LABOR AND EMPLOYMENT LAW UPDATE

2017: A Year In Review

I. New Laws

A. New York

1. NY State Paid Family Leave Law Goes into Effect

[In 2016, New York State adopted a 12-week paid family leave policy for New York employees (the "Paid Leave Law"). Once fully implemented, the Paid Leave Law will provide New York employees with up to 12 weeks of job-protected paid family leave for the purpose of (1) caring for a new child, (2) caring for a family member with a serious health condition, or (3) relieving family pressures when a family member, including a spouse, domestic partner, child or parent, is called to active military service. Starting on January 1, 2018, employees will be eligible for eight weeks of paid leave, earning 50% of their weekly pay (capped at 50% of the statewide average weekly pay). The number of weeks of leave and amount of pay increases yearly until, by 2021, employees will be eligible for the full 12 weeks of paid leave, earning 67% of their weekly pay (capped at 67% of the statewide average weekly pay).

Paid leave to care for a new child will be available to both men and women and will include leave to care for an adoptive or foster child. An employee may take paid leave to care for a new child any time within the first 12 months after the child's birth or 12 months after the placement for adoption or foster care of a child with the employee. Paid leave to care for a family member with a serious health condition includes leave to care for a child, parent, grandchild, grandparent, spouse or domestic partner.

Employees with a regular work schedule of 20 or more hours per week are eligible for Paid Leave after 26 weeks of employment and employees with a regular work schedule of less than 20 hours per week are eligible after 175 days worked.

Paid Leave will be fully funded by employee contributions, which are set at 0.126% of employees' weekly wages (or the state average wage, if less) and will be deducted from their paychecks. For 2018, the maximum employee contribution is roughly $1.65 per week (or $85 per year).

If time taken off qualifies for leave under both FMLA and Paid Family Leave, then the leaves run concurrently under both laws, provided that the employer has informed the employee that s/he is eligible for leave under both laws.

2. NYC Salary History Ban

Effective October 31, 2017, New York City enacted § 8-107(25) of the New York City Human Rights Law, which makes it an "unlawful discriminatory practice" to inquire about, seek or consider an applicant's salary history in determining whether to make an offer of employment or the financial terms of an offer. Salary history is broadly defined and includes current and prior wages, benefits, and "other compensation." This law applies to all employment in NYC and, according to FAQs published by the NYC Human Right Commission (HRC), the law also "may apply" to a salary inquiry made in the City for work outside of the City.

The law permits an employer to rely upon and verify salary information that is *voluntarily disclosed without prompting*. It also does not prohibit an employer from asking an applicant about his or her salary expectations, nor does it prohibit an employer from asking about

- any competing offers the applicant may have received;
- unvested equity, deferred compensation or bonus that an applicant would forfeit if s/he resigns from current employment; or
- "objective measures" of an applicant's prior job performance, such as revenue or sales generated.

The law also does not apply to current employees seeking internal transfer or promotion with their current employer. Moreover, in the context of a potential acquisition, for purposes of due diligence, employees of the target company are not considered "applicants." However, according to the HRC, if individual employees of the acquired company are asked to interview for a position with the acquiring company, the salary history inquiry ban "may be implicated."

In addition to employers, those who disclose salary history in violation of the law, including applicant's representatives (such as headhunters and agents), may be held liable for "aiding and abetting" a violation. In this regard, the HRC advises that a prospective employer should obtain a copy of an applicant's written consent before relying on a representative's disclosure about the applicant's salary history.

Employers who violate the new law can face civil penalties of up to $250,500, back pay, compensatory damages, and attorneys' fees.

3. NYC Updates "Ban the Box" Law to Detail Per Se Violations and Procedures Employers Must Follow to Conduct Employment-Related Criminal Background Checks

On August 5, 2017, the New York City Commission on Human Rights' comprehensive interpretive "Enforcement Guidance" regarding New York City's Fair Chance Act ("FCA") went into effect. These regulations expanded and clarified the requirements under the FCA, which regulates criminal background checks on employees and license holders. This law is the City's version of a growing trend of so-called municipal "Ban the Box" laws designed to prohibit employers and agencies from denying jobs and licenses to would-be employees because of a criminal conviction(s), especially when the conviction is not directly related to the persons' ability to perform the job. The Fair Chance Act itself took effect on October 27, 2015. Since then, the New York Commission on Human Rights, the agency charged with enforcing the FCA, has published revisions that further clarify the law, provide guidelines for *per se* violations, and detail the analysis and process for legally withdrawing conditional offers of employment based on the results of a criminal background check.

