Issue 2, 2018

The Editors' Note

Welcome to the second quarter edition of *SuperVision*, the e-newsletter of Spilman Thomas & Battle's Labor & Employment Group. Planning is underway for our SuperVision symposium in Charleston, West Virginia, which is set for Friday, June 22 at the Embassy Suites. This year's focus is on handling "bet-the-company issues in a digital world," a topic which will examine best practices for conducting internal investigations, external criminal investigations, employment practices and compliance, and gender equity issues. If you would like to attend this free event, please click **here**.

One of the topics we are addressing at SuperVision is workplace harassment in the post-Weinstein era. In addition to the lessons from the symposium, Spilman offers a variety of services to help tackle this important issue. We can help draft best-in-class harassment policies, conduct live, in-facility training on harassment and discrimination issues, and design onboarding training for new employees to further protect the company. Please feel free to reach out to any member of the **Spilman employment team** to discuss how we can help design a customized toolkit.

Spilman is a proud member of the National Workers' Compensation Defense Network ("NWCDN"), a national network of workers' compensation defense firms. Because of that membership, we are excited to offer our clients the opportunity to attend, free of charge, the annual NWCDN meeting in Minneapolis September 26-27. The meeting will address incisive topics timely to the business of workers' compensation. Speakers will address complex issues ranging from traumatic brain injuries, medical legal exposure of claims, new approaches to deal with soaring medical costs, building and managing relationships in the claims professional team, to offering solutions to internal employer policies that hinder resolution of claims--all with a foothold on today and an eye on tomorrow. Click **here** to learn more, **here** to register, or contact Dill Battle at 304.340.3823.

In this issue, Mitch Rhein examines the Supreme Court decision permitting class action waivers, Spencer Cook looks at a recent decision that warns employers to be careful about asking for past pay rates, Chelsea Thompson tells us not to throw out our FMLA documentation even though they have "expired," and Mary Smiley from Next Consulting offers the first of her practical tips--this one on recruiting. As always, we welcome any suggestions and comments regarding the newsletter and thank you so much for reading.

Eric W. Iskra, Chair of the Labor and Employment Practice Group
Eric E. Kinder, Executive Editor of *SuperVision*

The Case for Class - Class Action Waivers in Arbitration Agreements

By Mitchell J. Rhein

Last month, in *Epic Systems Corp. v. Lewis*, the Supreme Court of the United States decided class action waivers in employment arbitration agreements do not violate the National Labor Relations Act ("NLRA"). A class action waiver requires an employee to arbitrate disputes with his or her employer, such as discrimination or wage payment claims, on an individual basis rather than in court through a class action. The Supreme Court's opinion blessed the use of class action waivers in employment arbitration agreements by eliminating a significant roadblock for the enforcement of class action waivers. As we previously wrote, employers

must decide whether to require arbitration agreements with class action waivers from their employees. Their use may add another level of protection from bet-the-company class litigation. In addition to clearing the way for employers' use of class action waivers, the Court's opinion provided helpful pro-employer commentary on the scope of the NLRA.

Click **here** to read the entire article.

Be Careful What You Ask For - How Asking a Job Applicant About Previous Pay May Violate the Equal Pay Act

By J. Spencer Cook

As we discussed in our Mind the Gap webinar, many states and municipalities have enacted laws that prohibit employers from using previous pay to justify unequal pay between men and women or between members of different protected classes (race, color, religion, national origin and gender). The United States Court of Appeals for the Ninth Circuit has joined that movement by holding that prior pay cannot be used to justify wage differentials between employees under the Equal Pay Act of 1963. In adopting the growing view, the Ninth Circuit's opinion in *Rizo v. Yovino* emphasizes that asking a job applicant about previous pay no longer serves a business purpose.

Click **here** to read the entire article.

The DOL's Model FMLA Forms Have Expired - What Now?

By Chelsea E. Thompson

Some eagle-eyed employers may have noticed the Department of Labor's model FMLA forms expired on Friday, June 1, 2018. This is because the DOL is required under the Paperwork Reduction Act of 1995 to submit its FMLA forms to the Office of Management and Budget every three years for approval. The last round of approvals occurred in 2015 and were effective through May 31, 2018 --hence the current expiration of the model FMLA forms.

Click **here** to read the entire article.

Hiring in Today's Competitive Recruiting Market

By Mary Ellen Smiley

Regardless of the size of the organization, all HR professionals are "fighting the war for talent." Our inboxes overflow daily with advice from "experts" on preparing for the digital future of staffing, increasing our speed in attracting and securing talent, fixing the talent gap, increasing our presence on social media, and on and on and on. While all of these are important concerns to be considered in today's competitive recruiting market--meeting recruiting demand is essential to business success--is this advice helping us?

Click **here** to read the entire article.