LABOR AND EMPLOYMENT LAW UPDATE

2016: A Year In Review

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NEW LAWS

NEWLY ENACTED CALIFORNIA STATE LAWS

California New Minimum Wage (SB 3). While the federal minimum wage remains at $7.25 per hour, effective January 1, 2017, California's minimum wage increased to $10.50 per hour and is set to increase incrementally each year (subject to possible temporary delays for general economic or budgetary reasons in the Governor's discretion) until it reaches $15 in 2022. As shown in the table below, each increase is delayed by one year for employers with 25 or fewer employees and for qualifying in-home supportive service workers:

Date of Increase	26 or More Employees	25 or Fewer Employees / In-Home Supportive Services
January 1, 2017	$10.50	No change ($10.00)
January 1, 2018	$11.00	10.50
January 1, 2019	$12.00	$11.00
January 1, 2020	$13.00	$12.00
January 1, 2021	$14.00	$13.00
January 1, 2022	$15.00	$14.00
January 1, 2023	No change ($15.00)	$15.00

Starting in August 2022, the California Director of Finance will annually calculate an adjusted minimum wage, to be implemented the following year, according to a specific formula. Such adjusted minimum wage can only be increased, not decreased.

The minimum wage increase also affects employees classified as exempt from California's overtime laws. Specifically, in order to qualify for the executive,

administrative and professional exemptions, employees must earn no less than two times the state minimum wage for full-time employment, increasing the minimum weekly salary for exempt employees to $840 in 2017. Likewise, certain commissioned salespeople must earn more than one-and-a-half times the state minimum wage to be exempt from California's overtime laws.

Moreover, a number of California cities have adopted more aggressive minimum wage hikes, as illustrated in the chart found below in the Newly Enacted California Local Laws section of these materials.

California Broadens Its Fair Pay Act, Again (AB 1676 / SB 1063). AB 1676 amended California's Fair Pay Act ("CFPA") to make it unlawful for employers to rely on an applicant's wage history as the sole justification for a wage disparity. Accordingly, an employer may no longer rely solely on wage history in order to defeat a fair pay claim. Rather, it must establish that, in addition to wage history, the challenged wage gap resulted from at least one other factor enumerated under the CFPA (such as a seniority system, a merit system, a system that measures earning by quantity or quality of production, or some other "bona fide factor"). Unlike a Massachusetts law enacted in 2016, the California law does not prohibit employers from seeking wage history. (In this regard, there is pending legislation in New York City which, if enacted, would also restrict an employer from seeking wage histories from applicants.)

SB 1063 also expands the CFPA to prohibit wage differentials based on race and ethnicity. Specifically, newly enacted Labor Code § 1197.5(b) mirrors the gender-related provisions of the CFPA at § 1197.5(a) and prohibits employers from paying "employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." Similarly, employers bear the burden of establishing that any wage differential is based upon a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or "a bona fide factor other than race or ethnicity, such as education, training, or experience." Under the CFPA, a "bona fide factor" must not be based on or derived from a race or ethnicity-based differential and must be job-related and consistent with a "business necessity," defined as an "overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." Similarly, one or more of the factors relied upon must account for the entire wage differential. The new law also incorporates the amendments made by AB 1676, discussed above, such that employers are precluded from relying on an applicant's wage history as the sole justification for a race or ethnicity-related wage disparity.

The CFPA also prohibits an employer from discharging, or in any manner retaliating against, an employee for exercising any right under the CFPA.

California Limits Forum Selection In Employment Agreements (SB 1241). SB 1241 has added Section 925 to the Labor Code, which prohibits employers from imposing their choice of law and venue on employees who "primarily reside[] and work[] in California," even where the employer is headquartered outside California. Specifically, for all employment agreements required as a condition of employment, including arbitration agreements, executive contracts, and covenants not to compete, employers are prohibited from: (1) requiring the employee to litigate or arbitrate outside of California a claim arising in California; and (2) depriving the employee of the substantive protection of California law with respect to a controversy arising in California.

Under the new law, employees now have the unilateral right to void any provision that violates the foregoing protections and to litigate or arbitrate their dispute in California with California law governing the dispute. The new law applies to contracts entered into, modified, or extended on or after January 1, 2017.

Although the new law restricts employers from enforcing and allows employees to void choice of forum and choice of law provisions, it does not make the inclusion of such provisions unlawful. Accordingly, such a provision will continue to be enforceable with respect to disputes arising outside of California and, even where the new law applies, employees may elect not to void the provision. Further, employees who are individually represented by legal counsel in negotiating their employment agreements are exempt from the law's coverage.

Juvenile Criminal History Off-Limits (AB 1843). The Labor Code already prohibits employers from asking applicants to disclose juvenile convictions. AB 1843 expands those restrictions to include: (1) asking an applicant to disclose information concerning or related to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the applicant was subject to the process and jurisdiction of juvenile court law; or (2) using any such information as a factor in determining any condition of employment. Some narrow exceptions apply. Specifically, health care facilities may inquire about an applicant's juvenile criminal record to determine if, according to a juvenile court's final ruling or adjudication, the applicant committed a felony or misdemeanor involving sex or some controlled substance within five years prior to applying for the job. However, such inquiry and any information obtained must be disclosed to the applicant. Regardless, inquiries regarding sealed juvenile criminal records still are prohibited.

California Paid Family Leave and State Disability Benefits Increased (AB 908). California's paid family leave ("PFL") law provides up to six weeks of wage replacement benefits to workers who take time off to care for a seriously ill or injured family member or to bond with a minor child within one year of birth or adoption, and is wholly funded by employee contributions. Likewise, the State Disability Insurance ("SDI") program provides wage replacement benefits to individuals who are unable to work due to their

own illness or injury. Effective January 1, 2017, benefits under both programs increased to 60 or 70 percent of participant wages (up from 55 percent) depending on the applicant's income. For example, workers earning less than one-third of the state average quarterly wage now are entitled to recover 60 percent of their wages. In addition, the new law also eliminates the 7-day waiting period for PFL benefits effective January 1, 2018.

NEWLY ENACTED CALIFORNIA LOCAL LAWS

Los Angeles "Bans The Box" ("Fair Chance Initiative"). Effective January 22, 2017, employers in Los Angeles will be prohibited from asking applicants about their criminal histories "unless and until a conditional offer of employment has been made" (defined as an offer of employment "conditioned only on an assessment of the Applicant's Criminal History, if any, and the duties and responsibilities of the Employment position"). Prohibited inquiries include any direct or indirect conduct intended to gather criminal history information from or about an applicant, using any mode of communication, including application forms, interviews, and criminal history reports, including reports created by a consumer reporting agency. Employers also will be required to include in all job advertisements a statement that they will consider qualified applicants with criminal histories consistent with the new law.

Once a conditional offer is made, the new law also requires employers to engage in a "Fair Chance Process" prior to withdrawing or canceling an offer on the basis of the applicant's criminal history. Specifically, employers must perform a written assessment linking the specific aspects of the applicant's criminal history with risks inherent to the duties of the job position. Employers also must provide written notice and a copy of the written assessment to the applicant, and refrain from filling the position for at least 5 days from the date of notice in order to allow the applicant the opportunity to provide information or documentation regarding the accuracy of the criminal history information, evidence of rehabilitation, or other mitigating factors. If, upon provision of such information, an employer cancels or withdraws the offer of employment, it must first perform a written re-assessment and provide notice and a copy of the written re-assessment to the applicant.

The new law applies to employers with 10 or more covered employees working in the City of Los Angeles and city contractors. A covered "employee" is one who works in the city at least two hours "on average" each week. There are limited exceptions to the law's coverage, including for positions that require employees to carry firearms, positions working with minors, and any other position that cannot by law be filled by a person convicted of a crime.

Once the new law goes into effect, Los Angeles will be the latest in a growing number of jurisdictions that have adopted similar "ban the box" laws: over 100 cities and counties

and about 23 states have enacted similar legislation; California's state and local governments have been prohibited from seeking disclosure of conviction history since 2013 (AB 218); and, in 2015, President Obama announced that the federal government and federal contractors may not consider applicants' criminal conviction history in the initial stages of the employment process.

Los Angeles, San Diego, and Santa Monica Have Joined The Paid Sick Leave Bandwagon. In 2016, three Southern California municipalities – Los Angeles, San Diego, and Santa Monica – passed paid sick leave law ordinances, each more generous to employees than California's Healthy Workplaces, Healthy Families Act. Similar laws were previously enacted in other California cities (San Francisco in 2007 and Oakland and Emeryville in 2015).

Los Angeles. Effective July 1, 2016, Los Angeles' new paid sick leave law requires employers to provide employees working in the City of Los Angeles city with 48 hours of paid sick leave (compared to 24 hours under the state law), accrued at the rate of 1 hour for every 30 hours worked in the city (or in a lump sum), and capped at a minimum of 72 hours (compared to 48 hours under the state law). Annual use may be capped at 48 hours. The Los Angeles law applies to employees who work at least two hours in a particular week in the City of Los Angeles for the same employer, are entitled to minimum wage under California law, and who work in the city for at least 30 days a year. Critically, the exemptions to the California law do not apply. Thus, employees exempt from the California law, most significantly, those covered by collective bargaining agreements ("CBA"), are covered by the Los Angeles Law. "Covered family members" also is broader than under the California law (which includes child, parent, spouse, registered domestic partner, grandparent, grandchild, and sibling), and covers "*any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship*." Under the ordinance, an employer may seek an exemption if its sick leave policy does not meet all of the requirements of the ordinance, but overall it provides "more generous" benefits. The city has not posted and application form and worksheet that is to be used when requesting an exemption. These forms are available here.