Under these clarifying regulations , an employer may not inquire about an applicant's criminal history or even request authorization or run a criminal background check until after making a conditional offer of employment. There are several categories of *per se* violations of the Act: 1) Recruiting materials that express limitations or specifications regarding criminal history; 2) applications that require applicants to submit to a background check or to provide their criminal history prior to a conditional offer; 3) any statements or inquiries into pending arrests or criminal convictions prior to making a conditional offer; 4) the use of boilerplate applications that refer to criminal history; 5) disqualifying an applicant for refusing to respond to any prohibited inquiry or statement about criminal history; 6) asserting, either orally or in writing, that individuals with a criminal history, or with certain convictions, will not be considered or hired; 7) seeking to discover, obtain, or consider the criminal history of an applicant before a conditional offer of employment is made; 8) failing to comply with review and notice process in the event of withdrawal of a conditional offer (employer to provide applicant a written copy of any inquiry the employer conducted into the applicant's criminal history, share employer's

A-23 analysis); and 9) seeking information about arrests that did not result in criminal conviction.

Accordingly, it is imperative that employers immediately review their job applications and advertisements, as well as their hiring practices to ensure they are not committing a *per se* violation.

Once a conditional offer of employment is made, it may only be revoked on the basis of a felony, misdemeanor or unsealed violation conviction. However, the employer must conduct an analysis and engage in the Fair Chance Process before revoking a conditional offer of employment. The specific requirements of the analysis and Fair Chance Process are set forth here.

4. ***Minimum Wage and Minimum Salary Increases***

As of December 31, 2017, the New York City minimum wage increased to $12 per hour for employers with 10 or fewer employees and to $13 per hour for employers with 11 or more employees. The minimum wage increased to $11 per hour for employers in Westchester, Nassau and Suffolk Counties and to $10.40 per hour in the rest of the state.

In addition, the minimum salary for exemption as an "administrative" or "executive" employee increased from $787.50 per week ($40,950 annually) to $900 per week ($46,800) for New York City employers with 10 or fewer employees and from $825 per week ($42,900 annually) to $975 per week ($50,700 annually) for New York City employers with 11 or more employees. The minimum salary for exemption as an "administrative" or "executive" employee increased from $750 per week ($39,000 annually) to $825 per week ($42,900 annually) for employers in Nassau, Suffolk, and Westchester counties and from $727.50 per week ($37,830 annually) to $780 per week ($40,560 annually) for other counties in New York State.

5. Expanded Coverage Under NYC Earned Sick Time Act

New York City has amended its Earned Sick Time Act, expanding the covered reasons for leave under the law, as well as broadening the definition of a covered family member for whom an employee may take leave to provide care. The amendment renames the law the "NYC Earned Sick and Safe Time Act" and extends leave protections under the law to include situations where an employee or an employee's covered family member is a victim of domestic violence, sexual offenses, stalking or human trafficking ("safe time"). Employers may obtain "reasonable

documentation" of the need for safe time following an absence of more than three consecutive work days; however, employers are not permitted to require disclosure of specific details relating to the domestic violence, sexual offenses, stalking or human trafficking.

The amendment also expands the list of covered family members for whom an employee may use sick and/or safe time to provide care to include the following broad categories: any other individual related by blood to the employee; and any other individual whose close association with the employee is the equivalent of a family relationship. These new categories are in addition to the current list of covered family members, which includes an employee's spouse, domestic partner, parent, child, sibling, grandparent, grandchild or the child or parent of the employee's spouse or domestic partner.

The amendments take effect on May 5, 2018.

6. NYC's Fair Workweek Law Impacts Fast Food and Retail Industries

On November 26, 2017, New York City's Fair Workweek Law went into effect. This legislation heavily regulates the scheduling practices and flexibility of retail and fast food employers.

