for failure to maintain websites accessible to the blind and visually impaired. The industries most susceptible to these lawsuits have been retail, hospitality, and financial services. On June 13, 2017, the U.S. District Court for the Southern District of Florida ruled after a bench trial that a major U.S. supermarket chain violated the ADA because its website was inaccessible to a visually impaired customer. The U.S. District Court for the Southern District of New York recently refused to dismiss a website accessibility claim against a fast-food restaurant chain, ruling that "the text and purposes of the ADA . . . suggest that defendant's website is covered under the ADA, either as its own place of public accommodation or as a result of its close relationship as a service of defendant's restaurants". *See* Case No. 17-cv-00788 (S.D.N.Y. July 21, 2017).

Background Check Claims

a. Salary Inquiry Bans. States and localities are continuing to enact legislation prohibiting employers from asking applicants about their salary histories. To date, California, Delaware, Massachusetts, Oregon, Puerto Rico, New York City, Albany, Westchester County, Philadelphia, San Francisco, Vermont, and most recently, Suffolk County all have enacted similar measures. Employers must educate recruiters and hiring managers regarding what is not permitted under these laws. At the very least, those in the hiring process should not ask applicants about salary histories until after a conditional offer of employment is made. In some locations (including New York City), such an inquiry can never be made.

b. Ban the Box. As of March 2018, 30 states and more than 150 cities have adopted some form of "Ban the Box" legislation prohibiting employers from inquiring about an applicant's criminal history. Eleven states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington) have passed laws limiting the use of credit checks in employment. A number of cities and counties (including New York City, Chicago, and, most recently, Westchester) have implemented similar restrictions. Failure to comply could give rise to claims of wrongful denial of hiring or wrongful discharge, on both individual and group bases. The lack of "paperwork" compliance also could create class action exposure.

c. Fair Credit Reporting Act (FCRA). Employers also must be mindful of class action litigations under the FCRA. Though the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), requires FCRA plaintiffs to identify at least a "concrete injury," courts continue to allow FCRA class actions to move forward despite presenting merely paperwork violations. For example, in March 2017, a Florida federal court allowed a putative FCRA class action to continue against Amazon. Since the Supreme Court ruling in *Spokeo*, several class action lawsuits were filed against employers that conduct applicants' background checks alleging FCRA violations:

i. In November 2017, ESR News reported that Avis agreed to pay $2.7 million to settle a class action lawsuit that claimed the car rental company allegedly violated the FCRA when conducting background checks on job applicants for employment purposes. On the other hand, in October 2017, a California federal judge granted a Motion to Dismiss a class action lawsuit against a major home-improvement supplies retail chain claiming a violation of the FCRA because the retail chain allegedly failed to make proper disclosures and failed to obtain proper authorization. In the Order dismissing the case, Judge Gary Klausner explained that the lawsuit failed to demonstrate actual harm and did not allege a "concrete" injury as required after *Spokeo*; and

ii. Consumer lawsuits filed under the FCRA grew by nearly 60% in September 2017 over the previous month, an increase that "keeps it in line with the aggressive growth in recent years," according to litigation statistics reported by WebRecon LLC. The 3,328 filings under the FCRA from January 2017 to September 2017 are a 13.5% increase from the 2,932 FCRA filings from January 2016 to September 2016.