San Diego. Effective July 11, 2016, employees covered by San Diego's paid sick leave law are entitled to use 40 hours of paid sick leave time, accrued at the rate of 1 hour for every 30 hours worked in the city (or in a lump sum), and capped at 80 hours. San Diego's law applies to employees who work at least 2 hours in the city and are entitled to minimum wage under California law *or* are participants in a California Welfare-to-Work Program. Similar to the Los Angeles law, the exemptions to the California law do not apply. However, the San Diego law provides some limited carve outs, including for employees of a publicly subsidized summer or short term youth employment program, student employees, camp counselors, and program counselors of an organized camp. Permitted use under the San Diego law is somewhat broader than under the California

law, and include when the employee's place of business, child's care provider or school is closed due to a public health emergency. Covered family members are co-extensive with the state law. And employers are not allowed to deduct sick leave in blocks of 2 hours.

Santa Monica. Effective January 1, 2017, under Santa Monica's new paid sick leave law, small businesses (employers with 25 or fewer employees in the city) must provide 32 hours of paid sick leave time and large business (employers with 26 or more employees in the city) must provide 40 hours, accrued at the rate of 1 hour for every 30 hours worked in the city (or in a lump sum). Benefits under the Santa Monica law increase to 40 hours for small businesses and 72 hours for large businesses on January 1, 2018. Santa Monica's law applies to employees who work at least 2 hours per week in the city for the employer and who are qualified for California minimum wage. Excluded from Santa Monica's new law are employees covered by a CBA containing an explicit, clear, and unambiguous waiver of benefits, and employees of government agencies.

California Local Minimum Wage Laws

City or County	Date(s) of Increase (Minimum Wage)
Berkeley	October 1, 2016 ($12.53), October 1, 2017 ($13.75), October 1, 2018 ($15.00)
Cupertino	January 1, 2017 ($12.00), January 1, 2018 ($13.50), January 1, 2019 ($15.00)
El Cerrito	July 1, 2016 ($11.60), January 1, 2017 ($12.25), January 1, 2018 ($13.60), January 1, 2019 ($15.00)
Emeryville	July 1, 2016 ($14.82, $13.00*), July 1, 2017 ($15.20, $14.00), July 1, 2018 ($15.60, $15.00) * The first rate listed is for employers with 56 or more employees, the second is for employers with 55 or fewer employees
Los Altos	January 1, 2017 ($12.00), January 1, 2018 ($13.50), January 1, 2019 ($15.00)
Los Angeles City/County, Malibu	July 1, 2016 ($10.50, $10.00)*), July 1, 2017 ($12.00, $10.50), July 1, 2018 ($13.25, $12.00), July 1, 2019 ($14.25, $13.25), July 1, 2020 ($15.00, $14.25), July 1, 2021 ($15.00, $15.00) *The first rate listed is for employers with 26 or more employees, the second is for employers with 25 or fewer employees
Mountain View	January 1, 2017 ($13.00), January 1, 2018 ($15.00)
Oakland	January 1, 2017 ($12.86)
Palo Alto	January 1, 2017 ($12.00)

Pasadena	July 1, 2016 ($10.50, $10.00*), July 1, 2017 ($12.00, $10.50), July 1, 2018 ($13.25, $12.00) * The first rate listed is for employers with 26 or more employees, the second is for employers with 25 or fewer employees
Richmond	January 1, 2017 ($12.30), January 1, 2018 ($13.00)
San Diego	January 1, 2017 ($11.50)
San Francisco	July 1, 2016 ($13.00), July 1, 2017 ($14.00), July 1, 2018 ($15.00)
San Jose	January 1, 2017 ($10.50)* *To expire June 30, 2017
San Leandro	July 1, 2017 ($12.00), July 1, 2018 ($13.00), July 1, 2019 ($14.00), July 1, 2020 ($15.00)
San Mateo	January 1, 2017 ($12.00, $10.50*), January 1, 2018 ($13.50, $12.00), January 1, 2019 ($15.00, $13.50), January 1, 2020 ($15.00 + consumer price index, $15.00 + consumer price index) *The first rate listed is for all employers, the second is for 501(c)(3) nonprofit employers
Santa Clara	January 1, 2017 ($11.10)
Santa Monica	July 1, 2016 ($10.50, $10.00*), July 1, 2017 ($12.00, $10.50), July 1, 2018 ($13.25, $12.00), July 1, 2019 ($14.25, $13.25), July 1, 2020 ($15.00, $14.25), July 1, 2021 ($15.00, $15.00) * The first rate listed is for employers with 26 or more employees, the second is for employers with 25 or fewer employees. Hotels must pay the following rates: July 1, 2016 ($13.25), July 1, 2017 ($15.37 + consumer price index in 2017)
Sunnyvale	January 1, 2017 ($13.00), January 1, 2018 ($15.00)

NEWLY ENACTED NEW YORK STATE LAWS

New York State Expands Protections Against Sex Discrimination And Harassment (9 NYCRR § 466.13). On January 19, 2016, the New York State Division of Human Rights (the "Division"), which has interpreted the New York State Human Rights Law ("HRL") to protect the rights of transgendered persons, added § 466.13 to the HRL explicitly codifying those protections. The new law clarifies that sex discrimination includes discrimination on the basis of "gender identity," which is broadly defined as "having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance,

behavior or expression is different from that traditionally associated with the sex assigned to that person at birth." The new law further defines "sex" as including gender identity and the status of being "transgender," which in turn, is defined as having a gender identity different from the sex assigned at birth. Further, the law provides that prohibited sexual harassment includes harassment on the basis of gender identity or on the basis of being transgender. Finally, the new law provides that disability discrimination includes discrimination on the basis of "gender dysphoria," which is defined as a recognized medical condition related to having a gender identity different from the sex assigned at birth, and that refusal to provide reasonable accommodation for gender dysphoria is disability discrimination. Under the new law, victims of gender discrimination are entitled to recover damages, including reasonable attorneys' fees.

New York State Prohibits Discrimination Based on Relationship Or Association (9 NYCRR § 466.14). On May 19, 2016, the Division added § 466.13 to the HRL, which prohibits employment discrimination on the basis of an individual's relationship or association with a member of an HRL protected category. Specifically, the new law provides that, wherever the HRL uses the term "unlawful discriminatory practice," the term includes discrimination against an individual because of his or her relationship or association with a member of a protected category. The new section codifies Division precedent interpreting the HRL.

New York State Raises Its Minimum Wage. In April 2016, New York State enacted a schedule of increases in the state minimum wage depending on location and size, set to reach $15.00 in most areas by 2021, as follows:

Date of Increase	New York City – Businesses with 11 or More Employees	New York City – Businesses with 10 or Fewer Employees	Nassau, Suffolk, and Westchester Counties	Rest of the State
Dec 31, 2016	$11.00	$10.50	$10.00	$9.70
Dec 31, 2017	$13.00	$12.00	$11.00	$10.40
Dec 31, 2018	$15.00	$13.50	$12.00	$11.10
Dec 31, 2019	$15.00	$15.00	$13.00	$11.80
Dec 31, 2020	$15.00	$15.00	$14.00	$12.50
Dec 31, 2021	$15.00	$15.00	$15.00	To be determined

The Director of the Division of Budget will determine additional increases for the rest of the state in consultation with the New York Department of Labor after December 31, 2020, with the goal of reaching a $15.00 minimum wage state-wide. The new law also includes a safety valve whereby increases may be suspended or delayed in the event of an economic slowdown. Finally, the new law does not affect the preexisting wage increases already scheduled for fast food workers pursuant to the Hospitality Industry Wage Order, set to reach $15.00 by December 31, 2018 in New York City, and in the rest of the state by July 1, 2021.

New York State Paid Family Leave. Beginning January 1, 2018, eligible employees in New York State will be eligible for up to 8 weeks of paid family leave ("PFL") benefits equal to 50% of their average weekly wages, capped at 50% of the state average weekly wage. Benefits will increase annually to reach 12 weeks at 67% of the employee's average weekly wage, capped at 67% of the state average weekly wage. As with the minimum wage increases, the new law includes a safety valve at the discretion of the Superintendent of Financial Services in the event of an economic downturn. PFL must be used concurrently with leave under the federal Family and Medical Leave Act, and employees are prohibited from collecting disability and PFL benefits at the same time. Workers must be employed for 6 months in order to be eligible to participate and they may collect PFL benefits even if they are not eligible for leave under the Family and Medical Leave Act. The program is solely funded by employee payroll deductions. Qualifying uses include: (1) care of a family member with a serious health condition; (2) bonding with a child during the first 12 months after birth or adoption; and (3) when a spouse, domestic partner, child, or parent is called to active military service.