Fast Food employees have the right to:

1. *Good Faith Estimate of Schedule:*
   On or before workers' first day of work, employers must provide written schedules for the first two weeks of work with hours, dates, start and end times of shifts and written "Good Faith Estimates". Employers must provide an updated estimate if the estimate changes.

2. *Advanced Notice of Work Schedules:*
   Employers must give workers their written work schedule at least 14 days before their first shift in the schedule.

3. *Priority to Work Newly Available Shifts:*
   Before hiring a new employee when new shifts become available, employers must advertise shifts to existing workers in NYC first by: 1) posting information at the worksite where the shifts have become available and by directly providing the information to workers electronically, which may include via text or email; 2) giving priority to work open shifts to workers at the worksite where shifts are available; 3) giving shifts to interested workers from other worksites only when no or not enough

workers from the worksite accept. Employers can only hire new workers if no current NYC workers accept the shifts by the posted deadline.

4. *Consent Plus $100 for "Clopening" Shifts:*
   Employers cannot schedule workers to work two shifts over two days when the first shift ends a day and when there are less than 11 hours between shifts (a "clopening") UNLESS workers consent in writing AND are paid a $100 premium to work the shift.

Retail employees have the right to:

1. *72 Hours' Advance Notice of Work Schedule:*
   Employers must give workers their written work schedule at least 72 hours before the start of the schedule in the way the employer usually contacts workers, which may include via text and email. They must post the schedule at the workplace where all workers can see it. This schedule must include dates, shift start and end times, and location(s) of all shifts in the work schedule. If the schedule is changed, employers must update and repost the schedule and contact all affected workers.

2. *No On-call Shifts:*
   Employers cannot require workers to be ready and available to work at any time the employer demands, regardless of whether workers actually work or report to work; or to "check in" within 72 hours of a scheduled shift to find out if they should report for the shift.

3. *No Shift Additions with Less than 72 Hours' Notice:*
   If employers want to add time or shifts to employee schedules less than 72 hours before the change, workers have the right to accept or decline the change. If workers accept an additional shift, they must do so in writing.

4. *No Shift Cancellations with Less than 72 Hours' Notice:*
   Employers cannot cancel a shift less than 72 hours before the start of the shift except under the following circumstances: threats to worker safety or employer property, public utility failure, shutdown of public transportation, fire, flood, or other natural disaster, or a government-declared state of emergency. However, workers may trade shifts voluntarily.

II. Federal Laws of Note

A. New Tax Law

1. Impact of Confidentiality Provisions in Sexual Harassment Settlement Agreements

The new tax law contains a provision stating that no tax deductions will be allowed for settlement payments or attorneys' fees related to "sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement." (None of these terms are defined.) This pro vision will apply to "amounts paid or incurred after the date of the enactment of this Act" (December ? 2017) regardless of when settlement agreement was entered into. Apparently also applies to plaintiff's attorneys' fees although this may have been an error that will be corrected in technical corrections.

III. Case Law and Administrative Developments

A. Federal Court Decisions of Note

1. Openly Gay Employee Has Valid Gender Stereotyping Claim under Title VII Arising from Workplace Discrimination

In *Christiansen v. Omnicom Media Group*, 852 F.3d 195 (2nd Cir 2017), review denied (June 28, 2017), an HIV-positive, openly gay employee of an advertising agency alleged that he was harassed by his direct supervisor based on his sexual orientation and "effeminacy." The employee sued the agency and its parent for discrimination under the American Disabilities Act, Title VII of the Civil Rights Act, and state and local law.

The district court dismissed the employee's Title VII claims, following Second Circuit precedent in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) that sexual orientation discrimination is not cognizable sex discrimination under Title VII. The Second Circuit disagreed in part and reversed, finding that the employee's claims adequately alleged discrimination on the basis of gender stereotyping under the U.S. Supreme Court's decision in Price *Waterhouse v. Hopkins*, which said discrimination for failure to comport to gender stereotypes is illegal under Title VII.

