

# Littler's WPI Labor Day Report 2018

*The State of the U.S. Workforce and Outlook for the Year Ahead*

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## MESSAGE FROM THE WPI CO-CHAIRS

A park at 92nd Street and 9th Avenue in New York City was the venue for the first Labor Day in our history. The Central Labor Unions of New York, Brooklyn, and Jersey City had 20,000 tickets to sell for the festivities celebrating the great contributions labor had made to our country. The date was September 5, 1882.

Over the next 12 years, 23 states enacted legislation adopting Labor Day as a state holiday. Congress made it a federal holiday in 1894. It is most appropriate the holiday continues to this day.

The changes that have taken place to our labor markets since then are too numerous to mention. Among them are moving to an industrial economy and passing laws recognizing union rights, prohibiting discrimination, setting minimum wage and overtime pay, and promoting safe workplaces, to name just a few. American workers have not only played a profound role in making America the economic engine it is today, but have also been called numerous times to war and other conflicts, while enduring the Great Depression, the Great Recession, and many other economic and social challenges.

Of course, workers cannot be successful without entities to employ them, which is where Littler enters the equation. For over 75 years we have striven to provide our clients and friends with timely and creative strategies to navigate an often bewildering array of workplace rules and regulations to ensure compliance so the rights of employees are protected. Organizations need a voice in how the workplace should develop. Littler's Workplace Policy Institute® (WPI™) offers that voice through coalition building, regulatory engagement, direct interventions with policy makers, crafting legislation, and the like. In short, WPI is the bridge between the workplace legal world and its policy implications.

So it is fitting, given who we are and what do, for Littler's WPI to offer our Labor Day Report. We hope you enjoy it and find it useful. Please give us your feedback so we can make the report even better next year. In the meantime, let's celebrate another Labor Day as we recognize with loud applause all those who have made this holiday an American tradition we trust will never end.

—Michael J. Lotito and Maury Baskin



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## I. EXECUTIVE SUMMARY

Almost two years into the new presidential administration, and with highly consequential and hotly debated mid-term elections around the corner, Littler's Workforce Policy Institute's Labor Day Report examines the state of the American workforce. The WPI offers this Report to provide an overview of the U.S. labor economy, highlight employment trends, discuss key employment developments from the past year, and provide a preview of things to come.

### State of the U.S. Labor Market

Today, the U.S. labor market has historically low unemployment. But at the same time, employers are challenged by a low labor market participation rate, and many workers see wage increases that sometimes lag behind inflation. Seventeen million workers want to find work or more work, 7.8 million workers hold more than one job, and 3.2 million workers are getting by with multiple part-time jobs alone.

### Changing Nature of Work

Contingent worker classification issues of all kinds will continue to be a challenge as long as 20th century laws are applied to 21st century workforces. We will see continued experimentation of working arrangements outside the traditional employer/employee relationship, creating great strains on

wage and hour laws and compliance, uncertainty with classification standards, the desire for portable benefits, the need to address retirement security, and calls for anti-discrimination laws and other workplace protections to apply more broadly.

### The "Skills Gap" and the Coming TIDE

The skills gap—the mismatch between the skills employers expect workers to have and the skills that they actually possess—continues to widen. An aging workforce and a poor educational pipeline will only exacerbate that trend. At the same time, technology-induced displacement of employees—the coming TIDE—will displace tens of millions of jobs with automation. The need to revitalize apprenticeship and vocational training programs has never been greater. The efforts of the president's Apprenticeship Task Force and the recently announced National Council for the American Worker are much-needed and welcome steps toward addressing these looming issues.

### Restoring Balance to Federal Labor Law

With a working Republican majority in place, WPI expects the National Labor Relations Board (NLRB) to address some of the thorniest issues via case law and a revitalized rulemaking agenda (likely addressing—as soon as this fall—contentious joint-employer rules). Controversy over appointments and even over the status of

existing NLRB members will continue as the weaponization of ethics has become a standard tactic. Nevertheless, we look to the NLRB to quickly turn to key policy issues and address the 4,500+ years of precedent overturned by the prior administration, and the chaos it has created.

### **The #MeToo Era Will Continue to Impact Employers**

Renewed national focus both in the public and among policymakers on workplace harassment shows no signs of abating nearly a year after the #MeToo movement came to dominate the national discourse. In the absence of federal action, state and local lawmakers will continue to offer “solutions” to fill the gap. The The Equal Employment Opportunity Commission’s (EEOC) 2016 report on harassment is becoming required reading as more and more companies look for fundamental cultural change to address the problem.

### **Challenges for the Department of Labor**

The Department of Labor (DOL) faces major tasks ahead without a full complement of political appointees in place nearly two years into the administration. Employers will continue to call on the DOL to use its rulemaking authority to address issues of regular rates of pay, overtime, joint-employer status, and the classification of independent contractors. In the absence of more formal clarifications, employers will continue to press the DOL for opinion letters and subregulatory guidance on critical issues.

### **Is Pay Equity The New Normal?**

Pay equity analysis will become increasingly common in many major companies, even as challenges to the legality of recently proposed mandates continue. The First Amendment will be tested as laws prohibiting salary history inquiries continue to abound, and courts grapple with how to balance different competing principles. State and local efforts to “strengthen” pay equity laws in their jurisdictions will continue to proliferate and will continue to be challenged.

### **Health Care Conflict, Confusion, and (Un)Certainty**

Lawsuits challenging the future of Association Health Plans will put small employers’ ability to offer health care in doubt. Meanwhile, a patchwork of mandated leave laws will continue to create more compliance burdens as state and local lawmakers fill the vacuum caused by Congress’s inability to enact preemptive legislation.

### **Whither Workplace Wellness?**

Employers large and small will be forced to roll the dice on workplace wellness plans, as the EEOC’s regulations are voided and new rules are unlikely to come anytime soon. The agency heads into 2019 with the increasing likelihood of a two-member Commission, and a General Counsel’s seat vacant for almost two years.

### **Here Comes the Judge(s)**

The aftermath of this year’s Supreme Court *Janus* decision will play out in lower courts all over the country as the retroactivity of recovering dues already paid by public sector workers will be hard fought. We can expect also to see efforts to apply *Janus*’s expansion of First Amendment protections against compelled speech to the private sector. At the highest level, the Supreme Court is expected to tackle a number of workplace issues as its new term begins in October, likely with new Justice Kavanaugh in place. The Court will scrutinize even more closely all forms of rulemaking, as *Chevron* deference to administrative agency interpretation is under frontal attack.

***And Little’s WPI will be on top of all of it.***



## II. AN OVERVIEW OF THE STATE OF THE U.S. LABOR MARKET

An overview of employment and industry statistics helps set the stage for the legal and regulatory developments that are occurring in the workplace.<sup>1</sup> Overall, employment is rising and unemployment falling, suggesting a robust labor market. However, some concerns remain.

Between July 2017 and July 2018, total employment as estimated from the Bureau of Labor Statistics (BLS) Current Population Survey increased 2.5 million.<sup>2</sup> Non-farm payroll jobs based on the BLS Establishment Survey of Employers increased by 2.4 million.<sup>3</sup> Full-time employment increased even more (by 3.1 million), as expanding labor demand enabled some workers to move from part-time to full-time job schedules. Part-time employment fell by 570,000. The official unemployment rate continued to fall: 4.1% in July 2018, compared to 4.6% in July 2017, and significantly below the post-recession peak of 10% in October 2009.<sup>4</sup>

In July 2018, according to BLS data, there were 6.7 million job seekers. This count, however, omits 5.5 million individuals who have stopped actively looking for work, but still want to work. During this period, there were also 4.8 million part-time workers who were seeking full-time employment. Altogether, 17 million individuals wanted some work or more hours of work in July 2018, but this number was down by 1.6 million from a year ago. In addition, approximately 7.8 million workers are holding more than one job. This number increased by about 530,000 over the past year. Of these multiple jobholders, 4.6 million held full-time primary jobs and part-time or full-time second jobs. The other 3.2 million workers hold multiple part-time jobs only.

In short, we face an economic paradox: economic optimism is at a record high,<sup>5</sup> yet many workers

face wage increases that may lag behind inflation, and employers continue to face a low labor market participation rate. Does the changing nature of work itself explain or exacerbate these trends?

## III. CHANGING NATURE OF WORK

### The Contingent Workforce and the Sharing Economy

Perhaps the most visible and frequently discussed trend in the 21st century labor market has been the rise of the contingent workforce. Broadly defined, the contingent workforce includes “independent contractors, self-employed individuals, freelancers, temporary agency workers and individuals working full-time or when they want via online platforms.”<sup>6</sup> The broad definition also includes employees with no expectation of long-term work, who often work on a project-by-project basis.

An increasingly prominent component of the contingent workforce are workers in the “sharing economy,” in which individuals earn income through web- and app-based platforms that allow them to sell discrete personal or other services, generally on a project-by-project basis. Ride-sharing apps and web platforms geared to home services providers are the most familiar examples of this newly prominent component of the workforce.

The size and growth rate of the contingent workforce has been the subject of controversy, particularly in light of a survey released this year by the BLS, which found that 10.1% of workers had primary jobs that met the BLS definition of “alternative work arrangements,” which includes “people employed as independent contractors, on-call workers, temporary help agency workers, and workers provided by contract firms.” But some reports by private-sector groups and think tanks place the number of contingent workers far higher than does the BLS survey, and generally

1 A detailed examination of the state of the U.S. workforce, including economic data and analysis, is set forth in the Appendix, “Economic Analysis of the U.S. Workforce.”

2 For purposes of this Report, BLS data was analyzed as of July 2018.

3 This survey excludes self-employed persons and farm workers.

4 These rates are not seasonally adjusted. Seasonally adjusted unemployment was 3.9% in July 2018 compared to 4.3% in July 2017.

5 Jed Graham, *IBD/TIPP Economic Optimism Index Surges To 14-Year High*, Investor's Business Daily (Apr. 7, 2018), available at: <https://www.investors.com/news/economy/ibd-tipp-poll-economic-optimism-14-year-high/>

6 Catherine Mazy, *The rise of the contingent workforce*, Financial Times (Apr. 4, 2018), <https://www.ftiecla.com/2018/04/04/the-rise-of-the-contingent-workforce/>.



project strong growth into the future for the contingent workforce.

Regardless of the definition used, there does not appear to be any dispute that contingent workers comprise a vital part of the workforce that will be essential to companies' workforce planning in the coming years and that will raise new challenges for employers, workers, and regulatory agencies alike.

### ***Independent Contractor Classification***

The legal challenges are particularly acute for companies that use "freelancers" and other independent workers. Virtually every aspect of the worker/company relationship is affected by the classification of a worker as an employee or an independent contractor, and the penalties for misclassifying an employee as an independent contractor can be stiff. As companies grow increasingly reliant on contingent workers for their operations, the risk of misclassification increases.

Courts have split in their approaches to classifying workers who perform services through online platforms and other outlets for freelance or "gig"-based work. In April of this year, in *Dynamex Operations West v. Superior Court*,<sup>7</sup> the California Supreme Court adopted a modified version of Massachusetts' strict "ABC" test for independent

contractor classification. Under that test, a worker is considered an employee unless an employer can demonstrate (A) the worker is free from the control and direction of the hirer; (B) the worker performs work that is outside the usual course of the hirer's business; and (C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

In a June 2018 opinion, by contrast, a New York appellate court applied its longstanding classification standards in holding that a courier who performed delivery services through a web-based platform was an independent contractor for unemployment insurance purposes, and not an employee of the platform.<sup>8</sup> The court examined whether the worker's relationship with the platform bore the "indicia of supervision, direction and control necessary to establish an employer-employee relationship," focusing on the couriers' control over their schedules and ability to "accept, reject or ignore a delivery request, without penalty." The court held these characteristics of the couriers' work sufficed to classify them as independent contractors, even though the platform had some "incidental control" over the couriers by setting rates and fees and handling customer complaints.

<sup>7</sup> 4 Cal. 5th 903 (2018).

<sup>8</sup> See *Matter of Vega*, 2018 N.Y. Slip Op. 04610 (3rd Dept. 2018); see also Kevin Vozzo and Andrew Spurchise, [New York Appellate Court Delivers Big Win to Gig Economy Business](#), Littler ASAP (July 6, 2018).



There is little indication that states will come to a consensus on classification or that the federal government will establish a clear nationwide standard<sup>9</sup> under the federal Fair Labor Standards Act (FLSA). Consequently, classification issues will continue to be a major compliance challenge for companies that hire contingent workers.

### ***Portable Benefits and Contingent Worker Protections***

In addition, politicians and worker organizations have raised concerns that contingent workers are not entitled to many of the benefits and protections that employees receive as a matter of course, such as protection from certain forms of discrimination and access to health insurance and retirement plans. These concerns have spurred a flurry of legislative interest in the contingent workforce. New York City adopted an ordinance in 2016 giving freelance workers the right to full and timely payment as well as protection from retaliation. And bills have been introduced in Washington, California, New York, and New Jersey to explore how to best implement a portable benefits system.<sup>10</sup> Interest in contingent workforce issues also appears to be increasing in Congress, where Senator Mark Warner (D-VA) has introduced the Portable Benefits for Independent Workers Pilot Program Act, which would establish a \$20 million grant fund administered by the U.S. Department of Labor to encourage experimentation with portable benefits programs.<sup>11</sup>

As the contingent workforce grows in size and prominence, the legal risks and challenges associated with it will continue to proliferate. Eventually, courts or legislatures may look to add a third category of workers to the existing employer/contractor dichotomy, as Canadian courts have done by recognizing a “dependent contractor” classification,<sup>12</sup> which could best be described

as a contractor with some employee-like characteristics. At the moment, however, the legal and regulatory climate remains decidedly unsettled, and employers must remain attuned to potential legal compliance risks when using contingent workers in their operations.

### **The Skills Gap and the Coming TIDE**

Another major area of concern for companies trying to prepare for the workforce of the future is the potential that the already-troublesome “skills gap” will widen further in the face of automation. The skills gap refers to an observed mismatch between the skills workers have and the skills employers expect them to have. Different groups offer different proposed explanations for the skills gap, but they all revolve around a common theme: American workers are not getting the education and training they need to acquire the skills that employers demand.

Controversy surrounds the issue of where, exactly, the skills pipeline breaks down. Some place the blame on a decline in American K-12 education, particularly in education relating to science, technology, engineering, and mathematics (STEM); others place the blame on deficiencies in vocational training, or post-secondary or lifelong education; while yet others point to a decline in formal workplace training programs such as apprenticeships. In 2012, fewer than 150,000 Americans began apprenticeships; England, by contrast, had more than 500,000 apprenticeship starts in 2012, despite having a working-age population less than one-sixth the size of the United States'.<sup>13</sup>

The skills gap is already causing alarm and anxiety in both government and industry. But the problem could worsen significantly in the coming years due to the twin impacts of an aging workforce and a poor vocational education pipeline to replenish

9 Different federal agencies may use different standards for determining whether an individual is an employee or an independent contractor. For example, the IRS uses a 20-factor “right-to-control” test, while the DOL uses a separate “economic realities” multi-factor test to determine whether an employee-employer relationship exists under the FLSA.

10 Robert Maxim & Mark Muro, *Rethinking worker benefits for an economy in flux*, BROOKINGS (Mar. 30, 2018), available at <https://www.brookings.edu/blog/the-avenue/2018/03/29/rethinking-worker-benefits-for-an-economy-in-flux/>.

11 Press Release, [Sen. Warner Announces Growing Support for Portable Benefits Legislation](#) (June 20, 2018).

12 See *McKee v. Reid's Heritage Homes, Ltd.*, [2009] ONCA 916 (CanLII).

13 Sarah Ayres Steinberg and Ethan Gurwitz, *The Underuse of Apprenticeships in America*, Center for American Progress, July 22, 2014, <https://www.americanprogress.org/issues/economy/news/2014/07/22/93932/the-underuse-of-apprenticeships-in-america/>.

the ranks of retiring skilled workers. This trend is evident in fields as diverse as trucking and aerospace engineering. The median age of truck drivers is 55,<sup>14</sup> and the average age of Society of Professional Engineering Employees in Aerospace has risen from 40 to 45 in under a decade.<sup>15</sup>

For these reasons, the American labor market would likely be facing significant disruption even if we were not facing a wave of automation. But with recent and continuing advances in artificial intelligence (AI) and robotics, even more radical changes to the workforce will soon be coming to the labor market. Numerous studies by think tanks and industry groups have concluded that tens of millions of jobs in the United States could be displaced by automation over the next 10-20 years, in what Littler calls *technology-induced displacement of employees (TIDE)*.<sup>16</sup> These technologies will also create new economic opportunities for workers, but the same challenges that led to the existing skills gap will complicate employers' efforts to meet the TIDE.

The economies of other developed-world countries are facing similar pressures, and many of those countries' governments have responded by launching national initiatives geared toward vocational education and worker retraining to help manage the effects of automation. But the policy response in America has been rather muted. While the current administration signaled a desire to reinvigorate apprenticeship and vocational training programs,<sup>17</sup> the boldest workforce measure that the current administration has taken is reauthorizing the Perkins Act—a program first introduced in the Reagan administration that provides state-level

grants for technical and vocational education—at approximately the same funding levels that the program has historically received.<sup>18</sup>

Under the aforementioned executive order on apprenticeships, the DOL's Employment and Training Administration (ETA) has stated its intent to revise the Code of Federal Regulations as it pertains to the registration of apprenticeship programs. The proposed rule will establish guidelines on how to certify high-quality, industry-recognized apprenticeship programs, among other updates and modifications.<sup>19</sup>

The order also called for the Secretary of Labor to create and chair the Task Force on Apprenticeship Expansion to “identify strategies and proposals to promote apprenticeships, especially in sectors where apprenticeship programs are insufficient.”<sup>20</sup> The Task Force, comprising representatives from the business community, unions, trade associations, educational institutions, and public agencies, have met over the course of the past year and issued a final report.<sup>21</sup> On July 19, 2018, the president issued Executive Order 13845, which created the National Council for the American Worker.<sup>22</sup> Among its duties, the National Council is charged with following up on the Task Force on Apprenticeship Expansion, and examining how policymakers may work with private employers, educational institutions, labor unions, non-profit organizations, and state and local governments to implement its recommendations.<sup>23</sup>

Individual states are, fortunately, demonstrating an increased interest in technical and vocational education and training. South Carolina's Technical College System has an impressive track record of

14 Samantha Raphelson, *Trucking Industry Struggles With Growing Driver Shortage*, NPR (Jan. 9, 2018), <https://www.npr.org/2018/01/09/576752327/trucking-industry-struggles-with-growing-driver-shortage>.

15 Jim Frenner, *Aerospace Skills Gap: Workforce Declines, As Talent Needs Increase*, Area Development (2015), <http://www.areadevelopment.com/Aerospace/q3-2015-auto-aero-site-guide/Aerospace-Skills-Gap-Workforce-Declines-Needs-Increase-45711.shtml>.

16 See Michael J. Lotito et. al, *The Future Is Now: Workforce Opportunities And The Coming TIDE*, WPI Report (June 18, 2018).

17 See, e.g., Executive Order 13801, *Expanding Apprenticeships in America*, 82 Fed. Reg. 28229-28232 (June 20, 2017). The executive order focuses on promoting apprenticeships and workforce development programs by reducing the regulatory burden on those programs.

18 Andrew Kreighbaum, *Senate Passes Update to Perkins CTE Law*, Inside Higher Ed, July 24, 2018, <https://www.insidehighered.com/quicktakes/2018/07/24/senate-passes-update-perkins-cte-law>.

19 See Office of Management and Budget, Office of Information and Regulatory Affairs, RIN: 1205-AB85 (Spring 2018).

20 See DOL, *Task Force on Apprenticeship Expansion*, <https://www.dol.gov/apprenticeship/task-force.htm>.

21 Task Force on Apprenticeship Expansion, *Final Report to: The President of the United States* (May 10, 2018), available at <https://www.dol.gov/apprenticeship/docs/task-force-apprenticeship-expansion-report.pdf>.

22 Executive Order 13845 of July 19, 2018, *Establishing the President's National Council for the American Worker*, 83 Fed. Reg. 35099-35103 (July 24, 2018).

