LABOR AND EMPLOYMENT LAW UPDATE

2017: A Year In Review

1. New Laws

A. California

1. California Salary History Ban

AB 168, which enacted California Labor Code Section 432.3, is intended to promote equal pay, particularly between men and women. In passing AB 168, which went into effect on January 1, 2018, California joins a handful of states (Massachusetts, Delaware and Oregon) and municipalities (New York City, Philadelphia and San Francisco) which have enacted similar measures. In sum, AB 168 prohibits all California employers (including public employers) from

- Inquiring or seeking from job applicants, whether "orally or in writing, personally or through an agent," salary history information (the law does not define the term "salary history); and

- Relying on or considering salary history as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant.

In addition, the new law obligates an employer, "upon reasonable request," to provide "the pay scale for a position to an applicant applying for employment." (The law does not address whether an employer must establish a pay scale for all positions, and many employers do not have formal pay scales, particularly for higher level positions).

Notably, AB 168 does not prohibit an applicant from "voluntarily and without prompting," disclosing his or her salary history, nor does it prohibit an employer from relying upon such voluntarily disclosed information for purposes of determining the salary to offer. The law also does not apply to salary history information that is disclosable to the public pursuant to a federal or state law (e.g., the California Public Records Act, the federal Freedom of Information Act).

AB 168 does not specify any penalties. However, violating Labor Code Section 432.3 might subject an employer to equal pay or other civil claims.

2. *California Extends CFRA's Baby Bonding Leave Obligations to Smaller Employers*

SB 63, the New Parent Leave Act ("PLA"), which went into effect on January 1, 2018, extends baby-bonding leave with job protection rights and continuation of pre-existing health insurance to a broad segment of California employees. Employers with twenty (20) or more employees within 75 miles of a qualified employee's worksite must provide "12 weeks of [unpaid] parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement." A qualified employee is one with twelve (12) months of service to the employer and 1,250 hours worked in the previous year. This leave is unpaid but the employee is entitled to use any accrued vacation pay, sick pay or other paid time off during the period of parental leave. Moreover, during the protected period of the leave, the employer must continue its payments for employee health coverage under a group health plan.

It should be noted that this law does not change anything for businesses with 50 or more employees as they were already required to provide such baby-bonding leave under the California Family Rights Act ("CFRA") and the federal Family and Medical Leave Act ("FMLA"). PLA is estimated to impact 16 percent of California's labor force.

Employers should bear in mind that the PLA confers rights that are ***in addition to*** those already established by the Pregnancy Disability Leave ("PDL") provisions of the Fair Employment and Housing Act. The PDL provides employees with disabilities related to pregnancy, childbirth or related medical conditions with up to four (4) months of leave. The PLA will provide qualified employees with the opportunity to take an additional leave of absence for baby-bonding.

SB 63 also requires the California Department of Fair Employment and Housing ("DFEH") to set up a pilot mediation program, effective until January 1, 2020, that will permit employers who receive a right-to-sue notice to request that all parties participate in a DFEH mediation. If such a request is made, the employee cannot bring a civil action until the mediation is "complete." Unfortunately, a mediation will be deemed "complete" if an employee simply elects not to participate in mediation.

3. *New Training and Posting Requirements with Respect to LGBT Rights*

While existing law already requires employers with fifty (50) or more employees to provide at least two (2) hours of sexual harassment training to supervisors

every two years, SB 396 adds mandates that this training now address harassment based on gender identity, gender expression, and sexual orientation, including providing practical examples. Additionally, SB 396 also imposes a new posting obligation addressing the rights of transgender applicants and employees. https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/11/DFEH_E04P-ENG-2017Nov.pdf

4. ***All-Gender Restrooms***

AB 1732, which went into effect on March 1, 2017, requires all single-user toilet facilities in any business establishment, place of public accommodation, or government agency to be identified as all-gender (or gender-neutral) toilet facilities. The law does not require any specific wording on the signs as long as the wording used is gender neutral. For example, the sign may state "Restroom," "All-Gender Restroom," "Gender-Neutral," or "Unisex."

5. ***California Prohibits Employers from Voluntarily Cooperating With Federal Immigration Authorities***

Effective January 1, 2018, the Immigrant Worker Protection Act (AB 450) restricts public and private employers in California from admitting immigration inspectors to the workplace without a judicial warrant. It also requires employers to notify their employees before and after certain immigration inspections take place.

In conflict with the U.S. Immigration and Customs Enforcement's ("ICE") plans to increase enforcement actions under the Immigration Reform and Control Act ("IRCA"), which includes criminal and civil penalties for employers who knowingly employ unauthorized workers, the new California law seeks to protect foreign workers from unfair immigration-related practices, potentially causing problems for employers who must comply with federal and state laws.

Unless required by federal law, the Immigrant Worker Protection Act prohibits California employers from:

- Allowing immigration enforcement agents to enter any nonpublic areas of a workplace without a judicial warrant. However, an employer may permit an agent to enter a nonpublic area (where employees are not present) for purposes of verifying whether the agent has a judicial warrant.

- Allowing immigration enforcement agents to access, review, or obtain their employee records without a subpoena or judicial warrant. This includes Social Security numbers, payroll

information and other personnel records. The only exception to this requirement is for I-9 Employment Eligibility Verification forms and other documents for which a Notice of Inspection has already been provided to the employer.

- Requires employers (within 72 hours of receiving a Notice of Inspection for I-9 Forms or other employment records by an immigration agency) to provide a notice to each current employee and their union, if one exists. The Notice should be posted in the language the employer normally uses to communicate employment-related information to its employees and must include specific details about the upcoming inspection.

- Requires the employer, within 72 hours of receiving the results of an inspection, to provide each current "affected employee" and their union, if any, a copy of the written results and the obligations of the employer and the affected employee arising from the results of the inspection. This notice must contain specific information about the investigation results.

- Prohibits employers, from reverifying employment eligibility of a current employee at a time or manner not required by federal law. This may create problems for employers conducting voluntary internal audits in the course of business, who may now risk violating the law.

However, nothing in the new law restricts an employer's compliance with the memorandum of understanding governing the use of the federal E-Verify system.

A violation of the new law may impose an employer to a civil penalty of up to $10,000.

6. California Legalizes Recreational Marijuana

In 2016, California passed Proposition 64, authorizing the legalization of recreational marijuana use in California. New provisions consistent with Proposition 64 went into effect on January 1, 2018. Many employers are concerned about what, if any, impact the legalization of recreational will have on the workplace. Here are the primary things to consider:

- Like alcohol, marijuana may impair an employee's ability to do his or her job and an employer has a legitimate right to regulate the use of marijuana during working hours and working under the influence of marijuana.

- Under current law, a California employer has no duty to accommodate even lawfully obtained medical marijuana. *See, Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 390 (2008)

- Significantly, marijuana still remains illegal under federal law and on January 4, 2018, Attorney General Jeff Sessions announced plans to rescind the Obama-era federal policy of not enforcing certain federal marijuana laws in jurisdiction where medical or recreational use is permitted under state law.

7. California "Bans the Box"

In 2017, California became part of the group of several states and localities that have adopted a "ban the box" statute that significantly restricts an employer's ability to seek or obtain information about a job applicant's criminal history. This new California law (AB 1008) amends the California Fair Employment and Housing Act ("FEHA"). Employers with five (5) or more employees now are prohibited under FEHA from:

- Including on any employment application any question that seeks the disclosure of an applicant's criminal conviction history; or

- Inquiring into or considering an applicant's conviction history before he or she receives a "conditional offer of employment."

- Interfering with, restraining, or denying the exercise or attempted exercise of any rights under the statute.

Once an employer has made a conditional offer of employment to an applicant, it may make inquiries about the applicant's conviction history and also may conduct a criminal background check. However, even after making a conditional offer, employers are prohibited from considering the following types of information: (a) an arrest that did not result in a conviction, subject to certain exceptions; (b) referral to or participation in a pretrial or post trial diversion program; and (c) convictions that have been sealed, dismissed, expunged or statutorily eradicated pursuant to law.