In a concurring opinion, Chief Judge Katzmann argued that the Second Circuit should revisit *Simonton* and *Dawson*. Although the Second

Circuit panel in *Christiansen* denied review, a different Second Circuit panel granted review in another case, *Zarda v. Altitude Express*, to revisit its position on Title VII sexual orientation discrimination claims. Oral argument was heard in September 2017, and the Second Circuit's decision is pending.

2. ***Unpaid Interns Not Employees of Hearst Corporation***

In *Wang v. Hearst Corp.*, 877 F.3d 69 (2d Cir. 2017), the Second Circuit held that, based on an examination of the seven factors enumerated in *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015) (*i.e.*, no expectation of compensation, training similar to educational environment, internship tied to formal education program for receipt of credit, internship corresponding to academic calendar, duration limited to beneficial learning, no displacement of paid employees, and no entitlement to paid job after internship), Hearst's unpaid interns were not employees under the FLSA. In particular, the plaintiffs were six individuals who participated in Hearst's fashion-related internship programs and later sued for minimum wage violations under the FLSA and New York labor laws. The Second Circuit held that, even though some of the *Glatt* "primary beneficiary" factors supported the plaintiffs' claims, the factors overall demonstrated that the interns were the primary beneficiaries of the relationship. As such, the interns were properly classified as interns and not employees.

3. ***Outside Counsel Personally Liable for Retaliation under FLSA.***

In *Arias v. Raimondo*, 860 F.3d 1185 (9th Cir. 2017), the Ninth Circuit held that an employer's attorney could be held liable for retaliation under the Fair Labor Standards Act ("FLSA") for reporting an undocumented plaintiff in a wage and hour claim to the Immigration and Custom Enforcement agency ("ICE"). The attorney for the defendant dairy farm contacted ICE to inform them that the plaintiff was undocumented and to encourage them to take him into custody at a scheduled deposition and remove him from the United States. Subsequently, plaintiff filed a claim against the attorney personally, alleging that in his capacity as the dairy farm's agent, the attorney retaliated against plaintiff in violation of the anti-retaliation provision of the FLSA. Defendant argued that he was not plaintiff's employer. The Ninth Circuit held that the FLSA anti-retaliation provision includes a broader definition of "employer" than the FLSA's provisions regarding wages, and applies to "any person acting directly or indirectly in the interest of an employer in relation to an employee."

4. Supreme Court to Decide Whether Internal Complaints Grant "Whistleblower" Status

In *Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045 (9th Cir. 2017), *petition for cert granted*, 137 S.Ct. 2300, plaintiff Paul Somers made several reports to senior management regarding possible securities law violations by his employer. The company fired him before Somers reported any violation to the SEC. Joining the Second Circuit, and disagreeing with the Fifth Circuit, the Ninth Circuit adopted the broader interpretation of "whistleblower" and held that Section 21F of the Dodd-Frank Act "unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally." The Supreme Court will review this decision to resolve the Circuit Split.

B. Federal Administrative Developments of Note

1. The DOL's Overtime Rule Cut Down

In 2016, the DOL finalized an expansion of the FLSA's overtime exemptions for executive, administrative and professional workers, designed to increase their wages. The rule would have doubled the minimum salary required to qualify for the exemptions and increased the overtime eligibility threshold for highly-compensated workers.

Texas, Nevada and 19 other states filed suit challenging the rule, and their case was consolidated with a similar lawsuit lodged by various business groups in the U.S. District Court for the Eastern District of Texas, *State of Nevada v. U.S. Department of Labor*, Case No. 4:16-cv-00731. In late 2016, the Texas District Court issued a nationwide order temporarily enjoining enforcement of the rule pending a final decision on the merits. The Obama DOL appealed the injunction to the Fifth Circuit. However, after President Trump's inauguration, the DOL was silent regarding its position on the appeal.

On June 30, 2017, the DOL informed the Fifth Circuit that the DOL was dropping its defense of the salary levels established by the rule, but requested that the Fifth Circuit approve the DOL's use of both a "salary" and "duties" test to demonstrate eligibility for the "white collar" overtime exemptions. The DOL also informed the Fifth Circuit that it would commence further rulemaking to determine the appropriate salary levels for such exemptions.