23 See *id.* § 7(c).

building apprenticeship programs in collaboration with local employers. BMW's Spartanburg production facility worked with the Technical College System to establish an apprenticeship program in 2011; it has been so successful that the company announced in January 2018 that it was doubling the size of the program. Other states have apparently taken note, with Kentucky, Montana, Washington, and Wisconsin all establishing new technical education and apprenticeship initiatives over the past five years. While these developments are welcome, the need remains for dramatic changes to workplace-focused education and training programs to close the widening skills gap and meet the challenges of the TIDE.<sup>24</sup>

#### IV. KEY LABOR AND EMPLOYMENT DEVELOPMENTS OF THE PAST YEAR

Labor and employment laws and regulations affect an employer's hiring, operational, and management decisions. The following section discusses key developments over the past year that have—or will—shape the way employers do business.

##### A. LABOR RELATIONS

In 2017, the union membership rate (10.7%) remained unchanged from the prior year.<sup>25</sup> Although the percentage of union membership did not increase, because of increased employment generally, the number of union workers did increase by 262,000 in 2017 to total 14.8 million. Out of the 14.8 million workers, 7.2 million employees work in the public sector. The unionization rate in the public sector remains significantly higher at 34.4% compared to 6.5% in the private sector. Among the states, New York had the highest unionization rate at 23.8% while South Carolina had the lowest rate at 2.6%.

The most heavily unionized occupational groups in 2017 were protective service occupations at

34.7%, followed by education, training, and library occupations at 33.5%. Unionization rates were lowest (3.2%) in sales and related occupations. Among age groups, union membership was highest among workers ages 45 to 64 with 13.2% of workers ages 45 to 54 and 13.5% of workers ages 55 to 64 belonging to a union. Although unionization rates remained comparatively high in the public sector in 2017, there is reason to believe that this number may decrease in 2018 due to the U.S. Supreme Court's recent decision in *Janus v. American Federation of State, County and Municipal Employees*.<sup>26</sup>

In a 5-4 decision, the Supreme Court held in *Janus* that states may no longer allow public-sector unions to force public employees who are not union members to pay "agency" or "fair share" fees because such requirements violate the First Amendment. For over 40 years, public-sector unions were permitted to require employees who were covered by a collective bargaining agreement to pay union dues so long as those dues were used to fund collective bargaining, contract administration, grievance adjustment purposes, and other activities related to the union's duties as the employees' collective bargaining representative (rather than, say, political activities).<sup>27</sup> The Supreme Court, however, overturned this precedent and delivered a major blow to public-sector unions. Now, public-sector unions will not be able to force employees covered by collective bargaining agreements to pay "fair share" fees.

The ramifications of this decision are significant. Immediately following this decision, some labor experts predicted that teachers' unions could lose up to one third of their members.<sup>28</sup> There is already evidence that public-sector unions will face an enormous challenge in 2018 and beyond as New York has announced that it will stop collecting

24 To address the coming TIDE, WPI and Washington-based Prime Policy Group have formed the Emma Coalition. The Emma Coalition's mission is to save American capitalism by reinventing the workforce so the 21st century is the next American century. It will organize a nationwide effort by employers in partnership with workers, industry groups, educational institutions, and other private and public organizations and institutions to prepare the workforce for the coming TIDE through education, training, and engagement with policymakers.

25 Economic New Release, Bureau of Labor Statistics, *Union Members Survey* (Jan. 19, 2018).

26 *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S.Ct. 2448 (2018).

27 See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

28 Dana Goldstein and Erica L. Green, *What the Supreme Court's Janus Decision Means for Teacher Unions*, N.Y. Times, June 27, 2018, available at <https://www.nytimes.com/2018/06/27/us/teacher-unions-fallout-supreme-court-janus.html>.

dues from 31,000 state workers.<sup>29</sup> Indeed, there are several organizations that are encouraging public employees to opt out of paying union dues.<sup>30</sup> These organizations have prepared form letters that public-sector employees can complete quickly to opt out of paying their dues.<sup>31</sup> Given these developments, it is very likely that public-sector unions will see a decrease in membership in 2018. Whether this trend will impact private-sector unionization rates is uncertain.

At the state level, 27 states have right-to-work laws in place. Missouri had enacted right-to-work legislation (Senate Bill 19) on February 6, 2017, which was set to take effect on August 28, 2017. This law was put on hold and eventually overturned, however, by a special veto referendum on August 7, 2018.

### New NLRB Composition

The National Labor Relations Board (NLRB) has experienced a transformation since the election of Donald Trump in 2016. President Trump appointed three new members of the Board—Marvin E. Kaplan, William J. Emanuel, and John F. Ring.<sup>32</sup> Mr. Ring is currently serving as NLRB Chairman.<sup>33</sup> With these new appointments, the Board is now comprised of a majority of Board Members appointed by a Republican president. Until recently, two other Board Members, Mark Gaston Pearce and Lauren McFerran, were appointed by President Obama. Mr. Pearce's term expired on August 27, 2018 (though he has since been renominated), however, leaving Ms. McFerran as the lone Democrat on the Board until a new member is confirmed. McFerran's term expires on December 16, 2019. In addition to naming new Board Members, President Trump nominated Peter B. Robb as General Counsel (GC) of the NLRB for a four-year term.<sup>34</sup> With a new complement of members and GC, the Board has already begun to reverse course on priorities and positions that had been in place during the prior administration.

### Shift in the General Counsel's Priorities

Two weeks after being sworn in as the new GC on November 17, 2017, Peter Robb issued Memorandum 18-02, instructing NLRB Regional Directors on which types of cases should be submitted to his office for advice. Additionally, the GC's memorandum rescinded policy memoranda issued by his predecessor, Richard F. Griffin, Jr. The new memorandum indicated that many of the contentious decisions issued and policy shifts undertaken by the past administration would likely be getting a second look.

#### *Rescission of Prior GC Memoranda*

GC memoranda typically outline certain matters the GC requires NLRB regions to submit to the GC's office so that the GC can pursue litigation to memorialize new legal theories or positions as Board precedent. In his memorandum, GC Robb noted that while he had not yet identified which new initiatives to pursue, his office would be rescinding many prior memoranda. This list for rescission included:

- GC 15-04 (Employer Work Rules)
- GC 17-01 (General Counsel's Report on the Statutory Rights of University Faculty And Students in the Unfair Labor Practice Context)
- GC 16-03 (Seeking Board Reconsideration of the Levitz Framework)
- GC 13-02 (Inclusion of Front Pay in Board Settlements)
- GC 12-01 (Guideline Memorandum Concerning Collyer Deferral)
- GC 11-04 (Default Language)
- OM 17-02 (Model Brief Regarding Intermittent and Partial Strikes)

29 Jon Campbell, *Janus decision: New York stops collecting union fees from 31,000 state workers*, Democrat & Chronicle, July 5, 2018, available at <https://www.democratandchronicle.com/story/news/politics/albany/2018/07/05/janus-decision-new-york-stops-collecting-union-fees-31-000-workers/755987002/>.

30 Stand With Workers, [https://standwithworkers.org/workers-rights/?gclid=Cj0KCQjw77TbBRDtARIsAC4183nRtwN-Ku7KGaXLA6N2GPJoRnljQHiiDh\\_oCun61laAKneixYOYyp4aAgZ6EALw\\_wcB](https://standwithworkers.org/workers-rights/?gclid=Cj0KCQjw77TbBRDtARIsAC4183nRtwN-Ku7KGaXLA6N2GPJoRnljQHiiDh_oCun61laAKneixYOYyp4aAgZ6EALw_wcB) (last visited Aug. 10, 2018);

31 *Id.*

32 National Labor Relations Board, *Who We Are*, <https://www.nlr.gov/who-we-are/board> (last visited Aug. 10, 2018).

33 *Id.*

34 National Labor Relations Board, *Who We Are: General Counsel*, <https://www.nlr.gov/who-we-are/general-counsel> (last visited Aug. 10, 2018).





The GC announced several other initiatives no longer in effect, including, among others:

- Efforts to extend *Purple Communications*,<sup>35</sup> in which the Board held employers must generally allow employees to use the company’s e-mail systems for union organizing or group discussion about the terms and conditions of employment during non-work time, to other electronic systems (e.g., internet, phones, instant messaging) if employees use those regularly in the course of their work. Notably, on August 1, 2018, the Board invited briefs on whether it should “adhere to, modify, or overrule” *Purple Communications* via the case of *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino*, 28-CA-060841.<sup>36</sup> Meanwhile, legal challenges to the *Purple* case itself remain pending at the U.S. Court of Appeals for the Ninth Circuit.<sup>37</sup>
- Efforts to overturn the *Tri-Cast* decision, which concerns the legality of employer statements to employees during organizing campaigns that they will not be able to discuss matters directly with management if they select union representation.
- Arguments that an employer’s misclassification of employees as independent contractors, in and of itself, violates Section 8(a)(1) of the National Labor Relations Act (NLRA).

The rescission of these and other initiatives indicates the new GC—at a minimum—no longer considers these areas to be priorities.

### ***Mandatory Submission to the GC***

In the new memorandum, GC Robb explains:

*[T]he last eight years have seen many changes in precedent, often with vigorous dissents. The Board has two new members who have not yet revealed their views on many issues. Over the years, I have developed some of my own thoughts. I think it is our responsibility to make sure that the Board has our best analysis of the issues. To that end, I have developed the following guidelines which will serve as my mandatory Advice submission list.*

This list identifies the areas in which the GC would like to weigh in. These topics touch upon many areas of great concern to employers. They include:

- *Common employer handbook rules found unlawful.* The GC requests submission of cases involving allegations of rules prohibiting “disrespectful” conduct or the use of employer trademarks and logos; rules governing “no camera” or “no recording”; and rules requiring employees to maintain the confidentiality of workplace investigations, among others.

35 361 NLRB 1050 (2014).

36 Press Release, NLRB, [Board Invites Briefs Regarding Employee Use of Employer Email](#) (Aug. 1, 2018).

37 *Purple Communications v. NLRB*, Case Nos. 17-71948, 17-71062 and 17-71276 (9th Cir. appeal pending); *Cellco Partnership v. NLRB*, Case Nos. 17-71493, Nos. 17-70648 and 17-71570 (9th Cir. appeal pending).



- *Concerted activity for mutual aid and protection.* The GC is interested in cases in which the conduct was found to involve “mutual aid and protection,” but only one employee had an immediate stake in the outcome. The GC is also seeking to review cases finding employees’ engagement in obscene, vulgar, or other highly inappropriate conduct did not cause them to lose protection under the NLRA.
- *Conflicts with other statutory requirements.* Such situations might involve a finding that an employee’s social media postings are protected even though such conduct could violate EEO principles.
- *Joint Employment.* The GC appears to be interested in cases in which the new Board could revisit its decision in *Browning-Ferris*, in which it established a new test for finding joint employment based on evidence of indirect or potential control over the working conditions of another employer’s employees.
- *Weingarten.* The GC appears interested in cases where *Weingarten* rights<sup>38</sup> were applied in a drug-testing context.

Other issues making the GC’s mandatory submission list include scenarios involving an off-duty employee’s access to property; protected work stoppages; disparate treatment of represented employees during contract negotiations; successorship; unilateral changes consistent with past practice; establishing a duty to bargain before imposing discretionary discipline where parties have not executed initial collective bargaining agreement; dues checkoff; and remedies.

The GC memorandum states that until the Board overturns existing precedent on these issues, the GC’s office will continue to enforce the Board’s rulings as written, though the GC reserves the right to suggest “alternative analysis” in certain cases. By highlighting these issues and making them mandatory subjects for advice from the GC’s office, the memorandum opens the door for those prior decisions to be overruled or amended by the new members of the Board. Moreover, the directive from the GC to all Board regions is likely

to lead to a re-examination over time of the some of the most far-reaching and precedent-setting decisions from the GC’s predecessor and the Obama administration Board.

### **NLRB’s Election Rule Scrutinized**

On December 15, 2014, the NLRB issued a final rule accelerating the election process for labor unions, potentially allowing an election to be held in as few as 13 days from the filing of a representation petition. In December 2017, the NLRB issued a request for information, seeking public submission of comments on the efficacy of its 2014 election rule amendments, expressly asking if the rule should be retained, rescinded, or modified. Although the initial request set forth a February 2018 deadline for submitting public input, the deadline was later extended to March 2018, and then again to April 2018. The NLRB reportedly received thousands of comments and currently is in the review phase.

### **The 2016 Persuader Rule Rescinded**

In July 2018, the U.S. Department of Labor formally rescinded a rule that would have required employers to file public reports with the DOL when they use consultants (including lawyers) to provide labor relations advice and services that have the purpose of persuading employees regarding union organizing or collective bargaining. The consultants would also have been required to file similar reports containing the details of advice and services provided and the amount of payment received for that advice and service. This “persuader rule” had received substantial pushback from business and legal communities since its 2011 proposal. In rescinding the rule, the DOL acknowledged that it exceeded the DOL’s authority under the Labor-Management Reporting and Disclosure Act (LMRDA) by effectively eliminating the Act’s advice exception. Another concern was that it contained reporting requirements that are inconsistent with and undermine the attorney-client privilege and the confidentiality of the attorney-client relationship. The rule’s formal rescission follows years of litigation,<sup>39</sup> and puts this matter to rest for the foreseeable future.

38 *Weingarten* rights generally refer to the right of an employee to have union representation present during certain employer interviews.

39 *National Federation of Independent Business v. Perez*, No. 5:16-cv-00066 (N.D. Tex. Nov. 16, 2016).

## Key NLRB Decisions Reflect the New Republican Majority

As then-NLRB Chairman Philip Miscimarra's term approached its conclusion in late 2017, the recently formed three-member Republican majority issued a number of important rulings impacting not only unionized employers, but all employers. In a cluster of decisions, the Board overruled Obama-era rulings and reversed course on Obama-era enforcement policies concerning Board settlement agreements, employee handbook policies, and appropriate bargaining units in union elections.

### Return to "Reasonable" Partial Settlements

The Board issued its *University of Pittsburgh Medical Center (UPMC)* decision<sup>40</sup> on December 11, 2017. *UPMC* held that an Administrative Law Judge (ALJ) may approve partial settlement agreements regardless of objections by the charging party and/or General Counsel/Region.<sup>41</sup> This ruling marked a return to the Board's longstanding policy of non-litigious resolution of unfair labor practice charges where the proposed settlement advances the policies of the NLRA. *UPMC* expressly overruled *U.S. Postal Service*,<sup>42</sup> a 2016 decision that held settlement agreements only advance the policies of the NLRA if they provide a complete remedy for each violation alleged in the complaint.<sup>43</sup> Recognizing that this onerous standard is less likely to encourage settlement agreements—and thus less likely to advance the policies of the NLRA—in *UPMC* the Board returned to the multi-factor "reasonableness" standard for evaluating settlements, set forth 30 years prior in *Independent Stave*.<sup>44</sup> Under that standard, an ALJ is required to weigh multiple factors when considering a partial settlement proposal, including the reasonableness of the proposal.

### "Categorical" Change of Course for Employee Handbook Scrutiny

Just a few days later, on December 14, 2017, the Board issued a decision in the case of *The Boeing Co.*<sup>45</sup> The decision—constituting a ceasefire in the years-long perceived war against employee handbook policies—declared a new standard for assessing the legality of employer rules, policies, and handbook provisions.<sup>46</sup> In *Boeing*, the Board announced three categories of facially neutral handbook rules, intended to create predictability with respect to Board enforcement efforts: (i) lawful rules; (ii) rules that are unlawful on their face; and (iii) rules subject to individualized scrutiny on a case-by-case basis. In the years immediately prior to *Boeing*, the Board struggled to provide consistent guidance with respect to the legality of facially neutral handbook policies, resulting in regular disagreements and reversal of Board rulings by federal appeals courts. The genesis for this era of uncertainty was the Board's 2004 *Lutheran Heritage*<sup>47</sup> decision, which provided in part that the Board should consider whether "employees would reasonably construe the [challenged workplace policy] to prohibit Section 7 [of the NLRA] activity," in assessing its legality. *Boeing* held that when determining in which category to place a facially neutral workplace rule, the Board should analyze both: (i) the nature and extent of the potential impact on employee rights; and (ii) legitimate justifications associated with the rule, rather than simply whether an employee could conceivably construe the rule to prohibit protected activity. The new analytical tool is expected to significantly reduce both the number and type of policies deemed unlawful.

In furtherance of the Board's stated aim to "ensure a meaningful balancing of employee rights and employer interests," the NLRB GC issued guidance

40 365 NLRB No. 153 (2017).

41 See Brooke Niedecken and Kathryn Siegel, [NLRB Issues Reversal of Obama-Era Precedent on Settlements and Seeks Comment on Quickie Election Rule](#), Littler ASAP (Dec. 20, 2017).

42 364 NLRB No. 116 (2016).

43 See William Emanuel, et al., [NLRB Issues Numerous Decisions Against Employers as Hirozawa's Term Expires](#), Littler Insight (Oct. 24, 2016).

44 287 NLRB 740 (1987).

45 365 NLRB No. 154 (2017).

46 See Fred Miner, [New NLRB Majority Calls off the War on Employee Handbooks](#), Littler Insight (Dec. 18, 2017).

47 343 NLRB 646 (2004).



regarding the three categories on June 6, 2018, including abundant practical examples of how to apply the new standard.<sup>48</sup>

***“Fundamental Flaws” Doom Specialty Healthcare’s “Overwhelming Community of Interest” Standard***

On December 15, 2017, the Board issued *PCC Structurals, Inc.*,<sup>49</sup> which reestablished the traditional community-of-interest standard as the proper method to determine whether a proposed bargaining unit constitutes an appropriate one. *PCC Structurals* overruled *Specialty Healthcare*,<sup>50</sup> a controversial 2011 NLRB decision that opened the door for the proliferation of “micro-units” comprising only a small subset of employees, rather than larger bargaining units comprising employees with comparable job titles across a facility.<sup>51</sup> Often, when a union files an election petition, the employer claims that there are unlisted job classifications that belong in the petitioned-for unit. Before 2011, the Board applied a number

of “community of interest” factors to determine unit placement of non-petitioned-for employees, including departmental organization, skills, job functions, and functional integration.<sup>52</sup> *Specialty Healthcare* changed the calculus for determining an appropriate bargaining unit by placing the burden on employers to “demonstrate that the additional employees the [employer sought] to include share[d] an *overwhelming community of interest* with the petitioned-for employees, such that there is no legitimate basis upon which to exclude certain employees from the petitioned-for unit because the traditional community-of-interest factors overlap[ped] almost completely.”<sup>53</sup> In *PCC Structurals* the Board ruled that *Specialty Healthcare* is “fundamentally flawed,” and returned to the pre-2011 standard. In doing so, the Board eliminated a substantial hurdle for employers challenging the scope of a union’s proposed bargaining unit, and likely eliminated or substantially reduced the risk of “micro-units.”

48 See GC 18-04 “Guidance on Handbook Rules Post-Boeing.” See also Fred Miner, *NLRB General Counsel Issues Guidance Regarding Handbook Rules*, Littler ASAP (June 11, 2018); *Enforcing Civility: The Board’s New Boeing Standard Influences a Range of Policies Promoting Positive Workplaces for Employers and Employees*, Littler Insight (June 19, 2018); and *The NLRB Expands the Use of Confidentiality Rules in The Boeing Co.*, Littler Insight (July 2, 2018).

49 365 NLRB No. 160 (2017).

50 357 NLRB 2119 (2011).

51 For example, in 2014 the Board relied on *Specialty Healthcare* in holding that cosmetics and fragrance employees in a larger department store comprised an appropriate bargaining unit (*Macy’s Inc.*, 361 NLRB 12 (2014)), but also held that women’s shoe sales associates did not comprise an appropriate bargaining unit due primarily to departure from the employer’s organizational structure (*Neiman Marcus Group*, 361 NLRB 50 (2014)).

52 See *United Operations, Inc.*, 338 NLRB 123 (2002).

53 *Specialty Healthcare*, 357 NLRB at 944.