If the employer intends to deny the applicant employment solely, or in part, because of his or her conviction history, then the employer is required to make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. The individualized assessment must take into account: (a) the nature or gravity of the offense; (b) the time that has passed

since the offense and completion of the sentence; and (c) the nature of the job held or sought. The employer may memorialize in writing the results of the individualized assessment, but is not required to do so.

If the employer makes a preliminary decision that an applicant's conviction history disqualifies him or her from employment, the employer must notify the applicant in writing. The notification may, but is not required to, justify or explain the employer's reasoning. The notification must, however, contain all of the following: (a) identification of the disqualifying conviction(s) that are the basis for the preliminary decision to rescind the conditional offer; (b) a copy of the conviction history report, if any; and (c) an explanation of the applicant's right to respond to the notice of the preliminary decision, including that the applicant may submit evidence challenging the accuracy of the conviction history report or evidence of rehabilitation or mitigating circumstances, and the deadline to respond.

The employer must provide the applicant with at least five (5) business days to respond to the employer's preliminary decision. If, within that period, the applicant notifies the employer in writing that he or she intends to dispute the accuracy of the conviction history report and is taking steps to obtain evidence supporting this assertion, then the employer must provide the applicant with an additional five (5) business days to respond.

If after considering information submitted by the applicant, the employer makes a final decision to deny an application solely, or in part, because of the conviction history, the employer must notify the applicant, in writing. The notification must include the following: (a) the final denial or disqualification (the employer may, but need not, justify or explain its reasoning); (b) any procedure that the employer has for the applicant to challenge the decision or request reconsideration; and (c) the applicant's right to file a complaint with the California Department of Fair Employment and Housing.

The new law does not apply to several types of position, most notably a position where an employer is required by law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history.

Significantly, by adding these new prohibitions to FEHA, the California legislature made the full panoply of civil rights remedies available to those claiming violation of the new law, including economic, emotional distress and punitive damages and attorneys' fees.

8. DLSE's Authority Expanded

Pursuant to SB 306, effective January 1, 2018, the Division of Labor Standards Enforcement ("DLSE") is now authorized to commence an investigation of an employer, with or without a complaint being filed, when specified retaliation or discrimination is suspected during the course of: (a) a wage claim; or (b) other specified investigations conducted by the Labor Commissioner.

In addition, the DLSE or an aggrieved employee may obtain temporary injunctive relief, such as reinstatement of employment, from a superior court if the employee has been or currently is being subjected to retaliation. The superior court is required to issue temporary injunctive relief on a mere showing that "reasonable cause" exists to believe a violation of the law has occurred. In ruling on the request for injunctive relief, the superior court will consider the chilling effect on other employees asserting their rights. If temporary injunctive relief is granted, the relief cannot be stayed pending an appeal by the employer.

The bill clarifies that the issuance of temporary injunctive relief does not prohibit an employer from disciplining or terminating an employee for conduct unrelated to the claim of retaliation.

The Labor Commissioner also has the authority to issue citations directly to individuals found to have engaged in discrimination or retaliation, directing the individual to provide specific relief to the victim. The bill establishes procedures for the alleged wrongdoer to obtain review of any citation issued. An employer who refuses to comply with a final order shall be subject to a penalty of $100 per day of noncompliance, up to a maximum penalty of $20,000.

9. New Notice Requirements Regarding Domestic Violence, Sexual Assault and Stalking Protections

California law prohibits employers with 25 or more employees from discharging, discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault or stalking for taking time off of work for specified reasons related to the domestic violence, sexual assault or stalking. More specifically, employees who are victims may take time off to: seek medical attention; obtain services from a domestic violence shelter, program or rape crisis center; obtain psychological counseling; and participate in safety planning to avoid future incidents of such conduct.

As a result of AB 2337, covered employers are now required to provide notice to new employees, or existing employees upon request, of their rights under the law if they are the victim of domestic violence, sexual assault or stalking. The Labor Commissioner has created a notice that employers may use to comply with the

new law, which can be found here.

10. Workplace Smoking Restrictions

Previously, California law prohibited smoking of tobacco products inside an enclosed space, at a place of employment with more than five (5) employees. A new law (ABX2-7) expands the prohibition to all employers, including owner-operated businesses. It also eliminates exemptions that previously permitted smoking in some work environments such as hotel lobbies, bars and taverns, banquet rooms, warehouse facilities, and employee break rooms.

For employers that allow access to their place of employment to non-employees, they can comply with this law by posting clear and prominent signs at each entrance to the building that state "no smoking" or "smoking is prohibited except in designated areas," whichever is applicable. In addition, if a non-employee is smoking in an enclosed workplace, the employer must request that the individual refrain from smoking, unless making such a request involves a risk of physical harm to the employer or any employee. The employer is not required to eject smokers physically.

This law does not apply to twenty percent (20%) of the guestrooms in hotels and motels, nor does it apply to tobacco shops or private smokers' lounges. This law supersedes local regulation of smoking tobacco products in enclosed places of employment or owner-operated businesses.

A violation of the workplace smoking restrictions is punishable by a fine not to exceed $100 for a first offence, $200 for a second violation within one year, and $500 for each subsequent violation within one year.

11. Military Service Discrimination

California law previously has prohibited various types of discrimination against members of the military or naval forces of California or the United States. AB 1710 expands existing law to prohibit discrimination in all "terms, conditions or privileges" of employment against those service members.

A person who violates this law is guilty of a misdemeanor and is liable for actual damages and reasonably attorneys' fees incurred by the service member.

12. *California Minimum Wage Increase*

The California minimum wage will continue to annually, consistent with SB 3 which became effective in January 2017. The below schedule of incremental increases remains subject to possible temporary delays for general economic or budgetary reasons at the Governor's discretion.

Rate (Jan. 1)	26 Employees or More	25 Employees or Less
2018	$11.00	$10.50
2019	$12.00	$11.00
2020	$13.00	$12.00
2021	$14.00	$13.00
2022	$15.00	$14.00
2023	$15.00	$15.00
2024	Indexed*	Indexed*

* Rate adjusted to changes in Consumer Price Index (if any) to a cap of 3.5 percent each year.

The increased minimum wage will affect whether certain employees meet the minimum salary requirements for exempt employees. For example, in order to qualify for the executive, administrative and professional exemptions, an employee must earn no less than two (2) times the state minimum wage for full-time employment. For employers with 26 or more employees, an employee must earn an annual salary of $45,760 in 2018 to be eligible for certain exemptions. For smaller employers, the annual salary requirement in 2018 is $43,680.

Approximately 22 localities in California have enacted their own minimum wage ordinances. Many of the ordinances increase the local minimum wage effective January 1, 2018, including but not limited to the following cities: Berkeley; Emeryville; Los Angeles; Malibu; Oakland; Pasadena; San Francisco; San Jose; and Santa Monica.

13. *SDI and Paid Family Leave Benefits Increased*

California law provides partial wage replacement benefits as follows: (a) for employees who have a short-term disability; and (b) paid family leave benefits for

up to six (6) weeks for employees who take approved leave to bond with a new child or to care for certain family members with a "serious health condition" AB 908 increases the weekly benefit amount from 55% of the employee's salary to 60-70% (depending on employee's income) of the employee's salary, and increases the maximum weekly benefit to $1,216. The maximum benefit is tied to California's average weekly wage, which changes from year to year.

The bill also eliminates the seven (7) day waiting period that previously applied before an employee was able to receive the paid family leave benefits.

B. New York

1. NY State Paid Family Leave Law Goes Into Effect

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

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

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

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

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

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

Under the revised Fair Chance Act, an employer may not inquire about an applicant's criminal history or even request authorization or run a criminal background check until after making a conditional offer of employment. There are several categories of *per se* violations of the Act. Accordingly, it is imperative that employers immediately review their job applications and advertisements, as well as their hiring practices to ensure they are not committing a *per se* violation.