In August 2017, the Texas District Court invalidated the DOL rule in its entirety, holding that, by setting the salary level where it did, the DOL

effectively eliminated the so-called duties test for determining which workers are eligible for the exemptions. The DOL announced that it would not appeal this ruling. It also requested public comment regarding a new overtime rule; however, no proposed rule has been announced.

2. DOL Adopts "Primary Beneficiary" Test to Determine Whether Interns Are Employees

On January 5, 2018, the DOL embraced the *Glatt* test (already applied by several Circuit courts, including the Ninth Circuit) to assess whether interns are employees under the FLSA. In doing so, the DOL rescinded its guidance from 2010, which set forth a stricter standard. Under the DOL's 2010 test, an intern was considered an employee unless all of the six enumerated factors favored the company.

The new 7-factor DOL test, available at https://www.dol.gov/whd/regs/compliance/whdfs71.pdf, was set forth by the Second Circuit in *Glatt v. Fox Searchlight Pictures Inc.*, 811 F.3d 528, 536-37 (2d Cir. 2016). The test analyzes interns' relationships with the company to determine which party is the "primary beneficiary" of the relationship. The DOL has noted that courts describe the primary beneficiary standard as "flexible" and that a review of the unique circumstances of each case should be made.

3. Congress Repeals Obama's Fair Pay and Safe Workplaces Executive Order

In March 2017, Congress repealed the Fair Pay and Safe Workplaces Executive Order, which was introduced by the Obama administration in 2014. Regulations implementing the Executive Order were finalized in 2016; however, a court enjoined its implementation prior to it going into effect. In part, the Executive Order would have required contractors and prospective contractors to list any recent violations of labor laws (including, *e.g.*, the FLSA, the NLRA, Title VII, and the ADEA) in their contract bids, with "serious, repeated, willful or pervasive" labor law violations to be taken into account by contracting officers when determining whether to award or extend contracts. In addition, it would have required contracts over $1 million to include a provision stating that the contractors agreed that "the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise."

C. New York Court Decisions of Note

1. *Entities That Exercise "Order and Control" Over An Individual's Work May Be Liable For Criminal Conviction History Discrimination Under NYSHRL*

In *Griffin v. Sirva, Inc.*, 29 N.Y.3d 174 (N.Y. Ct. App. 2017), two former employees, who were terminated after past criminal convictions were discovered through a background check, sued their direct employer, Astro Moving and Storage Co., and the company to which the employer provided services as a contractor, Allied Van Lines, Inc. ("Allied").

The trial court granted summary judgment in favor of Allied. On appeal, the New York Court of Appeals held that only "employers" may be liable for criminal conviction history discrimination under Section 296(15) of the New York State Human Rights Law ("NYSHRL"). However, the court broadly construed the definition of covered employer to extend beyond an employee's direct employer and concluded that New York common law's 4-factor test applies to determining whether an entity is a covered employer, which looks at: (i) the selection and engagement of the servant; (ii) the payment of salary or wages; (iii) the power of dismissal; and (iv) the power of control of the servant's conduct. Of these factors, the "greatest emphasis [should be] placed on the alleged employer's power to order and control the employee in his or her performance of work." The court further held that the "aiding and abetting" provisions of the NYSHRL may apply to entities even where a direct or indirect employment relationship cannot be shown.

2. *NYCHRL Does Not Bar Discrimination Claim Based On "Perceived Untreated Alcoholism"*

In *Makinen v. City of NY*, 30 N.Y. 3d 81 (2017), two former New York City police officers sued the NYPD, alleging that it had discriminated against them based on the its perception that they were alcoholics. The jury found in plaintiffs' favor. The NYPD appealed, and the Second Circuit certified to the New York Court of Appeals the question: does the New York City Human Rights Law ("NYCHRL") preclude a plaintiff from bringing a disability discrimination claim based solely on a perception of untreated alcoholism? The Court answered affirmatively, holding that the NYCHRL does not prohibit discrimination based on "perceived untreated alcoholism," even though such claims would be recognized under its state and federal counterparts, the NYSHRL and the Americans with Disabilities Act. The Court's decision was based on the

plain and clear text of the statute, which defines alcoholism as a "disability" only in certain circumstances, prohibiting discrimination against "a person who (1) is recovering or has recovered and (2) currently is free of such abuse."