## Joint Employer Limbo

On August 27, 2015, departing from years of precedent, the Board issued its decision in *Browning-Ferris Industries of California*,<sup>54</sup> and imposed a new standard to identify joint employment relationships.<sup>55</sup> The new standard established a two-part test: the Board must determine (1) whether there is a common law employment relationship between the employees and the putative joint employer, and if so, (2) whether the putative joint employer possesses sufficient control (including “potential” or “ultimate” control) over the employees’ essential terms and conditions of employment to permit meaningful collective bargaining. Prior to *Browning-Ferris*, two employers were only “joint employers” for NLRA liability purposes when they exerted “direct” and “immediate” control over the same employees, and shared or co-determined matters governing the employees’ essential terms and conditions of employment.

In late 2017, following constitution of a new Republican majority, the Board issued *Hy-Brand Industrial Contractors, Ltd.*,<sup>56</sup> which overruled *Browning-Ferris* and the “indirect control” test. *Hy-Brand* returned the Board to its historical standard that required direct and significant control for joint employment to exist. Though lauded as a return to a more realistic and predictable standard, the Board vacated *Hy-Brand* on February 26, 2018, following conflicts of interest concerns. Thus, the current joint employer standard remains *Browning-Ferris*, and not *Hy-Brand*.

This decisional see-saw has not resolved the issue of a joint employer standard with any certainty, and there are presently two avenues by which *Browning-Ferris* could be overturned. First, on April 6, 2018, the D.C. Circuit agreed to review the Board’s decision in *Browning-Ferris*. Were the D.C. Circuit to invalidate *Browning-Ferris*, it would return

the Board to its pre-2015 standard. Second, the NLRB’s spring 2018 agenda included a statement that it is “considering engaging in rulemaking to establish the standard for determining joint-employer status.”<sup>57</sup> There is presently no timetable for a notice of proposed rulemaking, which would be the first step to establishing such a rule, but if the Board proceeds with formal rulemaking, it might invalidate *Browning-Ferris*, and establish a joint employer standard through regulatory, rather than decisional means.

## Supreme Court’s *Epic* Decision Conclusively Establishes the Lawfulness of Class and Collective Action Waivers in Arbitration Agreements

On May 21, 2018, the Supreme Court issued its long-awaited decision in *Epic Systems Corp. v. Lewis*,<sup>58</sup> which held that employers can lawfully include class action waivers in employment arbitration agreements. *Epic* ended a years-long battle at the NLRB and numerous federal appellate courts concerning, from a legal standpoint, whether the NLRA trumps the Federal Arbitration Act (FAA), and from a practical standpoint, whether a common tool for managing employment disputes—at both unionized and non-union employers—was legally enforceable.<sup>59</sup>

In 2012, the NLRB held that class action waivers in employment arbitration agreements violate the NLRA because such agreements restrain employees’ right to engage in concerted activity. Challenges proliferated at the Board and in various federal circuits resulting in a patchwork of rulings both in support of, and contrary to, the Board’s decision. In *Epic* (a 5-4 decision authored by Justice Gorsuch), the Supreme Court held that the FAA trumps the NLRA due to the procedural history of the respective laws. The decision also held that class action waivers in employment arbitration agreements do not violate the FAA, and regardless,

54 362 NLRB No. 186 (2015).

55 See Michael Lotito, et al., *NLRB Imposes New “Indirect Control” Joint Employer Standard in Browning-Ferris*, Littler Insight (Aug. 28, 2015).

56 365 NLRB No. 165 (2017).

57 See Michael Lotito, *Agencies Release Regulatory Roadmap for 2018 and Beyond*, Littler ASAP (May 10, 2018).

58 584 U.S. \_ (2018).

59 See Sean McCrory et al., *Supreme Court Upholds Lawfulness of Class and Collective Action Waivers in Arbitration Agreements*, Littler ASAP (May 21, 2018).



the NLRA does not grant employees the right to engage in class or collective actions as a basic protected concerted activity.

While *Epic* is a great win for employers—not only for the certainty it provides, but also the contractual tool it espouses—the practical implication of class action waivers remains to be seen.

Looking ahead to 2019, the Board will likely continue to re-evaluate previous decisions that concern issues flagged in the GC's memorandum discussing his enforcement priorities.

## B. EQUAL EMPLOYMENT OPPORTUNITY

### Status of the EEOC

Nearly two years into the new administration, the composition of the Equal Employment Opportunity Commission (EEOC) remains in limbo. Acting Chair Victoria A. Lipnic (R) has served in that capacity since January 25, 2017. She will remain on the Commission until at least July 1, 2020, when her second term is set to expire, and potentially beyond that date, given Title VII's rules on Commissioners "holding over" until the confirmation of a successor (or, should Lipnic seek a third term, her own reconfirmation). Lipnic's ability to address certain controversial Obama-era EEOC policies has been limited by the fact that throughout her tenure as Acting Chair, she has been the lone Republican, and has been in the minority pending confirmation of a Republican majority.

Serving alongside Lipnic is Commissioner Charlotte Burrows (D), whose term will expire on July 1, 2019. Long-serving Democratic Commissioner Chai Feldblum's term technically expired on July 1, 2018, but she remains on the Commission in holdover status until early January 2019 or her own reconfirmation by the U.S. Senate. President Trump has nominated Feldblum for a third term, but her reconfirmation has drawn criticism from several of the Senate's more conservative members, and the full Senate has yet to act on her nomination.

Two Republican nominees—Janet Dhillon and Daniel Gade—have been approved by the Senate Health, Education, Labor, and Pensions (HELP)

Committee and await confirmation by the full Senate. Dhillon, who upon her confirmation would become the EEOC's Chair, has a long career as in-house corporate counsel to several large national companies. Gade is an Iraq combat veteran, and has served a professor of public policy at the United States Military Academy at West Point. During a September 2017 hearing before the Senate HELP Committee, the nominees were—as is customary and expected at such hearings—noncommittal in their positions regarding more controversial EEO issues, such as whether Title VII should be interpreted to expressly prohibit discrimination on the basis of sexual orientation.

The president has also nominated a candidate to serve as the EEOC's general counsel, Sharon Fast Gustafson. Gustafson is perhaps best known for her role as plaintiff's counsel in the case of *Young v. United Parcel Services*,<sup>60</sup> the 2015 U.S. Supreme Court case addressing employers' obligations with respect to reasonable accommodations for pregnant workers under the Pregnancy Discrimination Act. Gustafson had a confirmation hearing before the Senate HELP Committee in April 2018, but the Committee has yet to formally act on her nomination. Many had expected the Senate to quickly confirm the four nominees (three Republican, one Democrat) as a "package," but opposition to Feldblum's renomination from some Senate Republicans has complicated that plan. At this writing, the fate of these nominations, at least in this session of Congress, is uncertain.

### EEOC's Priorities

In February 2018, the EEOC released its Strategic Plan for Fiscal Years 2018-2022,<sup>61</sup> which broadly sets the agency's operational framework and overarching strategic objectives: (1) combatting and preventing employment discrimination through strategic enforcement; (2) preventing discrimination through education and outreach; and (3) promoting an agency culture of excellence. Perhaps of greater interest to employers, in 2016 the Commission updated its Strategic Enforcement Plan (SEP) for Fiscal Years 2017-2021, which sets forth the agency's enforcement priorities in greater detail, and

60 575 U.S. \_\_\_, 1335 S. Ct. 1338 (2015).

61 EEOC, Strategic Plan for Fiscal Years 2018-2022 (Feb. 2018), available at [https://www.eeoc.gov/eeoc/plan/upload/strategic\\_plan\\_18-22.pdf](https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_18-22.pdf).



identifies core areas of interest where the agency will focus its limited resources.<sup>62</sup> For FY 2017-2021, these include:

- Eliminating barriers in recruitment and hiring that discriminate against protected classes, including “exclusionary policies and practices” and “screening tools that disproportionately impact workers based on their protected status”;
- Protecting vulnerable workers, including immigrant and migrant workers and underserved communities, from discrimination by way of job segregation, harassment, trafficking, pay discrimination, and retaliation;
- Addressing selected emerging and developing legal issues, including ADA qualification standards and “inflexible” leave policies; accommodation of pregnancy-related limitations; protection of LGBT workers; complex or non-traditional employment relationships and the on-demand economy; and “backlash” religion or national origin discrimination against certain workers;
- Ensuring equal pay protections for all workers, not solely on the basis of sex, but on all other protected bases;
- Preserving access to the legal system via close scrutiny of “overly broad” waivers, releases, and mandatory arbitration agreements; applicant and employee data and retention policies; and “significant” retaliatory practices; and
- Preventing systemic harassment, including policies, practices, or patterns of workplace harassment.

### ***Inventory (a/k/a “Backlog”) Reduction***

As Acting Chair, Lipnic has made reduction of the agency’s backlog of pending charges a high priority. In November 2017, the Commission announced that through the deployment of new strategies to more

efficiently prioritize charges with merit, and more quickly resolve investigations, it had resolved 91,109 charges, and reduced its backlog by 16.2% to just over 61,000—the lowest level in 10 years.<sup>63</sup> At the same time, the agency announced that in FY 2017, it recovered just under \$400 million in monetary relief for private-sector workers, by way of mediation, conciliation, administrative enforcement, and litigation.

### ***Age Discrimination***

On June 26, 2018, Acting Chair Lipnic released a report on the state of older workers to mark the 50<sup>th</sup> anniversary of the effective date of the Age Discrimination in Employment Act (ADEA).<sup>64</sup> According to the report, more than 44% of the U.S. civilian workforce in 2017 was age 45 or older.<sup>65</sup> This fact notwithstanding, EEOC’s report details how age discrimination—particularly discrimination in hiring—remains a significant barrier for older workers.<sup>66</sup>

The report recommends that employers take steps to improve workplace culture to counter unconscious bias and stereotyping, including increasing age diversity in the workforce and fostering a corporate culture that values a multi-generational workforce. Specific recommendations include ensuring that age is included in diversity and inclusion programs, and avoiding application or interview questions such as date of birth or other age-related inquiries.<sup>67</sup>

### ***Harassment***

Taking root in October 2017, the #MeToo movement has refocused the nation’s attention on workplace harassment, particularly sexual harassment. On this issue, the EEOC appears to have been significantly ahead of the curve. In January 2015, the agency formed a Select Task Force on the Study of Harassment in the Workplace, co-chaired by Lipnic and Feldblum. The Task Force, which included stakeholders representing workers, employers,

62 EEOC, *Strategic Enforcement Plan Fiscal Years 2017 – 2021*, available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

63 See Press Release, EEOC, *EEOC Dramatically Reduces Charge Inventory* (Nov. 9, 2017).

64 EEOC, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act* (ADEA) (June 2018).

65 *Id.* at 16.

66 *Id.* at 32.

67 *Id.* at 43.

organized labor, as well as academics and social scientists, culminated in a final report in June 2016.<sup>68</sup> The report includes a review of available data on workplace harassment, as well as practical tips for employers with regard to anti-harassment programs, investigations, reporting systems, and the like.

Shortly before President Trump took office, the EEOC issued draft guidance on workplace harassment. The 70-page guidance document set forth the EEOC's legal positions on workplace harassment law regarding all protected bases—not just sex-based harassment—and offered recommendations and best practices for employers to prevent and/or address future incidents of harassment. As of this writing, the draft remains pending review by the Office of Management and Budget, and no final guidance has been issued. Given the new administration's skepticism of subregulatory guidance generally, pending nominations, and conflict within the administration over certain substantive provisions in the draft, the fate of final guidance remains uncertain at best. That fact notwithstanding, given continued national attention and its inclusion in the EEOC's SEP, it is likely the Commission will continue to make the prevention and remedy of unlawful workplace harassment a high priority.

### ***Nondisclosure Agreements and Harassment Settlements***

The increased awareness of sexual harassment also found its way into the first significant piece of legislation to make it to President Trump's desk, the Tax Cuts and Jobs Act, which included a provision that eliminates a business expense deduction related to nondisclosure agreements (NDAs) in connection with the settlement of sexual harassment claims. The law amends section 162 of the tax code, which generally allows businesses to deduct certain business expenses, to provide that no business expense deduction will be allowed for: (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or

payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment. This exclusion applies to amounts paid or incurred after December 22, 2017, the date the tax bill was enacted. As a practical matter, this new restriction means employers likely will need to decide on a case-by-case basis whether any amount paid to settle a sexual harassment claim is significant enough to be worth the tax deduction at the expense of an NDA.

Several standalone federal bills likewise seek to limit the use of NDAs in sexual harassment settlements, ban mandatory agreements that would require the arbitration of sexual harassment claims, impose sexual harassment training requirements, and mandate new employer reporting requirements. For example, the bipartisan Ending the Monopoly of Power Over Workplace harassment through Education and Reporting (EMPOWER) Act (H.R. 6406, S. 2994), introduced in both chambers, would, *inter alia*, ban non-disparagement and non-disclosure clauses that cover workplace harassment as a condition of employment, promotion, or compensation, and require public companies to disclose the number of settlements, judgments, and aggregate settlement amounts in connection with workplace harassment in their annual SEC filings. Although these bills have earned some bipartisan support, they have yet to advance, and the likelihood of legislative action before the end of this session of Congress is slim.

State legislatures, however, have taken up the slack.<sup>69</sup> At least eight states have enacted bills that would achieve any or all of the above steps to combat harassment, and lawmakers in at least 26 states introduced similar bills since January 1, 2018. While there remains a question of whether the Federal Arbitration Act would preempt local laws regulating arbitration agreements, this significant legislative trend will likely continue into 2019.

68 Available at: [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm).

69 See Helene Wasserman, *From Settlement Disclosures to Retaliation: A Summary of Sexual Harassment Legislation in 2018*, Littler Insight (May 21, 2018).



### ***Pay Equity***

In August 2017, the Obama-era EEOC's efforts to revamp its EEO-1 Report to include detailed data on employee compensation appeared to come to an abrupt halt. The revisions—which were finalized in 2016 over Republican objections—would have required private-sector employers with 100 or more employees and covered federal contractors to provide detailed information annually on employee compensation and hours worked (in addition to the demographic information already required on the EEO-1). The changes to the EEO-1 drew intense criticism from the business community regarding the substantial cost of compliance, the lack of privacy safeguards, and the questionable utility of the data in explaining pay differentials or enforcing pay discrimination laws.

In response to a petition filed by the U.S. Chamber of Commerce, the Office of Management and Budget's Office of Information and Regulatory Affairs stayed enforcement of the revised EEO-1 in August of last year (as in years past, employers are required to file the demographic information required on the "old" EEO-1 form). It is unclear what, if any, next steps will be for the EEOC with respect to the collection of pay data, but we may be certain that employee advocates and stakeholders will continue to bring pressure on the EEOC to move on this front.

As with harassment, with bills at the federal level unlikely to move in this political climate, states and localities have swept in to fill the void. Since the beginning of 2018, at least 25 states have introduced laws or ordinances intended to target the so-called gender-based "wage gap." These bills vary in their approaches to promote pay equity. Some measures would broaden protection or narrow defenses under existing state equal pay laws, while other proposals would create new restrictions, such as a ban on employer salary history inquiries. Proponents of prohibiting inquires as to prior salary argue that setting compensation based on prior salary may perpetuate discrimination by a prior employer (placing employers in the curious and untenable position of being held liable for a prior company's discriminatory decision-making). Legislatures have also considered wage transparency measures, which prevent employers from banning discussion of pay in the workplace, or from retaliating against employees who discuss their wages with others (although, as a practical matter, at least with respect to non-supervisory employees, these sorts of bans or retaliatory actions arguably violate the National Labor Relations Act).

On July 5, 2018, Hawaii became the latest jurisdiction to enact a law generally prohibiting employers from asking applicants about their prior

compensation history.<sup>70</sup> To date, the following jurisdictions have similarly enacted restrictions on inquiring about and/or using an applicant's salary history: California; San Francisco, CA; Connecticut; Delaware; Massachusetts; New York City, NY; Albany County, NY; Westchester County, NY; Oregon; Puerto Rico; Philadelphia, PA;<sup>71</sup> and Vermont.

Other states have enacted laws to strengthen existing equal pay laws. On April 28, 2018, for example, New Jersey enacted amendments to existing statutes substantially expanding pay equity protections for New Jersey employees.<sup>72</sup> Notably, under this new law, employees are entitled to an equal rate of pay (including benefits) for "substantially similar" work—a standard arguably more friendly to employers than the "equal work" standard under federal law. Similarly, only a month earlier, Washington State enacted the Equal Pay Opportunity Act, which significantly expanded Washington's existing gender pay law for the first time since its enactment in 1943.<sup>73</sup> Among other changes, the new law prohibits discrimination in compensation between "similarly employed" employees, and prohibits discrimination in the payment of discretionary and nondiscretionary wages as well as employment benefits. State and local efforts to promote pay equity are expected to continue during the 2019 legislative session.

### **Status of LGBTQ Discrimination**

There were significant legal developments this year regarding protections against employment discrimination for members of the LGBTQ community. Last year, the U.S. Court of Appeals for the Seventh Circuit became the first federal

appellate court to hold that discrimination on the basis of sexual orientation is a form of sex discrimination prohibited by Title VII.<sup>74</sup> In February 2018, the Second Circuit followed suit.<sup>75</sup> In contrast, citing binding precedent, the Eleventh Circuit reached the opposite conclusion in 2017.<sup>76</sup> The Supreme Court declined review of that case, leaving at least currently a split in the circuits as to the scope of Title VII's protections. In another groundbreaking 2018 decision, in March the U.S. Court of Appeals for the Sixth Circuit held that discrimination based on an employee's transgender status is discrimination based on "sex" in violation of Title VII.<sup>77</sup>

There has been conflict within the administration as to whether discrimination on the basis of sexual orientation or gender identity is expressly prohibited under Title VII. Since 2012, the EEOC has held the position that discrimination on the basis of gender identity is prohibited by Title VII.<sup>78</sup> In 2015, the agency held further that discrimination on the basis of sexual orientation is similarly unlawful.<sup>79</sup> The Department of Justice (DOJ) has taken the opposite view. In a memo dated October 4, 2017, Attorney General Jeff Sessions set forth DOJ's position that "Title VII does not prohibit discrimination based on gender identity *per se*,"<sup>80</sup> and has argued in federal court that Title VII does not protect employees from discrimination on the basis of sexual orientation.<sup>81</sup> It is unclear how this conflict will play itself out, or how a new Republican majority at the Commission will view the issue.

The DOJ has also created a Religious Liberty Task Force, that will, among other things, "facilitate

70 See William J. Simmons, Martha J. Keon and Judy M. Iriye, [Hawaii Joins Salary History Ban Trend](#), Littler ASAP (July 6, 2018).

71 Philadelphia's law has been partially enjoined by *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia*, No. 2:17-cv-01548 (E.D. Pa. Apr. 30, 2018) (motion for preliminary injunction granted in part).

72 See Jedd Mendelson, [New Jersey Governor Expected to Sign Expansive Equal Pay Bill](#), Littler ASAP (Mar. 28, 2018).

73 See Breanne Martell and Dan Thieme, [New Pay Equity Law in Washington State](#), Littler ASAP (Apr. 16, 2018).

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

75 *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. 2018) (en banc).

76 *Evans v. Georgia Reg'l Hosp.* 850 F3d 1248 (11th Cir. 2017), cert. denied, No. 17-370 (Dec. 11, 2017).

77 *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424 (6th Cir. Mar. 7, 2018).