Pregnancy and Lactation Accommodation

In 2018, South Carolina became the latest state to pass a pregnancy accommodation law, joining 22 states and Washington D.C. While varying by jurisdiction, these laws expand protections for pregnant workers beyond the prohibition against discrimination under federal law. Enactment of these laws followed a 2015 U.S. Supreme Court decision, which held that a pregnant worker could claim disparate treatment under the Pregnancy Discrimination Act by showing that her employer refused to provide an accommodation despite providing accommodations to employees with restrictions upon their ability to work. *See* 135 S. Ct. 1338 (2015). For example, in the years since the U.S. Supreme Court's 2015 decision, New York amended its Human Rights Law to require that employers provide reasonable accommodations for employees with pregnancy-related conditions unless the proposed accommodation would impose an undue hardship on the employer's business. New York City has gone even further in protecting pregnant women or women who were recently pregnant by forbidding employers from requiring a doctor's note. Rhode Island amended its Fair Employment Practices law to require employers to reasonably accommodate an employee's or prospective employee's pregnancy-related condition, and to prohibit employers from requiring pregnant employees to take a leave of absence if an on-the-job reasonable accommodation could be provided. In June 2015, the District of Columbia's Office of Human Rights and Department of Employment Services announced that they will work jointly to increase investigation and enforcement of the District's Protecting Pregnant Workers Fairness Act of 2014, which requires employers to provide reasonable accommodations to employees affected by pregnancy, childbirth, breastfeeding, and related medical conditions.

In addition, several state laws (as well as city and local laws) expressly require employers to accommodate lactation and the need to express breast milk while at work, including requirements that employers provide dedicated lactation rooms. In May 2015, for example, the New York City Commission on Human Rights issued a legal interpretive guidance clarifying that the City's Human Rights Law requires employers to provide a dedicated lactation space (not in a bathroom) with a refrigerator available for employees expressing breast milk in the workplace. In California, employers are required to make reasonable efforts to provide employees with a private area, other than a toilet stall, to express breast milk. Failure to comply could lead to claims of denial of accommodation, constructive discharge (*i.e.,* a female worker quit due to lack of a clean, private area in which to express breast milk), or wrongful termination claims, whether on an individual or group basis.

Growth of Federal Court Litigation

Despite the continuing migration of claims to state court in California, New Jersey, New York City, and other claimant-friendly jurisdictions, federal court litigation remains a robust threat to employers. In FY 2016, 14,093 workplace lawsuits were filed up from 13,976 in 2015. Alarmingly, the number of ADA suits increased by nearly 10%; Family and Medical Leave Act (FMLA) suits were up about 30% in recent years (approximately 8% in the past year alone).

Whistleblower Claims

The number of federal whistleblower suits and settlements continues to grow rapidly. The Occupational Safety and Health Administration (OSHA) administers whistleblower claims under the Sarbanes-Oxley Act (SOX), as well as under more than 20 other federal anti-retaliation/whistleblower laws. For example, under the Dodd-Frank Act Whistleblower Program, the Securities and Exchange Commission (SEC) has paid out a total of approximately $262 million in “bounties” to 53 whistleblowers who the SEC deemed to have provided original and useful information leading to successful enforcement actions. The SEC recently reported that enforcement actions have resulted in more than $1 billion in fines and penalties. This number does not take into consideration the fees and costs incurred by publicly traded companies to investigate or otherwise defend SEC enforcement actions.

In-House Counsel and Compliance Personnel as Whistleblowers

The scope of whistleblower protection afforded by anti-retaliation provisions continues to expand. Our Corporate Governance and Internal Investigations Practice Group and litigators have identified a growing trend of in-house attorneys and compliance professionals filing whistleblower status. The recent $11 million jury award in favor of a former general counsel of Bio Rad Laboratories in federal court in California brought attention to this type of claim. The company has filed an appeal with the Ninth Circuit. A number of state courts, including based on New Jersey's Conscientious Employee Protection Act (CEPA), have rejected the defense that the whistleblower's job mandated identifying compliance issues. In *Trzaska v. L'Oreal USA, Inc.*, 865 F.3d 155 (3d Cir. 2017), the U.S. Court of Appeals for the Third Circuit held that L'Oreal's in-house counsel had adequate support in the state's ethics rules to enable them to pursue a whistleblower retaliation claim against L'Oreal. Further signifying this movement, a magistrate judge in the U.S. District Court for the Northern District of California held that SOX whistleblower protections preempt the attorney-client privilege, allowing general counsel to use otherwise privileged and confidential information as evidence in the lawsuit. Since these cases arise from what would seem violation of the attorney-client privilege, it is important for employers to address these issues as soon as they are raised, especially at the pre-litigation stage.