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

3. ***New York State Increases Minimum Wage and Minimum Salary for Administrative and Executive Exemptions***

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

In addition, the minimum salary for exemption as an "administrative" or "executive" employee increased from $787.50 per week ($40,950 annually) to $900 per week ($46,800) for New York City employers with 10 or fewer

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

4. Expanded Coverage Under NYC Earned Sick Time Act

New York City has amended its Earned Sick Time Act, expanding the covered reasons for leave under the law, as well as broadening the definition of a covered family member for whom an employee may take leave to provide care. The amendment renames the law the "NYC Earned Sick and Safe Time Act" and extends leave protections under the law to include situations where an employee or an employee's covered family member is a victim of domestic violence, sexual offenses, stalking or human trafficking ("safe time"). Employers may obtain "reasonable documentation" of the need for safe time following an absence of more than three consecutive work days; however, employers are not permitted to require disclosure of specific details relating to the domestic violence, sexual offenses, stalking or human trafficking.

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

The amendments take effect on May 5, 2018.

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

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

Fast Food employees have the right to:

1. *Good Faith Estimate of Schedule:*
On or before workers' first day of work, employers must provide written schedules for the first two weeks of work with hours, dates, start and end times of

shifts and written "Good Faith Estimates". Employers must provide an updated estimate if the estimate changes.

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

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

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

Retail employees have the right to:

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

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

3. *No Shift Additions with Less than 72 Hours' Notice:*
If employers want to add time or shifts to employee schedules less than 72 hours

before the change, workers have the right to accept or decline the change. If workers accept an additional shift, they must do so in writing.

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

6. *NY Regulations on Wage Payment Methods Declared Invalid*

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

II. Employment Discrimination Law

A. Ninth Circuit Decisions

1. *Equal Pay Act Not Violated Where Salary Differential is Based on Salary History*

In *Rizo v. Yovino*, 854 F.3d 1161 (9th Cir. 2017), a Fresno public school employee sued her employer when she discovered her male counterparts were paid more for the same work. The employer conceded that was true but asserted the statutory affirmative defense that the pay difference was "based on any other factor other than sex" because the pay difference was based on employees' prior salaries. The district court denied employer's motion for summary judgment ruling that a difference in salary based on mens' and womens' prior salary is not a factor other than sex. The 9th circuit overturned, ruling that "the Equal Pay Act does not impose a strict prohibition against the use of prior salary."

The Court reasoned that an employer can avoid liability under the Equal Pay Act for paying women less for the same work when the lower pay is based on plaintiff's prior salary and the policy of looking at prior salary "effectuate[s] some business policy" and the employer uses prior salary "reasonably in light of [its] stated purpose as well as its other practices." Here, the County's policy was objective and applied consistently, necessarily gave employees a pay increase from their prior job, and was a judicious use of tax payer dollars.

2. ***Disability Discrimination Action Property Dismissed Where Employer Unaware of Disability When Termination Decision Made***

In *Alamillo v. BNSF Ry. Co.*, 869 F.3d 916 (9th Cir. 2017), a locomotive engineer missed several calls and was suspended on at least two occasions before being terminated. Around the same time, the employee was diagnosed with obstructive sleep apnea ("OSA") for which he was prescribed a CPAP machine. After being terminated for his poor attendance, the employee sued for disability discrimination. The district court granted summary judgment in favor of the employer, and the United States Court of Appeals for the Ninth Circuit affirmed, holding that the employee had failed to establish a prima facie case of disability discrimination.

The district court had concluded that there was no evidence that the claimant's OSA was a substantial motivating reason for the decision to terminate his employment because the employer did not know that the employee was allegedly disabled when it made the decision to initiate disciplinary proceedings against him. Further, even if the employee had established a prima facie case of discrimination, the employer's asserted reason for terminating was the employee's recurrent absenteeism, and there was no evidence that that reason was pretext for discrimination. The Court also affirmed dismissal of a claim for failing to reasonably accommodate the claimant's alleged disability, noting that the employer was not required to offer "leniency" as an accommodation. Similarly, the Ninth Circuit affirmed dismissal of the claimant's failure to engage in the interactive process claim because no reasonable accommodation could have cured his prior absenteeism.

3. ***Employer Vicariously Liable for Non-Supervisor Harassment Where it Knew About Harassment but Failed to Respond Adequately***

In *Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678 (9th Cir. 2017), the claimants, a father and son, were the only millwrights of Mexican descent working at the company. The father alleged that during the course of his employment he was subjected to disparate treatment and a hostile work environment based on his race or national origin. Specifically, he pointed to a contentious relationship that had developed with the lead millwright, who allegedly had harassed the father by making racially disparaging comments. Following an investigation into these allegations, the employer rearranged the lead's work schedule so that he would not be on the same shift as the father. However, when the lead was subsequently scheduled to work the same shift as the father and son, they refused to work and their employment was terminated. The district court granted summary judgment in favor of the employer, but the Ninth

Circuit reversed, holding that the lead's demeaning comments that directly referenced race were not "offhand comments" or "mere offensive utterances" and were sufficiently severe or pervasive to create a hostile work environment. The Court also held there was sufficient evidence of disparate treatment and retaliation to preclude entry of summary judgment for the employer.

4. ***Summary Judgment in Favor of Employer Reversed Where Male Supervisor Engaged in More Than 100 Chest-to-Breast Hugs and Kisses with Female Subordinate***

In Zetwick v. County of Yolo, 850 F.3d 436 (9th Cir. 2017), a female correctional officer for Yolo County sued the County and the county sheriff, alleging that the sheriff created a sexually hostile work environment in violation of Title VII and the FEHA. Over the course of 12 years, he greeted her with unwelcome chest-to-breasts hugs more than 100 times and attempted to kiss her once on the lips. He hugged and kissed other female officers as well, but no male officers. The sheriff had hugged male coworkers as well, but the claimant testified that the hugs given to females were different because they had sexual overtones.

Although the district court granted summary judgement for the County, finding that the conduct was not severe or pervasive, but was instead innocuous, socially acceptable conduct, the Ninth Circuit reversed, holding that there were genuine issues of material fact as to whether the sheriff's conduct was sufficiently severe or pervasive so as to alter the claimant's conditions of employment and create an abusive environment. The Ninth Circuit also held that the trial court had applied the incorrect legal standard and rejected the notion that there could be a "mathematically precise test" to determine whether there were genuine issues of material fact based on the frequency of the hugs. In reaching its conclusion, the district court failed to consider the totality of the circumstances, including the impact of harassment from a supervisor, the effect the behavior had on the claimant, and the evidence that Prieto hugged and kissed other women.

5. ***Sanitation Employee Could Proceed With Age Discrimination Claim Despite Failure to Provide Proof of Right to Work Documentation.***

In *Santillan v. USA Waste of Cal*., 853 F.3d 1035 (9th Cir. 2017), a 53-year-old garbage truck driver who had been employed for 32 years was terminated by a new route manager after the claimant had four accidents in a 12-month period. The claimant disputed that he had been involved in four accidents and testified that he was one of five older, Spanish-speaking employees who were fired or suspended by the new route manager. Following what the court described as a "public outcry" over the claimant's termination, the employer agreed to reinstate the claimant if he passed a drug test and physical examination, a criminal

background check and "e-Verify" to prove his right to work in the United States. When the claimant failed to provide sufficient information for the employer to complete an e-Verify check, he was fired again because he did not provide "proof of [his] legal right to work in the United States within three days of hire as required by the Immigration Control and Reform Act of 1986."