78 See *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC Appeal No. 0120120821 (Apr. 20, 2012).

79 See *Baldwin v. Dept. of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015).

80 U.S. Department of Justice, Memorandum, [Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964](#) (Oct. 4, 2017).

81 See U.S. Department of Justice Brief for the United States of America as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. en banc) (filed July 25, 2017).



interagency coordination”<sup>82</sup> in implementing a memorandum on religious liberty issued last year.<sup>83</sup> Whether and to what extent parties can justify discriminatory actions based on their sincerely held religious beliefs remains a hot-button issue. Although a case that made its way to the Supreme Court involved the intersection of so-called “religious freedom” and sexual orientation discrimination, the Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* largely skirted thornier issues via a narrow ruling on the specific facts of the case presented.<sup>84</sup> Given the significant public debate and splits in the circuit courts, it is likely that sooner or later these issues will be squarely addressed by the U.S. Supreme Court. How a more conservative Court will rule on is at best unclear.<sup>85</sup>

### ***Criminal Background Checks***

In 2012, the EEOC issued revised Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (the “Enforcement Guidance”), updating guidance on the use of criminal history in making employment decisions dating back to the late 1980s. The revised Enforcement Guidance sets forth the EEOC’s position that employers should avoid overly broad policies that act as blanket exclusions. Rather, the EEOC recommends that employers should craft more tailored criminal background check policies that take into account the nature and severity of the offense, the time that has passed since conviction or completion of a sentence, and the nature of the job held or sought. Moreover, the EEOC takes the position that where criminal background checks are not narrowly tailored, in most circumstances an

employer should make an individualized assessment before disqualifying an individual for employment based on past criminal conduct (for example, giving an applicant the opportunity to correct misinformation, or explain why he or she should not be excluded from the job in question).<sup>86</sup>

The state of Texas sued in federal court to enjoin the EEOC’s enforcement of the Enforcement Guidance, and to seek a declaration of Texas’s absolute right to categorically exclude felons from employment. The court enjoined EEOC’s enforcement of the Enforcement Guidance against the State of Texas finding that it violated the Administrative Procedures Act insofar as it had not been subject to notice and public comment. The court declined to declare Texas’s absolute right to bar felons in all instances, noting that for many categories of employment there may not be an objectively reasonable basis on which to exclude all applicants. At this writing, it is unclear whether the agency will seek to appeal the lower court’s ruling, and what the practical effect of the court’s decision will be. While this decision applies only to the State of Texas, it opens to the door to similar lawsuits across the country, and a new Republican majority at the agency could revisit the issue in the coming years.

At the state and local levels, several jurisdictions continue to enact “ban the box” laws limiting an employer’s ability to inquire about and base employment decisions on an applicant’s or employee’s criminal record. In 2018 alone, Washington and Kansas City, Missouri enacted new ban-the-box laws,<sup>87</sup> while Massachusetts and San Francisco, California, amended existing statutes.<sup>88</sup> In contrast, Michigan and Wisconsin both enacted laws in 2018 that explicitly *prevent* localities from

82 U.S. Department of Justice, Memorandum, [Religious Liberty Task Force](#) (July 30, 2018).

83 U.S. Department of Justice, Memorandum, [Federal Protections for Religious Liberty](#) (Oct. 6, 2017).

84 See Emily Haigh, Devjani Mishra, and Mark Phillis, [The Supreme Court’s Ruling in Masterpiece Cakeshop: A Masterpiece on Dodging Key Constitutional Issues](#), Littler ASAP (June 4, 2018).

85 Petitions for *certiorari* have been filed in *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. 2018) and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424 (6th Cir. 2018).

86 See Rod M. Fliegel and Molly Shah, [EEOC’s Background Check Guidance Suffers Loss in Texas Federal Court](#), Littler ASAP (Feb. 5, 2018).

87 See Daniel Thieme, James Zissler, and Brad Bigos, [Washington State Enacts Fair Chance Act](#), Littler ASAP (Apr. 26, 2018); William J. Simmons, Uzo N. Nwonwu, and Jason N.W. Plowman, [Kansas City, Missouri, Enacts “Ban-the-Box-Plus” Ordinance](#), Littler ASAP (Feb. 6, 2018).

88 See Rod M. Fliegel and Allen P. Lohse, [Impending Necessary Ban-the-Box Updates for Criminal Record Inquiries in Massachusetts and San Francisco](#), Littler ASAP (Apr. 24, 2018).





enacting ban-the-box measures.<sup>89</sup> Employers will likely continue to see legislative attempts to limit an employer's ability to conduct background checks until later in the hiring process, as well as proposed bills to preempt localities from enacting such restrictions.

### C. FEDERAL CONTRACTING

Federal contractors have not seen as many executive orders rescinded as originally expected at the commencement of the Trump administration. For example, the Obama-era executive orders requiring pay transparency,<sup>90</sup> project labor agreements,<sup>91</sup> and notice to employees of their rights under the National Labor Relations Act<sup>92</sup> are still in place. Executive Order 13706,<sup>93</sup> and the resultant DOL final rule,<sup>94</sup> which require employers with certain types of federal government contracts to provide up to 56 hours of paid sick leave per

year, also remain in effect. There has also been no meaningful reform of burdensome requirements imposed on federal contractors under the Davis-Bacon Act<sup>95</sup> and Service Contract Act.<sup>96</sup>

Rather than a presidential rescinding of Obama-era executive orders, federal contractors have instead seen an explicit focus by the Office of Federal Contract Compliance Programs (OFCCP) on increasing transparency and consistency across its U.S. offices. From the time of his appointment in December 2017, OFCCP Director Ondray Harris expressly undertook these objectives.

On March 14, 2018, the OFCCP issued a directive providing that it will no longer issue final findings of a violation without first issuing a Predetermination Notice and considering the contractor's response.<sup>97</sup> Predetermination Notices had been issued by OFCCP offices on a discretionary basis in the past. This directive removed regional discretion,

89 See Jaclyn Giffen and Bill Vincent, [Michigan Expands its Preemption Law to Cover Interview Limitations](#), Littler ASAP (Mar. 29, 2018); Adam Tuzzo and Jon Levine, [Still "Open for Business" - New Wisconsin Legislation to Preempt Most Local Employment Ordinances](#), Littler ASAP (Mar. 27, 2018).

90 Executive Order 13665 of Apr. 8, 2014, *Non-Retaliation for Disclosure of Compensation Information*, 79 Fed. Reg. 20749-20750 (Apr. 11, 2014).

91 Executive Order 13502 of Feb. 6, 2009, *Use of Project Labor Agreements for Federal Construction Projects*, 74 Fed. Reg. 6985-6987 (Feb. 11, 2009).

92 Executive Order 13496 of Jan. 30, 2009, *Notification of Employee Rights Under Federal Labor Laws*, 74 Fed. Reg. 6107-6111 (Feb. 4, 2009).

93 Executive Order 13706 of Sept. 7, 2015, *Establishing Paid Sick Leave for Federal Contractors*, 80 Fed. Reg. 54697-54700 (Sept. 10, 2015).

94 U.S. DOL, Wage and Hour Division, *Establishing Paid Sick Leave for Federal Contractors*, 81 Fed. Reg. 67598-67724 (Sept. 30, 2016).

95 40 U.S.C. 3141.

96 41 U.S.C. 351.

97 See David Goldstein, Meredith Shoop, & Brandon Haugrud, [New OFCCP Directive on Predetermination Notices Makes it Easier for Contractors to Understand and Address OFCCP Audit Concerns](#), Littler ASAP (Mar. 14, 2018).

standardizing practices across the agency's offices. It promises to provide contractors with a significant opportunity to better understand and address the OFCCP's concerns toward the end of an audit, and potentially resolve those concerns at a time when the agency should still be relatively open to fairly consider additional evidence.

A month later, in another step signaling increased transparency for federal contractors, the OFCCP issued a release describing in detail its methodology for selecting and scheduling federal contractors for audit in 2018.<sup>98</sup> This release brought clarity to an audit selection process that had long been a source of confusion and often consternation for contractors. By making public its audit selection processes, the OFCCP provided important insights and procedures for contractors to minimize their exposure and improve compliance.

Effective July 27, 2018, OFCCP Director Harris unexpectedly resigned. However, the OFCCP has continued to signal its commitment to transparency and consistency, including through the actions and public statements of Acting Director Craig Leen.<sup>99</sup> Acting Director Leen has touted Director Harris' Predetermination Notice Directive and has also discussed the possibility of increased compliance guidance from the OFCCP through its toll-free help line, and possibly through opinion letters and the revival of a contractor ombudsman position to create a new avenue for resolving disputes between contractors and the agency.

In early August 2018, the OFCCP also released a contractor "Bill of Rights," titled "What Contractors Can Expect."<sup>100</sup> This document, conceived during the OFCCP's Town Hall Meetings earlier in 2018, covers many items Acting Director Leen has highlighted and sets forth specific expectations for contractors' interactions with the OFCCP, including timely access to accurate compliance assistance,

opportunities to provide meaningful feedback and to collaborate, professional conduct by the OFCCP's staff, neutral scheduling of compliance evaluations, reasonable opportunity to discuss compliance evaluation concerns, timely and efficient progress on compliance evaluations, and confidentiality.

The OFCCP's focus on transparency and consistency does not, however, signal a turn toward more lenient treatment of contractors that are out of compliance with OFCCP's regulations. Instead, the OFCCP has indicated it will use its increasingly limited resources<sup>101</sup> to focus compliance review efforts on contractors that failed to certify affirmative action compliance during the contract bidding process. In addition, in an August 14, 2018 Directive, the OFCCP announced its intent to undertake focused reviews in FY 2019.<sup>102</sup> Rather than commencing with a broad-based compliance review, focused reviews will assess compliance against only some of a contractor's affirmative action obligations: women and minorities (under Executive Order 11246), disabilities (under Section 503 of the Rehabilitation Act), or protected veterans (under the Vietnam Era Veterans' Readjustment Assistance Act of 1974). Focused reviews are not new, but the Directive signals OFCCP's continued commitment to ensure that those entities doing business with the federal government are meeting their affirmative action and equal employment obligations.

The Obama-era directive by which the OFCCP established its procedures for reviewing contractor compensation systems and practices during compliance evaluations also remains in place.<sup>103</sup> As a result, federal contractors must continue to anticipate that their compensation systems and practices will be subject to intensive scrutiny in the event of an audit. Further, rather than officially abandoning enforcement efforts on the basis of health care industry employers' participation

98 Meredith Shoop & David Goldstein, *OFCCP Clarifies Methodology for Contractor Audit Selection*, Littler Insight (Apr. 19, 2018).

99 See Lance Gibbons & David Goldstein, *OFCCP Acting Director Promises Clear Guidance and Consistency While Laying out a Program of Carrots and Sticks*, Littler ASAP (Aug. 6, 2018).

100 U.S. DOL, Office of Federal Contract Compliance Programs, *What Federal Contractors Can Expect*, available at [https://www.dol.gov/ofccp/regs/compliance/posters/FS\\_WhatFedContractorsCanExpect-v2ESQA508c.pdf](https://www.dol.gov/ofccp/regs/compliance/posters/FS_WhatFedContractorsCanExpect-v2ESQA508c.pdf).

101 The OFCCP's staffing and budget levels have dropped significantly in recent years. In FY 2010, the OFCCP had 788 full-time employees and a budget of \$105 million. The proposed budget for FY 2019 includes 450 full-time employees and a funding level of \$91 million.

102 See Lance Gibbons & David Goldstein, *OFCCP Focused Reviews Coming in FY 2019*, Littler ASAP (August 14, 2018).

103 Directive 2013-03, U.S. DOL, Office of Federal Contract Compliance Programs (Feb. 28, 2013), available at <https://www.dol.gov/ofccp/regs/compliance/directives/dir307.htm>.

in TRICARE, the OFCCP has merely extended the existing enforcement moratorium for an additional two years, until May 7, 2021.<sup>104</sup> As a result, uncertainty continues regarding the status of health care employers that provide medical benefits to active duty and retired military personnel and their families through the TRICARE network, but that are otherwise not federal contractors.

## D. WAGE AND HOUR

### Developments from the Executive Branch Agencies

Almost one year ago, President Trump nominated Cheryl Stanton, current executive director of the South Carolina Department of Employment and Workforce, to be the Administrator of DOL's Wage and Hour Division (WHD). Stanton is a former clerk of U.S. Supreme Court Justice Alito (Stanton clerked for him he was a judge on the U.S. Court of Appeals for the Third Circuit), a former partner in private practice, and the former principal legal liaison to the DOL, NLRB, and EEOC for the President George W. Bush administration.

Even though President Trump and the Republican-controlled Senate have pushed through a record number of federal judge confirmation votes, President Trump has not had a swift and smooth confirmation process for deputy cabinet positions. Stanton breezed through the U.S. Senate's HELP Committee in October 2017. Since then, her confirmation process has stalled. Although Republicans only need a simple majority to confirm Stanton, Republicans hold the majority by only 51 votes. The upcoming midterm elections complicate a potential vote since numerous Senators likely will be out campaigning, endangering the slim majority needed to confirm. Senate Majority Leader Mitch McConnell, therefore, likely will not bring Stanton's position to a vote before November 6.

While Stanton awaits a confirmation vote, Bryan Jarrett, a former law partner in private practice, will continue as Acting Wage and Hour Administrator.

### *Status of the Overtime Rule*

In 2015, the Obama administration implemented a new rule regarding the minimum salary requirements necessary to categorize employees as exempt employees under the Fair Labor Standards Act (FLSA). The rule would have increased the minimum salary level for exempt employees from \$455 per week (\$23,660 annually) to \$913 per week (\$47,476 annually). The rule was met with significant opposition, and was ultimately struck down by a federal court in Texas in 2017. While the DOL appealed the court's ruling to the U.S. Court of Appeals for the Fifth Circuit, it also requested (and was granted) a stay of the appeal to readdress new rulemaking.

On July 26, 2017, the Department of Labor's Wage and Hour Division (WHD) issued a Request for Information seeking public input regarding the minimum salary level required for exempt status so that it could prepare a new set of proposed overtime exemption regulations. The comment period for that Request for Information ended in September 2017, and while it was expected that the WHD would promptly issue a new proposed rule, a release of the WHD's spring agenda indicates that a notice of proposed rulemaking will not likely be issued until January 2019.

### *DOL Reinstates Opinion Letters*

On April 12, 2018, the DOL issued three opinion letters, signaling its reinstatement of a process abandoned in the prior administration. The three opinion letters tackled the subjects of (1) what counts as compensable travel time for work,<sup>105</sup> (2) the compensability of travel time and rest breaks provided as a reasonable accommodation,<sup>106</sup> and (3) whether certain types of lump-sum payments to employees from employers are considered "earnings" for child-support-related wage garnishment purposes under Title III of the Consumer Credit Protection Act.<sup>107</sup>

104 See Meredith Shoop & David Goldstein, [OFCCP Extends Moratorium on TRICARE Enforcement for Two More Years](#), Littler ASAP (May 21, 2018).

105 Opinion Letter, DOL, [FLSA2018-18](#) (Apr. 12, 2018).

106 Opinion Letter, DOL, [FLSA2018-19](#) (Apr. 12, 2018).

107 Opinion Letter, DOL, [CCPA2018-1NA](#) (Apr. 12, 2018).



The first opinion letter, FLSA2018-18, confirms longstanding DOL positions regarding when travel time is compensable under the FLSA (e.g., hotel-to-worksite travel is a normal non-compensable commute). However, the letter also addresses a knottier issue that has remained unresolved for many years: For employees with irregular schedules, how does an employer determine their “normal work hours” (during which they must be paid when travel requires an overnight stay)? This letter provides employers with two different methods to reasonably ascertain an employee’s normal work hours, and to determine whether travel time is compensable. The employer may review the employee’s time records during the most recent month of regular employment and use the average start/end times during that time period. Employers also may negotiate with the employee or employee’s representative and agree to what constitutes the employee’s normal work hours. If employers use either of these methods, the DOL will not find FLSA violations when employees are not paid for travel time occurring outside these normal working hours on work or non-work days.

In the second letter, FLSA 2018-19, the DOL clarified that rest breaks given by an employer to accommodate an employee’s serious health condition predominantly benefit the employee and are not compensable as a result. This ruling provides an exception to the current FLSA regulations, which state that employees must be paid during rest breaks of 20 minutes or less. The DOL opined that a 15-minute rest break each hour that was certified by a health care provider due to the employee’s serious health condition—and therefore covered by the Family and Medical Leave Act (FMLA)—was *not* compensable time under the FLSA. Notably, employees that take FMLA-protected breaks as an accommodation must still receive as many paid rest breaks as their coworkers.

The third letter, CCPA 2018-NA, considers whether certain lump-sum payments are considered “earnings” for purposes of the garnishment limitation in Title III of the Consumer Credit Protection Act (CCPA). In determining whether

certain lump-sum payments are earnings under the CCPA, the opinion letter articulates the central inquiry: Whether the employer paid the amount in question for the employee’s services. The letter specifically analyzes 18 types of lump-sum payments, including commissions, bonuses, profit-sharing payments, relocation payments, awards, retroactive merit increases, holiday pay, termination pay, and severance pay. The letter specifies that lump-sum payments for workers’ compensation, insurance settlements for wrongful termination, and buybacks of company shares do not constitute “earnings” under the CCPA.

Finally, the DOL issued a fact sheet, Fact Sheet 17(s): Higher Education Institutions and Overtime Pay Under the FLSA, discussing the applicability of the “white collar” exemptions common in higher education institutions. More specifically, this Fact Sheet lists the following positions as typically exempt under the FLSA: (a) part-time teachers; (b) teachers who teach online or remotely; (c) teachers who spend a “considerable amount of time” in extracurricular activities (e.g., coaching); and (d) athletic coaches employed by higher education institutions. The Fact Sheet also determines that the “learned professional exemption” applies to: (a) certified athletic trainers; (b) librarians; and (c) post-doctoral fellows. Further, the administrative exemption applies to: (a) admissions counselors; (b) student financial aid officers; (c) department heads; (d) intervention specialists; and (e) academic counselors. Finally, the Part 541 exemptions apply to the following student-employees if they meet the salary tests: (a) graduate teaching assistants; (b) research assistants; and (c) student residential assistants.

### ***The “PAID” Program***

In March 2018, the WHD announced the launch of its Payroll Audit Independent Determination (PAID) Program as an initial six-month pilot program. The pilot program is currently slated to conclude in September 2018, and the WHD has not yet indicated whether it will extend its trial run.



Through the PAID program, employers that meet certain eligibility requirements<sup>108</sup> can proactively seek to resolve potential and actual violations of the FLSA. To participate, an employer must first conduct a mandatory review of FLSA compliance materials and obtain a Certificate of Completion, which must be submitted with other required documentation to the WHD. Once the certificate is obtained, the employer may begin the auditing process. While the WHD has not given express criteria on *how* to conduct the audit, it has identified the information that must be produced to the WHD as a result. Specifically, the employer must provide to the WHD:

- A concise explanation of the scope of potential violation(s), which may be used when crafting a liability release;
- Names, addresses, and phone numbers of all affected employees;
- Back wage calculations, including methodology and supporting evidence used in the calculation;
- Payroll records and “any other relevant evidence”;
- Detailed time records for each affected employee during the two-year period;
- Records demonstrating that the company has corrected the compensation practices at issue, and that pay practices now comply with the FLSA;
- The Certification of Completion; and
- Certification that the employer meets all of the eligibility criteria.

To submit the information and begin the program, the employer must contact its local WHD District Office for specific instructions and discussion of next steps.

The process concludes with the WHD’s review of the submitted materials and assessment of back wages owed. While the employer must provide its own calculations of back wages, that sum is not automatically accepted by the WHD. While not expressly stated in the latest guidance, past practice dictates that the WHD will not approve a release of employees’ rights to bring a private action if it is not in agreement as to the amount of back wages owed. Indeed, the latest guidance explicitly points out that should the employer decide to pay back wages *prior* to the WHD’s review of the calculation and makes its own assessment of back wages owed, that payment will be considered “unsupervised” and will not act as a waiver of the employees’ private right of action.

Successful participation in the PAID program concludes with payment to employees of **100%** of the calculated back wages owed, and the execution of a narrowly tailored release of claims by the employees.

#### ***Clarifications of “Regular Rate” under the FLSA***

The WHD’s spring regulatory agenda revealed that in September 2018, it intends to issue a proposed rule updating the regulations regarding calculation of the regular rate for non-exempt employees, which is used to identify what payments qualify as compensation to the employee for purposes of determining overtime pay. Specifically, the WHD is looking to clarify Section 207(e)(2) of the FLSA, which excludes payments made for periods where no work is performed, such as vacation or holiday pay, reimbursements to employees for travel expenses, and any similar payments made to an employee that are not made as compensation for the employee’s work. It is unclear at this time what the nature of WHD’s “clarification” of Section 207(e)(2) will entail.