Top 10 EEOC Employment Discrimination Claims in 2018

In April, the EEOC published its statistics for FY 2018. The EEOC has disclosed the resolution of 90,558 charges of employment discrimination, securing $353.9 million for victims of discrimination in private, federal and state and local government workplaces through voluntary resolution and litigation, and $55.6 million for victims of sexual harassment. In addition:

- The EEOC filed 217 lawsuits, 111 that included allegations under Title VII.

- The EEOC resolved 156 lawsuits across the country.
- Charges filed with the EEOC alleging sexual harassment increased by more than 15 percent from FY 2017.
- Courts continue to wrestle with the scope of sex discrimination (*i.e.,* is it solely gender-based?) under Title VII. (*See, Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018), in which the court, *en banc,* considered whether Title VII prohibits discrimination on the basis of sexual orientation such that court precedents to the contrary should be overruled. The court held that sexual orientation discrimination constitutes a form of discrimination "because of . . . sex," in violation of Title VII, and overturned *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-23 (2d Cir. 2005), to the extent they held otherwise. *Zarda v. Altitude Express, Inc.*, 883 F.3d at 107, 2018 U.S. App. LEXIS 4608, *1-2, 130 Fair Empl. Prac. Cas. (BNA) 1245, 102 Empl. Prac. Dec. (CCH) P45,990, 2018 WL 1040820). *See also, Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017), recognizing sexual orientation discrimination as a form of sex discrimination prohibited by Title VII); and *Evans v. Georgia Regional Hospital*, 650 F.3d 1248 (11th Cir. 2017), holding that sexual orientation discrimination is not protected by Title VII.) Significantly, in April 2019, the U.S. Supreme Court granted certiorari to several sexual orientation and transgender cases, including *Zarda v. Altitude Express, Inc.*, so additional guidance regarding these issues and Title VII should be forthcoming in the next year or so. In the meantime, despite the decrease in EEOC discrimination charges overall, the EEOC resolved 2,101 charges and recovered $6.1 million for lesbian, gay, bisexual, and transgender (LGBT) individuals who filed sex discrimination charges with EEOC in FY 2018. Data reflects a steady increase during the six years the Commission has collected LGBT charge data, with an increase in monetary benefits received by about $1 million every year. From FY 2013 through FY 2018, nearly 9,000 charges were filed with EEOC by

LGBT individuals alleging sex discrimination. EEOC recovered $21.2 million for victims of such alleged discrimination.

- The top 10 types of employment charges handled by EEOC in 2018 were:
    - Retaliation: 39,469 (51.6%)
    - Sex: 24,655 (32.3%)
    - Disability: 24,605 (32.2%)
    - Race: 24,600 (32.2%)
    - Age: 16,911 (22.1%)
    - National Origin: 7,106 (9.3%)
    - Color: 3,166 (4.1%) (overlaps with race)
    - Religion: 2,859 (3.7%)
    - Equal Pay Act: 1,066 (1.4%)
    - Genetic Information Non-Discrimination Act: 220 (0.3%)

EEOC Filings Surprisingly Decline

The Equal Employment Opportunity Commission received 76,418 charges during FY 2018, the lowest in 10 years, down from 84,254 charges in FY 2017. EEOC charge filings tend to signal the approximate rate of filing of discrimination and wrongful discharge lawsuits. This is true even in the most litigious jurisdictions (*i.e.,* California, New York City, and New Jersey), where claims often are filed under state or local laws.

