Labor and Employment Law Update

2018: A Year In Review

I. New Laws

A. California

Unless otherwise stated, all new California laws set forth below went into effect on January 1, 2019.

1. Expanded Sexual Harassment Training for Employees

Currently, the relevant provisions of California's Fair Employment and Housing Act ("FEHA"), sections 12950 and 12950.1 of the California Government Code, require employers with 50 or more employees to provide sexual harassment training for all supervisory employees. SB 1343 amends these provisions, instead requiring employers of five or more employees—including seasonal and temporary employees—to provide sexual harassment training for both supervisory and non-supervisory employees by January 1, 2020.

Under the new law, within six months of assuming their positions (and once every two years thereafter), all supervisors must receive at least two hours of training, and all non-supervisory employees must receive at least one hour of training.

2. California Legislature Amends FEHA and Expressly Affirms and Rejects Harassment Case Law

SB 1300 amends FEHA in several ways. First, it expands employer liability for any acts of unlawful harassment by nonemployees (not just "sexual" harassment). Second, it prohibits employers, in exchange for a raise or bonus or as a condition of employment or continued employment, from requiring: (1) a release of FEHA claims or rights; (2) execution of a non-disparagement agreement, or other document that prohibits disclosure of unlawful workplace conduct. This provision does not apply to negotiated settlements of claims filed in court, with administrative agencies, or resolved through an ADR process (e.g., mediation) or through an employer's internal complaint procedure. Third, the bill prohibits a defendant who prevails in a lawsuit from being awarded fees and costs unless the court finds the action was frivolous when brought or that the plaintiff continued to litigate after it clearly became so.

The bill also adds a new section to the Government Code (Section 12923) that declares that the purpose of FEHA is "to provide all Californians with equal opportunity to succeed in the workplace and should be applied accordingly by the courts." In adopting this new section, the

legislature expressly affirmed and rejected certain holdings reached by California and federal courts. Specifically, it affirmed the following:

- The plaintiff in a harassment lawsuit need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.

- The existence of a hostile work environment depends upon the totality of the circumstances. Therefore, a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decisionmaker, may be relevant, circumstantial evidence of discrimination (rejecting the "stray remarks" doctrine).

- Hostile work environment cases involve issues "not determinable on paper" (thus making it difficult to prevail on summary judgment).

Further, the legislature explicitly rejected the Ninth Circuit's opinion in *Brooks v. City of San Mateo*, 229 F.3d 917 (2000), which may no longer be used in determining whether conduct is sufficiently severe or pervasive to constitute unlawful harassment (i.e., elimination of the "one free grope" rule). It also rejected reliance on *Kelley v. Conco Companies*, 196 Cal.App.4th 191 (2011), to support different standards for hostile work environment harassment depending on the type of workplace.

3. California Limits Sex Harassment Settlement Agreement Confidentiality Provisions

SB 820 prohibits and renders void provisions in settlement agreements entered into on or after January 1, 2019, that prevent disclosure of factual information related to civil or administrative complaints of sexual assault, sexual harassment, workplace harassment, or discrimination based on sex. The law does not apply to provisions that: (1) protect the claimant's identity at the claimant's request, provided the defendant is not a government agency or public official; or (2) prohibit disclosure of settlement payment amounts.

4. New Protections against Defamation Lawsuits by Alleged Harassers

AB 2770 protects sexual harassment victims and their employers against lawsuits for defamation by: (1) ensuring victims of sexual harassment and employers are not sued for defamation by the alleged harasser when a complaint of sexual harassment is made and the employer conducts its internal investigation; and (2) allowing an employer to state on a reference check that the alleged harasser is not eligible for rehire based upon the "employer's determination that the former employee engaged in sexual harassment." The new law amends

Section 47 of the California Civil Code, which relates to privileged communications, to make the conduct described above "privileged," and therefore protected from defamation claims.

5. Ban on Contractual Waivers of Right to Testify

AB 3109 bans any provision in a contract or settlement agreement (entered into on or after January 1, 2019) that waives a party's right to testify in a legal proceeding (if required or requested by court order, subpoena or administrative or legislative request) regarding criminal conduct or sexual harassment on the part of the other contracting party, or the other party's agents or employees. The law adds section 1670.11 to the Civil Code.

6. Personal Rights: Non-Workplace Sexual Harassment

SB 224 eliminates as an element of a sexual harassment claim the requirement that the plaintiff prove that he/she is unable to easily terminate the relationship with the defendant. The bill also expands this protection to apply to relationships with an investor, elected official, lobbyist, director, and producer. SB 224 amends section 51.9 of the Civil Code, and sections 12930 and 12948 of the Government Code.

7. California Requires Women on Corporate Boards of Directors

Under SB 826, a publicly held corporation with principal executive offices in California must have a representative number of women on its board of directors. Specifically, by the end of 2019, covered corporations must have at least one woman on their boards. By the close of 2021, the law will require at least two women on boards with five directors and at least three women on boards with at six or more directors. Companies that don't comply face a $100,000 fine for the first violation.

8. Minors Ages 14-17 to Receive Sexual Harassment Training Prior to Issuance of Entertainment Work Permit

AB 2338 includes a provision requiring minors 14-17 years of age and their parents/guardians to receive sexual harassment prevention training prior to the issuance of an entertainment work permit by the Labor Commissioner (with few exceptions, such permits are required in order for a minor to appear in any television show, movie, recording, etc.)

The new law provides that the training "shall consist of training administered by a third-party vendor, on-site, electronically, via Internet Web site, or other means" and must cover, at a minimum, the components specified in the Department of Fair Employment and Housing's informational pamphlet on sexual harassment (Form 185).

9. California Expands the 1-Hour Digital Exhibition Exemption from Regulations Governing Minors in Entertainment

AB 2388 expands the exemption from California's Labor Code provisions governing employment of minors in the entertainment industry for certain limited performances to include "digital exhibitions." Specifically, Labor Code Section 1310(c) now radio or television broadcasting or digital exhibitions where: (1) the minor does not receive compensation (directly or indirectly); (2) the engagement is limited to a single appearance lasting not more than one hour; and (3) no admission is charged.

According to the bill's author, examples of exempt performances under this section might include minors performing the national anthem at a ball game, singing in a church choir performance, or appearing in a local theater production, where such performances are broadcast.

10. California Clarifies Equal Pay Laws

AB 2282, the Fair Pay Act Bill, clarifies Labor Code sections 432.3 and 1197.5, which dictate how employers can use salary history information of employees and job applicants. Section 432.3 prohibits all California employers (including public employers) from relying on the salary history information of an applicant as a factor in determining whether to offer the applicant employment or what salary to offer the applicant. It also requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant applying for employment. Section 1197.5 (also known as the California Equal Pay Act) prohibits employers from paying employees of one sex less than the other for substantially similar work and prohibits prior salary, by itself, from justifying any pay disparity.