<sup>108</sup> According to the DOL’s new guidance, to be eligible, an employer must be able to *certify* the veracity of: (1) that the entity is an “employer” covered by the FLSA, (2) the employees included in the proposed self-audit are *not* covered by any federal prevailing wage laws, such as the Davis Bacon Act, the Service Contract Act, prevailing wages established by executive orders, or under various immigration visa programs, (3) the pay practices that are the subject of the proposed audit cannot be the same pay practices that: (a) either the WHD or any court of law, within the last five (5) years, has found to be a violation of the FLSA’s minimum wage and overtime provisions, (b) are currently being litigated, to which the employer is a party to the litigation, (c) are currently being investigated by the WHD, (d) are the subject of recent complaints made by the company’s employees or made on the employees’ behalf by representatives to: (i) the company and its representatives, (ii) the WHD, or (iii) state wage enforcement agencies, about which the Company specifically has knowledge of or is aware; or (e) were addressed by the company in a previous PAID program submission; (6) the Company has a continuing duty to update WHD on any changes to any of the previously identified information. Eligibility is determined on a case-by-case basis. Of course, the WHD has made it clear that it may exercise its discretion to include or exclude any employer from participating in the PAID program, regardless of whether the employer meets these criteria. U.S. Dept. of Labor, Wage and Hour Div., *Questions and Answers About the PAID Program*, <https://www.dol.gov/whd/paid/paid-faq.htm>.



### ***DOL Issues Guidance on Independent Contractors / Worker Classification***

On July 13, 2018, the WHD issued a Field Assistance Bulletin (FAB) entitled “Determining Whether Nurse or Caregiver Registries Are Employers of the Caregiver.”<sup>109</sup> Although this FAB focuses on the caregiver registry industry, it provides the new administration’s first substantive guidance on independent contractor classification.

In 2015, the DOL issued an Administrative Interpretation (AI) on independent contracting that was a radical departure from the direction it had previously taken on independent contractor status. In that AI, the DOL diverged from the IRS’s standards on independent contractor status, asserted that lack of control over the worker was not a determining factor for finding independent contractor status, and that “most workers are employees under the FLSA’s broad definitions.” In June 2017, the DOL withdrew the 2015 AI, but did not immediately replace it, stating only that the removal of the AI “does not change the legal responsibilities of employers under the Fair Labor Standards Act.”

The new June 2018 FAB announces that the DOL will consider the totality of the circumstances

and all factors when making determinations as to the appropriateness of independent contractor status, with a focus on historically important factors, including control of the work performed by the independent contractor. Helpfully, the FAB acknowledges that registries can serve as the liaison between the independent contractors and caregivers without defeating the independent contractor relationship.

The FAB provides long-awaited and specific guidance on how to structure independent contractor relationships in the caregiver registry industry but also more generally, and it signals the DOL’s return to the traditional, multi-factor balancing test to determine independent contractor status with a primary focus on control of the worker. This guidance is welcome news for employers following the tougher new California independent contractor standards under the *Dynamex* decision.<sup>110</sup>

### ***DOL Updates Guidance on Unpaid Interns***

On January 5, 2018, the DOL issued guidance rejecting its previous practice of using a six-factor test when evaluating whether a worker is properly categorized as an intern under the FLSA, or is actually a non-exempt employee

109 U.S. Dept. of Labor, Wage and Hour Division, [Field Assistance Bulletin No. 2018-4](#) (July 13, 2018).

110 *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018). In this case, the California Supreme Court adopted a modified “ABC” test for determining independent contractor status under California’s Industrial Welfare Commission Wage Orders.

entitled to minimum wage and overtime pay.<sup>111</sup> The DOL acknowledged that several U.S. Courts of Appeal had ruled the six-factor test too inflexible, so it adopted what is known as the “primary beneficiary” test instead.

Under the primary beneficiary” test, the DOL and the courts examine the economic reality of the relationship between the intern and the for-profit entity offering the internships. If the economic reality of the relationship shows that the for-profit entity is the primary beneficiary of the work provided under the purported internship, then the worker is most likely misclassified as an intern, and should instead be categorized as an employee (with the associated wage protections that come with that status). If, instead, the intern is the primary beneficiary of the opportunity to work for the non-profit entity, then classification as an unpaid intern is more likely appropriate.<sup>112</sup> Importantly, no one factor is determinative and the test is intended to be a flexible one.

### ***No Meaningful Reform of Davis-Bacon and Service Contract Enforcement***

As previously discussed, there has been no meaningful reform of burdensome requirements under the Davis-Bacon Act or the Service Contract Act during the Trump administration. Among the open issues are the misclassification problem created by wage determinations that do not provide public notice of work assignments for the various trades, inaccurate wage surveys that result in disproportionate numbers of union scales

identified as “prevailing,” and attempts to expand the scope of federal prevailing wage law to privately funded projects.<sup>113</sup>

## **Legislative Updates**

### ***More Toes Can Dip into the (Tip) Pool***

On March 27, 2018, President Trump signed into law Congress’s omnibus budget bill, the Consolidated Appropriations Act, 2018.<sup>114</sup> Buried within the over 2,000-page document is an amendment to the FLSA. This amendment addresses rules affecting tipped employees and tip ownership, adding the following language to the FLSA:<sup>115</sup>

An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees’ tips, regardless of whether or not the employer takes a tip credit.<sup>116</sup>

The remedy for violating this provision includes the loss of the tip credit and disgorgement of improperly kept tips, a remedy already provided by several states’ wage and hour laws for violations of tipping statutes and regulations.

The FLSA amendment left open many questions, some of which were answered on April 6, 2018, when the Department of Labor issued Field Assistance Bulletin No. 2018-3.

The field bulletin clarifies that the FLSA amendment nullifies the 2011 regulations prohibiting tip-sharing with non-tipped employees even when an employer did not take a tip credit.<sup>117</sup> However, uncertainty

<sup>111</sup> U.S. Dept. of Labor, Wage and Hour Division, [Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act](#) (updated Jan. 2018).

<sup>112</sup> To determine the “economic reality” of the relationship, the DOL examines seven factors: (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa; (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions; (3) The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit; (4) The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar; (5) The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning; (6) The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; (7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

<sup>113</sup> See *District of Columbia v. Dept. of Labor*, 819 F.3d 444 (D.C. Cir. 2016).

<sup>114</sup> Pub. L. 115-141 (2018).

<sup>115</sup> In December 2017, the DOL issued a proposed rule to rescind its position that employers must comply with tip-pooling requirements even when paying the full minimum wage. This proposal sought to reverse the Department’s regulations promulgated in 2011, and would have allowed employers to require tipped employees paid at least the full minimum wage (without the tip credit) to share their tips with employees who are not otherwise customarily tipped, such as cooks, dishwashers, porters and maintenance staff. Although the new law’s amendments to the FLSA effectively negate the need for the December 2017 proposed rule, the DOL intends to proceed with separate rulemaking to fully address the impact of the 2018 FLSA amendments.

<sup>116</sup> *Id.*, Sec. 1201(a)(5)(B).

<sup>117</sup> 29 C.F.R. §§ 531.52, 531.54 and 531.59.

remains regarding whether the FLSA amendment also effectively rescinds other changes to the tip credit regulations adopted in 2011, such as the detailed notice requirements in 29 C.F.R. § 531.59. While Congress attempted to address this issue by explaining that only regulations “not addressed by section 3(m)” are rescinded, the vague language will likely require regulatory or judicial clarification.

The DOL also explains that it will define the terms “supervisor” and “manager” in the amendment by using the executive employee overtime exemption criteria set forth in 29 C.F.R. § 541.100(a)(2)-(4). To meet the DOL’s definition, a supervisor or manager must meet the following criteria:

- Primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- Customarily and regularly directs the work of two or more other employees; and
- Authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

This standard is certainly higher than one might expect for the phrase “supervisor” and signals the DOL’s likely approval of including employees in a tip pool that have dual functions, such as lead waiters, lead bartenders, or lead cooks. The DOL further clarifies that the FLSA amendment does not affect the long-accepted permissible practice of allowing employers to deduct credit card processing fees associated with processing credit card tips, nor will the amendment prohibit an employer from administering an otherwise lawful tip pool. Finally, the DOL confirms that the amendment to the civil money penalty provisions for unlawfully keeping an employee’s tips will still require a finding that the violation is repeated or willful, in keeping with the DOL’s normal procedures. The DOL announced it will proceed with rulemaking.

### ***Efforts to Boost the Minimum Wage at the Federal Level***

In recent years, a wave of bills to increase minimum wage rates has swept across many cities and states, including Alaska, Arizona, California, Colorado, Florida, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New York, Ohio, Rhode Island, South Dakota, Vermont, Washington, and the District of Columbia.

This trend has gained little practical traction federally, where the minimum wage remains \$7.25 per hour. In 2017, Democratic lawmakers introduced H.R. 15 – Raise the Wage Act.<sup>118</sup> This bill would raise the federal minimum wage, in increments, to \$15.00 per hour over a seven-year period. Under Republican control, Congress has not advanced the bill. Capitol Hill watchers believe, however, that should the Democrats take control of the House of Representatives after the 2018 midterm elections, they will shortly thereafter reintroduce this or similar legislation.

Meanwhile, states and municipalities continue to lead the crusade to increase minimum wages. Currently, 29 states have a minimum wage higher than the federal minimum wage. Since January 1, 2018, 23 states introduced bills to increase the state’s minimum wage, and two states have passed such legislation.

### **Judicial Update**

#### ***Narrowly Construed No More: Encino Motorcars, LLC v. Navarro***

The *Encino Motorcars* case—considered by the Supreme Court for a second time in the October 2017 term—considered whether the automotive sales exemption “applies to service advisors—employees at car dealerships who consult with customers about their servicing needs and sell them servicing solutions.”<sup>119</sup> But in deciding that the exemption does apply to service advisors, the Court dropped a true bombshell with respect to FLSA jurisprudence more broadly: it rejected

118 H.R. 15, 115th Cong. § 1 (2017).

119 *Encino Motorcars, LLC v. Navarro*, No. 16-1362, 584 US \_\_ (2018). For more details about this decision and its implications, see Joshua B. Waxman and Cori K. Garland, *Employers, Rev Your Engines: SCOTUS Rejects Narrow Construction of FLSA Exemption in Encino Motorcars, LLC v. Navarro*, Littler Insight (Apr. 6, 2018).





the longstanding principle that exemptions are to be construed narrowly. Specifically, the Supreme Court held that nothing in the FLSA’s text demands a narrow construction of exemptions and that the FLSA contains “over two dozen” exemptions. Therefore, the Court reasoned, exemptions are as integral to the statute as are the overtime and minimum wage requirements. Thus, quoting language from a decision from last term that “it is quite mistaken to assume . . . that whatever might appear to further the statute’s primary objective must be the law,” the Supreme Court held that courts “have no license to give the exemption anything but a fair reading.” As a result, going forward, courts will need to place exemptions on the same statutory and interpretive footing as the substantive overtime requirements in the statute.

Although the issuance of a revised white collar overtime exemption rule is likely the most-anticipated wage and hour development in the year ahead, employers can expect additional WHD activity once permanent leadership is instituted.

## E. SAFETY, HEALTHCARE, AND BENEFITS

### OSHA’s Record in the Trump Administration

Nearly two years into the Trump administration, OSHA does not yet have a confirmed Assistant Secretary for Occupational Safety and Health.<sup>120</sup> During this time, the agency has struggled to address the significant changes to safety enforcement proposed and/or finalized during the Obama administration. OSHA has attempted to moderate some of the most burdensome changes initiated prior to 2017, while keeping other standards and enforcement changes in place.

Thus, in 2017, OSHA defended in court the Obama administration’s dramatic reductions in exposure limits and mitigation requirements for respirable crystalline silica.<sup>121</sup> As a result, the D.C. Circuit upheld OSHA’s new standard, despite serious concerns expressed by the business community over the feasibility of implementing the new standard.<sup>122</sup> During 2018, however, OSHA engaged in multi-party negotiations for the purpose of clarifying methods of compliance, particularly the “specified exposure control methods” known as “Table 1.” On August 13, 2018, OSHA published answers to “53 Frequently

<sup>120</sup> Scott Mugno, a well-regarded business safety executive, was nominated in 2017 but has yet to be confirmed.

<sup>121</sup> 29 C.F.R. 1910.1053(a)(1).

<sup>122</sup> *North America’s Building Trades Unions v. OSHA*, 878 F.3d 271 (D.C. Cir. 2017).

Asked Questions” about the new standard,<sup>123</sup> together with a Request for Information to revise Table 1 altogether.<sup>124</sup>

OSHA has delayed outright the enforcement of “ancillary” provisions of the final rule changing the beryllium standard, another Obama administration standard that created controversy in late 2016. OSHA began enforcing certain new beryllium requirements for construction and shipyards in May 2018, but delayed full enforcement of the new standard until December 12, 2018, while the standard is under possible reconsideration.<sup>125</sup>

The most significant “holdover” rulemaking proceeding still pending at OSHA, affecting the largest number of employers nationwide, is the Injury Tracking and Reporting Rule promulgated by the Obama administration in late 2016.<sup>126</sup> The rule originally required employers with 250 or more employees or in certain hazardous industries to electronically submit information about work-related injuries and illnesses to OSHA on Form 300, along with a summary of the reported incidents on OSHA Form 300A, and more detailed injury and illness incident reports on OSHA Form 301. Most controversially, OSHA announced the intent to make the report accessible to the public. At the same, OSHA created for itself a new authority, seemingly contrary to Section 11(c) of the OSH Act, to issue citations against any covered employer that retaliates or discriminates against employees for reporting injuries or illnesses. OSHA announced in the preamble to this rule that routine post-accident drug testing and incident-based safety incentive programs would be deemed to be retaliatory or discriminatory under a variety of circumstances.

On July 30, 2018, OSHA issued a Notice of Proposed Rulemaking to rescind the electronic reporting requirements for the Forms 300 and 301, leaving

only the summary Form 300A to be reported by covered employers.<sup>127</sup> OSHA separately clarified that Form 300As received from employers will not be made public for at least four years. Despite petitions and lawsuits filed by the business community,<sup>128</sup> however, OSHA’s 2018 NPRM did not address industry’s concerns over the final rule’s anti-drug testing and safety incentive provisions. If the drug testing and safety incentive issues are not addressed by OSHA, it appears likely the litigation currently being held in abeyance will be restarted in order to challenge the agency’s restrictions on programs that promote workplace safety.

Other issues pending before OSHA include concerns over whether the agency will become involved in workplace harassment issues, traditionally the exclusive province of the EEOC. Under a 2011 Compliance Directive issued during the Obama administration, OSHA asserted authority to investigate workplace violence resulting from events occurring in the workplace under the general duty clause. The open question is whether non-violent sexual harassment can be the basis for citation by OSHA under this claimed authority.

Finally, OSHA has increasingly become involved in cases raising joint employment concerns. The agency has long asserted authority to hold prime contractors responsible for worksite safety violations for which multiple contractors bear responsibility. In 2013, the Obama administration announced OSHA’s Temporary Worker Initiative, in which OSHA declared that staffing agencies and host employers would be jointly responsible for maintaining a safe working environment for temporary workers. Litigation is ongoing as to the extent of responsibility of the various employers for workplace training to avoid hazards.<sup>129</sup>

123 OSHA, Occupational Exposure to Respirable Crystalline Silica, 29 C.F.R. § 1926.1153, [https://www.osha.gov/dsg/topics/silicacrystalline/construction\\_info\\_silica.html](https://www.osha.gov/dsg/topics/silicacrystalline/construction_info_silica.html).

124 Office of Management and Budget, Office of Information and Regulatory Affairs, RIN: 1218-AD18 (Spring 2018), available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubid=201804&RIN=1218-AD18>.

125 83 Fed. Reg. 39351 (Aug. 9, 2018).

126 29 C.F.R. 1904.41 (Eff. Jan. 1, 2017).

127 OSHA, *Tracking of Workplace Injuries and Illnesses*, Fed. Reg. 36494 (July 30, 2018).

128 *TEXO ABC/AGC et al v. Perez*, 16-cv-01998-L (N.D. Tex.), *NAHB v. Acosta*, No. 17-cv-0009 (W.D. Okla.).

129 *Secretary of Labor v. A.H. Sturgill Roofing, Inc.*, OSHRC Docket No. 13-0224.

## Legalized Marijuana and Drug Testing

While marijuana remains a controlled, illegal substance under federal law, legalization of marijuana has accelerated among the states. The state laws vary, but either legalize marijuana for medical use or for recreational use.<sup>130</sup> Of these legalizing states, most allow employers to enforce their drug-free workplace policies.<sup>131</sup> However, an increasing number of states prohibit discrimination against employees who use marijuana outside the workplace,<sup>132</sup> and the rights of employers to test or discharge for marijuana on or off the job is increasingly unsettled.

## Status of the Affordable Care Act

Opponents of the Affordable Care Act (ACA) have attempted to repeal outright or weaken its provisions ever since its 2010 enactment. While wholesale repeal and replace efforts have failed, more incremental legislative and regulatory efforts to revise the landmark healthcare law have proven more successful. For example, the Tax Cut and Jobs Act of 2017 effectively eliminates the “individual mandate” penalty starting in 2019. The “employer mandate,” however, remains alive and well. Despite repeated congressional attempts to dismantle it, the controversial tax penalty remains in effect and is under active enforcement by the Internal Revenue Service.

By way of background, the employer mandate requires most large employers to offer certain minimum levels of medical coverage to employees meeting the IRS’ definition of “full-time employee.” Employers that fail to meet these standards will be liable for tax penalty if their employees obtain subsidized medical coverage through the state or federal Marketplaces.

Each year, employers are required to self-report their compliance with the employer mandate using Forms 1094-C and 1095-C. These forms are then compared to the Marketplace enrollment records

to determine whether employers are liable for tax penalties under the employer mandate. The IRS is currently enforcing tax penalties for the 2015 tax year.

ACA penalty assessments are issued on Letter 226J and include detailed information listing the names of the employees who received tax-subsidized Marketplace coverage and the information reported by the employer on the Form 1095-C with respect to those employees. Employers have 30 days to respond or object to the penalty amounts reported in the Letter 226J. As of the date of this Report, enforcement for the 2016 plan year has not yet begun.

Importantly, the employer mandate’s coverage threshold for avoiding the larger of the two employer mandate penalties increased from 70% of full-time employees in 2015 to 95% of full-time employees in 2016. For that reason, we expect that the enforcement activity for the 2016 plan year will affect a larger percentage of employers.

## Association Health Plans

On June 19, 2018, the U.S. Department of Labor (DOL) issued its highly anticipated final rule expanding the availability of association health plans (AHPs).<sup>133</sup> The core purpose of an AHP is to allow small employers to band together and obtain coverage in the large group insurance market, which generally imposes fewer coverage requirements. For example, unlike the small group insurance market, policies issued in the large group insurance market are not required to cover “essential health benefits.” According to the DOL, AHPs will “expand employer and employee access to more affordable, high-quality coverage.” However, as explained below, AHPs are subject to regulation under state laws governing multiple employer welfare arrangements (MEWAs), and they are still subject to certain other federal mandates including coverage of mental health benefits, no lifetime or annual limits on

<sup>130</sup> Arkansas, California, Colorado, District of Columbia, Massachusetts, Maine, Nevada, Oregon, and Washington.

<sup>131</sup> California, Colorado, Delaware, Florida, Illinois, Montana, New Hampshire, and Washington each have permitted employers to terminate or refuse to hire employees who use marijuana in the workplace.

<sup>132</sup> Arkansas, Arizona, Connecticut, Delaware, Florida, Illinois, Maine, Massachusetts, Minnesota, New York, Nevada, Pennsylvania, and Rhode Island have passed such laws.

<sup>133</sup> DOL, *Definition of “Employer” Under Section 3(5) of ERISA-Association Health Plans*, 83 Fed. Reg. 28912-28964 (June 21, 2018).

certain benefits, and nondiscrimination provisions, which will add additional layers of complexity to these new plan designs.

Under existing guidance, multiple employers are treated as a single “employer” under the Employee Retirement Income Security Act of 1974 (ERISA) if they are members of a bona fide group or association of employers. To qualify as a bona fide group or association, the employer members must have a “commonality of interest,” which the DOL had narrowly defined.