The district court granted summary judgment in favor of the employer, but the Ninth Circuit reversed, holding that the claimant had established a *prima facie* case of age discrimination, which the employer had failed to rebut. The Court held that the claimant was exempt from the IRCA requirements because he was a "continuing" and not a "new" employee. Moreover, the Court held that California public policy considers immigration status to be irrelevant in the enforcement of state labor, employment, civil rights and employee housing laws, so the agreement to satisfy the e-Verify requirements was void as against public policy. The Court also held that employee had engaged in protected activity by using an attorney to represent him in negotiating the original settlement agreement.

B. California Court Decisions

1. *Employee Who Took CFRA Leave May Proceed With Retaliation Claim Where Employer Failed to "Inquire Further" About Need for Leave Before Termination*

In *Bareno v. San Diego Cmty. Coll. Dist.*, 7 Cal. App. 5th 546 (2017), as an assistant at San Diego Miramar College was terminated after she failed to return from a medical leave of absence taken under the California Family Rights Act ("CFRA"). During the course of her employment, the assistant had received several disciplinary warnings for, among other things, excessive absences, workplace disagreements, incompetence, inefficiency and neglect of duty. On February 19, 2013, the college disciplined the assistant with a three-day unpaid suspension for additional performance issues; the suspension ran from February 20 through February 22 (a Friday). At 4:30 a.m. on Monday, February 25, the employee called her supervisor and claimed to be "sick, depressed, stressed" and said she needed to go to the hospital. She subsequently provided a "work status report" from Kaiser indicating that she needed to take a medical leave from February 25 through March 1. The assistant then emailed a second "work status report," placing her "off work" through March 8, which her supervisor denied receiving. The assistant failed to show up for work on Monday, March 4, and on Friday, March 8, the college sent her a letter indicating that her unauthorized absences constituted a voluntary resignation.

Although the trial court granted summary judgment to the employer, the Court of Appeal reversed, holding that an employer is obligated to "inquire further" about an employee's need for CFRA leave before terminating employment and citing the CFRA regulations that give an employee up to 15 days to provide necessary certification of the need for a medical leave. The Court further held that the employee had submitted sufficient medical certification to support her need for medical leave.

2. *Refusal to Rescind Voluntary Termination is Not Adverse Employment Action*

In *Featherstone v. S. California Permanente Med. Grp.*, 10 Cal.App.5th 1150 (2017), review denied (July 12, 2017), the claimant contended that, as a side effect of medication that she took following sinus surgery, she was in an "altered mental state." She called her supervisor and told her that she was resigning, effective immediately, because "God had told [her] to do something else." She posted something similar on Facebook. Her supervisor did not consider her to be acting odd, as the reference to God was not inconsistent with her character. After the phone call, the claimant's supervisor asked her to confirm the resignation, and she did so three days later.

The day after she resigned, the claimant was hospitalized due to her erratic behavior, including taking "off her clothes" and walking around naked in front of others, repeatedly and uncharacteristically swearing and taking "showers for no reason." A coworker learned this information and shared it with a different manager, who told her to contact HR. When the coworker did so, HR said they could not communicate with her since she was not a relative. Five days after the employee confirmed the resignation in writing, she contacted the HR department and informed them that she had been suffering from an adverse drug reaction and, as a result, requested that they allow her to rescind her resignation. The employer refused, taking the position that there was nothing improper about their accepting her resignation, nor were they required to allow her to rescind it. After Featherstone filed suit for violations of FEHA and wrongful termination, the employer moved for summary judgment, which the trial court granted. Featherstone appealed.

The court of appeal affirmed. Following federal authorities, it held that the refusal to allow a former employee to rescind a voluntary resignation, free of employer misconduct or coercion, is not an adverse employment action under FEHA. It reasoned that an "adverse employment action" is an action that affects an employee, not a former employee, in the terms, conditions, or privileges of his or her employment, not in the terms, conditions, or privileges of his or her unemployment. The court also held that the employer was not on notice of any

mental disability triggering a duty to accommodate, and that the call from the coworker that she had been hospitalized was insufficient to put it on notice.

C. California Agency Actions

1. *New DFEH "Workplace Harassment Guide for California Employers"*

In May 2017, the Department of Fair Employment and Housing (DFEH) published a guide which provides recommended practices for preventing and addressing workplace harassment. The 9-page guide outlines (1) the elements of an effective anti-harassment program; (2) the appropriate response to a complaint of harassment or other wrongful behavior; (3) the basic steps of a fair investigation; and (4) effective remedial measures.

Anti-harassment programs: according to the guide, an effective anti-harassment program includes:

- A clear and easy to understand written policy that is distributed to employees and regularly discussed at meetings (e.g., every six months);
- Holing managers and supervisors to high standards, as role models of appropriate workplace behavior;
- Training for supervisors and managers in compliance with California laws AB 1825 and AB 2053;
- Specialized training for complaint handlers;
- Policies and procedures for responding to, and investigating complaints;
- Prompt, thorough, and fair investigations of complaint; and
- Prompt and fair remedial action.

Responding to complaints: The DFEH also recommends that employers make any reports or complaints a "top priority" and promptly determine if the report involves behavior serious enough to warrant a formal investigation. If a report includes are allegations of conduct that, if true, would violate the employers' rules or expectations, then the report should be investigated.

Investigations: the guide provides advice on how to conduct fair and legally defensible investigations into reports of harassment, including specific advice on

interviewing complainants, subjects, and other witnesses, weighing evidence, making credibility determinations, applying burden of proof standards, and managing confidentiality during the investigative process.

Remedial action: the guide explains that FEHC regulations require appropriate remedial actions whenever there is proof of misconduct, regardless of whether there has been a violation of the law. Such measures may include training, verbal counseling, "last chance" agreements, demotions, salary reductions, rescinding of a bonus, or terminations.

2. ***Updated DFEH Brochure On Sexual Harassment***

The DFEH also updated its required Sexual Harassment prevention brochure, publication DFEH-18. The brochure defines harassing conduct; discusses the different kinds of unlawful harassment (quid pro quo and hostile work environment); provides examples of behaviors that may constitute sexual harassment; and specifies the procedures and policies that California employers must develop and follow to prevent and correct sexual harassment. It also discusses remedies available in sexual harassment cases, including in cases of retaliation for complaining about harassment or rejecting advances. The DFEH also provides this information in a printable poster format. Distributing either the poster or the brochure fulfills an employer's responsibility to provide employees with an information sheet regarding sexual harassment under Section 12950(b) of the California Government Code.

3. ***New FEHA Transgender Regulations***

Effective July 1, 2017, the California Fair Employment and Housing Council implemented new regulations regarding the Fair Employment and Housing Act's prohibition of discrimination on the basis of gender identity and gender expression.

Updated Definitions: The new regulations updated the definitions of "gender expression" and "gender identity" while added a definition for "transitioning":

- The definition of "gender expression" was expanded to include not only a person's gender-related appearance or behavior but also "the perception" of such gender-related appearance or behavior.

- The term "gender identity" is now defined to mean each person's "internal understanding of their gender, or the perception of a person's gender identity, which may include male, female, a combination of male and female, neither male nor female, a

gender different from the person's sex assigned at birth, or transgender."

- The term "transitioning" is defined as a “process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. This process may include, but is not limited to, changes in name and pronoun usage, facility usage, participation in employer-sponsored activities (e.g., sports teams, team-building projects, or volunteering), or undergoing hormone therapy, surgeries, or other medical procedures.”

Restroom Facilities: Consistent with AB 1732, employers must use gender-neutral signage for single-occupancy facilities under their control. In addition, employers are now required to provide equal access to restroom facilities regardless of the sex of the employee. Employees must be allowed to use restroom facilities that correspond to the employee’s gender identity or gender expression. Employers cannot require any proof of sex or gender for an employee to use a particular facility.

Dress Code: While prior regulations allowed an employer to impose dress standards upon job applicants and/or employees so long as such standards did not discriminate on the basis of sex or significantly burden the individual in his or her employment, the new regulations prohibit an employer from imposing a dress standard that is inconsistent with an employee’s gender identity or expression in the absence of a business necessity.