The new law, AB 2282, clarifies these two laws. First, it defines the previously undefined terms, "applicant," "pay scale," and "reasonable request," in Labor Code section 432.3. "Applicant" is an individual who seeks employment with the employer, not a current employee. "Pay scale" means the salary or hourly wage range. "Reasonable request" means a request made after the applicant has completed the initial interview. Second, AB 2282 clarifies that while employers may not ask for an applicant's salary history information, they may ask for an applicant's salary expectations. Third, it amends Section 1197.5 to authorize an employer to make a compensation decision based on an employee's current salary as long as any wage differential resulting from that compensation decision is justified by one or more specified factors, including a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a bona fide factor other than race or ethnicity, such as education, training, or experience.

11. California Eliminates the 7-Day Waiting Period for Paid Family Leave Benefits

AB 2587 amends Section 3303.1 of the California Unemployment Insurance Code, which pertains to Paid Family Leave ("PFL"). PFL is a wage replacement program for California workers who take time off to care for a seriously ill family member or to bond with a minor child within one year of birth, adoption or foster care placement. Prior to January 1, 2018, individuals were required to go through an unpaid seven-day waiting period before they could start receiving PFL benefits. As of January, 1, 2018, the amendment removes the seven-day waiting period, along with provisions regarding use of vacation time during that period.

12. Meal Periods after Six Hours of Work for Some Commercial Drivers

Currently, in almost all industries, employers are prohibited from requiring an employee to work more than five hours per day without providing a duty-free meal period of not less than thirty minutes. The meal period must commence before the end of the fifth hour of work.

AB 2610 amends section 512 of the Labor Code and authorizes a commercial driver employed by a motor carrier to commence the meal period after six hours of work under the following conditions: (a) the driver is transporting nutrients and byproducts from a licensed commercial feed manufacturer to a customer located in a remote rural location; and (b) the regular rate of pay of the driver is no less than one and one-half times the state minimum wage and the driver receives overtime compensation in accordance with specific provisions of existing law. "Remote rural location" is not defined.

13. Employees to "Receive A Copy" of Employment Records

SB 1252 amends Labor Code Section 226 to require that employers provide employees the right to "receive a copy" of employment records and not just the right to "inspect or copy records" as formerly required under the Labor Code.

14. Occupational Injuries and Illness: Employer Reporting Requirements

Existing rules require, among other things, that the Division of Occupational Safety and Health (the "Division") enforce all occupational safety and health standards and that it issue citations for employer violations of recordkeeping requirements. Currently, the Division is prohibited from issuing a citation more than six months after the "occurrence" of the violation.

AB 2334 provides that an "occurrence" continues until: (a) it is corrected; (b) the Division discovers the violation; or (c) the duty to comply with the requirement that was violated no longer exists. This Bill amends Sections 138.7, 3702.2 and 6317 of the Labor Code, and adds Sections 6410.1 and 6410.2 to the Labor Code.

15. Disability Compensation: Paid Family Leave – Military Service

Effective January 1, 2021, SB 1123 expands the scope of Paid Family Leave, also known as California's disability insurance program, to include time off to participate in a qualifying exigency related to covered active duty, or call to covered active duty, of the individual's spouse, domestic partner, child or parent in the armed forces of the United States. This bill makes various modifications to the Unemployment Insurance Code, including to sections 3301, 3302.1, 3302.2, 3303, 3303.1 and 3307.

16. Lactation Accommodations

Under current California law, employers are required to make reasonable efforts to provide an employee with the use of a room or other location (other than a toilet stall), in close proximity to the employee's work area, for the employee to express breast milk in private for the employee's child. AB 1976 replaces the term "toilet stall" with "bathroom." In addition, employers that make a temporary lactation location available to employees shall be deemed to be in compliance if all of the following conditions are met: (1) they are unable to provide a permanent lactation location because of operational, financial or space limitations; (2) the temporary location is private and free from intrusion while an employee expresses milk; (3) the temporary location is used only for lactation purposes while an employee expresses milk; (4) the temporary location otherwise meets the requirements of state law concerning lactation accommodations.

17. Minimum Wage Increases

The following California cities and counties increased their minimum wage in July 2018:

City/County	# of Employees	Minimum Hourly Wage Beginning July 1, 2018	Minimum Hourly Wage Before July 1, 2018
Emeryville	56 or more employees	$15.69	$15.20
	55 or fewer employees	$15.00	$14.00
Los Angeles (city)	26 or more employees	$13.25	$12.00
	25 or fewer employees	$12.00	$10.50
Los Angeles (county) (unincorporated areas only)	26 or more employees	$13.25	$12.00
	25 or fewer employees	$12.00	$10.50
Malibu	26 or more employees	$13.25	$12.00
	25 or fewer employees	$12.00	$10.50
Milpitas	—	$13.50	$12.00

City/County	# of Employees	Minimum Hourly Wage Beginning July 1, 2018	Minimum Hourly Wage Before July 1, 2018
		$13.25	$12.00
Pasadena	26 or more employees 25 or fewer employees	$12.00	$10.50
San Francisco	—	$15.00	$14.00
San Leandro	—	$13.00	$12.00
		$13.25	$12.00
Santa Monica**	26 or more employees 25 or fewer employees	$12.00	$10.50

** Hotel workers' minimum wage will be indexed, meaning that their rates will be adjusted annually based on changes in the Consumer Price Index (CPI).

Most of these jurisdictions' minimum wages are slated to increase again on July 1, 2019.

Belmont adopted an ordinance to establish its own minimum wage of $12.50/hour beginning July 1, 2018, with another increase set to go into effect on January 1, 2019.

18. Human Trafficking Awareness

SB 970 requires hotel and motel employers (excluding bed and breakfast inns), to provide—by January 1, 2020, and once every two years thereafter—at least 20 minutes of interactive human trafficking awareness training to employees likely to interact with human trafficking victims. The Department of Fair Employment and Housing can seek an order requiring an employer comply with these requirements. The new law adds section 12950.3 to the Government Code.

19. San Francisco's Salary History Ordinance

San Francisco's new Consideration of Salary History ordinance (also known as the Parity in Pay ordinance) went into effect on July 1, 2018, and prohibits employers from considering applicants' current or past salaries when determining whether to extend an offer of employment and what salary to offer. The ordinance also prohibits employers from asking applicants about their current or past salaries, or disclosing a current or former employee's salary history without that employee's authorization (assuming that salary history is not publicly available).