The new final rule revises prior DOL guidance regarding what constitutes a “commonality of interest,” providing that the association members have a commonality of interest if they are: (1) in the same “trade, industry, line of business or profession,” or (2) are located in “same state or metropolitan area even if the metropolitan area includes more than one state.”

The determination as to what constitutes a trade, industry, line of business or profession is based on “all relevant facts and circumstances.” While the DOL declined to provide specific definitions or sanction specific industry classifications, the preamble provides some examples of classifications that would not meet the new rule’s “commonality of interest” standard. For example, classifications based on ownership characteristics, business models or structures, the size of employer, or shared religious or moral convictions would be considered too broad. Language in the preamble does suggest that national associations based on such characteristics could establish subgroups along relevant industry or business lines or that associations form within states or metropolitan areas.

The final rule also clarifies that the association must have at least one substantial business purpose unrelated to providing health coverage. According to the rule, a substantial business purpose exists if the association would be a viable entity in the absence of sponsoring an employee benefit plan.

Further, AHPs must comply with certain nondiscrimination requirements of the Health Insurance Portability and Accountability Act (HIPAA). Specifically, AHPs may not condition

eligibility for benefits or rate premiums based on health factors. The rule makes clear through examples that employment-based classifications such as part-time or full-time employment status do not violate the HIPAA nondiscrimination requirements and may be used in determining eligibility or setting rates.

In addition to other requirements, the final rule also confirms that working owners and sole proprietors may be treated as employers for membership in an AHP and as employees eligible for coverage under the plan. This new rule allows working owners and sole proprietors to participate in group policies, rather than individual policies.

Seen as a win for many employers and employer groups, the DOL included a specific provision that participation in an AHP will not subject employers to joint employer liability under any other federal or state law, rule, or regulation. It also clarified that a business will not be considered an employer of its independent contractors merely by its participation in an AHP with those independent contractors that participate in the same AHP as working owners.

Despite the promising new opportunities for AHPs, the regulations expressly state that the new guidance does not modify existing state authority to regulate MEWAs. Under ERISA, the DOL and states have joint authority over MEWAs to ensure “appropriate regulatory and consumer protections for employers and employees relying on an AHP for healthcare coverage.” The final rule affirms this joint structure and does not reduce the “historically broad role of the states” regulating MEWAs, including AHPs.

In fact, the DOL notes that state-level MEWA regulations may limit employers’ flexibility to exclude certain essential health benefits: “In addition, under ERISA’s provisions saving state regulation of MEWAs from preemption, States may also extend benefit mandates to self-insured AHPs.” AHPs with employer members in multiple states may be subject to multiple competing sets of state-level MEWA compliance obligations.

Fully insured AHPs may begin to provide coverage as of September 1, 2018. Existing self-insured AHPs may have an effective date as of January 1, 2019



and new self-insured AHPs may be formed as of April 1, 2019.

As a final wrinkle, 12 state attorneys general have filed a lawsuit to enjoin the new rule. On July 26, 2018, the plaintiffs filed suit against the DOL, alleging the rule “upends decades-old understanding of a foundational employee benefits law for the purpose of exempting a significant portion of the health insurance market from the Affordable Care Act’s consumer protections.”<sup>134</sup> At the date of publication, this matter is still pending.

### Wellness Program Rules

After years of uncertainty, the EEOC in 2016 issued final regulations under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) regarding permissible incentive limits for workplace wellness plans, offering employers at least some certainty in their plan structure. Unfortunately, key provisions of these rules proved to be short-lived.

Generally speaking, the ADA prohibits employers from requiring employees to submit to physical examinations or answer disability-related questions, unless these activities are part of a “voluntary employee health programs.” GINA generally prohibits acquiring genetic information of applicants or employees, but includes an exception where employers offer voluntary health or genetic services to employees or their family members. Under both statutes, the key question is whether medical information is provided on a *voluntary* basis. For years the EEOC failed to answer the question of when a financial incentive or penalty became so great in the agency’s view as to render the disclosure of such information coercive and involuntary.

The EEOC’s 2016 wellness plan regulations purported to answer that question. Under the final rules, a wellness program would be considered to be a “voluntary employee health program” as long as certain requirements were satisfied, including privacy and confidentiality safeguards, mandatory notice distributions, and caps on the rewards or

penalties associated with the wellness program. Specifically, the regulations provided that a wellness program would still be considered “voluntary” if rewards (or penalties for nonparticipation) did not exceed 30% of the total cost of the least-expensive employee-only medical coverage option (the regulations provided alternative caps for employers that do not sponsor medical coverage).

Shortly after the rules were issued, AARP filed a lawsuit in federal court challenging them, alleging that the EEOC failed to adhere to proper rulemaking procedure, and failed to sufficiently explain how it arrived at a 30% “voluntary” threshold. In August 2017, the court ruled in favor of AARP and remanded the regulations to the EEOC for reconsideration.<sup>135</sup> In its decision, the court held that the EEOC did not respond to “substantial criticism” of its choice of the 30% threshold, and did not consider its financial and economic impact, such as the impact on specific premium levels, personal income, and other factors. The court subsequently vacated the EEOC’s final regulations effective as of January 1, 2019. Importantly, the court’s ruling struck down only those sections of the regulations regarding the penalty/reward incentive limits. The remainder of the regulations remains in effect.

To date, the EEOC has not provided updated regulations, and, given the complexity of the issue and the length of the rulemaking process, it appears unlikely that the agency will issue new final rules for at least several years. Accordingly, employers will continue to lack certainty as to whether their wellness programs are in compliance with the ADA and GINA.

### Paid Leave

Paid leave remains one of the more frustrating benefits for employers operating in multiple jurisdictions, as the scope and requirements of paid leave laws and ordinances vary significantly. Several new measures were enacted in 2018. For example, new paid sick and safe laws were enacted statewide in Maryland and New Jersey (which, when the Garden State law takes effect, will preempt 13 existing local laws)—and locally in Duluth,

<sup>134</sup> *State of New York, et al. v. Acosta*, Case 1:18-cv-01747, Complaint For Declaratory And Injunctive Relief (D.D.C. filed July 26, 2018).

<sup>135</sup> *AARP v. U.S. Equal Employment Opportunity Commission*, 267 F.Supp.3d 14 (D.D.C. 2017).



Minnesota, as well as Austin and San Antonio, Texas. Relatedly, Massachusetts enacted a new statewide paid family-medical law.

There are numerous differences between laws that entitle employees to accrue a certain amount of paid leave hours per year, and those that create an insurance-like fund into which employees and employers contribute. For example, all of the new paid sick and safe laws introduced at the state and local levels provide employees legal protections when they use leave, while not all paid family-medical laws do because some only provide wage replacement benefits.<sup>136</sup> Paid sick and safe laws require employers to provide the benefits directly to employees, while paid family medical laws involve the *state* providing benefits to employees. These benefits are funded in part through payroll deductions that are in turn contributed to the state fund. The range of possible reasons an employee can be absent from work are generally broader under paid sick and safe laws, *e.g.*, if an employee or family member is a victim of domestic violence, sexual assault, or stalking; closure of a business, school, or place of care due to a public health emergency.

Federal bills concerning both issues were introduced this legislative term. On August 1, 2018, Senator Marco Rubio (R-FL) introduced the Economic Security for New Parents Act,<sup>137</sup> legislation that would establish a paid family leave program that would allow individuals to withdraw funds from their future Social Security benefits. Rep. Ann Wagner (R-MO) intends to introduce companion legislation in the House.<sup>138</sup>

Employers subject to more than one paid sick and safe law have been monitoring developments concerning the Workflex in the 21st Century Act,<sup>139</sup> a federal bill introduced in Congress in late 2017 that would exempt employers from state and local paid sick and safe laws if they annually offer employees a minimum amount of paid leave and offer flexible working arrangements. On July 25, 2018, the House Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions held a hearing on the bill, although further movement is not expected this legislative term.

Finally, a provision in the recently-enacted Tax Cuts and Jobs Act<sup>140</sup> provides that in 2018 and 2019, employers may be able to claim a federal tax credit

136 The vast majority of paid family-medical laws do not provide a standalone right to protected leave. Instead, they allow for an employee to receive benefits when absent from work for a qualifying purpose. However, protections exist under New York State's Paid Family Leave Law. Although the enforcement agency acknowledges a protected leave right is not provided by San Francisco, California's Paid Parental Leave Ordinance, it notes that the ordinance's anti-retaliation protections are so robust that a quasi-protected right is essentially provided.

137 S. 3345, 115th Cong. (2018).

138 Press Release, [Wagner, Rubio Announce Conservative Paid Family Leave Legislation](#) (Aug. 2, 2018).

139 H.R. 4219, 115th Cong. (2017).

140 Pub. L. 115-97, 131 Stat. 2054 (2017).



if they annually provide to qualifying employees, via a written policy, at least two weeks of family and medical leave, and employees are paid at least 50% of their normal wages during that leave period.<sup>141</sup> Similar proposals have been floated at the state level, either to offset costs employers incur when providing mandatory paid leave, or to incentivize them to do so without a legal requirement.

The number of paid leave laws could increase before the year ends because there remain numerous “live” bills at the state and local levels. Although not all paid leave bills are bound for enactment—e.g., paid family-medical bills were recently vetoed in Maine and Vermont—the odds of success increase when put to the voters, which will occur in Michigan at the November 2018 elections. Employers should expect paid leave to be an issue in 2019 and future years.

## F. IMMIGRATION

From his first foray into politics, Donald Trump has maintained a strong pro-enforcement stance on immigration. After serving as president for almost two years, attrition through immigration enforcement and a reduction in illegal entry into the United States remain among the Trump administration’s highest priorities.

The most publicity has surrounded the DACA issue, discussed below, and the so-called “travel ban” (recently upheld by the U.S. Supreme Court),<sup>142</sup> in which some nationals of Iran, Syria, Yemen, Libya, Somalia, Venezuela, and North Korea are restricted from entering the United States.

But employers have felt the greatest impact from Trump administration initiatives that have received relatively little public attention, particularly the increase in worksite raids, the Buy American, Hire American executive order in April 2017,<sup>143</sup> and new restrictions on issuance of H-1B visas. As further discussed below, on a practical level, these institutional changes have translated to difficulties for U.S. employers looking to employ foreign workers.

### Increased Worksite Raids

One of the most drastic and visible changes in this administration’s approach to employers is the significant increase in worksite enforcement actions carried out by the U.S. Immigration and Customs Enforcement (ICE). ICE worksite enforcement comes in two forms. The more common occurrence is for ICE to conduct a Form I-9 audit. When ICE issues a Notice of Inspection, thereby initiating a

141 See Ilyse Schuman, Tom Cryan, and Michael J. Lotito, *What Notable Employment Provisions are in the Tax Bill?*, Littler ASAP (Dec. 20, 2017).

142 See Jorge R. Lopez and Ashley A. Diaz, *SCOTUS Upholds Travel Restrictions*, Littler ASAP (June 28, 2018); Executive Order 13769 of January 27, 2017, *Protecting the Nation From Foreign Terrorist Entry Into the United States*, 82 Fed. Reg. 8977-8982 (Feb. 1, 2017).

143 Executive Order 13788 of April 18, 2017, *Buy American and Hire American*, 82 Fed. Reg. 18837-18839 (Apr. 21, 2017).



Form I-9 audit, an employer has only three days to provide the requested I-9s to ICE. ICE will then review the I-9s to determine if there are any errors, and will issue fines ranging from \$220 to \$2,191 per form with a substantive error. ICE will also ensure employees are authorized to work and are not using fraudulent documents. Any employees who lack work authorization are required to be terminated.

The second form of worksite enforcement, the so-called “raid,” where ICE arrests employees who lack work authorization or who have otherwise put their lawful immigration status in jeopardy, had ceased during the Obama administration, but has returned in full force. There have been several raids across the country involving the arrests of sometimes hundreds of employees at their place of work.

Towards the end of last year, ICE’s former acting director indicated that ICE would quadruple worksite enforcement actions. ICE is on track to fulfill this promise. From the information available now, ICE performed 3,510 worksite enforcement actions between October 1, 2017 and May 4, 2018. This is a significant jump, because during the entire fiscal year of 2017, ICE conducted only 1,716 actions. On July 24, 2018, ICE announced it had performed more than 5,200 I-9 audits since January 2018, while performing only 1,360 audits during the entire 2017 fiscal year. While these numbers already represent a drastic increase, Derek Benner, the Acting Executive Associate Director for ICE’s Homeland Security Investigation Division, has indicated ICE would like to open 15,000 audits per year if possible.

The increase in audits is of obvious concern to employers. Fines for I-9s are one issue, but employers must also contend with potential workforce shortages and morale issues should an enforcement action occur. In response to the administration’s actions, California has also implemented new laws that require employers to provide notice to employees when an enforcement action occurs. The U.S. Department of Justice (DOJ) has challenged California’s laws arguing they infringe on the federal government’s role in

enforcing federal immigration laws. The outcome of this litigation is not certain.

In short, employers are presently left with a difficult road to travel, which likely will only become more fraught with liability. To prepare, employers should review their I-9 forms and policies. They should also develop action plans to handle the ever more likely ICE enforcement action.

### **USCIS and DOJ Create Partnership**

On May 11, 2018, the DHS’s United States Citizenship and Immigration Services (USCIS) and the DOJ’s Civil Rights Division entered into the Memorandum of Understanding Regarding Information Sharing and Case Referrals,<sup>144</sup> expanding on the parties’ previously established partnership, and furthering the objective of President Trump’s Buy American, Hire American executive order.

The partnership seeks to aid both agencies regarding (1) an employer’s potential misuse of the employment-based immigrant and or non-immigrant visa programs to discriminate against available and qualified U.S. workers in violation of applicable laws and regulations; and (2) an employer’s potential violation of the statutes and regulations governing the processes for seeking employment-based immigrant (green-card processing) and/or non-immigrant (employment-based) visas.

Under the Immigration and Nationality Act, 8 U.S.C. § 1324b, it is unlawful for employers to intentionally discriminate against or otherwise favor an employee due to national origin or citizenship status.<sup>145</sup> The DOJ’s U.S. Workers Initiative launched in 2017 specifically addresses this issue. Since the launch of the Initiative, the DOJ has opened dozens of investigations against employers, filed a lawsuit against one employer, and reached settlement agreements with several others. The information-sharing and case referrals will likely increase the number and efficiency of these investigations. The information-sharing and case referrals is intended also to aid the USCIS’s efforts to ensure the integrity of employment-based immigration programs and improve its ability to detect and prevent fraud.

144 U.S. Citizenship and Immigration Services, *Memorandum of Understanding Between U.S. Department of Justice Civil Rights Division and the U.S. Department of Homeland Security U.S. Citizenship and Immigration Services Regarding Information Sharing and Case Referrals* (May 11, 2018).

145 News Release, USCIS, *USCIS and the Justice Department Formalize Partnership to Protect U.S. Workers from Discrimination and Combat Fraud* (May 11, 2018).



## Update on Key H-1B issues

On April 18, 2017, President Trump signed the Buy American, Hire American executive order, which called for the application of existing U.S. laws to visa recipients and the re-evaluation of the H-1B program. The order requests that various agencies and departments promulgate new rules and guidance to “supersede or revise previous rules and guidance, if appropriate” under existing law to protect American workers. The order also requests that the “Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.”

In the year since the Buy American, Hire American order was announced, several changes have occurred with the H-1B program. Notably, USCIS has begun implementing stricter guidelines, and employers have noticed an increase in more restrictive adjudication of visa petitions.

On February 22, 2018, USCIS published a memorandum establishing its policy relating to H-1B petitions filed for employees who will be working at one or more third-party worksites. According to the USCIS, the new guidance “aligns with President Trump’s Buy American and Hire American executive order and the directive to protect the interests of U.S. workers.” The guidance stipulates that, in H-1B petitions where a third-party worksite is involved, the petitioner must show:

1. The beneficiary will be employed in a specialty occupation; and
2. The employer will maintain an employer-employee relationship with the beneficiary for the duration of the requested validity period.<sup>146</sup>

What is the result of this increased scrutiny?

Requests for evidence and denials on H-1B petitions swelled in 2017. Denials increased by 41% from Q3 to Q4, and the number of requests for evidence in Q4 was more than the first three quarters of the year combined.

Complicating matters, effective September 11, 2018, USCIS has updated its policy guidance on certain requests for evidence and notices of intent to deny, providing guidance to USCIS adjudicators regarding their discretion to deny an application, petition, or request without first issuing a request for evidence or notice of intent to deny when required initial evidence was not submitted or the evidence of record fails to establish eligibility.<sup>147</sup>

USCIS also issued updated guidance in July 2018 that aligned its policy for issuing Form I-862, Notice to Appear, with the immigration enforcement priorities of the DHS. Under the new guidance, USCIS officers will now issue an NTA for a wider range of cases where the individual is removable and there is evidence of fraud, criminal activity, or where an applicant is denied an immigration benefit and is unlawfully present in the United States.<sup>148</sup> Currently, this policy has been placed on hold pending further guidance on its implementation,<sup>149</sup> but it is a natural concern for both employers and foreign workers alike.

## Update on DACA

The Obama administration’s Deferred Action for Childhood Arrivals or DACA program provided work authorization to well over 500,000 individuals. DACA beneficiaries are individuals who lack immigration status in the United States and were brought to the United States as children. On September 5, 2017, the administration rescinded the DACA program, and encouraged Congress to develop a legislative solution for DACA beneficiaries.

The administration’s decision was met with a variety of lawsuits, which at this point, has resulted in a partial return to the status quo before the rescission. On April 24, 2018, Judge John Bates, a U.S. District Court Judge for the District of Columbia, ordered USCIS to continue to accept new applications for DACA (USCIS was already continuing to accept renewal applications), but stayed his decision for 90 days to allow the administration to explain the reasons for the program’s rescission. Judge Bates

146 News Release, USCIS, [USCIS Strengthens Protections to Combat H-1B Abuses](#) (Feb. 22, 2018).

147 News Release, USCIS, [USCIS Updates Policy Guidance for Certain Requests for Evidence and Notices of Intent to Deny](#) (July 13, 2018).

148 News Release, USCIS, [USCIS Updates Notice to Appear Policy Guidance to Support DHS Enforcement Priorities](#) (July 5, 2018).

149 News Alerts, USCIS, [Updated Guidance on the Implementation of Notice to Appear Policy Memorandum](#) (July 30, 2018).



has twice again stayed his decision to allow the administration the opportunity to appeal.

Throughout the fog surrounding the DACA litigation, USCIS has continued to renew grants of DACA, and even announced that it had approved slightly more than 20,000 new applications from October, 2017 through June, 2018. While there have been several proposed legislative fixes to DACA, Congress has yet to advance any of them. Texas and seven other states have complicated the issue by challenging DACA in federal court.

DACA beneficiaries make up a significant portion of the current and future workforce, so whatever happens with DACA is certain to impact employers. While the status quo may be prevailing now, it is on precarious ground.

### **More to Come?**

Because increased immigration enforcement has been a cornerstone of the Trump administration's policies and priorities, employers can continue to expect increased visa scrutiny and workplace inspections. The Trump administration has already called for the mandatory use of E-Verify (an online tool that allows employers to determine the work authorization of its employees) and the implementation of an electronic biometric entry/exit system for all noncitizens entering and leaving the U.S., though these have not yet been

implemented. It should be emphasized that because the administration is instituting immigration policy changes on a rapid and continuing basis, it would be impossible to cover all new immigration-related developments in this Report. Employers that have been grappling with these ever-evolving requirements and restrictions are advised to consult with counsel to stay abreast of the most recent changes.