Preferred Name and Pronoun: The new regulations add a requirement that employers comply with an employee's request to be identified by a certain name or pronoun. Employers can only insist on using an employee’s legal name or gender if it is otherwise required to meet a legally-mandated obligation.

No Requests for Documentation or Proof: Employers are prohibited from inquiring into, or as a condition of employment requiring an applicant or employee to produce documentation of, the applicant or employee's sex, gender, gender identity or gender expression unless the employer can establish a business necessity for such an inquiry.

D. Second Circuit Decisions

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

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

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

In a concurring opinion, Chief Judge Katzmann argued that the Second Circuit should revisit *Simonton* and *Dawson*. Although the Second Circuit panel in *Christiansen* denied review, a different Second Circuit panel granted review in another case, *Zarda v. Altitude Express*, to revisit its position on Title VII sexual orientation discrimination claims. Oral argument was heard in September 2017, and the Second Circuit's decision is pending.

E. New York Court Decisions

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

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

The trial court granted summary judgment in favor of Allied. On appeal, the New York Court of Appeals held that only "employers" may be liable for criminal conviction history discrimination under Section 296(15) of the New York State Human Rights Law ("NYSHRL"). However, the court broadly construed the definition of covered employer to extend beyond an employee's direct employer and concluded that New York common law's 4-factor test applies to determining whether an entity is a covered employer, which looks at: (i) the selection and engagement of the servant; (ii) the payment of salary or wages; (iii) the power of dismissal; and (iv) the power of control of the servant's conduct. Of these factors,

the "greatest emphasis [should be] placed on the alleged employer's power to order and control the employee in his or her performance of work." The court further held that the "aiding and abetting" provisions of the NYSHRL may apply to entities even where a direct or indirect employment relationship cannot be shown.

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

In *Makinen v. City of NY*, 30 N.Y. 3d 81 (2017), two former New York City police officers sued the NYPD, alleging that it had discriminated against them based on the its perception that they were alcoholics. The jury found in plaintiffs' favor. The NYPD appealed, and the Second Circuit certified to the New York Court of Appeals the question: does the New York City Human Rights Law ("NYCHRL") preclude a plaintiff from bringing a disability discrimination claim based solely on a perception of untreated alcoholism? The Court answered affirmatively, holding that the NYCHRL does not prohibit discrimination based on "perceived untreated alcoholism," even though such claims would be recognized under its state and federal counterparts, the NYSHRL and the Americans with Disabilities Act. The Court's decision was based on the plain and clear text of the statute, which defines alcoholism as a "disability" only in certain circumstances, prohibiting discrimination against "a person who (1) is recovering or has recovered and (2) currently is free of such abuse."

III. Wage and Hour Law

A. Federal Court Decisions

1. *No Administrative Exemption for Mortgage Underwriters*

In *McKeen-Chaplin v. Provident Sav. Bank*, 862 F.3d 847 (9th Cir. 2017), the Ninth Circuit reversed the district court's holding that mortgage underwriters qualified for the "administrative exemption" under the Fair Labor Standards Act ("FLSA"). In particular, the plaintiff alleged that she and other underwriters often worked in excess of 40 hours in a workweek and, therefore, were owed overtime compensation. The defendant argued that mortgage underwriters were exempt under the administrative exemption, and the district court agreed. The Ninth Circuit reversed, and focused on the distinction, imposed by Department of Labor ("DOL") regulations interpreting the scope of the FLSA exemptions, between "work directly related to running or servicing of the business" and "working on a manufacturing production line or selling a product in a retail or service establishment," also known as the "administrative-production dichotomy." According to the DOL, those engaged in management of the business are exempt from the overtime-pay requirements of the FLSA, while those involved in making

the goods it sells or performing the services a business provides to the marketplace are not exempt. The Ninth Circuit noted that two other circuit Court of Appeals, the Second Circuit (which ruled underwriters are non-exempt) and the Sixth Circuit (which ruled they are exempt) have reached opposite conclusions.

The Ninth Circuit determined that, although underwriters evaluated whether a particular loan fit within the bank's guidelines, the employees did not formulate those guidelines themselves. Underwriters did not set credit policy, were not involved in setting future strategy or business direction, did not "manage, guide, and administer the business," and did not perform functions related to the bank's overall efficiency or mode of operation. The Ninth Circuit, therefore, held that mortgage underwriters are not exempt from overtime pay and ordered summary judgment in favor of the plaintiff.

2. ***2nd Circuit: Unpaid Interns Not Employees of Hearst Corporation***

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

3. ***9th Circuit: Applying* Glatt *Test, Unpaid Interns Are Not Employees***

On December 28, 2017, the Ninth Circuit held that three beauty school students, who alleged they were employees while they studied for their degrees, were interns under the FLSA. In *Benjamin v. B & H Education*, the plaintiffs claimed that they were employees because they were unsupervised when they provided services to the public through the school's salons and performed repetitive tasks they already had learned. The Ninth Circuit applied the test set forth by the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536-37 (2d Cir. 2016) to hold that the "application of the Glatt factors establishes that students were the primary beneficiaries of their labors. Their participation in Marinello's clinic provided them with the hands-on training they needed to sit for

the state licensing exams." The Court also found that, even if it applied the more restrictive 2010 test adopted by the DOL, the students still would not be employees. Lastly, the Court determined that, even under California law (which defines "employment" more broadly than the FLSA), the *Glatt* factors are more appropriate than the DOL factors for an occupational training or educational program.

B. California Court Decisions

1. *Right to Statewide Discovery of Contact Information in PAGA Actions*

In *Williams v. Superior Court*, 3 Cal. 5th 531 (2017), a retail employee brought a representative action against Marshalls under the Private Attorneys General Act of 2004 ("PAGA"), alleging wage and hour violations. In the course of discovery, the plaintiff sought contact information for fellow California employees through special interrogatories. When Marshalls objected, the plaintiff filed a motion to compel, which was granted by the trial court as to the plaintiff's specific store (subject to an opt-out notice), but denied as to the rest of the stores in California. The trial court further conditioned any renewed motion for discovery on the plaintiff sitting for a deposition and showing some merit to the underlying action. The plaintiff filed a petition for writ of mandate, which was denied. In denying the writ, the Court of Appeal held that third party privacy interests were implicated, and the plaintiff had to demonstrate a compelling need for discovery by showing the discovery sought was directly relevant and essential to the fair resolution of the lawsuit.

The California Supreme Court reversed and held that the trial court abused its discretion by requiring Williams to demonstrate good cause for the production of contact information. Specifically, the Court rejected the notion that any special discovery rules apply to PAGA actions, and confirmed that liberal discovery rules have been in place for many years for collective actions, including class actions. The Court stated that the civil procedure rules do not impose any good cause requirement or any requirement to prove up the merits of claims prior to seeking information by interrogatory. Further, with respect to any privacy concerns, the Court held that fellow employees likely would not want to conceal their contact information from plaintiffs asserting wage and hour violations, and any residual privacy concerns could be protected by issuing notices that afford an opportunity to opt out from disclosure. The Court lastly held that Marshalls failed to show that supplying the contact information would be in any way burdensome.

2. *Day of Rest Explained*

In *Mendoza v. Nordstrom, Inc.*, 2 Cal. 5th 1074 (2017), the California Supreme Court answered unsettled questions regarding the state's day of rest statutes. In

short, the California Labor Code provides that employees are entitled to at least one day's rest out of seven. Specifically, Section 551 of the Labor Code states that "[e]very person employed in any occupation of labor is entitled to one day's rest therefrom in seven." Section 552 states that "[n]o employer of labor shall cause his employees to work more than six days in seven." Section 556 provides an exception to Sections 551 and 552, stating that they "shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof."