EMPLOYMENT DISCRIMINATION LAW

FEDERAL COURT DECISIONS

U.S. Supreme Court to Review Fourth Circuit Decision Holding That Schools Must Provide Transgender Students With Access To Restrooms Congruent With Their Gender Identity. In *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F. 3d 709 (4th Cir. 2016), a transgender male high school student ("G.G.") was banned from using the boys' restroom after the School Board implemented a policy requiring students to use bathrooms corresponding with their "biological" sex. Though the School Board's policy provided that "students with gender identity issues shall be provided an alternative appropriate private facility," G.G. alleged that the school board impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution. The district court dismissed G.G.'s Title IX claim, denied his request for a preliminary injunction to use the boys' restroom and withheld ruling on the motion to dismiss the equal protection claims. The Fourth Circuit Court of Appeals reversed the district court's dismissal of the Title IX

claim and ratified the Department of Education's interpretation of Title IX to include protections that allow transgender people to use restrooms that accord with their gender identity. The Fourth Circuit also concluded that the district court used a stricter evidentiary standard than was warranted and remanded for consideration. On remand, the district court granted G.G.'s request for a preliminary injunction to use the boys' restroom. On October 28, 2016 the U.S. Supreme Court announced it will review the Fourth Circuit's decision.

California Employment Case Stayed Pending The Outcome Of Supreme Court's Review Of G.G. v. Gloucester Cnty. Sch. Bd. In *Robinson v. Dignity Health*, 2016 U.S.Dist.LEXIS 168613 (N.D.Cal., 2016), the plaintiff, a transgender employee of Chandler Regional Medical Center ("Chandler"), filed a lawsuit alleging discrimination on the basis of sex because the employer excluded coverage for "sex transformation" surgery from its health plan. Plaintiff specifically alleged that the exclusion violated the anti-discrimination provisions of Title VII and Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116. In response, Chandler moved for a stay pending the outcome of *G.G. v. Gloucester Cnty. Sch. Bd*., 822 F.3d 709 (4th Cir. 2016) (see discussion above). The district court granted the stay, reasoning that there was a "high likelihood" that the decision in *Gloucester* would affect the decision as the central issue in both cases "is whether 'sex' encompasses gender identity for the purposes of anti-discrimination protection" under federal civil rights law.

Director of Human Resources Exercised Sufficient "Control" To Be Subject To Individual Liability Against Employees' FMLA Claims. In *Graziadio v. Culinary Institute of America*, 817 F. 3d 415 (2d Cir. 2016), plaintiff was terminated from her position as a Payroll Administrator at the Culinary Institute of America ("CIA") approximately two and a half months after she took leave to provide medical care for her sons. During her leave, plaintiff engaged in a protracted email dispute with defendant's Director of Human Resources, who told plaintiff that her paperwork did not justify her absences under the Family and Medical Leave Act ("FMLA"). Ultimately, plaintiff was terminated for job abandonment after failing to provide the correct paperwork by a date certain. Plaintiff subsequently brought suit under the FMLA and the Americans with Disabilities Act ("ADA"). The district court granted defendants' motion for summary judgment on all claims and specifically dismissed the FMLA claims against the individually named defendants, including the HR Director, on the basis that neither qualified as an "employer" subject to liability under the FMLA.

The Second Circuit Court of Appeals reversed in part, finding that plaintiff presented sufficient evidence to state an FMLA claim against the HR Director. The Court applied the economic-reality test used under the Fair Labor Standards Act, which considers "a nonexclusive and overlapping set of factors intended to encompass the totality of circumstances." These factors include "whether the alleged employer (1) had the power

to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." In analyzing these factors, the Second Circuit found ample evidence that the HR Director could be held individually liable under the FMLA.

FEDERAL AGENCY ACTIONS

EEOC To Begin Collecting Summary Pay Data In 2018. Historically, the U.S. Equal Employment Commission ("EEOC") has required federal contractors, as well as other employers with one hundred or more employees, to complete on an annual basis an "Employer Information Report" or "EEO-1," which identifies the number of persons employed by job category, sex, and ethnicity. Effective in 2018, covered employers also will be required to report summary pay data on their EEO-1 reports for the stated purpose of addressing pay discrimination. The expanded EEO-1 report includes two new reporting categories:

- Summary pay data: The total number of full and part-time employees by demographic categories (sex and ethnicity or race) in each of 12 pay bands listed for each EEO-1 job category, based on W-2 wages; and

- Aggregate hours worked data: The number of hours worked that year by all employees accounted for in each pay band in each pay period for the W-2 reporting year. For exempt employees, employers may either report 20 hours/week for each part time, and 40 hours/week for each full time, employee or they may report the actual number of hours worked.

EEOC Argues That Gender Identity And Sexual Orientation Are Protected Under Title VII. There is no federal statute prohibiting discrimination based on sexual orientation and/or gender identity. For many years federal courts have generally held that sexual orientation is not protected under Title VII and have been split on whether gender identity discrimination constitutes gender discrimination prohibited by Title VII. Recently, the EEOC has taken the firm position that gender identity and sexual orientation *are* protected by Title VII and has filed a number of lawsuits arguing this position. Several of these lawsuits resulted in published opinions in 2016. *See, e.g., EEOC v. Scott Med. Health Ctr.*, Case No. 16-225, 2016 U.S. Dist. LEXIS 153744 (W.D. Pa. Nov. 4, 2016) (holding that discharge based on sexual orientation was actionable as sex discrimination under Title VII). These cases are particularly relevant in those jurisdictions that do not have state or local prohibitions against discrimination on the basis of sexual orientation and/or gender identity.

CALIFORNIA COURT DECISIONS

FEHA Statute of Limitations Is Tolled Pending The Outcome Of An EEOC Investigation. In *Mitchell v. State Dept. of Public Health*, 1 Cal. App. 5th 1000 (2016), the plaintiff resigned from his job in September 2011 and shortly thereafter filed an original complaint for race discrimination with the United States Equal Employment Opportunity Commission ("EEOC") against his former employer, the State Department of Public Health (the "Department"). Pursuant to a work sharing agreement between the Department of Fair Employment and Housing ("DFEH") and EEOC, the EEOC automatically lodged a copy of the complaint with DFEH, which issued a right-to-sue notice in September 2011 stating that it deferred investigation of the charges to the EEOC. The EEOC issued its letter of determination in September 2013 and plaintiff subsequently filed his civil FEHA action in July 2014. The trial court dismissed the complaint as untimely. The California Court of Appeal reversed, reasoning that the DFEH's September 2011 right-to-sue letter stated that the one-year period to file a civil complaint would be tolled during the pendency of the EEOC's investigation and finding that this statement was enough to support the initial application of equitable tolling.

Proof Of An Employer's Animus Is Not Required In A Disability Discrimination Action. In *Wallace v. County of Stanislaus*, 245 Cal. App. 4th 109 (2016), the plaintiff, a deputy sheriff, injured his knee and was placed on leave. He alternated between taking leave and working with various limitations and was eventually placed on an unpaid leave of absence when his employer determined that with his restrictions he could not safely perform the essential functions of his position. When, more than one year later, he finally returned to full duty as a patrol officer, he sued for disability discrimination, seeking damages arising from the delays in reinstating him. At trial, the jury determined that there was no discriminatory intent and therefore found in favor of County.

The California Court of Appeal held that the jury was not properly instructed because animus is not relevant in disability discrimination claims, which fundamentally differ from other types of discrimination claims. The Court further explained that the traditional *McDonnell Douglas* burden-shifting test does not apply in disability discrimination cases where there is direct evidence of the employer's motivation. Relying on the California Supreme Court's ruling in *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2003), the Court concluded that an employer treats an employee differently "because of" a disability when the disability is a substantial motivating factor in the employer's decision to subject the employee to an adverse employment action. The Court also held that the County's reasonable—but mistaken—good-faith belief that Wallace was not capable of safely performing the job's essential functions was not relevant because the Legislature intended to "provide protection when an individual is *erroneously or mistakenly believed* to have any physical or mental condition that limits a major life activity." Thus, the Court held that the County was liable, as a matter of law, for disability discrimination, and remanded the case for further proceedings solely on the issue of damages.

California Court Of Appeal Suggests That Employers Must Accommodate Employees' Association With Disabled Individuals. In *Castro-Ramirez v. Dependable Highway Express, Inc.,* 2 Cal. App. 5th 1028 (2016), the plaintiff had requested schedule accommodations from his employer, Dependable Highways Express, Inc. ("DHE"), which would enable him to administer dialysis to his disabled son on a daily basis. DHE accommodated Castro-Ramirez's request as often as it could for 3 years, but in early 2013, a new supervisor assigned him later shifts that interfered with his ability to administer dialysis to his son in the evenings. After plaintiff refused to work an assigned late shift, he was fired. He sued DHE for disability discrimination, among other claims. The trial court granted DHE's motion for summary judgment, and plaintiff appealed. In evaluating plaintiff's claim, the Court of Appeal held that (1) an employee's association with a disabled person should be treated as though it were itself a disability and that (2) under the FEHA, employers are required to provide an employee who is associated with a disabled person with a reasonable accommodation that would allow the employee to perform the essential functions of his or her job.