D. New York Administrative Developments of Note

1. NY Regulations on Wage Payment Methods Declared Invalid

In 2016, the New York State Department of Labor ("NYSDOL") published final regulations on the methods by which employees must be paid, including with respect to direct deposit of wages and payroll debit cards. On February 16, 2017, the New York State Industrial Board of Appeals (the "IBA") revoked the regulations, determining that they were "invalid because they exceed [the NYSDOL's] rulemaking authority." The NYSDOL appealed this ruling.

IV. National Labor Relations Act

A. The "New" National Labor Relations Board Decisions and Memos

As of this past fall, following confirmation of Marvin Kaplan and William Emanuel as new members of the National Labor Relations Board ("NLRB"), that agency has obtained a 3-2 Republican majority for the first time in almost a decade. As expected, in the few short months thereafter, the Trump era NLRB has been on a path to reverse many of the decisions and actions taken by the Obama era NLRB. Here are the more significant NLRB decisions that fall in this category. Notably all were decided this past December.

1. NLRB Establishes New Standard Governing Workplace Policies

On December 14, 2017, in *The Boeing Co.*, 365 NLRB No. 156, the NLRB overturned its standard for evaluating the legality of employee handbook policies. The standard that was overruled was established in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004). In *Lutheran Heritage*, the NLRB stated that a policy is illegal if employees could "reasonably construe" it to bar them from exercising their rights to engage in union or other concerted activities under the NLRA. In the *Boeing* case, the administrative law judge applied the *Lutheran Heritage* rule to Boeing's workplace policy restricting workers' use of camera-enabled devices and similar recording devices such as cellphones on company property violated the NLRA. Although Boeing's "no-recording" policy would have violated the NLRA under *Lutheran Heritage*, the NLRB in *Boeing* stated that *Lutheran Heritage's* "reasonably construe" standard

entails a "single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions."

The NLRB rejected continued application of the *Lutheran Heritage* standard and held that when evaluating the legality of workplace rules, it will now consider the "nature and extent" of a challenged rule's "potential impact on NLRA rights" and the "legitimate justifications associated with the rule."

In an effort to provide employers, unions and employees with some guidance for how the new standard will be applied, the *Boeing* decision also set forth three categories of cases under which the NLRB will classify workplace rules that are being challenged: (1) rules that are legal in all cases because they cannot be reasonably interpreted to interfere with workers' rights or because any interference is outweighed by business interests; (2) rules that are legal in some cases depending on their application; and (3) rules that are always illegal because they interfere with workers' rights in a way not outweighed by business interests.

The *Boeing* case is being applied retroactively; hence, all cases currently pending before the NLRB that have not been finally determined are subject to the new standard announced in *Boeing*.

2. NLRB Overrules Browning-Ferris Industries and Reinstates Prior Joint-Employer Standard

On December 14, 2017, in *Hy-Brand Industrial Contractors Ltd.*, 365 NLRB No. 156, the NLRB overturned the joint employer test that was established previously in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015). Under the *Browning-Ferris* test, a company and its contractors or franchisees could be deemed a joint employer even if the company had not exerted overt, actual, "direct and immediate" control over workers' terms and conditions—the company could be deemed a joint employer merely by exercising "indirect," "limited and routine" control, or having the ability or reserved right to exercise such control. In *Hy-Brand*, the NLRB disavowed *Browning-Ferris*, and returned to the joint employer standard that the NLRB applied prior to *Browning-Ferris*. Under the pre-*Browning-Ferris* standard (and now the current standard), "[a] finding of joint-employer status shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the

control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.'"

3. NLRB Reverses Stance On Employers' Duty to Bargain With Unions

On December 15, 2017, in *Raytheon Network Centric Systems*, 365 NLRB No. 161, the NLRB overturned a previous NLRB decision that precluded employers from effecting changes in workplace benefits and policies, even if those changes were merely a continuation of an established, routine practice. In the prior decision, *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016), the NLRB held that if the changes at issue were implemented under a management rights clause that was part of an expired collective bargaining agreement, or if company "discretion" was involved with making the change, then the employer must give notice to and bargain with the union before the changes could be effected.