20. San Francisco Amends Fair Chance Ordinance

San Francisco's amended Fair Chance Ordinance took effect on October 1, 2018. The amended "ban the box" ordinance now prohibits employers from inquiring about, requiring disclosure of, or basing an employment decision on a conviction for a crime that has been decriminalized (e.g., the non-commercial possession, use, and cultivation of marijuana). The ordinance now applies to all employers with at least five employees (versus 20) worldwide, as

well as job placement agencies, referral agencies, and other employment agencies, and includes city contractors and subcontractors. Employers must provide a required four-language notice to applicants and employees before conducting any criminal background checks. The amended ordinance also provides for a private right of action and increased penalties to be awarded to the applicant or employee, rather than (as formerly) to the city.

B. New York

1. Increase in New York State Salary Threshold for Executive and Administrative Exemptions

As of December 31, 2018, New York employers must meet new minimum salary thresholds to maintain exemptions for executive and administrative employees. The new minimum thresholds, which vary by employer size and location, are available in the wage orders posted on the New York Department of Labor website.

2. Expired Wage Deduction Law Extended

The New York Wage Deduction Law, which outlines permissible and prohibited employer wage deductions, expired on November 6, 2018. A new amendment extends this law for eight more years.

3. New York State and New York City Implement Stronger Protections against Workplace Harassment

New York State and New York City ("NYC") have implemented stronger protections for employees against workplace harassment. The new requirements impact employers' training, policies and procedures, and employment agreements for New York employees.

a) Changes to New York State Law:

Training: As of October 9, 2018, all New York State employers must provide sexual harassment prevention training to all New York employees every year. Harassment prevention training must be interactive and include: (1) an explanation of sexual harassment consistent with guidance issued by the New York Department of Labor; (2) examples of conduct that would constitute unlawful sexual harassment; (3) information concerning the federal and state statutory provisions regarding sexual harassment and remedies available to victims of sexual harassment; and (4) information concerning employees' rights of redress and all available forums for adjudicating complaints. Training must also address the role of supervisors with respect to sexual harassment claims. Employers can either use the model program provided by the New York State Department of Labor or can establish their own programs, as long as they equal or exceed the minimum standards provided by the model.

Policies and Procedures: By October 9, 2018, all New York employers are required to adopt (and distribute to employees) a policy that is compliant with the New York State model policy and contains the following:

- a statement prohibiting sexual harassment;
- examples of prohibited conduct that would constitute sexual harassment;
- information concerning the federal and state statutory provisions covering sexual harassment and remedies available to victims, along with a statement that there may be additional applicable laws;
- a standard complaint form;
- the procedure for timely and confidential investigation of complaints;
- a statement informing employees of their rights of redress and available forums for adjudicating sexual harassment complaints administratively and judicially;
- a statement that sexual harassment is a form of employee misconduct, and that sanctions will be enforced against individuals who engage in sexual harassment and against managers and supervisory personnel who knowingly allow such behavior to continue; and
- a statement that retaliation against individuals reporting sexual harassment or who testify or assist in any proceeding is unlawful.

Protections for Non-Employees: The New York State Human Rights Law makes it an unlawful employment practice for an employer's employees to sexually harass "non-employees," who are defined as contractors, subcontractors, vendors, consultants, or any other person who provides services under a contract in the workplace or an employee of the same, and where the employer or its agents or supervisors knew or should have known that the non-employee was subject to sexual harassment in the employer's workplace, and failed to take appropriate corrective action.

Employment Agreements: Effective July 11, 2018, New York State employers are prohibited from entering into agreements that require employees to submit sexual harassment claims to mandatory binding arbitration. Arbitration provisions in collective bargaining agreements are excluded. Employers are also prohibited from including confidentiality provisions relating to sexual harassment claims in their severance and settlement agreements unless the employee consents. In order to establish consent, an employer must provide the employee with 21 days to consider whether to consent to the confidentiality provision, and 7 days to revoke that consent. This law does not impact existing agreements.

b) **Changes to New York City Law**:

Effective immediately, for purposes of gender-based harassment claims only, the NYC Human Rights Law now applies to all employers regardless of their size (whereas, for other

types of claims, it applies to employers with four or more employees). The limitations period for filing gender-based harassment claims with the NYC Commission on Human Rights has been extended from one year to three years.

Training: Effective April 1, 2019, employers with 15 or more employees must also conduct training for all new NYC hires within 90 days of employment and annually thereafter. Employers are not required to provide this training to employees who have already received training at another job during the same annual training cycle.

The NYC law contains more specific requirements regarding the subject matter of the training than does the New York State law. Trainings conducted under the NYC law must include: (1) an explanation of sexual harassment as a form of unlawful discrimination under local law; (2) a statement that sexual harassment is also a form of unlawful discrimination under state and federal law; (3) a description of what sexual harassment is, using examples; (4) any internal complaint process available to employees through their employer to address sexual harassment claims; (5) the complaint process available through the NYC Commission on Human Rights, the New York State Division of Human Rights and the United States Equal Employment Opportunity Commission, including contact information; (6) the prohibition of retaliation and examples thereof; (7) information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention; and (8) the specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and measures that such employees may take to appropriately address sexual harassment complaints.

The NYC Commission on Human Rights will develop an online interactive training module that may be used by employers to satisfy these training requirements. If an employer chooses to use the Commission's module, the employer must also inform all employees of any internal complaint process available to address sexual harassment claims.

Poster/Information Sheet: Under the NYC law, employers must also post an anti-sexual harassment rights and responsibilities poster and provide an information sheet on sexual harassment to each employee at the time of hire. The required poster and information sheet are available on the nyc.gov website.

4. NYC Expands Lactation Accommodations

In late October 2018, the NYC Council passed two bills amending the NYC Human Rights Law to expand the requirements of employers with four or more employees to provide lactation space for breastfeeding employees. The bills have been sent to Mayor Bill de Blasio, who is expected to sign them. If enacted, they will take effect 120 days after signing.

The new bills expand the New York State Labor Law's requirement to provide reasonable unpaid break time (or permit employees to use paid break time) to express milk in the

workplace for up to three years following the birth of a child, and to "make reasonable efforts" to provide a room or other location, other than a restroom, to express milk in private.

Lactation Room Requirements: The first bill, Int. No. 879-A, would require covered employers to provide employees with access to a lactation room, as well as to a refrigerator suitable for breast milk storage, "in reasonable proximity" to the employee's work area. The bill further provides that, should providing a lactation room pose an undue hardship on an employer, the employer is nevertheless obligated to engage in a cooperative dialogue with employees to determine what, if any, alternate accommodation(s) may be available, and to provide a written final determination to employees at the conclusion of the cooperative dialogue process, identifying any accommodation(s) granted or denied.