DHE petitioned for a rehearing, and the Court of Appeal issued a new decision denying summary adjudication for several claims, including disability discrimination. As an initial matter, the Court stated that since plaintiff abandoned his reasonable accommodation cause of action, it would not decide whether the FEHA imposes a separate duty to reasonably accommodate employees associated with a disabled person. Despite the Court's retreat from its initial holding, it found that there was evidence that plaintiff's association with his disabled son was a substantial motivating factor for his termination and that DHE's stated reason for terminating him was pretext. The Court further determined that associational disability discrimination may occur when an employer acts proactively to avoid the nuisance of an employee's association with a disabled individual. Thus, the Court held that there was a triable issue of fact as to the associational disability discrimination claim because a jury could reasonably infer that plaintiff's supervisor wanted to avoid the inconvenience and distraction of plaintiff's need to care for his disabled son and engineered a situation wherein plaintiff would refuse to work and could be terminated.

CALIFORNIA AGENCY ACTIONS

Amended FEHA Regulations. Effective April 1, 2016, California's amended regulations regarding the Fair Employment and Housing Act ("FEHA") went into effect. Highlights include the following:

- Mandatory Written Policy. Covered employers (those with five employees) must have detailed harassment, discrimination, and retaliation prevention policies. Compliant policies must: (a) list all FEHA protected categories; (b) inform employees about avenues for complaint other than to their direct supervisor; (c)

instruct supervisors to report all complaints to a company designated representative; (d) provide for a fair, complete, and timely investigation; (e) provide for a confidential process, to the extent possible; (f) inform employees that remedial action will be taken if misconduct is found; (g) make clear that employees will not be retaliated against for making a complaint or participating in any investigation; (h) and inform employees that their supervisors, co-workers, and third-parties are prohibited from illegal conduct under the FEHA. Employers must distribute their policies to all current and future employees and can do so via a number of avenues, including: hard copy and written acknowledgment; email with an acknowledgment return form; posting to a company intranet with a tracking system for acknowledgment of receipt; and/or discussing upon hire or at orientation. Moreover, if more than 10 percent of employees in a given location primarily speak a language other than English, then the policy must also be translated to those languages.

- New Definitions. The amended regulations include several new terms regarding gender and gender discrimination, including: gender expression (a person's gender-related appearance or behavior, whether or not stereotypically associated with their sex at birth); gender identity (a person's identification as a male, female, a gender different from the person's sex at birth, or transgender); sex (includes, but is not limited to, pregnancy, childbirth, breastfeeding, and any related medical conditions, and gender identity and expression); sex stereotype (an assumption about a person's appearance or behavior, or about an individual's ability or inability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual's sex); and transgender (a person whose gender identity differs from their sex at birth. A transgendered person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth, and may or may not identify as transsexual).

- Failure to Prevent Discrimination. The amended regulations codify existing precedent that there is no standalone private cause of action for failure to take all reasonable steps necessary to prevent discrimination and harassment under Cal. Gov. Code § 12940(k). Accordingly, in order for an employee to prevail on a failure to prevent claim, they also must prevail on their underlying discrimination, harassment, or retaliation claims. Notwithstanding, the DFEH may still seek nonmonetary remedies for violation of 12940(k), regardless of whether it prevails on underlying claims for discrimination, harassment, or retaliation.

- Training and Recordkeeping. Employers with 50 or more employees already were required to provide compliant training to supervisors. Under the amended regulations, such training also must cover, among other things: (a) the elements

of "abusive conduct" (conduct undertaken with malice that a reasonable person would find hostile or abusive and that is not related to an employer's legitimate business interests); (b) the effects of abusive conduct on the abuser's victim and others in the workplace, including on their productivity and morale; (c) a supervisor's affirmative obligation to report unlawful conduct of which they become aware; and (d) the elements for a co-worker's individual liability for harassment.

- For web-based training, a "qualified" expert (such as a lawyer or human resources professional) must be available to answer trainee questions within two days of the training. Moreover, employers must retain all sexual harassment training materials for two years, including a list of attendees, the provider's name(s), the date of the training, the sign-in sheet, any certificates of attendance or completion, and any course materials, such as quizzes and written Q&A's (including those submitted in connection with a webinar).

- Pregnancy Disability. Under the new regulations, covered employers must post the revised Pregnancy Disability Leave notice (available on the DFEH website here) in a conspicuous location. In addition, any employer policy that covers reasonable accommodation, temporary disability leaves, and the like, must include a description of pregnancy disability leave in any versions published after April 1, 2016. As with mandatory harassment, discrimination, and retaliation prevention policies, such policy must be translated whenever more than 10 percent of the workplace in any location primarily speaks a language other than English. The amended regulations also clarify that the pregnancy leave entitlement is four months per pregnancy (and not per year), which need not be taken continuously.

- Support Animals. The new regulations clarify that access to a support animal may be a reasonable accommodation, based on an individualized analysis reached though the interactive process. The new regulations also define "support animal" as "one that provides emotional, cognitive, or other similar support to a person with a disability, including but not limited to, traumatic brain injuries or mental disabilities, such as major depression." Further, employers no longer may require that support animals be "trained to provide assistance for the employee's disability."

WAGE AND HOUR LAW

FEDERAL COURT DECISIONS

DOL's Rule Increasing Minimum Salary To Meet White Collar Exemption To $47,892 Preliminarily Enjoined. Under the FLSA, minimum wage and overtime requirements do not apply to any employee employed in a bona fide executive, administrative, or professional capacity, which is known as the "white collar" exemption. The DOL previously issued regulations requiring, among other things, that an employee must meet a certain minimum salary threshold to qualify for the exemption. In *State of Nevada et al. v. U.S. Dep't of Labor et al.*, Case No. 4:16-CV-00731 (E.D. Tex., November 22, 2016), several states challenged a new DOL regulation that would have increased the minimum salary threshold from $23,660 to $47,892, effective December 1, 2016. The new FLSA regulations also would have increased the minimum annual salary for "highly compensated employees," from $100,000 to $134,000, and would have increased both salary thresholds every 3 years beginning in January 2020.

The U.S. District Court for the Eastern District of Texas preliminarily enjoined the new rule, reasoning that the FLSA clearly and unambiguously exempts workers employed in an executive, administrative, or professional capacity. Thus, Congress defined the exemption with regard to the duties performed by the workers, not their salary level. Notably, there may still be a dispute over whether the higher "highly compensated employees" threshold was enjoined because the District Court did not explicitly address it in its order, even though the language of the order is broad enough to cover it as well.

The DOL has said it will appeal the decision, but the incoming Trump administration may elect to drop the appeal before it is decided.

Ninth Circuit Upholds DOL's Rule Requiring Tip Pools Be Composed Exclusively of Customarily Tipped Employees. In *Oregon Restaurant and Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2016), the Ninth Circuit upheld the validity of a revised DOL regulation that prohibited tip pools unless the pools were comprised exclusively of regularly and customarily tipped employees (such as waiters). Businesses that do not take a "tip credit" under Section 203(m) of the FLSA challenged the rule.

A "tip credit" is taken when an employer partially fulfills its hourly minimum wage obligation to a tipped employee with the employee's tips. In that situation, Section 203(m) requires employers to let employees keep all of their tips, unless the employees participate in a "valid tip pool," which is limited to employees that are "customarily and regularly" tipped. In a previous case, *Cumbie v. Woody Woo*, the Ninth Circuit held that when employers do not take tip credit (i.e., they pay all of their employees at least minimum wage in cash wages), Section 203(m) clearly allows tip pools to include employees (such as cooks) that are not customarily and regularly tipped.

Following *Cumbie*, the DOL revised its regulations to state that tips are the property of the employee whether or not the employer has taken a tip credit, and employers are always prohibited from including non-customarily tipped employees in tip pools. Despite *Cumbie*'s holding, the Ninth Circuit affirmed the DOL's new interpretation of Section 203(m) because the statute does not affirmatively allow tip pools to include non-tipped employees. Thus, the DOL was free to interpret that statute as prohibiting such a practice.

A sizeable minority of the Ninth Circuit criticized the *Oregon Restaurant* decision in a dissent from *en banc* review because the decision arguably creates a circuit split on the proper way to analyze a regulation prohibiting a practice when a statute is silent on the issue. The employers have petitioned for Supreme Court review.

Ninth Circuit Holds That Cash In Lieu Of Benefits Must Be Included In Calculation of Regular Rate Of Pay In Overtime Calculations. In *Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016), police officers sued for unpaid overtime under the FLSA. The city allowed them to accept cash in lieu of medical benefits if they had alternate medical coverage. Those "in lieu of benefits" averaged more than $1,000 per month. The city did not include that amount when calculating the officers' regular rate of pay for purposes of calculating overtime payments, which must equal one and one-half times an employee's regular rate of pay.

The officers claimed that the "in lieu of benefits" increased their regular rate of pay. Section 207(e)(2) of the FLSA excludes from the regular rate of pay "payments to an employee which are not made as compensation for his hours of employment." The city argued that exception applied because the amount of "in lieu of benefits" paid to the officers was not dependent on the number of hours worked by the officers. Although it was a "close question," the Ninth Circuit found that such payments must be included in the regular rate of pay calculation because DOL regulations interpreting the statute indicated that any payment considered "compensation for work" must be included. It is irrelevant whether that compensation fluctuates with hours worked or not.