The *Raytheon* case restores 50-year-old precedent that allows businesses to change policies without a union's permission if they've taken similar actions before. That precedent included a 1962 case in which the Supreme Court indicated that wage increases that were "in line with [a] company's long-standing practice of granting quarterly increases or semiannual merit reviews" were not really "changes" to employment terms and conditions but instead "were a mere continuance of the status quo." *NLRB v. Katz*, 369 U.S. 736, 745-747 (1962).

The "change" at issue in *Raytheon* involved adjustments to employee health care benefits. Because those "changes" were in line with unilateral changes the employer made at the same time each year for more than a decade, the NLRB held that the employer did not have to bargain with the union over the change. However, the NLRB cautioned that this new rule does not remove the employer's obligation to bargain with the union over the continuation of established practices if the union makes a demand to do so.

4. NLRB Eliminates "Overwhelming Community of Interest" Standard for Proposed Bargaining Unit

On December 15, 2017, in *PCC Structurals Inc.*, 365 NLRB No. 160, the NLRB overturned its standard in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (*Specialty Healthcare*), which had required employers to show that workers they want included in an NLRB election petition filed by a union share an "overwhelming" community of interest with the workers described in the petition.

In *PCC Structurals*, the union filed an election petition that covered only 102 employees out of an employer workforce that exceeded 2500 employees. The employer contended that the only appropriate bargaining unit in that case was a "wall to wall" unit consisting of all employees who were employed in the employer's production and maintenance operations. Applying the *Specialty Healthcare* rule, the Regional Director found that the excluded employees did not share an "overwhelming community of interest" with those employees described in the union's election petition; hence, the Regional Director approved the smaller bargaining unit described in the petition and denied the employer's attempt to obtain an election in a larger unit.

The employer sought NLRB review of the Regional Director's decision, which was granted. Reversing the *Specialty Healthcare* case, the NLRB held that employers should not be required to prove the excluded workers had an "overwhelming" community of interest with those included in the challenged unit; rather, the NLRB returned to its prior approach, which was to examine whether the excluded employees share a sufficient community of interest such as to warrant their inclusion in the unit. Under this less onerous standard, the NLRB will in each case determine:

> "whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the employer's other employees; have frequent contact with and interchange with other employees; have distinct terms and conditions of employment; and are separately supervised."

5. NLRB General Counsel Sets Forth Priorities in Memo

Peter Robb, who was newly appointed by President Trump to serve as General Counsel for the NLRB, also has indicated his intent to reverse many of the NLRB decisions that issued during the Obama administration. On December 1, 2017, the General Counsel issued Advice Memo 18-02, which sets forth the "Mandatory Submissions to Advice" – the kinds of cases Regional Directors must submit to the Division of Advice to obtain guidance before issuing a complaint. Many of the priorities in the Memo focus on the NLRB's handbook-related changes, granting employee access to employer email systems, and confidentiality rules in investigations. The Memo also rescinds a number

of prior Advice Memos, including GC 15-04, the prior GC's comprehensive views on employee handbooks, which significantly expanded the number of work rules deemed unlawful. The Memo lists "Examples of Board decisions . . . where [the GC's office] also might want to provide the Board with an alternative analysis." The list includes cases involving: joint employment; the NLRB's prior expansion of what constitutes protected concerted activity; common employer handbook rules including rules prohibiting "disrespectful" conduct and rules prohibiting recording; *Purple Communications* and an employee's presumptive right to use their employer's email system to engage in Section 7 activity; and *Quietflex* and cases finding work stoppages protected in contexts like retail sales floors.

6. NLRB Gives More Settlement Authority to Administrative Judges

In several cases involving the University of Pittsburgh Medical Center and its subsidiaries, the NLRB ruled that its ALJs can sign off on settlements that only resolve a portion of claims in a given labor suit even if the NLRB's general counsel and the party bringing charges object. See *UPMC*, 365 NLRB No. 153 (December 11, 2017). The ruling reversed the NLRB's *United States Postal Service*, 364 NLRB No. 116 (2016), holding that judges can only accept settlements where all parties agree, restoring ALJs' ability to sign off on "reasonable" settlements even if some parties would prefer to continue litigating.