First, considering the text and history of Sections 551 and 552, Wage Orders, and the statutory scheme of the day of rest provisions, the Court concluded that employees are entitled to one day of rest each work week (as defined by the employer) rather than one day in seven on a rolling basis. Thus, the Court acknowledged that an employee could be required to work up to twelve consecutive days without violating Sections 551 and 552. Second, the Court held that the exemption set forth in Section 556 applies only to those employees who never exceed six hours of work on any day of the workweek. Third, the Court clarified the definition of what it is to "cause" an employee to go without a day of rest, stating that an employer causes its employee to go without a day of rest when it "induces the employee to forgo rest to which he or she is entitled." The Court explained that an employer's obligation is to apprise employees of their entitlement to a day of rest and "thereafter to maintain absolute neutrality as to the exercise of that right." An employer may not encourage its employees to forgo the day of rest or conceal the entitlement to the day of rest, but is not liable simply because an employee chooses to work a seventh day.

3. ***Waiting Periods for Vacation Entitlements Are Lawful***

In *Minnick v. Auto. Creations, Inc.*, 13 Cal. App. 5th 1000 (2017), the employer had a policy requiring employees to work a full year before they earned/accrued vacation. The plaintiff, who had worked for only six months, brought a representative action under PAGA, claiming the vacation policy forfeited his "vested" vacation right and therefore violated state law. The trial court sustained the employers' demurrer, and the Court of Appeal affirmed. The Court of Appeal held that an employer may require a waiting period before an employee becomes eligible to earn vacation, and if the employer's policy is clearly stated, the waiting period policy is enforceable. The Court also found that such vacation policy does not contract around the rule against forfeiture of wages. An employer may lawfully decide it will not provide vacation and, by logical extension, can decide it will not provide paid vacation until after a specified waiting period. Because the defendants' vacation policy clearly provided for a waiting period and reasonably informed employees that their vacation accrual began after the completion of their first year, the policy was lawful.

4. *Rest Breaks for Commission-Based Employees*

In *Vaquero v. Stoneledge Furniture LLC*, 9 Cal. App. 5th 98 (2017), the plaintiffs were employed as sales associates for a furniture company and filed a class action, alleging that the defendant's commission pay plan violated California law because it did not compensate employees for any non-selling time, such as time spent in meetings, training sessions, or rest periods. Under the defendant's commission plan, if a sales associate failed to earn minimum pay of at least $12.01 per hour in any pay period, defendant paid the associate a "draw" against "future Advanced Commissions" in that minimum amount. The Court held that the defendant did not compensate employees for rest breaks under this structure. Specifically, drawing analogies to piece-rate employees, the Court held that sales employees must separately receive at least one paid rest period of 10 minutes for every four hours worked or major fraction thereof. If 100% of an employee's pay is attributable to commissions, then he or she is not being compensated for rest periods – *i.e.*, an employee cannot earn a commission while "resting," so an employee paid only in commissions necessarily does not receive pay for rest periods.

C. Department of Labor

1. *The DOL's Overtime Rule Cut Down*

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

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

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

In August 2017, the Texas District Court invalidated the DOL rule in its entirety, holding that, by setting the salary level where it did, the DOL effectively eliminated the so-called duties test for determining which workers are eligible for the exemptions. The DOL announced that it would not appeal this ruling. It also requested public comment regarding a new overtime rule; however, no proposed rule has been announced.

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

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

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

IV. Arbitration

1. ***Excluding claims arising from Confidentiality provision from the arbitration clause was substantively unconscionable***

In *Farrar v. Direct Commerce, Inc.*, 9 Cal. App. 5th 1257, review filed 4/28/17, a successful entrepreneur, Farrar, negotiated with Direct Commerce ("Direct") a contract to become its VP of Business Development. The contract excluded claims arising from the confidentiality provision from the arbitration clause. The Court of Appeal agreed with the trial court that the arbitration provision was substantively unconscionable, because it carved out more than provisional remedies and was therefore too "one-sided." The Court of Appeal, however, found the offending provision could be severed so that the arbitration provision could be enforced.

2. ***California Court of Appeal Split Develops on Arbitrability of Claims Brought Under Labor Code Section 558***

In late December 2017, in *Lawson v. ZB, N.A. et al., and ZB, N.A., et al. v. Superior Court of San Diego*, D071279 & D071376 (Dec. 19, 2017) , District Four of the California Court of Appeals held that the trial court erred in bifurcating and ordering arbitration of the underpaid wages portion of a PAGA claim brought pursuant to Labor Code section 558.

Section 558 of the Labor Code requires payment of underpaid wages, and also provides for civil penalties of $50 for a first violation and $100 for further violations. The employer argued that the underpaid wages portion of the claim was subject to arbitration because it was a private claim belonging to the employee, unlike PAGA penalties which are obtained on behalf of the State. The Court of Appeals held that the underpaid wages were also a penalty and, therefore, the claim for underpaid wages is a claim that the employee cannot waive as a representative action and cannot be forced to arbitrate.

The *Lawson* decision creates a split among California's Appellate Court Districts, as the Fifth District, in *Esparza v. KS Industries*, 13 Cal. App. 5th 1228 (2017), held this year that section 558 wage claims are not representative, and therefore can be arbitrated. *Esparza* held that section 558 claims actually involve claims for "statutory damages," rather than "civil penalties." In PAGA claims for civil penalties, 75 percent of the penalty goes to the State of California while only 25 percent goes to the aggrieved employees. Section 558 penalties go the employee alone.

The Court noted that under *Iskanian*, claims belonging to the state are not arbitrable, but claims belonging to individuals may be arbitrated. Thus, under *Esparza*, PAGA claims for civil penalties, when seeking money allocated primarily to the State, are not subject to arbitration while claims for victim-specific "statutory damages" can be subjected to arbitration pursuant to an enforceable arbitration agreement.

3. ***Employees Cannot Agree to Arbitrate PAGA Claim Until They Meet Statutory Requirements to Bring a PAGA Claim***

In *Julian v. Glenair, Inc.*, 17 Cal. App. 5th 853, the California Court of Appeal clarified when an arbitration agreement becomes a post-dispute agreement that can require arbitration of a PAGA claim. The Court determined that an arbitration agreement is a post-dispute agreement if it is entered into after the employee is authorized to commence a PAGA civil action as an agent of the state, i.e., after the employee has satisfied the statutory requirement for commencing a PAGA action. Prior to that, not only does the employee not know which alleged

violations, if any, they are authorized to assert in the action, but the state retains control of the right underlying the employee's PAGA claim. Enforcing an arbitration agreement that was entered into before the employee met the statutory requirements would contravene the state's control over that right as the employee is not authorized at that point to waive the state's right to a judicial forum.

In *Julian*, after a different employee initiated a PAGA civil action, the plaintiffs entered into an arbitration agreement that waived their right to bring PAGA cases in court. The plaintiffs later initiated their own PAGA case, and the defendant moved to compel arbitration. The Court determined that the arbitration agreement was a pre-dispute agreement because the plaintiffs had not satisfied the requirements to act as agents of the state at the time they agreed to arbitration.

4. *California Supreme Court Finds Another Exception to Enforcing Arbitration Agreement As Written*

In *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, the California Supreme Court was faced with a consumer pre-dispute arbitration agreement which, as conceded by the parties, waived the right to seek, in any forum, "public injunctive relief." Public injunctive relief is relief that is meant to stop unlawful acts from continuing in the future and is intended to primarily benefit the general public rather than the plaintiff singularly. Previous case law held that agreements requiring arbitration of claims for public injunctive relief, including under the California's Consumers Legal Remedies Act ("CLRA"), unfair competition law ("UCL"), or false advertising law, were unenforceable.

The Court ruled that the waiver in *McGill* was unenforceable as against California public policy because it sought to entirely waive the plaintiff's statutory right under the UCL and other laws to seek public injunction relief. It did not address the previous case law discussing the arbitrability of claims for public injunctive relief, leaving that issue for another day.