Lactation Room Policy: The second bill, Int. No. 905-A, would require covered employers to develop and implement a written policy regarding the provision of a lactation room, to be distributed to all new employees upon hire. The policy would be required to include a statement that employees have a right to request a lactation room, as well as identify a process (as specified in the law) by which employees could request a lactation room. The bill would further require the New York City Commission on Human Rights, in collaboration with the Department of Health and Mental Hygiene, to develop a model lactation room accommodation policy and request form for use by employers.

5. NYC Requires Employers to Engage in a "Cooperative Dialogue" With Employees Requesting Reasonable Accommodations

NYC passed a new law requiring employers to engage in a "cooperative dialogue" with employees requesting reasonable accommodation and provide a written determination at the end of the cooperative dialogue process. The law took effect on October 15, 2018.

This new law makes it an independent violation under the NYC Human Rights Law for employers not to "engage in good faith in a written or oral dialogue" about the needs of persons who may be entitled to an accommodation. This process is referred to under the law as a "cooperative dialogue" (similar to the "interactive process" required for accommodation requests under the Americans with Disabilities Act).

The new law also requires that "[u]pon reaching a final determination at the conclusion of a cooperative dialogue" regarding any accommodation requests that have been made, employers provide "a written final determination [to the person requesting an accommodation] identifying any accommodation granted or denied."

6. NYC Employers Must Grant Employee Requests for Temporary Work Schedule Changes When Needed for Medical and Family Care

Starting July 18, 2018, employers in NYC were required to grant employee requests for temporary work schedule changes when needed for certain medical and family care purposes.

Employers are required to grant such requests either twice per calendar year for up to one business day per request, or once per calendar year for two business days for a single request. Reasons for temporary schedule changes under the law include providing care to a minor child or to certain family or household members with a disability, to attend certain benefits-related proceedings, and for other reasons covered under the New York City Earned Safe and Sick Time Act ("ESSTA").

One of the major expansions to the ESSTA was the inclusion of leave relating to an employee or employee family member victimized by domestic violence, sexual offenses, stalking, or human trafficking, known as "safe time." Employers' written ESSTA policies must now include a provision to keep the reason for safe leave confidential. Furthermore, if the employer uses a term other than "safe/sick time" to describe leave under the ESSTA such as "paid time off" or "personal days," the written policy must expressly state that such leave may be used by an employee for any covered purpose under the ESSTA and without any condition otherwise prohibited by the ESSTA.

The amended rules also update several definitions, including the definition of "joint employer" and covered "family member." A joint employer is now "each of two or more employers who has some control over the work or working conditions of an employee or employees." And covered family members now include any blood relative or any individual whose close association with the employee is the equivalent of a family relationship.

Finally, the new law contains a notice posting requirement. Employers are obligated to post the notice You Have a Right to Temporary Changes to Your Work Schedule where employees can easily see it at each NYC workplace. Links to the new law and required posting are available on the nyc.gov website.

II. Employment Discrimination Law

A. Ninth Circuit Decisions

1. Salary History Not a Permissible "Factor Other than Sex" to Justify Wage Differential Under the Equal Pay Act

In *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), a public school math consultant filed suit under the federal Equal Pay Act (EPA) alleging that her employer's salary schedule, which set salaries for all new workers at 5% more than their prior salary, unlawfully resulted in higher salaries for male counterparts performing the same work. The employer moved for summary judgment based on the statutory affirmative defense that the pay difference was "based on any other factor other than sex." The district court denied the employer's motion, ruling that a difference in salary based on prior salary is **not** a permissible "factor other than sex." A Ninth Circuit panel overturned that ruling, finding that salary history **was** a permissible factor.

Earlier this year the Ninth Circuit, en banc, vacated that decision. In its new opinion, the Court concluded that salary history does **not** qualify as a defensible "factor other than sex" under the EPA. Rather, the Court determined that the "any factor other than sex" defense to a demonstrated wage differential is "limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance." The Court cautioned that the opinion expresses "a general rule" and "does not attempt to resolve its application under all circumstances." The Court specifically stated that the ruling does not decide "whether or under what circumstances, past salary may play a role in the course of an individualized salary negotiation."

2. Dismissal of High School Teacher's Discrimination and Harassment Claims Based on Conduct of Students and Administration Proper

In *Campbell v. State of Hawaii Dep't of Educ*., 892 F.3d 1005 (9th Cir. 2018), a high school music teacher alleged harassment by her students on the basis of race and gender. The teacher made numerous complaints to the Department of Education (DOE), which investigated the complaints and imposed disciplinary measures against the students who misbehaved. During that same time period, students, parents, and another teacher submitted complaints against the teacher, claiming physical and verbal abuse, discrimination, and failure to maintain a safe classroom. The DOE investigated the teacher, and although some claims were deemed valid, the DOE took no action against the teacher and she was allowed to remain in her position at the school. The teacher sought transfer to different schools, and when that failed, she sought, and received, an unpaid leave of absence and later resigned.

The teacher filed suit for hostile work environment, disparate treatment and retaliation under Title VII and sex discrimination under Title IX, relying on alleged mistreatment by her students and DOE administration. The district court granted summary judgment and the teacher appealed. The Ninth Circuit affirmed, holding there was no adverse employment action because the teacher's request for transfer did not comply with required procedures and there were no changes to her duties or the condition of her work. Rather, the teacher remained employed until her request for leave was granted. With respect to her hostile environment claim, the Court recognized that the DOE took reasonable steps to address the harassment by investigating and disciplining the students. The Court noted that reasonable steps are not required to be "immediately and perfectly effective in preventing all future harassment by a third party."

3. "Regarded As" Disability Does Not Require Proof of Employer's Subjective Belief

In *Nunies v. HIE Holdings, Inc*., 908 F.3d 428 (9th Cir. 2018), a full-time delivery driver made arrangements to swap positions with a part-time warehouse employee. At some point during the process of obtaining approval for the switch, the delivery driver notified his supervisor of a shoulder injury. Two days later, the company rejected the driver's transfer request and forced him to resign, stating that the part-time position sought no longer existed even

though a newspaper posting advertised the position as open. The delivery driver filed suit, alleging violation of the Americans with Disability Act (ADA) and Hawaii state law. After the district court granted summary judgment for the employer, the driver appealed.