B. Earlier 2017 Decisions of the Obama-Era NLRB

1. NLRB Rules Casino Violated NLRA By Barring Former Employee From Socializing In Nightclub

In *MEI-GSR Holdings, LLC dba Grand Sierra Resort & Casino,* 365 NLRB No. 76 (May 16, 2017), the NLRB held that a casino operator violated Section 8(a)(1) of the NLRA by forbidding a former employee from "socializing" at one of its nightclubs after she filed a Fair Labor Standards Act class action lawsuit against the employer. The NLRB held that the employer's exclusion of the former employee, in response to her participation in protected concerted activity, would reasonably tend to chill employees from exercising their Section 7 rights.

2. NLRB Finds Union Supporter's Profanity-Laden Rant Unprotected by the Act

In *Brooke Glen Behavioral Hospital*, 365 NLRB No. 79 (May 15, 2017), the NLRB affirmed an ALJ's decision that the termination of a union

bargaining-committee representative for a profanity-laden rant did not violate the Act.

The employer was engaged in collective bargaining with a nurses' union. The employee at issue was a registered nurse. The employer was conducting a tour of its hospital for managers and staff from an affiliated facility. When the tour group approached the registered nurse's work area, she began screaming and demanding to know "who the visitors were and why they were there." Receiving no response, the registered nurse "again asked what the visitors were doing at the hospital, asked one particular visitor how many orientations he needed, and pointed out, sarcastically, 'here's the hallway, here's the window.'" At the conclusion of the tour, while the tour group was in the parking lot, the registered nurse again approached the group and, pointing at her supervisor, stated, "this one don't do sh*t, she ain't shi*t … I'm going to get you the f*ck out of here." The employer terminated the registered nurse for her unprofessional conduct.

The ALJ held that the nurse's termination was in no way related to her involvement with the parties' collective bargaining sessions. It also rejected the argument that the nurse's confrontations with the tour group constituted protected activity.

C. Federal Court Decisions Affirming Obama-Era NLRB Decisions

1. Second Circuit Upholds NLRB Decision Finding No Recording Policy Unlawful

In *Whole Foods Mkt. Grp., Inc. v. NLRB*, 2017 BL 183726, 2d Cir., 16-0002-ag, unpublished 6/1/17, the Second Circuit upheld an NLRB decision that Whole Foods illegally prohibited employees from electronically recording communications in the workplace. The Whole Foods policy prohibited employees from "record[ing] conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership." In 2015, the NLRB had found that Whole Food's policy could potentially discourage employees from communicating about unions or engaging in concerted activities that are protected under the NLRA. Whole Food's argument that prohibiting recording would foster "spontaneous and honest dialogue" fell on deaf ears with the NLRB. The Second Circuit agreed. Leaving open the possibility that a more narrow policy might have survived, the Second Circuit remarked the extremely broad policy adopted by Whole Foods prohibited all

recordings without regard to their relationship to employee rights. This case is probably no longer good law in view of the *Boeing Company* case, *supra*.

2. Second Circuit Upholds Determination That Facebook Rant Was Protected

In *National Labor Relations Board v. Pier Sixty, LLC*, 2017 U.S. App. LEXIS 6974 (2d Cir. Apr. 21, 2017), the Second Circuit upheld a NLRB ruling that an employer violated the NLRA when it terminated an employee after the employee posted a profanity-laced rant directed to his supervisor on social media. Examining the specific factual background of the matter, the Second Circuit found that even though the employee's Facebook post sat at the "outer-bounds of protected, union-related comments," the Second Circuit agreed that the employee's conduct was not so opprobrious or egregious as to lose the protection of the NLRA. Specifically, the employee was terminated two days prior to a previously scheduled union election. Leading up to those two days and the election, the employer had engaged in conduct that the Second Circuit determined was hostile to employees. For example, Pier Sixty had threatened to rescind benefits and/or fire employees who voted for unionization. It also had enforced a "no talk" rule on groups of employees who wanted to discuss the union. Based on this hostility, the Second Circuit found that "the [NLRB] could reasonably determine that [the employee's] outburst was not an idiosyncratic reaction to a manager's request but part of a tense debate over managerial mistreatment in the period before the representation election."