Ninth Circuit Holds That Neutral Rounding Policies Are Valid Even If Individual Employees Are Paid For Less Time Than They Worked. In *Corbin v. Time Warner Entm't-Advace/Newhouse P'ship*, 821 F.3d 1069 (9th Cir. 2016), a call center employee claimed his employer violated the federal rounding regulation by rounding his time entries to the nearest quarter hour because it undercompensated him by $15.02 over 13 months. Under the federal rounding regulation, 29 C.F.R. 785.48(b), employers may round employee time so long as the rounding policy is facially neutral and as applied. In *Corbin*, the plaintiff argued that if any employee loses any compensation during the course of any pay period, or set of periods analyzed, the policy violates the rounding policy. The Ninth Circuit soundly rejected that argument because such an interpretation

would undermine the entire purpose of the rounding regulation and would force employers to "unround" time entries every pay period. As the policy was applied mechanically and did not benefit the employer or its employees on average, it was acceptable.

Second Circuit Holds That Concessionaires Operating Within Ballparks Qualify For Overtime Exemption Applicable To "Amusement Or Recreational Establishments." In *Hill v. Del. N. Cos. Sportservice*, 838 F.3d 281 (2d Cir. 2016), the Second Circuit had to interpret the breadth of the FLSA's overtime exemption applicable to seasonal "amusement or recreational establishments." In *Hill*, Oriole Park concession stand workers sued the owner of the stands for unpaid overtime under the FLSA. The owner defended on the grounds that it met the amusement or recreational exemption. Citing the legislative history, dictionary definitions, and DOL interpretations, the Second Circuit agreed with the owners because concessions almost exclusively serving patrons at the baseball park could be considered amusing or recreational in nature. The concessions also met the seasonal requirement to satisfy the exemption, so the workers were not entitled to overtime.

CALIFORNIA COURT DECISIONS

California Supreme Court Holds That On-Duty And On-Call Rest Periods Violate Rest Requirements. In *Augustus v. AMB Security Servs., Inc.*, S224853 (Cal. Dec. 22, 2016), security guards brought a class action claiming they were denied mandatory rest periods because their employer required them to be "on-call" during breaks. The guards were required to keep their radio and pagers on, remain vigilant, and respond to any security situations that arose. The class won a $90 million verdict. After the Court of Appeal vacated the judgment, the Supreme Court examined the relevant Wage Order and Labor Code Section 226.7, the latter of which states that "no employer shall require any employee to work during any meal or rest period mandated" by a Wage Order. The Court interpreted that to mean that employers must relieve employees of all duties and relinquish control over how employees spend their time during breaks. Requiring an employee to be on call during breaks could not practically satisfy that requirement.

The Court pointed out that employers may apply to the DLSE for an exemption if it would not materially affect the welfare or comfort of employees and applying the rule would work an undue hardship on the employee. AMB had been granted such exemptions in the past, but they had expired. If breaks are occasionally interrupted, employers may also pay a wage premium or provide an additional break. Those options cannot be use to "pervasively" interrupt scheduled rest periods. Finally, certain Wage Orders, including Wage Order 5, specifically permit on-call breaks.

***California Supreme Court Holds That Employees Covered By Wage Orders With Seating Requirements Are Entitled To A Seat During Work If Reasonably Feasible*.** In *Kilby v. CVS Pharmacy, Inc.*, 63 Cal. 4th 1 (Cal. April 4, 2016), the California Supreme Court interpreted the seating requirements in the Wage Orders covering the mercantile industry and professional, technical, clerical, mechanical, and similar occupations. The Orders state: (1) "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats," and (2) "[w]hen employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties."

The plaintiffs were CVS customer service representatives and JPMorgan Chase bank tellers that performed various tasks throughout the day, some of which could arguably be performed while seated and some which arguably required standing. They brought class actions for violations of the Wage Orders for failure to provide required seats. Defendants argued that all of the tasks performed by an employee must be holistically considered to determine whether an employee had a "sitting" or "standing" job. A job with more standing tasks would be a standing job and no seat would be required while work was performed. Defendants further argued that employees could be covered by only one seating requirement throughout the day, e.g., they either were entitled to a seat all day or were allowed to use a seat only during lulls at work. Plaintiffs argued that a seat was required when any single task could be performed seated.

The Court rejected both positions as extreme and adopted a test based on the subset of tasks performed at each work location, such as those performed at the cash register or teller window. Under the test, employers must examine all the tasks performed at a location and provide a seat if it is reasonably feasible to do so without interfering with the standing tasks performed at that location. Further, the Court clarified that the two seating provisions in the Wage Orders were not mutually exclusive, and an employee could be covered by different provisions during different times of the day. Thus, an employee may be entitled to a seat at one location, but not at another. At that second location, the employee would be entitled to a seat in reasonable proximity to the work area during lulls in operation.

The Court further clarified how the standard should be applied:

- When determining whether the nature of the tasks performed at a certain location permits the use of seats, employers must examine the tasks actually performed or expected to be performed. Abstract characterizations, job titles, and descriptions are irrelevant. Tasks performed more frequently or for greater duration are given more weight.

- Whether the work reasonably permits sitting at a location is based on the totality of the circumstances. Thus, the feasibility of providing seats may be considered. Examples given include whether a seat would unduly interfere with other standing tasks at the location, whether seated work would impact the quality of the work or overall job performance, and whether the physical layout of the workplace allows for sitting.

- Whether or not sitting impacts job performance must be measured objectively; it cannot be based merely on an employer's preference or business judgment.

- Employers may not unreasonably design workspaces to further a preference for standing.

- Individual employee characteristics are irrelevant to the inquiry. The inquiry turns solely on the nature of the work performed.

- If the work reasonably permits seated work, the employer bears the burden of showing that no suitable seating exists.

California Supreme Court Holds That Employees That Retire Are Entitled To Final Wages At Same Time As Employees That "Quit." In *McLean v. State of California*, 1 Cal. 5th 615 (Aug. 18, 2016), the California Supreme Court determined that sections 202 and 203 of the Labor Code governing prompt payment of final wages for employees who "quit" also apply to employees who retire because the word "quit" is broad enough to encompass a voluntary departure from a particular employment, whatever its motivation.

California Supreme Court To Decide The Proper Method For Calculating The Rate Of Overtime Pay When An Hourly Employee Also Receives A Flat Sum Bonus Each Pay Period. In *Alvarado v. Dart Container Corporation of California*, 243 Cal. App. 4th 1200 (Jan. 14, 2016), the Court of Appeal held that a California employer may use the federal formula for incorporating flat bonuses paid each pay period into overtime calculations, which includes overtime hours in the calculation of the regular rate of pay, even though the California Division of Labor Standards Enforcement Manual calls for a different formula. The Court held there was no binding California law covering the calculation in that situation, so following federal law was permissible. The California Supreme Court granted the petition for review and the case is now fully briefed.

Employers May Require Employees To Repay Educational Expenses. In *USS-POSCO Industries v. Case,* 244 Cal. App. 4th 197 (2016), the Court of Appeal held that an employee's agreement to reimburse his employer, upon the employee's termination or resignation, for the expense of a voluntary, employer-sponsored training program

was lawful and enforceable. The plaintiff agreed in writing that if he quit his job within 30 months of completing the program, he would reimburse his employer a prorated portion of program costs. Two months after completing the program, the plaintiff went to work for another employer. Among other things, the Court held that requiring reimbursement for the optional training program for quitting early (1) was not an impermissible attempt to transfer business expenses to the employee; (2) was not forced patronage; (3) was not an invalid restraint on employment; (4) did not violate the NLRA because it was not inconsistent with the operative collective bargaining agreement; and (5) did not violate Labor Code sections prohibiting recouping, withholding, or secretly paying less than agreed wages.

***Multiple Rest Breaks Cannot Be Combined Unless It Is Infeasible To Give Separate Breaks Near Middle of Work Periods And Employee Welfare Is Not Unduly Affected*.** In *Rodriguez v. E.M.E., Inc*., 246 Cal. App. 4th 1027 (April 22, 2016), the Court of Appeal analyzed whether an employer could combine two mandatory 10-minute rest periods into a single 20-minute rest period. The applicable Wage Order states that rest periods should fall in the middle of work periods "insofar as practicable." The Court determined that work periods are delineated by meal breaks, so the preferred schedule during an eight hour shift includes one rest break before and after the meal break. Further, "insofar as practicable" means that departing from that schedule is permissible only when (1) it will not unduly affect employee welfare and (2) it is tailored to alleviate a material burden that would be imposed on the employer by the preferred schedule. In *Rodriguez*, the employer provided evidence that showed employees preferred a combined break because it allowed them more time to cook and relax, and it alleviated a burden on the employer because it took ten minutes to shut down and restart the production line for each break. Although the employee provided contrary evidence, which precluded summary judgment, the Court determined that the facts established by the employer—if true would allow combining breaks. The Court emphasized, however, that employers must show that the alternate schedule is more than simply advantageous to the employer.

Eligibility For Amusement Exception To Overtime Requirement Turns On Nature of Employer's Revenue Producing Activities, Not The Nature Of An Employee's Work. In *Morales v. 22nd Dist. Agric. Ass 'n*, 1 Cal. App. 5th 504 (July 13, 2016), seasonal employees sued the California agency that maintains the Del Mar Fairgrounds and Horsepark for unpaid overtime. Under the FLSA's amusement exemption, businesses are exempt from paying overtime if they qualify as an amusement or recreational establishment and meet either the duration test (relating to months of operation) or the receipts test (relating to revenue generated during the high season). The Court rejected plaintiff's position that the nature of the employee's work determined whether an establishment was an amusement or recreational establishment. It held, instead, that the inquiry turns on the nature of the employer's revenue producing activities.