FLSA Developments

a. The DOL's regulations increasing the minimum salary cut-off for exempt status from $455/week to $913/week, nearly $50,000/year was enjoined by a U.S. District Court in Texas. On August 30, 2017, that court issued an order granting summary judgment to the state and business plaintiffs, holding the overtime rule is invalid. Where does that leave us? Currently, (1) the salary level of $455/week remains in place, and (2) the final rule has been held invalid. The decision confirmed the DOL's right to set a minimum salary level of some sort *(i.e.,* the court held only that the DOL exceeded its authority in this case). However, the AFL-CIO could appeal denial of its motion to intervene, and if that appeal is granted, the AFL-CIO could challenge the district court order granting summary judgment. If so, that might take the parties back to square one.

b. The DOL has issued a new proposed rule updating the salary level for the white-collar exemptions. The proposed rule has not yet been published, however, the new standard salary level will be $35,308/year ($679 per week). This is an increase from the current level of $455/week.

c. On October 2, 2017, the U.S. Supreme Court heard oral argument on whether mandatory pre-dispute arbitration agreements waiving participation in class and collective actions violates the National Labor Relations Act (NLRA). On May 21, 2018, in a 5-4 decision authored by Justice Neil Gorsuch, the Court found that requiring employees to agree to arbitration agreements with class waivers does not violate the NLRA, finding such agreements fully enforceable. *Epic Systems Corp. v. Lewis*, 584 U.S. __ (2018).

d. The DOL has recovered more than $1.8 billion in back pay for about 1.9 million workers since 2009. In FY 2016, the DOL found violations in 81% of its audits, and collected $266 million for approximately 280,000 workers (nearly $1,000/employee). In FY 2017, DOL recovered more than $270 million in back wages for more than 240,000 workers. On average, $1,125 was due back to each employee.

e. On June 7, 2017, the DOL announced withdrawal of the Obama-era “Administrative Interpretations,” thus changing again, it seems, rules governing employee/independent contractor classification and joint employer liability. It did so in a three-sentence press release. The Independent Contractor Administrative Interpretation issued by the prior DOL concluded that “most workers are employees” (not independent contractors) and advocated for a revised “economic realities test” that favored a determination of employee status. The Joint Employer Administrative Interpretation stated that joint employment relationships under the FLSA “should be defined expansively,” and favored an interpretation of joint employment even where no traditional indicia of control existed. What the courts will do with the ever-changing definitions is uncertain.

f. Contrary to the U.S. Supreme Court’s long-standing holding in *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697 (1945), a judge in the Southern District of New York held that private settlements waiving FLSA claims entered into prior to a lawsuit being filed are enforceable without approval by the DOL or a court. *See Gaughan v. Rubenstein*, 2017 U.S. Dist. LEXIS 107042 (S.D.N.Y. July 11, 2017). The Second Circuit has not yet ruled on the issue, but courts in other jurisdictions have issued diverging opinions. The Fifth Circuit has held a pre-litigation settlement may be valid and binding without approval where it is the result of a “bona fide FLSA dispute over hours worked or compensation owed.” *Martin v. Spring Break ’83 Productions, LLC*, 688 F.3d 247 (5th Cir. 2012). The Eleventh Circuit reached the opposite conclusion in *Lynn’s Food Stores, Inc. v. U.S. Dep’t of Labor*, 679 F.2d 1350 (11th Cir. 1982).

District courts in the Seventh Circuit routinely require approval of FLSA settlements. *See, Salcedo v. D'Arcy Buick GMC, Inc.,* 227 F. Supp. 3d 960, 961 (N.D. Ill. 2016).

National Labor Relations Board (NLRB)

Composition, and thus rulings, of the NLRB changed dramatically as a result of the U.S. Senate confirmation and swearing in of President Donald Trump's two Republican nominees to fill vacancies on the Board. While the private sector union rate is just 6.7%, labor's win rate in NLRB representation elections is around 70%. Perhaps of greater significance, the NLRB may narrow the scope of employee rights in non-union workplaces.

a. *Browning-Ferris* – Regarding joint employer liability for staffing companies, franchisees, subcontractors, and the companies that use them; the Obama NLRB held in *Browning-Ferris* that:

    i. No ownership, management, or financial interrelation is required for joint employer liability to be imposed; and

    ii. The test for joint employers is "direct or indirect control" – no one is quite sure what constitutes "indirect" control sufficient to cause an employer to have downstream liability.

On the other hand, the Pennsylvania Supreme Court has held that a franchisor was not liable for its franchisee's failure to obtain and maintain workers' compensation insurance.