## **V. CONCLUSION**

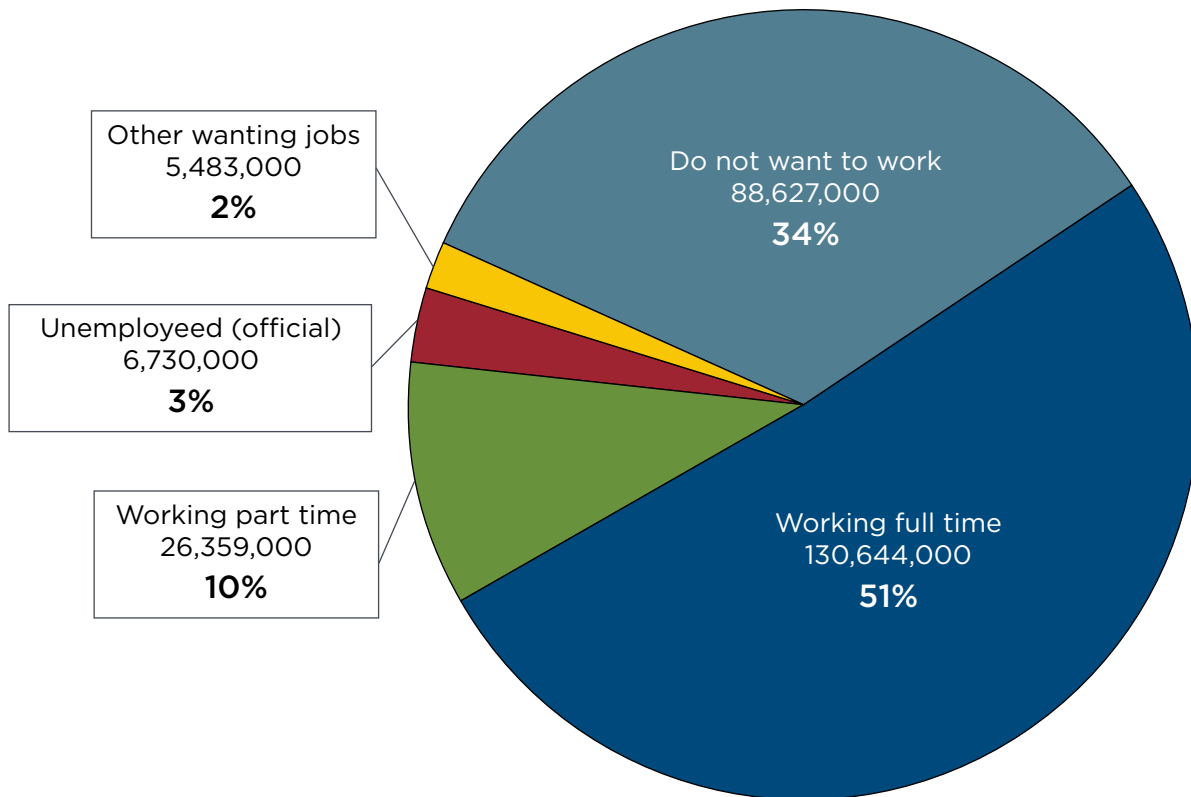
The challenges facing the U.S. economy in the near and long terms have never been greater. At the same time, we stand on the precipice of technological changes that will reshape the American workforce, and the nature of work itself. The laws and regulations governing employment are constantly shifting, as policymakers struggle to update 20<sup>th</sup> century rules for the 21<sup>st</sup> century workplace. WPI stands ready to meet these challenges with you, and hopes this Report provides insight on the state of the workforce today and where it is headed in the years to come.

## APPENDIX: ECONOMIC ANALYSIS OF THE STATE OF THE U.S. WORKFORCE

Between July 2017 and July 2018, total employment as estimated from the Bureau of Labor Statistics (BLS) Current Population Survey increased 2.5 million.<sup>150</sup> Non-farm payroll jobs based on the BLS Establishment Survey of Employers increased by 2.4 million.<sup>151</sup> Full-time employment increased even more (by 3.1 million), as expanding labor demand enabled some workers to move from part-time to full-time job schedules. Part-time employment fell by 570,000. The official unemployment rate continued to fall: 4.1% in July 2018, compared to 4.6% in July 2017, and significantly below the post-recession peak of 10% in October 2009.<sup>152</sup>

In July 2018, according to BLS data, there were 6.7 million job seekers. This count, however, omits 5.5 million individuals who have stopped actively looking for work, but still want to work. During this period, there were also 4.8 million part-time workers who were seeking full-time employment. Altogether, 17 million individuals wanted some work or more hours of work in July 2018, but this number was down by 1.6 million from a year ago. In addition, approximately 7.8 million workers are holding more than one job. This number increased by about 530,000 over the past year. Of these multiple jobholders, 4.6 million held full-time primary jobs and part-time or full-time second jobs. The other 3.2 million workers hold multiple part-time jobs only.

**CHART A: INDIVIDUALS WORKING AND NOT WORKING: LABOR MARKET STATUS OF 257.8 MILLION CIVILIAN POPULATION AGE 16 AND OLDER, JULY 2018**



*Source: Bureau of Labor Statistics, July 2018 Employment Situation Report. All data provided is not on a seasonally adjusted basis.*

150 For purposes of this Report, BLS data was analyzed as of July 2018.

151 This survey excludes self-employed persons and farm workers.

152 These rates are not seasonally adjusted. Seasonally adjusted unemployment was 3.9% in July 2018 compared to 4.3% in July 2017.

## Unemployment

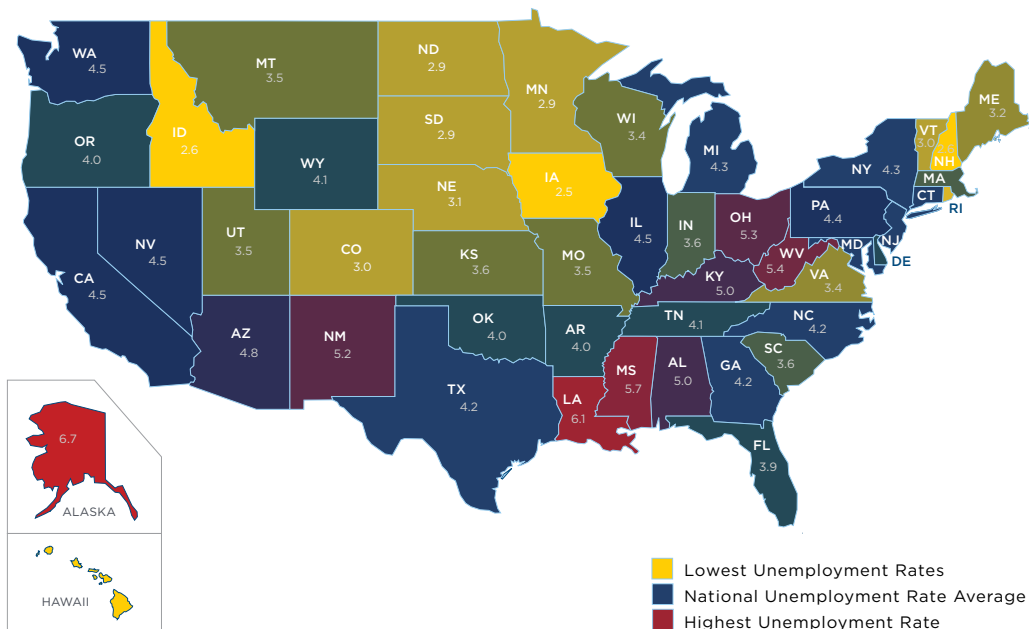
As of June 2018, the national unemployment rate (not seasonally adjusted) was 4.2%, a decrease of 0.3 points from the 4.5% unemployment rate in June 2017.<sup>153</sup> In addition to those fitting the official definition of “unemployed,”<sup>154</sup> about 5.6 million people not actively looking for work still expressed a desire for a job, although most had not actively sought jobs in more than a year, and some identified obstacles to immediately accepting a job offer (e.g., the need to resolve transportation or childcare needs).

The unemployment rate varies significantly by state and locality. In June 2018, Iowa’s 2.5% unemployment rate was the lowest in the United States, while Alaska’s 6.7% unemployment rate was the highest. Both the states with low unemployment rates and those with high unemployment rates are generally on the smaller side of the distribution in terms of total labor force. California, the state with the largest total labor force, accounted for the largest number unemployed, 869,000, which is 4.5% of California’s labor force.

The 10 states with the lowest unemployment rates (ranging between 2.5% and 3.1%) accounted for only 357,000 of the 6.8 million total unemployed in May 2018 (about 5% of the total). The 10 states with the highest unemployment rates accounted for 1.0 million of the 6.8 million unemployed (about 14.8% of the total national unemployed number). The remaining 31 states with unemployment rates between 3.2% and 4.5% accounted for 80.1 % of those who are currently unemployed.

Most unemployed persons live in the 10 states with the largest labor force numbers and with unemployment percentage rates near the national average (3.8 % to 4.6 %). These 10 large labor force states (California, Texas, Florida, New York, Illinois, Pennsylvania, Ohio, Georgia, North Carolina, and Michigan) accounted for 3.7 million unemployed persons, about 56% of total unemployed.

**CHART B: UNEMPLOYMENT RATES VARY AMONG STATES**



Source: Bureau of Labor Statistics, *State Employment and Unemployment – June 2018*, News Release USDL-18-1183 (July 20, 2018).

153 U.S. Bureau of Labor Statistics, News Release USDL-18-1183, *State Employment and Unemployment – June 2018*, (July 20, 2018). Note that not seasonally adjusted data is reported to facilitate 12-month comparisons.

154 People are classified as unemployed if they do not have a job, have actively looked for work in the prior 4 weeks, and are currently available for work. U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*.





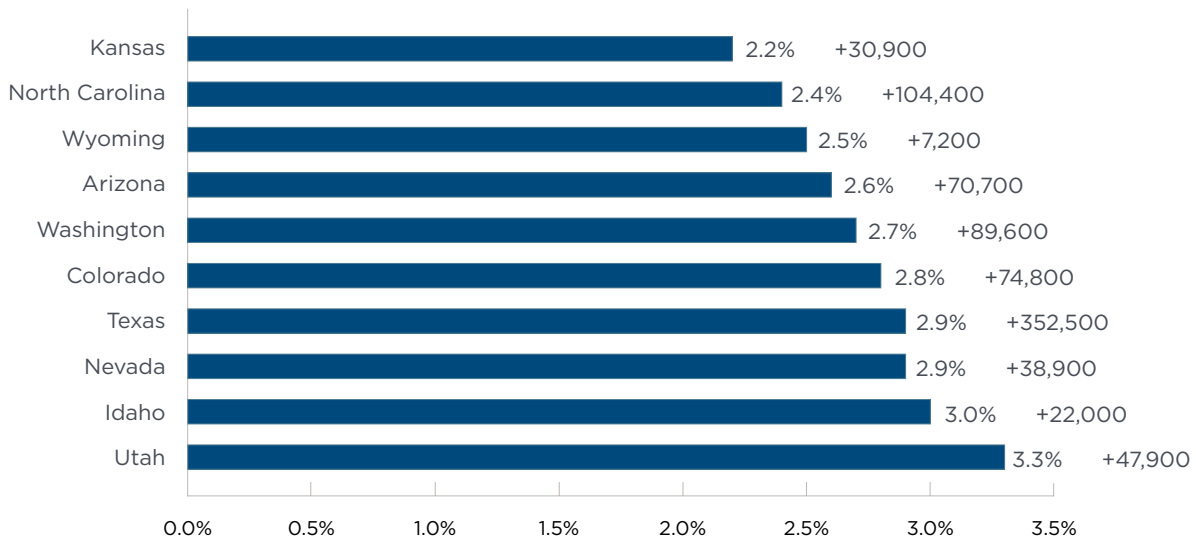
### Notable Employment Growth by State

Nationwide, non-farm payroll jobs grew by 1.6% (2.4 million) over the year to 150 million. Private sector jobs grew by 2.4 million to 127.7 million. The 10 states with the greatest percentage growth in payroll jobs accounted for a total of 838,900 new jobs, 35% of the total national increase.

The 10 states with the largest payroll employment totals accounted for 1.5 million of the payroll jobs increase, but Texas, North Carolina, Washington, and Colorado, were also among the 10 fastest growing.

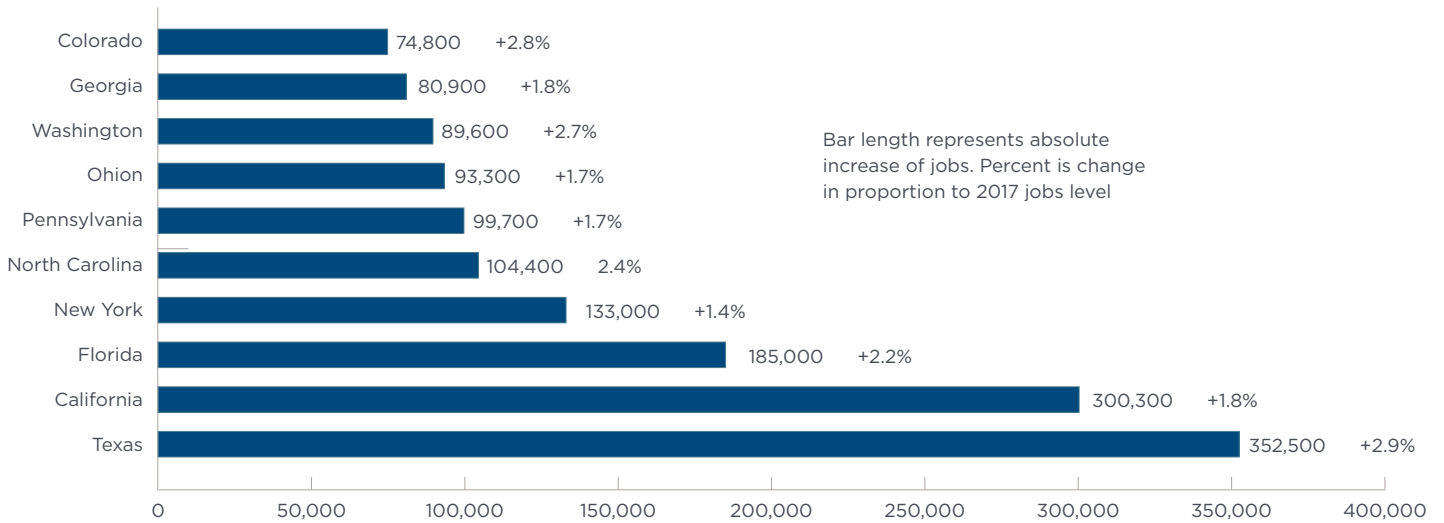
California, the largest in the nation with 17.2 million total payroll jobs in June 2018, added 300,300 new jobs over 12 months, and was 23rd in terms of growth (1.8%). Six states (Connecticut, Arkansas, Indiana, Maryland, Kentucky, and North Dakota) and the District of Columbia had job growth averaging less than 1.0%. Two states (Vermont and Alaska) lost payroll jobs over the 12 months ending June 2018, but by amounts that might not be statistically significant.

**CHART C: TOP 10 STATES BY PERCENTAGE INCREASE IN JOBS FROM JUNE 2017 TO JUNE 2018**



Source: Bureau of Labor Statistics, State Employment and Unemployment – June 2018, News Release USDL-18-1183 (July 20, 2018).

**CHART D: OVER 60% OF THE 2.4 MILLION U.S. JOB GROWTH OCCURRED IN 10 STATES WITH THE LARGEST TOTAL JOBS**

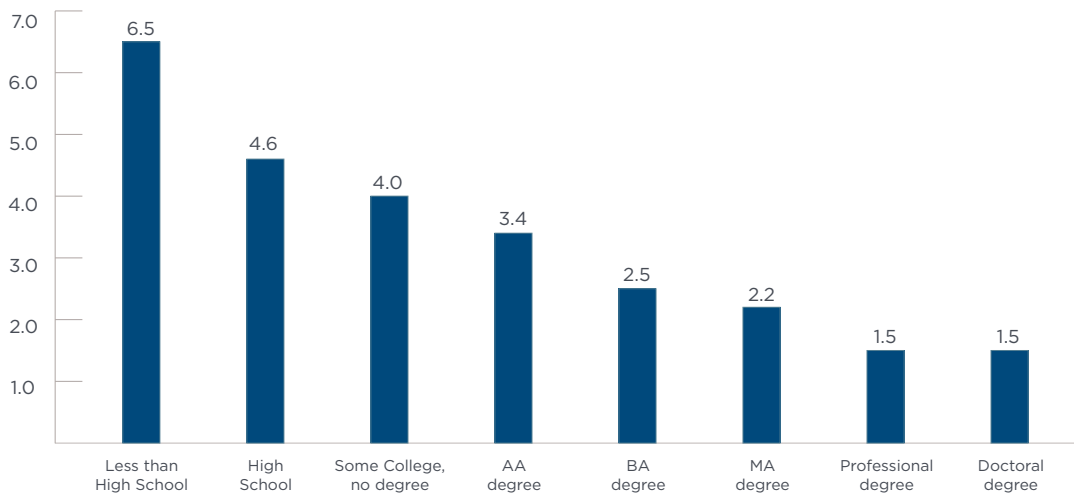


Source: Bureau of Labor Statistics, *State Employment and Unemployment - June 2018*, News Release *USDL-18-1183* (July 20, 2018). Total refers to non-farm payroll job growth based on the BLS establishment survey, June 2018 - June 2017, not seasonally adjusted.

**Educational Attainment and Unemployment**

A growing concern among employers is that potential hires lack the skills necessary for the positions at hand. It comes as no surprise, therefore, that unemployment is inversely proportional to education level achieved. Approximately 6.5% of individuals without a high school degree are unemployed, compared to only 1.5% of those with advanced degrees. From a policy perspective, one could speculate that improved training and apprenticeships would likely benefit this group—unemployed individuals without a high school diploma—the most.

**CHART E: EDUCATION LEVEL AND % UNEMPLOYMENT**

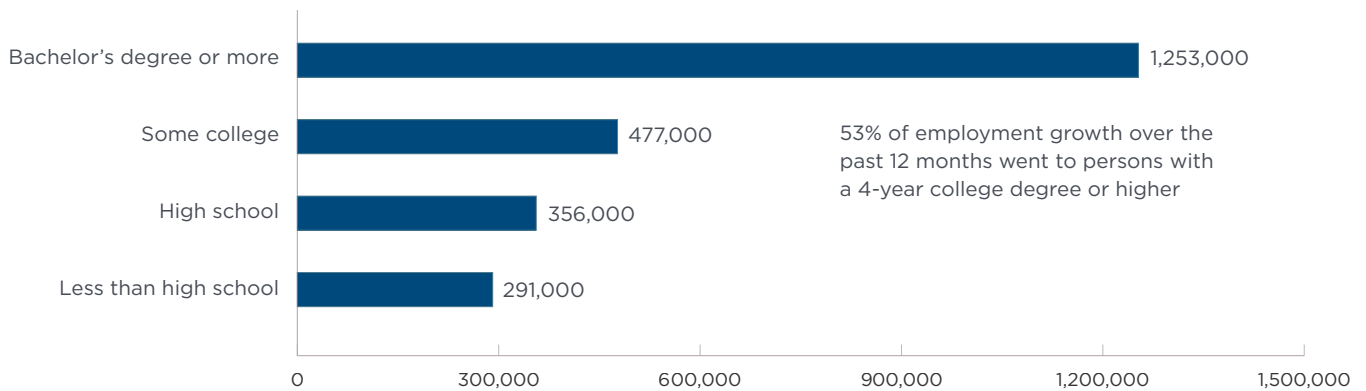


Source: Bureau of Labor Statistics, "Unemployment and earnings by education attainment, 2017," at <https://www.bls.gov/emp/chart-unemployment-earnings-education.htm>



**CHART F: EDUCATIONAL ATTAINMENT AND INCREASED EMPLOYMENT; JUNE 2018, 12-MONTH CHANGE**

Employment of college graduates grew more than others combined



Source: Bureau of Labor Statistics, June 2018 Employment Situation Report. Employment of persons with less than a bachelor's degree increased 1,124,000 versus 1,253,000 for a bachelor's degree or more.