The ruling in *McGill* is important to employers because the language that created the impermissible waiver is likely similar to language many employers have included in their pre-dispute arbitration agreements to ensure the permissible waiver of class actions in any forum. For example, the *McGill* plaintiff cited provisions such as "the arbitrator may award relief only on an individual (non-class, nonrepresentative) basis," "[a]n award in arbitration shall determine the rights and obligations between the named parties only, and only in respect of the Claims in arbitration, and shall not have any bearing on the rights and obligations of any other person, or on the resolution of any other dispute," and "neither you, we, nor any other person may pursue the Claims in arbitration as a class action,

private attorney general action or other representative action," as creating the waiver of public injunctive relief ultimately struck down by the Court.

V. Other Employment Law Developments

A. California WARN Act

1. *Layoffs Of Any Length Require Compliance with Cal-WARN*

In *The Internat. Brotherhood of Boilermakers etc. v. NASSCO etc.*, 17 Cal. App. 5th 1105 (Nov. 30, 2017), the employer notified 90 employees, without prior notice, to not return to work for at least 3 weeks due to a lull in shipyard production work. NASSCO later extended the layoff period by several weeks for some of the employees. The WARN Act's notice requirement provides that a covered employer "may not order a mass layoff, relocation or termination at a covered establishment unless, 60 days before the order takes effect, the employer gives written notice of the order to … the employees of the covered establishment…"

The employer argued that such short "furloughs" were not a mass "layoff" covered by Cal-WARN. The Court disagreed because the law defined "mass layoff" as "a separation from a position for lack of funds or lack of work." (§ 1400, subd. (c)) (emphasis added). The Court reasoned that, based on the plain meaning of that statutory language, a "separation" can be either temporary or permanent and there was no temporal requirement. The Court also noted that the Cal-WARN act was meant to give greater protection to employees than the Federal WARN act, which requires notice only when a layoff will last more than six months.

Liability for violations of the Cal-WARN act can include compensatory damages, attorney fees, and statutory penalties.

B. Fair Labor Standards Act

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

In *Arias v. Raimondo*, 860 F.3d 1185 (9th Cir. 2017), the Ninth Circuit held that an employer's attorney could be held liable for retaliation under the Fair Labor Standards Act ("FLSA") for reporting an undocumented plaintiff in a wage and hour claim to the Immigration and Custom Enforcement agency ("ICE"). The attorney for the defendant dairy farm contacted ICE to inform them that the plaintiff was undocumented and to encourage them to take him into custody at a scheduled deposition and remove him from the United States. Subsequently, plaintiff filed a claim against the attorney personally, alleging that in his capacity

as the dairy farm's agent, the attorney retaliated against plaintiff in violation of the anti-retaliation provision of the FLSA. Defendant argued that he was not plaintiff's employer. The Ninth Circuit held that the FLSA anti-retaliation provision includes a broader definition of "employer" than the FLSA's provisions regarding wages, and applies to "any person acting directly or indirectly in the interest of an employer in relation to an employee."

C. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

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

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

D. Fair Credit Reporting Act

1. *A Waiver Must Be Printed on a Document Separate From an Applicant's Credit Report Disclosure*

In *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017), the defendant provided plaintiff job applicant Syed a document labeled "Pre-employment Disclosure Release." The Disclosure Release informed Syed that his credit history and other information could be collected and used as a basis for the employment decision, authorized M-I to procure Syed's consumer report, and stipulated that, by signing the document, Syed was waiving his rights to sue M-I and its agents for violations of the FCRA. The FCRA states that an employer cannot obtain an applicant's credit report unless "a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists ***solely*** of the disclosure, that a consumer report may be obtained for employment purposes…" (emphasis added).

Syed sued and sought punitive and statutory damages for M-I's "willful" violation of the FCRA. The Ninth Circuit held that, "[i]n light of the clear statutory language that the disclosure document must consist 'solely' of the disclosure, a prospective employer's violation of the FCRA is 'willful' when the employer includes terms in addition to the disclosure, such as the liability waiver here,

before procuring a consumer report or causing one to be procured." Thus, a prospective employer should not include a waiver of liability on the same document where the employer provides the required disclosure to a prospective employee.

E. Fair Pay and Safe Workplaces Executive Order

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

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

VI. Free Speech Issues

A. Anti-SLAPP (Strategic Litigation Against Public Policy)Law, Code of Civil Procedure § 425.16

1. *Anti-SLAPP Statute Does Not Provide a Safe-Harbor Against Employee FEHA Lawsuits, Even if the Claims Arise Partially from Employer's Protected Conduct*

In *Nam v. Regents of the University of California*, 1 Cal.App.5th 1176, 1193 (2016), a resident in the anesthesiology department at UC Davis Medical Center brought a lawsuit claiming sexual harassment and retaliation against her employer. The resident accused her residency program director of sexual harassment, alleging that after she rebuffed his advances, he retaliated against her by, among other things, issuing an unwarranted disciplinary letter and placing her on investigatory leave. The resident further alleged that she was retaliated against because she complained about the clinical behavior of another doctor and serious patient care and safety issues.

According to the Medical Center, the resident was terminated after numerous complaints about her performance and multiple complaints given by her fellow residents with regard to her use of either verbally or physically threatening behavior. The resident was placed on leave two separate times while the complaints against her were investigated.

The Medical Center brought an anti-SLAPP motion to strike the resident's complaint, contending that her lawsuit arose from conduct protected under the anti-SLAPP statute because the investigation into allegations against her was an "official proceeding authorized by law." The trial court held that the "adverse actions" alleged in the Complaint were not taken as a result of complaints regarding her performance or the investigations, but rather due to her rebuffing advances made by the residency program director and complaints she made regarding patient care. Accordingly, the Medical Center failed to satisfy its initial burden of demonstrating that the resident's action "arose from a protected activity."

The California Court of Appeal affirmed the trial court, agreeing that the alleged wrongdoing did not arise out of protected conduct and additionally reasoned that granting the motion would go against the purpose of the anti-SLAPP statute because it would allow any employer that initiates an investigation of an employee to claim that its conduct was protected and shift the burden of proof to the employee.

2. ***Complaint Stricken Where the Employer's Protected Conduct is Central, Not Incidental, to Plaintiff's Claimed Injuries***

In *Daniel v. Wayans*, 8 Cal.App.5th 367 (2017), an extra in the film *Haunted House 2*, sued Marlon Wayans, the writer, producer and star of the movie, for racial harassment, alleging that Wayans had repeatedly called him "nigga" on set and had compared him to Black cartoon character both on set and in a social media posting to promote the movie. Daniel only worked on the movie for one day. In his defense, Wayans denied Daniel was singled out and asserted that the subject matter of the movie was "raunchy" and the creative process was largely improvisational, resulting in a free flowing and often crass on and off camera dialogue.

Wayans brought an anti-SLAPP motion to strike all of Daniel's claims because they arose from Wayans's constitutional right of free speech. Wayans argued the core injury-producing conduct arose out of the creation of the movie and its promotion over the Internet. The California Court of Appeal upheld the trial court's ruling and held that otherwise harassing comments on the set of a film, even while cameras were not rolling, that were in furtherance of the creative

process (it contributed to the formulation of dialogue in largely improvised scenes) were protected under the anti-SLAPP statute, especially in circumstances where the creative process is improvisational and the subject matter of the film is raunchy.

Additionally, the Court held that a posting on a widely-followed social media account to promote a successful film was deemed speech pertaining to an issue of "public interest" and therefore protected.

Finally, the Court ruled that under the above facts, it is not a hostile work environment for a black writer/director/actor to call a subordinate black actor "nigga," especially in light of the term's use intra-racially as a term of endearment.