On September 14, the NLRB published its a proposed joint-employer rule that mirrors the standard that the Board tried to put into place in its now-vacated December 2017 *Hy-Brand Industrial Contractors, Ltd.* decision, which would have overturned the more expansive 2015 *Browning-Ferris* decision.

- Proposed standard
  - o The NLRB will consider an employer most likely a joint employer of a separate employer's employees *only if* the two employers share or codetermine the employee's essential terms and conditions of employment. This includes hiring, firing, supervision, and discipline.
  - o The putative employer must actually exercise control over the employee's essential terms in a manner that is unique and not limited.
  - o This departs from *Browning-Ferris* because that standard required only the putative employer to reserve the right to exercise control, even so far as indirectly. Whereas the new (well, old) standard requires direct, substantial, and immediate control.
- Effect on employers
  - o Provides more consistency, predictability, and certainty among federal agencies.
  - o Decreases the possibility of a federal agency deeming a company a joint employer of individuals it never considered or thought about employing.
  - o Forces agencies to address the individual facts of each situation, rather than hypothetical scenarios in which the employer may not exercise direct and immediate control over the terms and conditions of the employee's employment.

b. <u>Recording Devices.</u>

i. Reviewing Board findings in a 2016 case involving a major international telecommunications company, the Fifth Circuit declined to enforce three of the NLRB's findings, including that the company workplace conduct policy, which encouraged employees to maintain a "positive work environment," discouraged discussions of unionizing; and the commitment-to-integrity policy, which prohibits "arguing or fighting," would inhibit the robust discussion of labor issues and union organizing. However, the court upheld the NLRB's finding that a recording policy that bans employees from "any and all photography on corporate premises without permission from a supervisor" would discourage employees from engaging in a protected activity, *e.g.,* recording unsafe work areas. Case No. 16-60284 (5th Cir. 2017).

ii. Similarly, in Whole Foods, 363 NLRB No. 87 (2015), the Board struck down policies prohibiting workplace audio or video recording without prior approval from management, finding a policy discouraged employees from communicating about unions or engaging in other protected concerted activities. The Second Circuit upheld the Board's decision, holding that the policy was overly broad, potentially limiting employees' right to engage in protected concerted activity. *Whole Foods Mkt. Grp., Inc. v. NLRB*, 16-0002-ag, (2d Cir. 2017) (unpublished); and,

c. Football Players – NLRB General Counsel issued a memo finding football players at private colleges are employees who can engage in collective bargaining.

Class Action Developments

a. Employee Retirement Income Security Act (ERISA) class action settlements involved payments of more than $800 million, while wage-hour class settlements were close behind, at nearly $700 million (up from about $460 million in 2015).

b. Wage and hour collective action certifications increased in 28% in 2016 (up from 175 in 2015 to 224 in 2016). FLSA opt-in collective actions are certified nearly 75% of the time and more than half of certification of opt-in classes survived post-discovery decertification motions. Decisions certifying wage and hour classes increased to 11% in 2016. Employers won decertification at a rate of 63% in 2017, which was up from 45% in 2016 and 36% in 2015.

Success in litigation often produces copycat filings. The value of top wage and hour settlements in 2017 (more than $525 million – and over $1.2 billion in the last two years) is likely to prompt more litigation. Compared to ERISA and employment discrimination class actions, FLSA litigation is less difficult and more cost-effective and predictable for plaintiffs.

c. In New York City, California, and New Jersey, wage-based class action suits regularly go to state court, and do not include FLSA claims. This appears to explain the number of FLSA lawsuits dropping from 8,954 filings in 2015 to about 8,300 filings in 2016. The slight dip in FLSA filings seems to have been reversed in 2017.

d. Biometric time management systems are becoming more popular and coming under scrutiny, particularly in Illinois, where hundreds of putative class action claims have been filed claiming violations of the 2008 Illinois Biometric Information Privacy Act (BIPA). Legislative efforts to relax BIPA's private right of action and liquidated damage provisions have failed to date and the state's Supreme Court has held that plaintiffs do not need to show actual harm to recover under the statute.