Wage Statements Do Not Need To Include The Monetary Value of Unused Vacation Time. In *Soto v. Motel 6 Operating, L.P.*, 4 Cal. App. 5th 385 (Oct. 20, 2016), the Court of Appeal held that unpaid vacation time is not a wage for purposes of California's wage statement statute, so the monetary value of the vacation time does not need to be included on wage statements until a payment is due at the termination of the employment relationship.

NEW YORK COURT DECISIONS

New York's $15 Minimum Wage For Fast Food Workers Employed By Larger Chains Held To Be Not Unconstitutional. In 2015, New York's Commissioner of Labor issued a rule requiring fast food establishments with a least 30 establishments nationally to increase their workers' minimum wage to $15 per hour by the end of 2018 in New York City and the end of 2021 in the rest of the state. In *Matter of National Rest. Assn. v. Commissioner of Labor*, 141 A.D. 3d 185 (N.Y. App. Div., June 9, 2016), the Appellate Division, Third Division, rejected several challenges to the new rule, including a challenge based on the dormant Commerce Clause of the United States Constitution. The Court rejected that challenge because the rule did not favor restaurant chains with locations solely in New York over those with locations anywhere in the country – it applied to New York locations of any chain with at least 30 establishments anywhere. There was also no suggestion that the rule's effect on interstate commerce would outweigh its local benefits.

ENFORCEMENT OF ARBITRATION AGREEMENTS

FEDERAL COURT DECISIONS

The Ninth Circuit Holds That Class Action Waivers In Mandatory Employment Arbitration Agreements Violate The NLRA. In *Morris v. Ernst & Young LLP,* 834 F.3d 975 (9th Cir. 2016), the employer sought to enforce a mandatory arbitration agreement requiring that claims be resolved on an individual basis in "separate proceedings." This provision effectively prohibited class and collective actions. The employer argued that the Federal Arbitration Act ("FAA") governed the issue and required enforcement of the agreement under the FAA's "savings clause." The Ninth Circuit disagreed in a 2-1 panel decision. In particular, the Ninth Circuit held that, if a provision in an arbitration agreement is "illegal," it need not be enforced by the FAA. The employer's requirement of "separate proceedings" was "illegal" because the right to engage in "concerted activity" under the National Labor Relations Act ("NLRA") is a long-standing and fundamental substantive right. Although procedural rights can be waived, substantive rights cannot be waived. Therefore, because the agreement purported to waive substantive rights (by prohibiting employees from pursuing "legal claims together"), the agreement violated the NLRA and the FAA did not mandate its enforcement.

Previously, the only appellate court to adopt the NLRB's position (first announced in the NLRB decision of *D.R. Horton*) was the Seventh Circuit in *Lewis v. Epic-Systems Corp.*, while other Circuit Courts (including the Second Circuit) had rejected that position. The *Morris* decision further splits the circuit courts on this issue. Notably, the Ninth Circuit's decision is contrary to the California Supreme Court's ruling on the same issue in *Iskanian v. CLS Trans. Los Angeles, LLC*, 59 Cal. 4th 348 (2014) (finding that class action waivers are not invalid under the NLRA).

CALIFORNIA COURT DECISIONS

California Supreme Court Upholds Multiple Elements Of Typical Employment Arbitration Agreements. In *Baltazar v. Forever 21, Inc.,* 62 Cal. 4th 1237 (2016), the California Supreme Court agreed that the employer's arbitration agreement was enforceable despite the plaintiff's contention that it was both procedurally and substantively unconscionable. Plaintiff asserted that the arbitration agreement was procedurally unconscionable because it was required as a condition of employment and it stated that any arbitration would be governed by the arbitral agency's employment rules (without actually attaching those rules). The Supreme Court was not particularly bothered by either issue, noting that the plaintiff was not "surprised" that she had signed an arbitration agreement and she failed to identify any provision in the arbitral agency's arbitration rules which purportedly were problematic. [Notably, though, the Supreme Court did not state one way or another whether the arbitration rules must be attached to the arbitration agreement or whether incorporating them by reference (as Forever 21 did here) is enough to avoid a finding of procedural unconscionability.]

With respect to substantive unconscionability, a clause in an arbitration agreement providing that the parties are authorized to seek preliminary injunctive relief in court (even if a claim proceeds in arbitration) merely restates existing law and does not render the agreement substantively unconscionable. Namely, California Code of Civil Procedure Section 1281.8 explicitly refers to the parties' right to seek preliminary injunctive relief and employers are allowed to reference those statutory rights in arbitration agreements (even if employers are more likely than employees to use that recourse). The Court also rejected the plaintiff's argument that the arbitration agreement was unfairly one-sided because, although the agreement expressly stated that all employment claims were covered, it listed as examples only claims that would be brought by employees. The Court explained that using language such as "including but not limited to," means what it says and does not cast doubt on the comprehensive reach of an arbitration agreement. Lastly, the Court rejected the plaintiff's argument that a provision in the agreement requiring both parties to take "all necessary steps" during the arbitration to protect the company's confidential information from disclosure made the agreement unduly one-sided. Thus, the Court concluded that the arbitration agreement was not unconscionable and was enforceable.

The Arbitrator Decides Whether Class Arbitration Is Permissible, Even Where The Arbitration Agreement Is Silent Or Ambiguous On Whom (The Court Or Arbitrator) Decides That Issue. In *Sandquist v. Lebo Automotive Inc.,* 1 Cal. 5th 233 (2016), the California Supreme Court held that "no universal rule" exists regarding who (the court or the arbitrator) should decide whether class-wide arbitration is permissible under an arbitration agreement, and that the issue must be decided on a case-by-case basis. However, based on the language in the arbitration agreement before the Supreme Court (which stated very broadly that "any claim, dispute, and/or controversy" arising from the employment relationship would be submitted to and determined exclusively by binding arbitration, and otherwise was silent on whether the court or arbitrator would decide the class arbitration question) necessarily meant that the question was left for the arbitrator to decide. The Supreme Court found that, had the employer wanted a different result, it easily could have said so in the agreement. The Supreme Court's analysis departs from a long line of federal court decisions holding that the permissibility of class-wide arbitration is a threshold and "gateway" issue to be determined by the court, not the arbitrator.

California Court of Appeal Holds That Arbitration Provision In Employee Handbook Was Not Enforceable. In *Esparza v. Sand & Sea, Inc.,* 2 Cal. App. 5th 781 (2016), the California Court of Appeal held that an arbitration provision contained in an employee handbook was not enforceable. A welcome letter accompanying the handbook expressly stated: "this handbook is not intended to be a contract (express or implied), nor is it intended to otherwise create any legally enforceable obligations on the part of the Company or its employees." The acknowledgement of receipt signed by the employee further stated that the handbook "is designed to provide information to employees… regarding various policies; practices and procedures that apply to them including our Arbitration Agreement." Because the welcome letter expressly denied that the handbook created any binding obligation and the acknowledgement suggested the handbook was merely informational, the Court held that the defendant failed to meet its burden of showing that the parties actually entered into an agreement to arbitrate.

PAGA Revisited: An Employer May Not Compel Arbitration To Determine Whether An Employee Is An "Aggrieved Employee" Under PAGA. In *Perez v. U-Haul Co. of California*, 3 Cal. App. 5th 408 (2016), the employer sought to compel arbitration as to whether plaintiffs were "aggrieved employees" under the Private Attorneys' General Act ("PAGA"). According to the employer, standing under PAGA required the plaintiffs to show they were "aggrieved employees," which further required them to show that the employer allegedly committed one or more Labor Code violations against them. That issue should be arbitrated, argued the employer, with the "representative portion" of the PAGA claims (including "the number, scope and identities of other 'aggrieved employees'…and the amount of representative penalties") reserved for the court *only if* an arbitrator found the plaintiffs to be "aggrieved employees."

The Court of Appeal disagreed. Given that the employer's own arbitration agreement attempted to prohibit representative claims, the employer could not now be heard to argue that the issue of whether plaintiffs had standing to bring a representative action under PAGA had to be arbitrated. The Court further held that in *Iskanian, supra*, it specifically prohibits the enforcement of an arbitration provision requiring an employee to "individually" arbitrate whether she qualifies as an "aggrieved employee" under PAGA, and then (if successful) litigate the remainder of the "representative" action in court. According to the Court of Appeal, to split the claim into "individual" and "representative" components would undermine the very purpose of PAGA and interfere with the state's interest in enforcing the Labor Code.

Another Court Holds That Employees Cannot Be Compelled To Arbitrate Aspects Of Their PAGA Claims. Like in *Perez, supra*, the defendant in *Hernandez v. Ross Stores, Inc.*, Case No. E064026 (Cal. Ct. App. Dec. 27, 2016) sought to compel the employee to arbitrate the issue of whether she was an "aggrieved employee" under PAGA, while the representative portion of the PAGA claim remained in court. The employee argued that the issue was not arbitrable under *Iskanian* and the trial court agreed. The Court of Appeal held that there was no authority supporting the defendant's argument that whether an employee is "aggrieved" under PAGA is arbitrable. According to the Court, in a PAGA action, there is no dispute between the employer and employee but, instead, the dispute is between the employer and the employee acting on behalf of the state. Therefore, requiring an employee to litigate a PAGA claim in multiple forums would thwart the public policy of PAGA to "empower employees to enforce the Labor Code" on behalf of the state.