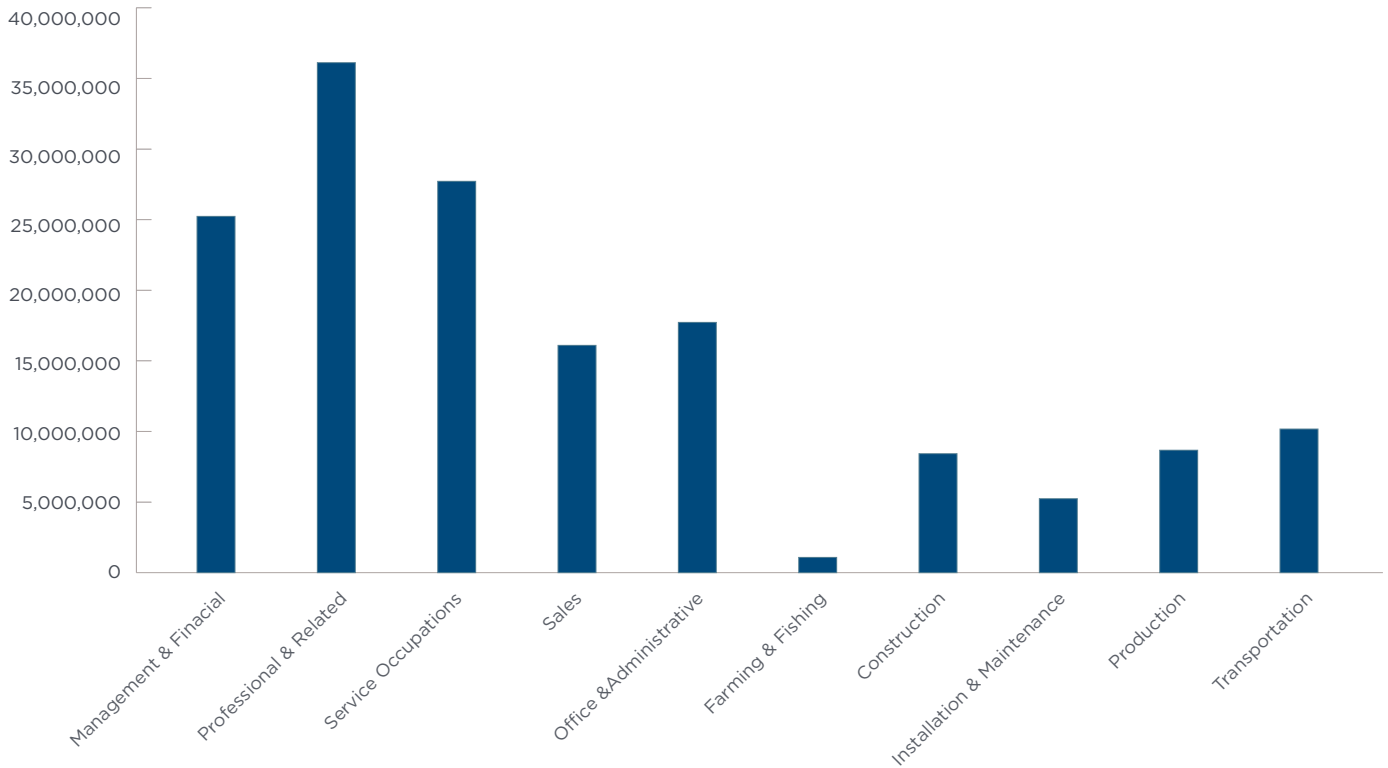
**Where Are the Jobs?**

A look at which occupations and industries are providing the greatest number of jobs and/or growth potential is telling. As of June 2018, occupations categorized as “professional and related technical” were the most prevalent (over 35 million jobs), with service-related occupations coming in second (over 25 million). The BLS considers “professional” occupations to be those concerned with the study, application, and/or administration of physical, mathematical, scientific, engineering, architectural, social, medical, legal statute, biological, behavioral, library, and/or religious laws, principles, practices or theories. “Related technical” occupations involve carrying out technical and technological functions in health, engineering, science, and other disciplines.<sup>155</sup> BLS defines service-related occupations as those catering to providing personal and protective services to individuals and commercial entities.

155 U.S. Bureau of Labor Statistics, [Occupational Classification System Manual](#).

**CHART G: EMPLOYMENT BY OCCUPATION**

Total employment including self-employed and farm workers, June 2018



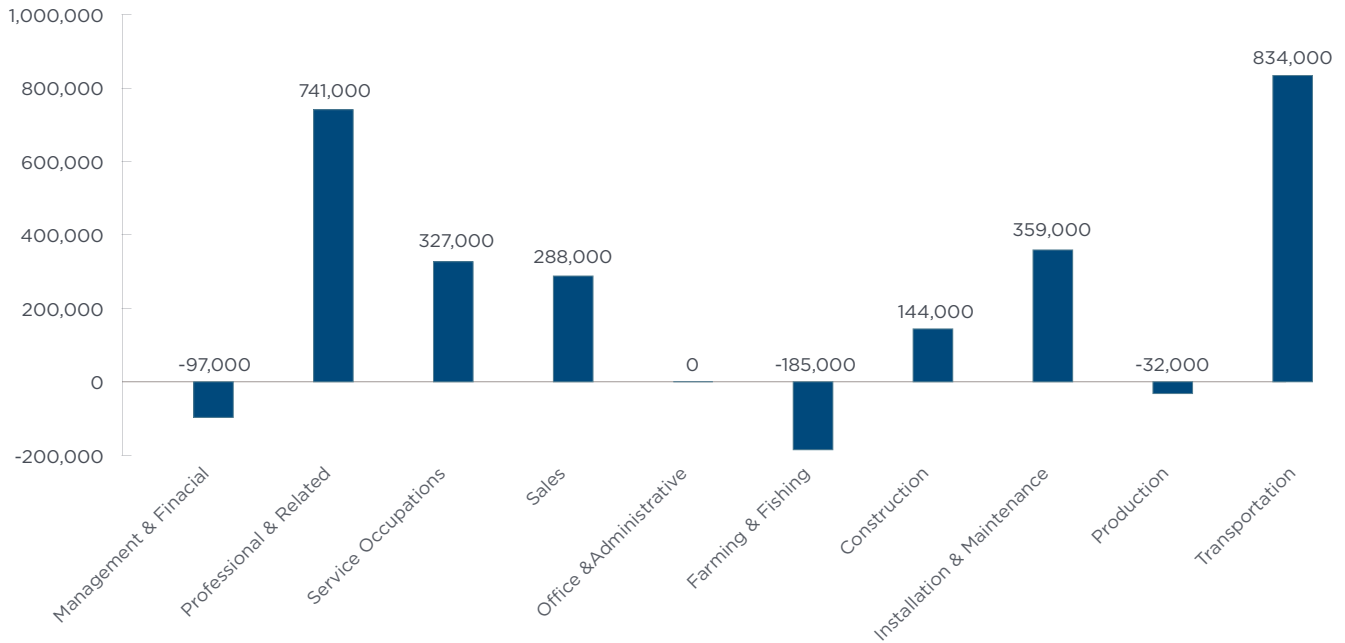
Source: Bureau of Labor Statistics, June 2018 Employment Situation Report. Current Population Survey (households) data not seasonally adjusted. See BLS definitions of major occupational groups at <https://www.bls.gov/ncs/ocs/ocsm/comMOGADEF.htm#mogaanchor>.

Looking at which occupations have experienced the most growth can show where job-seekers might best focus their energy. Over the past year, transportation jobs have exhibited the greatest surge—approximately 834,000 jobs in this field were added over a 12-month period. According to the BLS, workers in this job category are “concerned with the activities that are in immediate support of the operation and performance of transportation vehicles used to transport people or material.”<sup>156</sup> Notably, this data does not provide sufficient information to determine whether the rise of on-demand drivers has contributed to this dramatic increase.

156 *Id.*



**CHART H: EMPLOYMENT GROWTH BY OCCUPATION GROUPS**

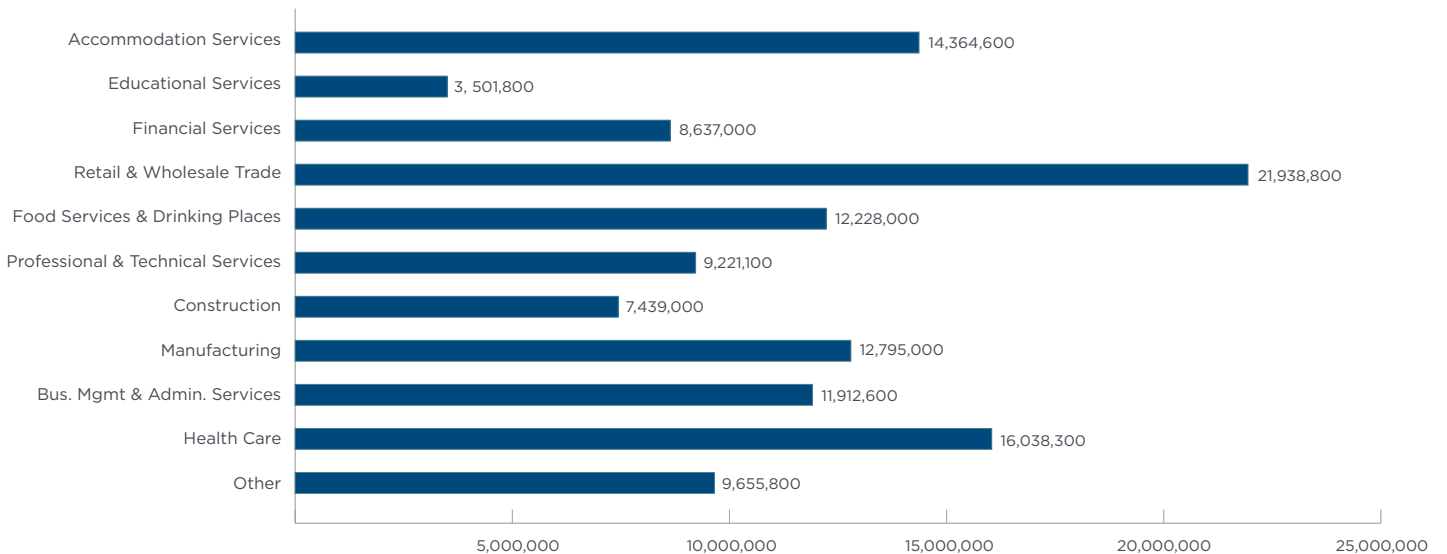


Source: Bureau of Labor Statistics, June 2018 Employment Situation Report. Current Population Survey (households) data not seasonally adjusted. See BLS definitions of major occupation groups at <https://www.bls.gov/ncs/ocs/ocsm/comMOGADEF.htm#mogaanchor>.

Which industries are hot? A look at the number of payroll jobs by major industry group provides some indication. Retail and wholesale trade, accommodation services,<sup>157</sup> and healthcare are the biggest industry employers. Educational services and construction provided the fewest jobs.

**CHART I: PAYROLL JOBS BY MAJOR INDUSTRY GROUPS**

Non-farm wage and salary workers, selected industry sectors, June 2018



Source: June 2018 Employment Situation Report, establishment survey data, not seasonally adjusted.

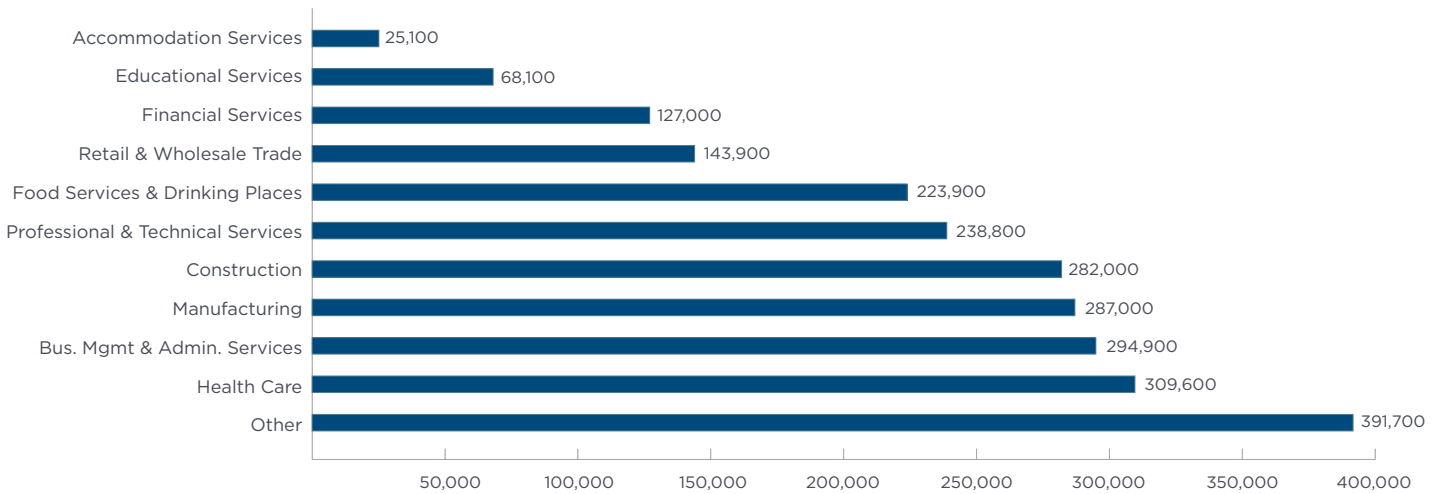
157 The accommodation industry provides lodging or short-term accommodations for travelers, vacationers, and others. U.S. Bureau of Labor Statistics, *Industries at a Glance*, [Accommodation: NAICS 721](#).



Which industries are growing the fastest? Notably, while the accommodation industry sector—which provides lodging or short-term accommodations for travelers, vacationers, and others—employed more than 14 million workers in the 12 months ending in June 2018, it was the industry that experienced the *least* amount of growth over this period. Only 25,100 new jobs were added in this sector, compared to over 309,000 jobs added in the healthcare industry.

**CHART J: PAYROLL JOB GROWTH BY MAJOR INDUSTRY GROUPS**

Non-farm wage and salary workers, selected industry groups, June 2017 to June 2018



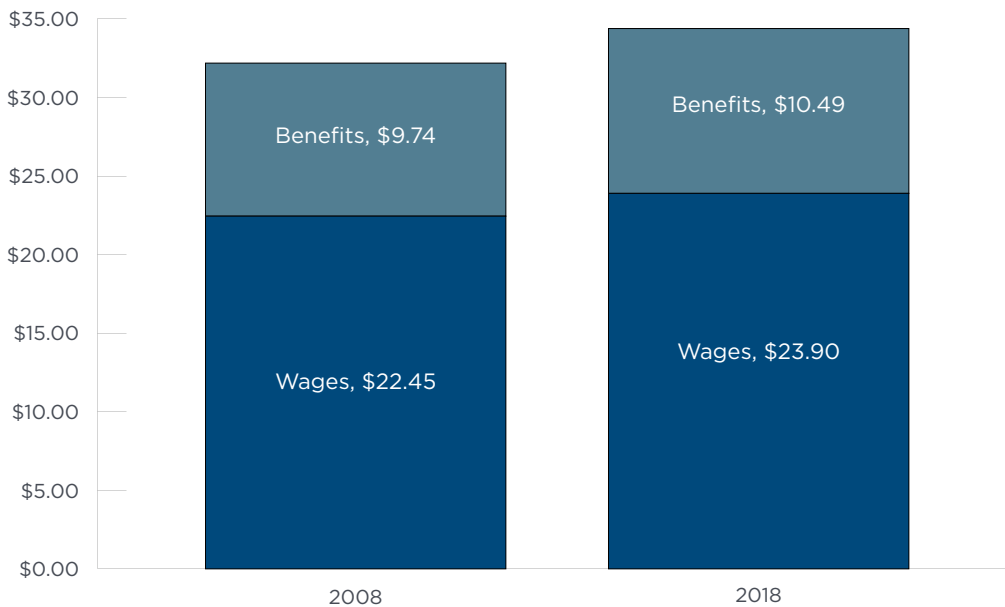
Source: June 2018 Employment Situation Report, establishment survey data, not seasonally adjusted.

## Employee Compensation

Inflation—which has been increasing—must be factored into employee compensation calculations to provide any meaningful data. After adjusting for inflation, the 12-month real change in employee compensation for the year ending in June 2018 is effectively zero.<sup>158</sup> This is a reversal from the small (+0.4%) increase for the 12 months ending March 2018, and a significant reversal from the +0.7% increase reported for the 12 months ending in June 2017, the 1.4% increase for the 12 months ending in June 2016, and the 1.8% increase in real civilian employee compensation for the 12 months ending in June 2015. In essence, despite the recently reported increases in employee wages, such increases have not kept up with inflation.

As indicated in Chart K, below, there was a modest increase in real terms for both wage and benefit components of compensation over the past ten years. From June 2008 to June 2018, wages grew 6.5%, and benefits grew 7.7%. If the chart showed annual values, however, it would indicate that these amounts peaked in 2017 and fell slightly in 2018.

**CHART K: CHANGE IN COMPENSATION AFTER INFLATION**



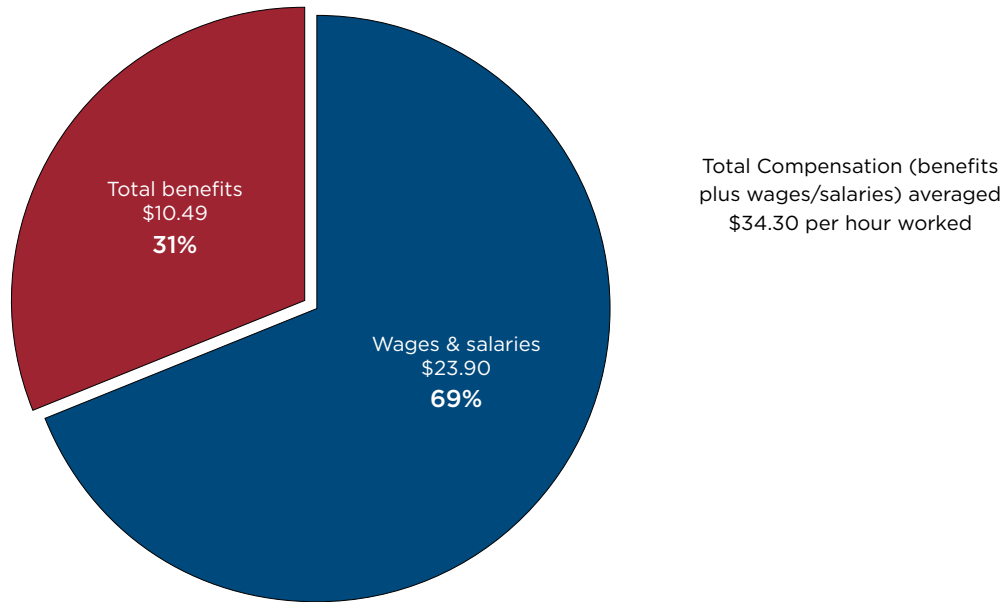
*Source: Bureau of Labor Statistics, “Employer Cost for Employee Compensation – March 2018,” News Release USDL-18-0944 (June 8, 2018) at [www.bls.gov/ect](http://www.bls.gov/ect) and “Employment Cost Index – June 2018,” News Release USDL-18-1238 (July 31, 2018). June dollar amounts estimated based on March 2018 published data and three month percent changes in wages and benefits from Table A of June 2018 Employment Cost Index news release. 2008 dollar amounts estimated based on BLS Employment Cost Index Supplement IV, “Constant Dollar Historical Series.”*

As for private-sector worker salaries, employers currently spend an average of \$34.39 per employee per hour worked. This total compensation amount includes benefits plus wages/salaries. Of that total, \$23.90, or 69%, constituted wages or salary, while the benefits component totaled \$10.49, or 31%.

<sup>158</sup> This result is based on separately published BLS Constant Dollar Employment Cost Index series.



**CHART L: LABOR COST - WAGES AND BENEFITS: PRIVATE INDUSTRY EMPLOYER COST FOR EMPLOYEE COMPENSATION**



Source: Bureau of Labor Statistics, "Employer Cost for Employee Compensation - March 2018," News Release USDL-18-0944 (June 8, 2018) at [www.bls.gov/ect](http://www.bls.gov/ect). Benefits include paid leave, health and life insurance, retirement plan contributions, bonus pay, and legally required employer contributions to Social Security, workers' compensation and unemployment insurance.

The above data provides a glimpse into the state of the economy and the workforce. Production jobs are on the decline, while service-related and professional jobs have seen recent growth. And as expected, higher educational levels significantly improve one's employment prospects.



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