e. Under state laws, liquidated damages often are available to prevailing claimants. Liquidated damages also are available under the FLSA to punish willful violations. In *Hamza Express Food,* the Second Circuit ruled that New York Labor Law and FLSA awards of liquidated damages cannot be piled on top of each other *(i.e.,* no stacking of federal and state liquidated damages) to enable claimants to recover four times the underpayment. *See Chowdhury v. Hamza Express Food Corp*., 2016 U.S. App. LEXIS 21870 (2d Cir. Dec. 7, 2016).

f. Failure to provide workers with state or locally mandated wage theft notices can lead to class action liability. In effect, no forms equals costly fines. Several states (including New York and California) have enacted legislation requiring employers to provide written notification to employees regarding their wage rates, overtime rates, pay dates, and other information upon hire or changes in rates. Failure to provide notification exposes employers to stiff penalties ($5,000 per "ungiven" notice under New York law). Similar laws exist, imposing significant monetary penalties, with respect to what must appear on a pay stub. For example, if proper tip notice forms are not provided, the tip credit is at risk and minimum wage supplements can be obtained on a class-wide basis.

g. Class action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act (FAA), the U.S. Supreme Court held in a much-anticipated decision in three critical cases. *Epic Systems Corp. v. Lewis,* No. 16-285; *Ernst & Young LLP et al. v. Morris et al.,* No. 16-300; *National Labor Relations Board v. Murphy Oil USA, Inc., et al.,* No. 16-307 (May 21, 2018). The comprehensive opinion is succinct in its conclusion that the NLRA does not trump the FAA. Further, the Court stated that Section 7 of the NLRA is focused on employees' rights to unionize and engage in collective bargaining and that it does not extend to protecting an employee's right to participate in a class or collective action. Now, employers can be certain that class or collective action waivers in arbitration agreements do not violate the NLRA.

ERISA/Fiduciary

ERISA claims continue to represent significant and complex liabilities for Plan sponsors and Plan administrators. Following the U.S. Supreme Court's 2011 decision in *Cigna Corp. v. Amara*, 563 S. Ct. 421 (2011), courts have more broadly interpreted claims for equitable relief under Section 502(a)(3) of ERISA (in addition to a traditional claim for benefits under Section 502(a)(1)(B)), which often (or may) mean broader discovery and more open-ended relief. This expansion of remedies has led to a host of new claims in the last couple of years. In particular, fiduciary claims centering around plan fees and company stock issues in employer-sponsored retirement plans and continuation of group life insurance coverage have increased. Claims increasingly focus on fiduciary processes and have expanded the bases on which to attack the fiduciary (plan administration) process.

One trend in the last couple of years involves class actions targeting Section 403(b) retirement plans sponsored by large, private universities. Class actions challenging allegedly excessive investment and plan-administration fees started in 2008 with 401(k) plans. The same firm began bringing similar ERISA class actions against numerous universities in 2016. Generally, the targeted universities' plans have between approximately 100 and 400 investment options, and between $2.4 billion and $4.7 billion in net plan assets.

Plaintiffs are suing under ERISA for breach of fiduciary related to:

- Administrative recordkeeping fees – typically claiming that tasks should have been consolidated to just one recordkeeper;
- Investment management fees – typically challenging additional fees charged for actively managed funds and annuities;
- Offering too many funds options;
- Portfolio performance losses; and
- Failure to monitor.

Although initially most universities lost motions to dismiss, 2018 brought two defense wins. In an ERISA class-action suit filed against a major university in the U.S. District Court for the Northern District of Illinois, the court dismissed all claims, and in a similar suit filed the Southern District of New York, the court ruled in favor of the defendants after trial on fiduciary breach claims. *See* 2018 U.S. Dist. LEXIS 87645 (N.D. Ill. May 25, 2018) and 328 F. Supp. 3d 273 (S.D.N.Y. July 31, 2018). More guidance should come in 2019, as these cases have been appealed to the Seventh and Second Circuits respectively, the Third Circuit will be deciding the appeal by the plaintiffs in similar litigation involving Penn State, and the Fourth Circuit will be reviewing a case.