EMPLOYMENT CLASS ACTION LAW

FEDERAL COURT DECISIONS

The United States Supreme Court Finds That The Use Of Representative Evidence Does Not Preclude Class Certification. In *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), workers at a Tyson pork processing plant filed a class action to recover unpaid overtime for time spent donning and doffing protective gear. Tyson did not keep records of the donning and doffing time. Therefore, to prove the amount of uncompensated time, the class members used "representative evidence" based on an expert's study of how long, on average, various donning and doffing activities took. A jury awarded the workers $2.9 million in overtime damages based on that expert's study.

Because different jobs at the plant required different types and amounts of gear, Tyson argued that it was unfair to let all class members rely on the same average amount of donning and doffing time to prove their overtime claims. According to Tyson, the Supreme Court already had rejected this type of representative evidence in *Walmart v.*

Dukes (which had rejected the concept of "trial by formula" to prove sex discrimination across all of Walmart's stores). Tyson, therefore, argued that the class never should have been certified in the first place.

The Supreme Court rejected any categorical rule against representative evidence (such as statistical sampling) in class actions. Instead, the Supreme Court held that, like all evidence, whether representative evidence is permissible turns on the degree to which the evidence is reliable in proving or disproving the elements of the cause of action. The Court explained that in many cases (especially where employers fail to keep relevant payroll records), a representative sample is the only practicable way of collecting and presenting relevant data establishing a defendant's liability. Here, Tyson had failed to object to the reliability of the expert's study and, as such, failed to prove that the data was unreliable or that any inferences made from the data would not be just or reasonable in determining liability.

The Court also rejected Tyson's reliance on *Walmart v. Dukes* because the plaintiffs in that case had not proved the threshold issue that there was a common policy of discrimination. Therefore, having a few plaintiffs prove their own individual discrimination claims and applying that result to the rest of the proposed class who worked at different stores for different managers under different work policies necessarily violated Walmart's rights to litigate individual defenses. By contrast, because Tyson's workers worked at the same facility, performed similar work, and were paid under the same policies, the experiences of a representative sample of workers was probative as to the experiences of other workers. The persuasiveness of that evidence, therefore, was up to the jury. The Supreme Court remanded to the District Court whether there was a way to distribute the overtime award only to injured class members.

A Settlement Offer, Without More, Does Not Moot Claims Brought By Named Plaintiffs In Putative Class Actions. In *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the named plaintiff was one of over 100,000 recipients of texts sent by a third party advertising agency retained by the Navy. The named plaintiff did not consent to the receipt of the text message and filed a putative nationwide class action against the advertising agency for allegedly violating the Telephone Consumer Protection Act ("TCPA"). Defendant made both a settlement offer and an offer of judgment to the named plaintiff that would have given him full relief on his TCPA claim. After the named plaintiff rejected both offers, the defendant filed a motion to dismiss arguing that the full offer of settlement meant that there was no "case or controversy" for the District Court to decide. The District Court disagreed with the defendant and the Ninth Circuit affirmed that decision.

The United States Supreme Court agreed with the Ninth Circuit. As the Supreme Court explained, an unaccepted settlement offer is a "legal nullity, with no legal effect." In

other words, the recipient's mere rejection of an offer "leaves the matter as if no offer had ever been made." For that reason, the plaintiff's individual and class action claims necessarily were not moot by the mere fact that a settlement offer was made. The Supreme Court left open the possibility that a named plaintiff's claims might be moot if the full amount of his individual claim were deposited into a bank account bearing his name or with the court. But see *Chen v. Allstate Ins. Co.*, 819 F.3d 1136 (9th Cir. 2016) [finding that money deposited into a court-controlled account was not sufficient to moot the case because the plaintiff had not received the funds (especially because the defendant conditioned release of the funds on certain terms) and that, even if the plaintiff's claims had been fully satisfied, the plaintiff still could seek class certification].

CALIFORNIA COURT DECISIONS

California Similarly Allows Statistical Sampling To Prove Class Liability and Damages. In *Lubin v. The Wackenhut Corp.*, 5 Cal. App. 5th 926 (2016), the California Court of Appeal reinstated a class of security guards who allegedly made meal and rest break claims, finding that the trial court incorrectly applied *Walmart v. Dukes* as banning statistical samples. Citing the U.S. Supreme Court's decision in *Tyson* (discussed above), the Court of Appeal upheld the use of statistical sampling to determine how many employees signed an unlawful meal period agreement over the course of nearly ten years (especially because the employer did not object to the reliability or accuracy of the information).

To Have Standing, A Plaintiff Must Allege Injury That Is Both "Concrete and Particularized." Spokeo operates a "people search engine" which aggregates a wide spectrum of databases to provide individual personal information to a variety of users, including prospective employers. In *Spokeo, Inc. v. Robins*, 136 S. Ct 1540 (2016), the plaintiff brought a putative class action because his Spokeo- generated profile contained inaccurate information which he believed violated the Fair Credit Reporting Act ("FCRA"). The Ninth Circuit initially held that the plaintiff had standing to sue because he had proven an injury in fact, namely, that the false information in the profile stating that the plaintiff was married and had children, a job, and a graduate degree was making it difficult for him to find a job. The United States Supreme Court, however, vacated and remanded the case, holding that the Ninth Circuit's standing analysis was incomplete.

Specifically, the injury in fact requirement under Article III of the Constitution requires a plaintiff to show that he suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." The Ninth Circuit had analyzed only whether the plaintiff's injury was particularized, but not whether it was "concrete." Concreteness requires that an injury be *de facto*, or that it actually exist, and "real"- not abstract. Therefore, according to the Supreme Court, a plaintiff cannot merely allege a bare procedural violation, divorced from any concrete

harm. The Court continued to note, however, that a "concrete" injury need not be tangible. The risk of real harm also can be "concrete," depending on what Congress deems to be harmful under any particular statutory scheme. Because the Ninth Circuit failed to fully appreciate the distinction between "concrete" and "particularized" harm, the case was remanded. [Note, though, that subsequent federal decisions applying *Spokeo* have found "concreteness," even when the plaintiff does not allege any actual damages.]

TRADITIONAL LABOR LAW

FEDERAL COURT DECISIONS

DOL's Persuader Rule Permanently Enjoined. In *National Federation of Independent Business v. Thomas E. Perez*, Case No. 5:15-CV-066 (N.D. Tex, Nov. 16, 2016), the U.S. District Court for the Northern District of Texas followed up on an earlier preliminary injunction order by permanently enjoining the Department of Labor's revised Persuader Rule. Under the persuader rule, any person who is pursuant to an "agreement or arrangement" with an employer undertakes to persuade employees to exercise or not exercise their right to organize and bargain collectively would be obligated to report specific information about such agreement or arrangement to the DOL. Historically, the DOL has exempted most legal work from these reporting requirements, provided that the attorneys avoided direct communication with their clients' rank and file employees and the client was free to accept or reject the attorney's advice. However, the DOL's revised persuader rule extends the reporting requirements to "indirect persuader activities" engaged in by attorneys.

Indirect persuader activities occur when a law firm advises a client how to persuade employees with respect to their representation and collective bargaining rights, such as advising managers on what communications to have with employees, drafting documents to be distributed to employees, or even providing a union avoidance seminar to an employer. The revised rule could have applied to attorney activities with little apparent connection with employees' collective bargaining rights, such as drafting an employer personnel policy if it is being adopted to influence employees with respect to their collective bargaining rights. The revised rule would have required employers and law firms to provide detailed information regarding their engagement agreements, compensation paid pursuant to such agreements, and the types of indirect persuader activities that will be provided.

The DOL has said it will appeal the injunction, but the Trump administration is expected to scuttle the appeal before it can be heard.

***Fifth Circuit Upholds NLRB's "Ambush" Election Rule*.** On April 14, 2015, the NLRB's new "ambush election rules" went into effect. Among other changes making it

easier to organize, the rules shorten the time between when an employer learns about an organization campaign and an election, thereby making it more difficult for the employer to respond to the campaign. The rules have sped up the election process: in 2014, the median number of days from petition to election was 38 days; in 2016 it was just 23 days—more than two weeks shorter. So far, the increased speed appears to be benefiting unions. In the three years preceding the rule change (2012-14), unions won 65.4% of elections. In 2016, they won 72.63% of elections. In *Associated Builders and Contractors of Texas v. NLRB*, No. 15-50497 (5th Cir. June 10, 2016), a group of employers sought to invalidate the new rules for violating the NLRA and Administrative Procedure Act. The Fifth Circuit disagreed because the employer's facial challenge could not meet the high standard required for invalidation, and upheld the rules.

NATIONAL LABOR RELATIONS BOARD DECISIONS

Claims Of Competitive Disadvantage Can Be Considered Claims Of Inability To Pay That Allow A Union To Audit An Employer's Financials. During labor negotiations, a union is entitled to audit certain employer financial information when the employer makes an "inability to pay" claim at the bargaining table. A claim of "inability to pay" occurs when the employer claims a certain level of wages or benefits could put its survival at stake. The union is entitled to the employer's financial information to verify the employer's claim. That audit right is not available when the employer claims only that the proposal would put it at a competitive disadvantage. In *Wayron, LLC,* 364 NLRB No. 60 (August 2, 2016), the employer claimed it could continue to pay established wages, but argued it needed to reduce wages to remain competitive, to avoid further layoffs (which had been necessitated by its inability to win bids), and to secure an extended line of credit. It also stated it was unprofitable. Since it claimed it could continue to pay the wages, the employer claimed it did not have to provide its financial records because it was not claiming an "inability to pay." The Board clarified that "magic words" are not determinative, and the totality of the circumstances determined whether the employer was claiming inability to pay or competitive disadvantage. Further, competitive disadvantage could lead to inability to pay. Under the circumstances, the Board determined that the employer was making a claim of inability to pay, which entitled the Union to audit it.