B. Disclosure of Anonymous Online Critics

1. *Names of Glassdoor Critics Compelled*

In *ZL Technologies, Inc. v. Does 1-7*, 13 Cal. App. 5th 603 (2017), ZL Technologies, Inc. (the "Company") brought suit, alleging libel *per se* and online impersonation, against seven anonymous individuals who represented themselves as current or former Company employees and who posted allegedly libelous reviews of the Company's management and work environment on Glassdoor (a website where workers can post "reviews" of their employers). The Company filed a motion to compel the names of the seven reviewers. The California Court of Appeal overturned the trial court and granted the motion to compel.

The Court ruled that employers have a right to the names of individuals who post allegedly libelous comments when the employer: 1) makes a *prima facie* showing of the elements of libel, 2) makes a reasonable effort to notify the anonymous poster that they are the subject of a subpoena, and 3) sets forth the specific statements that are alleged to be actionable. If these are established, no additional test weighing of the "First Amendment right of anonymous free speech against the strength of the ***prima facie*** case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed" is necessary.

2. *Disclosure of Individual Who Posted Comments In Alleged Breach of NDA Not Compelled*

In *Glassdoor, Inc. v. Superior Court*, 9 Cal. App. 5th 623 (2017), a software developer company ("Company"), brought suit against an anonymous former employee who allegedly violated a nondisclosure agreement ("NDA") by posting confidential information concerning the Company and its technology on the

Glassdoor website. The trial court granted the Company's motion to compel disclosure of the former employee's identity, but the California Court of Appeal vacated the order.

The Appellate Court held that in order to compel disclosure of the identity of an anonymous poster, the plaintiff had to satisfy two requirements to overcome the defendant's constitutional right to preserve his or her anonymity: 1) First, if the anonymous poster has not received notice of the attempt to lift the shield of anonymity, the plaintiff must show that it made reasonable efforts to provide such notice, and 2) the plaintiff must "make a ***prima facie*** showing that a case … exists" by presenting evidence that confidential information has been revealed. In order to do this, the plaintiff must identify "the specific statements claimed to have given rise to liability."

The poster in this instance posted information about the Company's translator product and purported valuation, and made references to a "platform team." The Court found that such statements did not facially communicate anything confidential and that the Company was unsuccessful in specifying how the statements of the poster conveyed any confidential information in violation of the NDA.

The Court reiterated the established rule that a publisher of anonymous speech has standing to assert the first amendment rights of an anonymous poster to speak anonymously as the publisher's pecuniary interest aligns with the poster's interest in staying anonymous.

VII. National Labor Relations Act

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

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

1. *NLRB Establishes New Standard Governing Workplace Policies*

On December 14, 2017, in *The Boeing Co.*, 365 NLRB No. 156, the NLRB overturned its standard for evaluating the legality of employee handbook policies. The standard that was overruled was established in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004). In *Lutheran Heritage*, the NLRB stated that a policy is illegal if employees could "reasonably construe" it to bar them from

exercising their rights to engage in union or other concerted activities under the NLRA. In the *Boeing* case, the administrative law judge applied the *Lutheran Heritage* rule to Boeing's workplace policy restricting workers' use of camera-enabled devices and similar recording devices such as cellphones on company property violated the NLRA. Although Boeing's "no-recording" policy would have violated the NLRA under *Lutheran Heritage*, the NLRB in *Boeing* stated that *Lutheran Heritage's* "reasonably construe" standard entails a "single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions."

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

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

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

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

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

have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.'"

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

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

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

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

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

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

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

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

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

5. ***NLRB General Counsel Sets Forth Priorities in Memo***

Peter Robb, who was newly appointed by President Trump to serve as General Counsel for the NLRB, also has indicated his intent to reverse many of the NLRB decisions that issued during the Obama administration. On December 1, 2017, the General Counsel issued Advice Memo 18-02, which sets forth the "Mandatory Submissions to Advice" – the kinds of cases Regional Directors must submit to the Division of Advice to obtain guidance before issuing a complaint. Many of the priorities in the Memo focus on the NLRB's handbook-related changes, granting employee access to employer email systems, and confidentiality rules in investigations. The Memo also rescinds a number of prior Advice Memos, including GC 15-04, the prior GC's comprehensive views on employee handbooks, which significantly expanded the number of work rules deemed unlawful. The Memo lists "Examples of Board decisions . . . where [the GC's office] also might want to provide the Board with an alternative analysis." The list

includes cases involving: joint employment; the NLRB's prior expansion of what constitutes protected concerted activity; common employer handbook rules including rules prohibiting "disrespectful" conduct and rules prohibiting recording; *Purple Communications* and an employee's presumptive right to use their employer's email system to engage in Section 7 activity; and *Quietflex* and cases finding work stoppages protected in contexts like retail sales floors.

6. NLRB Gives More Settlement Authority to Administrative Judges

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

B. Earlier 2017 Decisions of the Obama-Era NLRB

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

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

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

In *Brooke Glen Behavioral Hospital*, 365 NLRB No. 79 (May 15, 2017), the NLRB affirmed an ALJ's decision that the termination of a union bargaining-committee representative for a profanity-laden rant did not violate the Act.

The employer was engaged in collective bargaining with a nurses' union. The employee at issue was a registered nurse. The employer was conducting a tour of its hospital for managers and staff from an affiliated facility. When the tour group approached the registered nurse's work area, she began screaming and demanding to know "who the visitors were and why they were there." Receiving no response, the registered nurse "again asked what the visitors were doing at the hospital, asked one particular visitor how many orientations he needed, and pointed out,

sarcastically, 'here's the hallway, here's the window.'" At the conclusion of the tour, while the tour group was in the parking lot, the registered nurse again approached the group and, pointing at her supervisor, stated, "this one don't do sh*t, she ain't shi*t … I'm going to get you the f*ck out of here." The employer terminated the registered nurse for her unprofessional conduct.

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

C. Federal Court Decisions Affirming Obama-Era NLRB Decisions

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

In *Whole Foods Mkt. Grp., Inc. v. NLRB*, 2017 BL 183726, 2d Cir., 16-0002-ag, unpublished 6/1/17, the Second Circuit upheld an NLRB decision that Whole Foods illegally prohibited employees from electronically recording communications in the workplace. The Whole Foods policy prohibited employees from "record[ing] conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership." In 2015, the NLRB had found that Whole Food's policy could potentially discourage employees from communicating about unions or engaging in concerted activities that are protected under the NLRA. Whole Food's argument that prohibiting recording would foster "spontaneous and honest dialogue" fell on deaf ears with the NLRB. The Second Circuit agreed. Leaving open the possibility that a more narrow policy might have survived, the Second Circuit remarked the extremely broad policy adopted by Whole Foods prohibited all recordings without regard to their relationship to employee rights. This case is probably no longer good law in view of the *Boeing Company* case, *supra*.

2. *Second Circuit Upholds Determination That Facebook Rant Was Protected*

In *National Labor Relations Board v. Pier Sixty, LLC*, 2017 U.S. App. LEXIS 6974 (2d Cir. Apr. 21, 2017), the Second Circuit upheld a NLRB ruling that an employer violated the NLRA when it terminated an employee after the employee posted a profanity-laced rant directed to his supervisor on social media. Examining the specific factual background of the matter, the Second Circuit found that even though the employee's Facebook post sat at the "outer-bounds of protected, union-related comments," the Second Circuit agreed that the employee's conduct was not so opprobrious or egregious as to lose the protection of the NLRA. Specifically, the employee was terminated two days prior to a

previously scheduled union election. Leading up to those two days and the election, the employer had engaged in conduct that the Second Circuit determined was hostile to employees. For example, Pier Sixty had threatened to rescind benefits and/or fire employees who voted for unionization. It also had enforced a "no talk" rule on groups of employees who wanted to discuss the union. Based on this hostility, the Second Circuit found that "the [NLRB] could reasonably determine that [the employee's] outburst was not an idiosyncratic reaction to a manager's request but part of a tense debate over managerial mistreatment in the period before the representation election."