Another trend is "propriety fee" litigation in 401(k) plans. In these types of cases, the plan offers funds in which employer or affiliated company has an interest, *e.g.,* an investment management firm whose 401(k) plan includes funds that are managed by the firm. The plaintiffs have generally defeated motions to dismiss if they could allege some fact consistent with acting in the employer/fund provider's interest, *e.g.,* limiting funds to proprietary funds, having higher cost proprietary index funds, or using plan investments to seed new proprietary funds. But, as evidenced in two recent cases, the tide may be turning.

In an ERISA breach-of-fiduciary-duty case filed by a former employee against a multinational financial services company (who was upset with the company's investment decisions), the U.S. District Court of Minnesota's decision granting Defendant's motion to dismiss was affirmed on appeal. The Eighth Circuit rejected comparisons to Vanguard funds because they used different investment strategy and had different costs, and held that plaintiffs needed to demonstrate fund under-performance against a "meaningful benchmark" before it would infer imprudent or disloyal conduct.

In a similar case in the U.S. District of Massachusetts, the defendants prevailed at trial. The district court found it was not a breach of the duty of loyalty for the defendant to offer its own funds in its 401(k) plan when the investment company (i) made more than $40 million in discretionary contributions to plan, and (ii) paid for recordkeeping services. However, on appeal, the First Circuit reversed the district court's judgment.

Another category of cases centered on ERISA's exemption from coverage for "church" plans. On June 5, 2017, the Supreme Court ruled unanimously in *Advocate Health Network v. Stapleton*, 137 S. Ct. 1652 (2017) that a pension benefit plan need not be established by a church in order to qualify as a "church plan" exempt from ERISA funding and other rules, reversing three Court of Appeals decisions to the contrary. A plan qualifies for church plan status if it is a "plan established and maintained . . . for its employees . . . by a church . . . ." In 1980, this definition was expanded — an "employee of a church" would include an employee of a church-affiliated organization (such as a hospital, school, or charity) and to include plans maintained by certain church-associated entities whose main function is to fund or manage a benefit plan for the employees of churches or church affiliates (*i.e.,* a "principal-purpose organization"). Following the Supreme Court's ruling, several church plan cases are proceeding on the merits.

In addition, ESOP transactions continue to be the focus of class actions across the country. With a core group of experienced plaintiffs-side class action firms, the interest of private attorneys in ERISA class actions challenging large $50 million to $150 million ESOPs has gained steam. The targets are selling shareholders, the corporation, and the trustee. On the individual plaintiff front, the leading claims are asserted against employers in two areas: those with self-funded health plans and those who have group life insurance policies and failed to give notice to departing employees or those on extended leave of their right to continuation life coverage after the group coverage ends.

Prevailing Wage Laws

Federal and state laws require government contractors to pay prevailing wages to employees when working on government contracts. Employers sometimes do not realize they are required to pay prevailing wages or classify the work in the wrong category, which can result in significant underpayments and exposure to unpaid wages (and possibly loss of the contract itself). This exposure is likely to expand if an enhanced federal infrastructure program takes place.

Privacy/Data Breach

In June of last year, Governor Jerry Brown signed into law the California Consumer Protection Act of 2018 (CaCPA). CaCPA will apply to any entity that does business in California and satisfies one or more of the following: (i) annual gross revenue in excess of $25 million; (ii) alone or in combination, annually buys, receives for the business' commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices; OR (iii) derives 50% or more of its annual revenues from selling consumers' personal information. Under CaCPA, key consumer rights include:

- The right to request deletion of personal information which would require the business to delete information upon receipt of a verified request;
- The right to request that a business that sells the consumer's personal information, or discloses it for a business purpose, disclose the categories of information that it collects and categories of information and the identity of any third parties to which the information was sold or disclosed; and
- A consumer's right to opt-out of the sale of personal information by a business prohibiting the business from discriminating against the consumer for exercising this right, including a prohibition on charging the consumer who opts-out a different price or providing the consumer a different quality of goods or services, except if the difference is reasonably related to value provided by the consumer's data.