On appeal, the Ninth Circuit reversed. The Court clarified that the 2008 expanded definition of the Amended ADA's "regarded as" definition of disability did not require the driver to provide evidence that his employer subjectively believed that the driver was substantially limited in a major life activity. Therefore, the district court's reliance on pre 2008 caselaw requiring such evidence was error. The Court also concluded that there was "at least a dispute" regarding whether the driver had an actual disability in "two major life activities: working and lifting."

4. At Trial, Plaintiff Failed to Meet Burden to Prove Reasonable Accommodation Enabling Performance of Essential Job Functions

In *Snapp v. United Trans. Union*, 889 F.3d 1088 (9th Cir. 2018), a trainmaster was diagnosed with sleep apnea. The trainmaster underwent two unsuccessful surgeries and was deemed totally disabled. After five years of long-term disability benefits, the trainmaster failed to undergo the required continuing disability assessment. With no evidence of continuing disability, the trainmaster was returned to work and notified that he had 60 days to find a new position with the employer. He failed to find a position within the required period and was terminated.

The trainmaster sued for failure to provide a reasonable accommodation for his disability under the ADA. The case went to trial and the jury returned a verdict for the employer. The trainmaster appealed, arguing that the jury received improper instructions regarding burden shifting and burden of proof. The Ninth Circuit rejected the plaintiff's argument that the employer's alleged failure to engage in the interactive process shifted the burden to the employer to prove the unavailability of a reasonable accommodation, concluding that such burden-shifting, while appropriate at the summary judgment stage, was "neither appropriate or necessary" at trial. The Court also confirmed that at trial the plaintiff bears the ultimate burden of proving that the employer could have made a reasonable accommodation that would have allowed the plaintiff to perform the essential functions of his job.

B. California Court Decisions

1. Potential Employer May be Liable under FEHA for Deterring Pregnant Woman from Applying for a Job by Falsely Telling Her No Position was Available

In *Abed v. Western Dental Services, Inc.*, 23 Cal. App. 5th 726 (2018), a dental assistant student extern was informed at the beginning of her externship that the program often results in employment. The dental office later learned that the extern was pregnant. When the extern

inquired about an employment position, she was told there were no openings at that location. However, another extern was placed at that location and hired into a permanent position shortly thereafter.

The extern filed suit for discriminatory failure to hire under the California Fair Employment and Housing Act ("FEHA"). The trial court granted the defendant's motion for summary judgment on the basis that the extern had never actually applied for the position and therefore did not state a prima facie case. Recognizing that "the precise requirements of a prima facie case can vary depending on the context," the Court of Appeal reversed, ruling that an application was not required where the claim was that "[defendant] caused plaintiff not to apply by falsely telling her for discriminatory reasons that no position was available."

2. Employer Failed to Reasonably Accommodate Disabled Employee by Adjusting Probationary Period

In *Hernandez v. Rancho Santiago Cmty. Coll. Dist.*, 22 Cal. App. 5th 1187 (2018), a probationary employee took time off for surgery due to a workplace accident occurring during prior employment with the same school district. Although the district told her she could take the time off, the district terminated her employment while she was on leave. The district's reasoning was that her probationary period would expire before she returned to work, automatically converting her to a permanent employee before the district had a chance to formally review her performance as provided for by the Education Code. The employee filed suit for failure to reasonably accommodate her disability and failure to engage in the interactive process. The trial court held that the district could have accommodated the employee by extending her probationary period or by adding the time away from work to the probationary period. The Court of Appeal agreed: "We conclude that when a probationary employee suffers a temporary total disability requiring absence from work for an extended period of time, that period may be deducted from the employee's probationary period."

3. Reversal of Sexual Harassment Jury Verdict for Defense Due to Trial Court's Improper Exclusion of Evidence

In *Meeks v. AutoZone, Inc.*, 24 Cal. App. 5th 855 (2018), a store manager alleged that she had been sexually harassed by another store manager. The claimed harassment included verbal comments, sexual text messages (including pornographic videos), and forcible attempts to kiss her. The employee further claimed that when she reported the harassment to her supervisor, she was told to "squash" her complaint or risk losing her job. The employee filed suit under FEHA for sexual harassment and retaliation.

The trial court granted summary adjudication of the retaliation claim. During trial on the sexual harassment claim, the court excluded evidence regarding the substance of the sexual texts because the plaintiff no longer had them in her possession. The trial court also excluded "me too" evidence by other employees who experienced similar alleged harassment. The jury found

for the defendants at trial and plaintiff appealed. The Court of Appeal affirmed the dismissal of the retaliation claim because "a single threat of an adverse employment action, never carried out" did not qualify as an adverse employment action. The Court reversed the judgment on the sexual harassment claim, concluding that the trial court's exclusion of evidence was erroneous.

C. California Agency Actions

1. New FEHA National Origin Discrimination Regulations

New regulations effective July 1, 2018, delineate the scope of the Fair Employment and Housing Act (FEHA) prohibition against national origin discrimination. The regulations include a definition of covered persons, guidelines regarding language policies, height and weight restrictions, and demands to show or carry a driver's license. The regulations also emphasize application of FEHA to undocumented applicants and employees, and reiterate existing law regarding retaliation.

National Origin Definition: New regulations clarify that FEHA prohibits national origin discrimination on the basis of an individual or ancestors' actual or perceived:

- physical, cultural, or linguistic characteristics associated with a national origin group;
- marriage to or association with persons of a national origin group;
- tribal affiliation;
- membership in or association with an organization identified with or seeking to promote the interests of a national origin group;
- attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group; and
- name that is associated with a national origin group.

The regulations define national origin groups to include "ethnic groups, geographic places of origin, and countries that are not presently in existence."

Workplace Language Restrictions: The new regulations also prohibit discrimination based on an employee or applicant's accent and provide new guidelines regarding workplace language restrictions. The new regulations provide that English-only rules are presumed unlawful unless: (1) justified by a business necessity; (2) narrowly-tailored; and (3) such policy, and consequences for violating it are clearly communicated to employees. A "business necessity" is defined as an overriding legitimate business purpose that is: (a) necessary to the safe and efficient operation of the business; (b) where the restriction fulfills that purpose; and

(c) no alternative practice would accomplish the business purpose equally well with less discriminatory impact.

A language restriction policy may not be based on mere business convenience or customer or co-worker preference. Moreover, English-only rules are never lawful during non-work time, such as breaks, lunch, or other unpaid employer-sponsored events. Employers may make English proficiency inquiries to an applicant or employee if the level of proficiency is necessary to effectively fulfill the job duties of the position.

Driver's License Requirement: Employers may only require an applicant or employee to hold or present a driver's license where possession of a driver's license is required by law.