***NLRB Again Holds That Employer In Negotiations With Newly Certified Union Must Give Union Notice And Opportunity To Bargain Before Severely Disciplining Employee In Bargaining Unit*.** The NLRA prohibits employers from unilaterally changing the terms and conditions of employees represented by a union. In 2012 in *Alan Ritchey, Inc.*, the NLRB held that an employer is obligated to provide notice and opportunity to bargain before imposing certain types of discipline, including discharge, on employees represented by a union but not yet covered by a collective-bargaining agreement. That decision was overturned in 2014 in *NLRB v. Noel Canning* because

the appointments of two board members were constitutionally invalid. In *Total Security Management Illinois 1, LLC,* 364 NLRB No. 106 (August 26, 2016), the NLRB reinstated the rule established in *Alan Ritchey.* It held that serious discipline, such as demotion, suspension, or discharge, alters the terms and condition of employment, so employers are obligated to bargain before implementing such discipline on union employees even if a CBA is not yet in place. Less serious discipline, such as oral and written warnings, are also bargainable, but bargaining can be deferred until after the discipline is imposed.

***NLRB Returns To Old Position Allowing Bargaining Units With Both Solely And Jointly Employed Persons Without Employer Consent*.** Employees solely employed by their employer may work alongside other workers doing the same job, but who happen to be jointly employed by the same employer and a "supplier" employer, such as a temp agency. The NLRB once allowed those employees to organize in the same unit without employer consent if there was a sufficient unity of interest between the groups, but it did away with that rule in 2004 in its *Oakwood* decision. Reversing course again in *Miller & Anderson, Inc.*, 364 NLRB 39 (July 11, 2016), the NLRB eliminated the need for employer consent because a substantial portion of the modern workforce is employed temporarily, on a subcontract basis, or as contingent workers. According to the Board, making it more difficult to join solely and jointly employed workers in a single unit would have deleterious effects on the NLRA's charge that the Board assure employees the fullest freedom in exercising the rights guaranteed by the NLRA – including the right to choose whom to include and exclude from a union.

Miller follows the decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), in which the NLRB greatly expanded the scope of its joint employer test. It held that it would no longer require a joint employer to actually exercise the authority to control employees' terms and conditions of employment. Instead, if an entity possesses or reserves the authority to control the terms and conditions of employment of individuals, even if it does not exercise the authority, that entity is considered a joint employer. Thus, far more employers may be subject to collective bargaining obligations.

Work Rules Prohibiting "Insubordination Or Disrespectful Conduct", or "Boisterous or Disruptive Activity" Unlawful. In *Component Bar Products*, 364 NLRB No. 140 (2016), the NLRB found an employer violated the NLRA for maintaining work rules prohibiting "insubordination or other disrespectful conduction" and "boisterous or disruptive activity in the workplace," because such broadly worded rules could be "reasonably construed" by employees as prohibiting concerted activity. The dissent called for a repeal of the "reasonably construed" standard, and suggested such rules should be found unlawful only if an employer's justifications for the rules are outweighed by their potential adverse impact on Section 7 activity.

NLRB Rules That Prohibiting Workplace Recording Violates NLRA If Employees Could Interpret Ban As Restricting Protected Activity. In *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2016), Whole Foods prohibited its employees from recording inside of their stores in order to promote open discourse between employees. The NLRB has previously said that photography, audio, and video recording are protected by the NLRA if the employees are acting in concert for their mutual aid and protection, and no overriding employer interest is present. This gives them a right to, for example, record picket lines or to document unsafe work condition. A rule violates the NLRA if it chills employees' in the exercise of their protected rights, or if employees would reasonably construe it to prohibit protected activity. Since Whole Foods' no-recording policy prohibited all recording absent management approval, it was prohibited because employees could reasonably understand it to prohibit protected activity.

NLRB Distinguishes Prior Decisions To Hold That An Employer's Motivation For Hiring Replacement Workers During A Strike Could Evidence Unlawful Conduct. The right to strike is protected by the NLRA, and employers may not discourage membership in labor organizations by failing to rehire workers after a strike. An employer may, however, establish a legitimate and substantial justification for failing to rehire striking workers by showing that their positions have been filled permanently by replacements. An employer violates the Act, however, by hiring permanent replacements for an independent unlawful purpose. In 1964 in *Hot Shoppes, Inc.*, the Board held that an employer's motive for such replacements is immaterial, absent evidence of an independent unlawful purpose.

In *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13 (2016), the Board seemingly reversed course and held that an employer's motive alone could be used as evidence of an unlawful purpose. There, the employer admitted that it hired permanent replacements during a strike to teach the union a lesson and to avoid future strikes. The Board held that that motive was, in fact, relevant, and that it evidenced an unlawful purpose for the replacements.

NLRB Continues To Strike Down Social Media Rules That Could Reasonably Be Construed As Prohibiting Section 7 Activity. In *Chipotle Services LLC et al.*, 364 NLRB 72 (Aug. 18, 2016), the NLRB upheld, among other things, a finding that the following language included in Chipotle's social media policy was unlawful because an employee could reasonably construe it as restricting protected activity: "If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information. … You may not make disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors." With the exception of the prohibition on harassing or discriminatory remarks, the rule was overly broad and could be interpreted as prohibiting protected activity. For example, employees are allowed to make false statements under the NLRA as long as they are

not made with a malicious motive. Similarly, making derogatory remarks about an employer is protected, so prohibiting disparaging remarks was too broad. Additionally, the word "confidential" was not defined, so it would be easy for employees to construe it as restricting their rights. Given this decision and others, employers should continue to closely parse their social media rules to ensure compliance with NLRB decisions.

Prohibiting Dissemination Of Information Stored On Company Resources Could Chill Section 7 Activity. In *T-Mobile USA, Inc. et al*, 363 NLRB 171 (April 29, 2016), the NLRB held to be unlawful a work rule prohibiting users of the company's systems from allowing "non-approved individuals access to information or information resources, or any information transmitted by, received from, printed from, or stored in these resources, without prior written approval from an authorized TMobile representative." The Board upheld a determination that such a broadly written would reasonably be read by employees to prohibit them from disclosing information exchanged on the Respondent's email system which pertains to documents or discussions of wage and salary information, disciplinary actions, performance evaluations, and other subjects that are protected discussions among coworkers and, or their representatives under Section 7 of the Act.

NLRB Narrowly Construes Management-Rights Clause. In *Graymont PA, Inc. et al.*, 364 NLRB 37 (June 29, 2016), the Board found that an employer could not unilaterally update its work rules, absenteeism policy, and progressive discipline schedule despite the fact that its CBA stated the employer: "Retains the sole and exclusive rights to manage; to direct its employees; … to evaluate performance, … to discipline and discharge for just cause, to adopt and enforce rules and regulations and procedures; [and] to set and establish standards of performance for employees." The Board explained that employers can unilaterally alter union employees' terms and conditions of employment only when there is a "clear and unmistakable waiver" of the duty to bargain with respect to a particular employment term. In the Board's opinion, the language at issue was not specific to the terms sought to be amended by the employer, so the duty to bargain remained.

CALIFORNIA COURT DECISIONS

California Court of Appeal Holds That The NLRA Does Not Preempt Trespass Claims When Unions Conduct Protests Inside Stores. Under the NLRA, the NLRB has exclusive jurisdiction over disputes involving unfair labor practices, so state court actions addressing such practices are generally preempted. In *Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union*, 4 Cal. App. 5th 194 (Oct. 14, 2016), the Court of Appeal had to determine whether a superior court exceed its jurisdiction by permanently enjoining union protests (some described as "flash mobs") inside Walmart stores. The Court determined that the injunction focused on the issue of trespass rather than unfair labor practices. Thus, it fell under the "Local Interest" exception to

preemption, which applies when an issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that Congress cannot be inferred to have deprived states of the ability to regulate or sanction the conduct. Since the issue of trespass was unrelated to any balancing of employee rights under the NLRA, the injunction was upheld under the local interests exception.

EMPLOYMENT, SEPARATION AND SETTLEMENT AGREEMENTS

FEDERAL AGENCY ACTIONS

Federal agencies are increasingly examining the agreements private employers enter into with their employees to determine whether those agreements have language that could discourage employees from whistleblowing—from reporting to the agencies violations of the laws the agencies enforce. The Securities and Exchange Commission in particular stepped up their scrutiny of employee agreements lately, initiating several enforcement actions challenging standard provisions in severance agreements and issuing an alert in October 2016 entitled, "*Examining Whistleblower Rule Compliance.*" The Equal Employment Opportunity Commission, National Labor Relations Board, and Occupational Safety and Health Administration also have taken the position that certain customary confidentiality and non-disparagement provisions in employment, separation and severance agreements run counter to their missions.