At the end of August 2018, several substantive amendments to the CaCPA were enacted. These amendments provide:

- A clarification to the definition of personal information: The data elements listed in the definition are personal information, not automatically, but to the extent that they identify, relate to, describe, are capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household;

- An expansion of exempt information to include protected health information collected by a business associate governed by HIPAA/HITECH;
- A clarification that personal information governed by the Gramm-Leach-Bliley Act, the California Financial Information Privacy Act, and the Driver's Privacy Protection Act of 1994 is exempt regardless of whether the CaCPA conflicts with these laws;
- A clarification that information collected pursuant to the Gramm-Leach-Bliley Act and the Driver's Privacy Protection Act of 1994 will not be exempt from a consumer's cause of action relating to certain data breaches;
- A clarification that a private cause of action exists only for data breaches;
- Incorporation of a provision that businesses, service providers, or persons who violate the CaCPA and fail to cure such violation within 30 days will be liable for a civil penalty under the laws relating to unfair competition in an action brought by the state Attorney General; and
- A provision that the state Attorney General will not bring an enforcement action under CaCPA until six months after publication of the final implementation regulations or July 1, 2020, whichever is sooner.

In late-February 2019, an additional set of amendments intended to strengthen and clarify the CaCPA were introduced to:

- Expand a consumer's right to bring a private cause of action. Currently, the CaCPA provides consumers a private right of action if their nonencrypted or nonredacted personal information is subject to an unauthorized access and exfiltration, theft, or disclosure because the covered business did not meet its duty to implement and maintain reasonable safeguards to protect that information. The amendment broadens this provision to grant consumers a private right of action if their rights under the CaCPA are violated.

- Remove language that allows businesses the opportunity to cure an alleged violation within 30 days after being notified of alleged noncompliance.
- Remove language allowing a business or third party to seek the opinion of the Attorney General for guidance on how to comply with the law. The Attorney General *may* publish materials that provide businesses and others with *general* guidance on how to comply with the law.

With an effective date of January 1, 2020, it is expected that additional amendments will be negotiated, drafted, and published as consumers and industry groups advocate for additional changes.

Following on the heels of the European General Data Protection Regulation (GDPR) (See Does the GDPR Apply to Your U.S. Based Company?) and the BIPA class actions discussed above, the CaCPA is a reminder that data privacy protection initiatives are spreading across the U.S. and the globe. Brazil, India, Indonesia, and the Cayman Islands recently enacted, upgraded, or drafted comprehensive data protection laws. Last May, Vermont passed a law requiring data brokers to implement a written information security program (WISP), disclose to individuals what data is being collected, and permit individuals to opt-out of the collection. Last April, the Chicago City Council introduced the Personal Data Collection and Protection Ordinance, requiring opt-in consent from Chicago residents to use, disclose, or sell their personal information. Last fall, San Francisco adopted the “Privacy First Policy,” an ordinance requiring that businesses disclose their data collection policies to consumers as a predicate for obtaining city and county permits or contracts. On the federal level, several legislative proposals are being considered to heighten consumer privacy protection, including the Consumer Privacy Protection Act and the Data Security and Breach Notification Act.

Given this legislative climate, it is important that organizations continue to develop a set of best practices to ensure the privacy and security of the personal information they collect, use, or store. Key to this process is creating a data inventory to identify what personal information is collected, how it is used, where it is stored, and when it is destroyed. Once this "data mapping" is completed, attention should be paid to drafting and implementing a WISP. WISPs detail the administrative, technical, and organizational policies and procedures an organization has in place to safeguard the privacy and security of its data. These initial steps will help any organization identify and streamline its data processing activities, reduce its exposure in the event of a data breach, and prepare itself for upcoming data protection legislation.