Immigrant and Citizenship Status: Inquiry into an applicant or employee's immigration status is not permitted unless required by federal immigration law. Discrimination on the basis of immigration or citizenship status is also unlawful unless required by federal immigration law or other permissible defense.

Height and Weight: To the extent that height and weight requirements may have a disparate impact on the basis of national origin, they are prohibited unless job-related, justified by business necessity, and there is no equally-effective and less discriminatory alternative.

Recruitment and Job Segregation: Employers are prohibited from assigning applicants or employees to a position, facility, or geographical area based on national origin.

D. Second Circuit Decisions

1. Second Circuit Overrules Prior Decisions and Rules Sexual Orientation Discrimination Prohibited under Title VII

The Second Circuit ordered a rehearing, en banc, of *Zarda v. Altitude Express, Inc*. specifically to re-visit Second Circuit precedent regarding whether claims of sexual orientation discrimination are cognizable under Title VII.

In *Zarda v. Altitude Express, Inc*., 883 F.3d 100 (2nd Cir. 2018), a sky-diving instructor alleged that he was terminated from his job after making comments about his sexual orientation to a female client. The instructor filed suit, alleging sex stereotyping in violation of Title VII and sexual orientation discrimination in violation of New York law. The district court granted the employer's motion for summary judgment on the Title VII claim, concluding that sexual orientation discrimination did not state a claim under Second Circuit interpretation of Title VII. The instructor's state court claim went to trial, where the jury found for the employer. The instructor appealed dismissal of his federal claim, relying on an Equal Employment Opportunity Commission ("EEOC") Agency decision recognizing that Title VII prohibited sexual orientation discrimination. A Second Circuit panel affirmed the district court decision, stating that the

Second Circuit panel lacked the authority to revisit precedent, which can only be overturned by the entire Court sitting en banc.

Subsequently, the Second Circuit, en banc, granted review. The Court reviewed its prior decisions, as well as the persuasive authority of other circuit decisions and the position of the EEOC, and determined unequivocally that sexual orientation discrimination violates Title VII. Specifically, the Second Circuit ruled that sexual orientation discrimination is prohibited by Title VII as unlawful gender discrimination, gender stereotyping, and associational discrimination.

E. New York State and City Agency Actions

1. New York State Provides Model Sexual Harassment Training Materials for Employers

Following its passage of new laws requiring that all New York State employers provide annual sexual harassment prevention training and implement sexual harassment prevention policies (*see above*), New York State has published final versions of compliance materials for employers on a dedicated website, which includes: (1) a model sexual harassment policy; (2) model training materials; (3) a model complaint form; (4) Frequently Asked Questions ("FAQs") relating to the model materials and new laws; and (5) lists of minimum standards for sexual harassment policies and trainings for employers who wish to prepare their own.

2. NYC Commission on Human Rights: Required Posting and Information Sheet on Sexual Harassment

Under the new NYC Human Rights law discussed above, employers must also post an anti-sexual harassment rights and responsibilities poster and provide an information sheet on sexual harassment to each employee at the time of hire. These materials have been published by the NYC Commission on Human Rights:

Required Posting: All New York City employers must "conspicuously display" the required posting, in English and Spanish, in employee breakrooms or other areas where employees meet and must be posted at each worksite. Employers may provide the notice electronically (via electronic bulletin board) if a physical location is not available or if electronic posting is the most effective method of reaching employees. Remote workers may receive the posting notice via email.

Required Factsheet: Employers must provide a required fact sheet providing information regarding NYC Human Rights law and Sexual Harassment to employees "at the time of hire," but no later than the end of the employee's first week of work. Employers may distribute the fact sheet electronically where that is there ordinary method of communicating with employees.

III. Wage and Hour Law

A. U.S. Supreme Court Decisions

1. Supreme Court Rules that FLSA Exemptions Should No Longer Be Narrowly Construed

The Supreme Court in *Encino Motorcars, LLC v. Navarro*, 584 U.S. _ (2018), overturned over 70 years of legal precedent and ruled that exemptions under the Fair Labor Standards Act ("FLSA") should not be narrowly construed. In a 5-4 decision, the Supreme Court overturned a Ninth Circuit decision holding that certain auto service advisors were not exempt from the FLSA. The Ninth Circuit had held that, because FLSA exemptions should be narrowly construed, the employees' position must be specifically listed under the FLSA's auto dealership exemption to be exempt.

The Supreme Court disagreed and instead found no "textual indication" that courts should construe FLSA exemptions narrowly. Applying a more employer-friendly "fair interpretation" standard, the Court ruled that the nature of the work provided by service advisors fit the exemption. Lower courts are still grappling with the practical effects of *Encino*. However, the decision is expected to expand the types of positions that qualify for one of the FLSA's exemptions.

2. Supreme Court Upholds the Use of Class Action Waivers in Arbitration Agreements

In a closely watched case, the Supreme Court upheld the enforceability of class action waivers in employee arbitration agreements. In *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), the Court ruled that class action waivers are enforceable under the Federal Arbitration Act ("FAA") and are not prohibited by the National Labor Relations Act ("NLRA").

However, the *Epic* ruling does not change how courts evaluate arbitration agreements for unconscionability. Such agreements still must be substantively and procedurally conscionable. Furthermore, class action waivers in arbitration agreements may not waive an employee's right to pursue representative claims under California's Private Attorneys General Act ("PAGA"). As California courts have held, because PAGA claims belong to the state (not the employee), an employee's arbitration agreement cannot waive PAGA claims and cannot require those claims to be litigated in arbitration.

B. California Court Decisions

1. California Supreme Court Adopts "ABC" Test as Standard to Determine Independent Contractor Status under the Wage Orders

In *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), the California Supreme Court issued a unanimous decision adopting a new standard for determining whether a California worker is an employee or independent contractor under California's Industrial Welfare Commission's wage orders.

Under the new test, known as the "ABC Test," a worker is an independent contractor only if the employer establishes *each* of the following three factors: "(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of such work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed [for the hiring entity]."

The newly adopted ABC test presumptively considers all workers to be employees, and permits them to be classified as independent contractors only if the hiring entities demonstrates that all three of the "ABC" factors are met.

Employers may find themselves particularly stymied when it comes to the "B" factor of the ABC test (determining whether a worker performs work that is outside the usual course of the hiring entity's business). In evaluating this issue, the Court provided examples of workers it would consider to be independent contractors and employees. For instance, plumbers and electricians providing services to a retail store would not be considered performing work within the store's usual course of business, so these workers could properly be classified as independent contractors. On the other hand, the following workers would be considered employees: (1) a work-at-home seamstresses hired by a clothing manufacturing company to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company; and (2) a cake decorator hired by a bakery to work on a regular basis on its custom-designed cakes.

2. Employers Cannot Rely on the De Minimis Doctrine to Avoid Paying Small Amounts of Regularly Occurring Off-The-Clock Work

In *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018), a Starbucks employee claimed that, after clocking out, he was required to regularly perform tasks (such as transmitting sales data), which took an additional 4 to 10 minutes of time per day. The Ninth Circuit Court of Appeals asked the California Supreme Court to decide whether *de minimis* rule applies to claims for unpaid wages brought under the California Labor Code.

First, the California Supreme Court analyzed whether California's wage and hour statutes or regulations have adopted the *de minimis* doctrine found under the federal Fair Labor Standards

Act ("FLSA"). After surveying California's Labor Code statutes and Industrial Welfare Commission ("IWC") wage orders, the Court ruled that "[t]here is no indication in the text or history of the relevant statutes and [IWC] wage orders of such adoption."

Second, because the *de minimis* rule is a long-standing state law principle, the Court looked at whether some version of the doctrine nonetheless applies to wage and hour claims as a matter of state law. The Court declined to decide whether there are any circumstances "where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded." Instead, it looked only at the facts of the case, holding that the *de minimis* rule did not apply where the employer regularly required the employee to work "off the clock" several minutes per shift.

3. California Supreme Court Clarifies Overtime Calculations for Flat-Sum Bonuses

In *Alvarado v. Dart Container Corp. of Cal.*, 4 Cal. 5th 542 (2018), the California Supreme Court clarified how employers should calculate overtime in pay periods during which an employee receives a flat sum bonus. California law requires non-exempt employees to be compensated at 1.5 times the "regular rate" of pay for all hours worked in excess of 8 hours a day or 40 hours a week, and twice the regular rate of pay for hours worked in excess of 12 in a day or 8 on a seventh consecutive day of work. This regular rate must, in addition to the "straight time" rate, incorporate shift premiums, non-discretionary bonuses, and other compensation earned during the pay period. Previously undecided was how "flat sum" bonuses (non-formula bonuses unrelated to the number of hours worked) factor into overtime calculations.

In *Alvarado*, the employer (following guidance under the Fair Labor Standards Act) calculated the regular rate by dividing total compensation in the pay period by the total hours worked (including overtime hours). The plaintiff argued that the employer should have followed the guidance by the Division of Labor Standards Enforcement ("DLSE") that total compensation be divided by the "regular hours" (excluding overtime hours). Even though the DLSE's interpretation was deemed void for not following formal rulemaking procedures, the California Supreme Court found the DLSE's reasoning to be correct. Therefore, flat sum (non-production) bonuses should be factored into an employee's regular rate by dividing the amount of the bonus by the total number of nonovertime hours actually worked during the relevant pay period and using 1.5 or 2.0 as the multiplier for determining the employee's overtime pay rate. The Court further determined that its holding applies retroactively.

4. California Court of Appeal Provides New Guidance on Meaning of "To Employ" Workers

In *Curry v. Equilon Enterprises LLC*, 23 Cal. App. 5th 289 (2018), a California Court of Appeal ruled that a wage and hour class action against Shell Oil could not proceed because the

service station manager bringing the suit was not a Shell employee. Rather, the manager was employed by ARS, the company that contracted with Shell to operate the station.

In ruling that the plaintiff was not a Shell employee, the Court held that the "ABC Test" applies in the case of the potential misclassification of independent contractors, not in the joint employment context. The Court explained that, because a joint employee already has a primary employer, "the policy purpose for presuming the worker to be an employee . . . is unnecessary."

Similar to a franchisor-franchisee relationship, ARS had a contract with Shell to operate multiple gas stations. The plaintiff managed two locations. She was hired by ARS, was trained by ARS employees, reported to ARS employees, and supervised ARS employees. ARS paid the plaintiff and made all disciplinary and promotional decisions regarding her employment.

The Court discussed three possible definitions of what it means to employ someone: (1) to exercise control over wages, hours or working conditions; (2) to suffer or permit to work; and (3) to engage. The Court said the first definition did not apply because Shell did not control the plaintiff's wages, hours or working conditions. The second definition did not apply because Shell had no authority to hire or fire the plaintiff.

With respect to the third definition, the Court said "to engage" referred to a multi-factor test, which considers: (1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal's direction or by a specialist without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal's regular business, and (8) whether the parties believe they are creating an employer-employee relationship. Applying these factors, the Court held that the plaintiff was not employed by Shell.

5. California Courts of Appeal Pave the Way for More PAGA Claims

The California Courts of Appeal issued two employee-friendly rulings regarding the California Private Attorneys General Act ("PAGA"), which further expand PAGA's reach. PAGA authorizes individuals to bring representative actions against employers to recover civil penalties for violations of the California Labor Code.

In the first, *Huff v. Securitas Security Services USA, Inc.*, 23 Cal. App. 5th 745 (2018), the Court addressed the issue of whether a plaintiff who brings a PAGA representative action may seek penalties not only for the Labor Code violation that affected him or her, but also for different Labor Code violations that affected other employees. The Court held that PAGA allows a plaintiff to pursue penalties for all the Labor Code violations committed by that employer that affected any employee, provided that the plaintiff must have been affected by at

least one Labor Code violation. In other words, a plaintiff who brings a representative action under PAGA may seek penalties for violations that he or she did not even suffer.

In the second case, *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal. App. 5th 667 (2018), the Court ruled that a PAGA representative claim for a violation of Labor Code Section 226(a), which obligates employers to provide accurate wage statements to employees, does not require: (1) proof of injury, or (2) a knowing and intentional violation. The Court held that this is true even though these two elements are required to be proven when an employee brings an individual, non-PAGA claim for damages or penalties under Section 226(a).

6. California Supreme Court's Independent Contractor Decision Only Applies to Claims Brought under California Wage Orders

In *Garcia v. Border Transportation Group, LLC*, 28 Cal. App. 5th 558 (2018), a California Court of Appeal weighed in on the scope of the California Supreme Court's ruling in *Dynamex Operations West, Inc. v. Superior Court.* In *Dynamex*, the Supreme Court adopted a new standard for determining whether a California worker is an employee or independent contractor under the California Industrial Welfare Commission's ("IWC") wage orders.

In *Garcia*, the Court held that the Supreme Court's ruling *Dynamex* only applies to claims brought pursuant to the IWC wage orders, not to any other claims. The *Garcia* Court said it was "logical" to apply the ABC Test to wage orders because they define "employment" broadly and "regulate very basic working conditions" for workers, suggesting California courts should err on the side of extending employment protections. However, the Court said this was not the case for the labor statutes on which the plaintiff based his other claims. As for labor code claims, "[t]here is no reason to apply the ABC test categorically to every working relationship…Although both parties suggest *Dynamex* has some application to [plaintiff's] case, neither identifies a basis to apply *Dynamex* to non-wage-order claims."

Thus, the Court noted that, with respect to non-wage order claims (such as waiting time penalties), courts should continue to rely on the more flexible independent contractor standard set forth by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989).

7. Productivity Incentives Do Not Violate California Wage and Hour Requirements

A California Court of Appeal held in *Certified Tire & Serv. Ctrs. Wage & Hour Cases*, 28 Cal. App. 5th 1 (2018), that an employer may provide productivity incentives to its employees without violating California wage and hour laws. Her, the plaintiff auto technicians contested an employer's compensation program which guaranteed an hourly wage above the minimum wage, but also provided higher hourly wages for all hours worked based on certain productivity

measures. The plaintiffs claimed that they effectively were not paid during those hours when they were not eligible for increased production dollars.

In recent years, California courts have found that piece rate compensation systems violate California law, even when they result in per-pay-period compensation above minimum wage, if the employee is not paid at least minimum wage for each hour worked. Here, the Court held that the program was lawful because: (1) the employees were paid above the minimum wage for each individual hour worked; and (2) the employer provided the required paid rest periods.

8. Joint Employers Not Vicariously Liable for Each Other's Meal Break Violations

A California Court of Appeal held that a staffing company was not vicariously liable for meal period violations committed by its client. The plaintiff in *Serrano v. Aerotek, Inc.*, 21 Cal. App. 5th 773 (2018), was placed by a staffing agency with a temporary employer. The plaintiff then sued the staffing agency for Labor Code violations allegedly committed by that temporary employer.

The staffing agency did not dispute its own obligation to provide the plaintiff with meal periods. But it argued, and the appellate court agreed, that it had satisfied that obligation. As a part of its contract with the temporary employer, the staffing agency had required the client to comply with all applicable laws. In addition, the staffing agency provided its meal period policy to temporary employees, such as the plaintiff, and trained them on the policy during orientation. That policy required employees to notify the staffing agency if they believed they were being prevented from taking meal breaks.

The Court ruled that, because the staffing agency had fulfilled its own meal period obligations to the employee, it was not liable for another employer's violations, even if the two were joint employers. Contrary to plaintiff's argument, the staffing agency had no duty to take affirmative steps to ensure that its clients were implementing the client's own meal period policies.

9. Individuals Can Be Personally Liable For California Wage-Hour Violations

A California Court of Appeal ruled in *Atempa v. Pedrazzani*, 27 Cal. App. 5th 809 (2018) that individuals can be held personally liable for wage and hour penalties, regardless of whether they were the employer, or the employer was a limited liability company. In *Atempa*, two employees filed a variety of wage and hour claims against their former employer, Pama, Inc., and an individual, Pedrazzani, the owner, president, director, and secretary of the company. The employees' claims were successful and Pedrazzani appealed while Pama filed for bankruptcy.

The Court held that Pedrazzani was personally liable for the civil penalties after Pama's bankruptcy because "both the employer and any 'other person' who causes a violation of the

overtime pay or minimum wage laws are subject to the specified civil penalties." The Court further held that the corporate structure of the employer has no bearing on liability, and that an individual may be liable even if the entity is structured as a limited liability company.

Furthermore, an individual can be personally liable for wage violations even if that person has no formal relationship with the corporate employer. There is no need for the individual to be a manager, director, of officer of the employee as long as that person: (1) was "acting on behalf of the employer;" and (2) caused that wage violation.

10. California Court of Appeal Rejects Purely Derivative Wage Statement Claim

California employees claiming overtime, meal period, rest period, or minimum wage violations often add wage statement violation claims under California Labor Code Section 226. The theory is that, if the employer underpaid the employees, the employer's wage statements also must be inaccurate. Successful plaintiffs may recover an additional $4,000 per employee, as well as costs and reasonable attorneys' fees, under Section 226.

In *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308 (2018), a class of employees sought overtime wages based on the incorrect application of the alternative workweek schedule. In addition, the employees brought derivative wage statement violations. The employees argued that, although their wage statements correctly reflected what the employees were actually paid, the statements were nonetheless inaccurate because they did not reflect what the employees should have been paid.

The *Maldonado* court disagreed. It held that plaintiffs suffer an injury under Labor Code Section 226 only when the wage statement **inaccurately** reports the wages actually paid to the employee at the time. Instead, any claim that the employee was underpaid "will be remedied by the violated wage and hour law itself."

11. California Employers May Use Neutral Rounding Policies For Meal Breaks

California employers may use a rounding policy to calculate hours worked for non-exempt employees if the rounding policy is fair and neutral on its face and does not, over a period of time, fail to compensate employees properly for all the time they have actually worked. In *Donahue v. AMN Services, LLC*, __ Cal. Rptr. 3rd ___ (2018), the California Court of Appeals held that employers can also use neutral time-rounding systems for meal periods. These meal periods must be neutrally rounded up or down. So, contrary to the plaintiff's argument, a meal period that was actually less than a full 30 minutes but rounded up by a neutral time-rounding system did not necessarily violate California meal period laws. Indeed, in *Donahue*, the employees were asked as part of the time-keeping system whether they chose not to take a timely 30-minute meal period. If the employee responded yes, no meal period penalty was paid. If the employee responded no, the penalty was paid. By asking these questions of employees in the

time-keeping system, the Court was persuaded that no systematic violation of meal period laws was occurring.

C. Second Circuit Decisions

1. New York Employees May Not Recover Liquidated Damages under Both NY Labor Law and the FLSA

Both the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") allow plaintiffs who successfully argue they were denied minimum wage and/or overtime to recover liquidated damages equal to the unpaid wages unless the employer proves that it had a good faith basis to believe that its underpayment complied with the law. Therefore, successful wage and hour plaintiffs often recover double the amount of the unpaid wages.

The provisions of the NYLL and FLSA closely track each other. Accordingly, a violation of the FLSA often results in a violation of the NYLL. Previously, some courts held that a plaintiff could recover liquidated damages for both the NYLL and FLSA in the same lawsuit, granting plaintiffs a *triple* recovery for a successful claim. The Second Circuit has put an end to that practice. In *Rana v. Islam*, 887 F.3d 118 (2d. Cir. 2018), the Second Circuit held that employees may not recover liquidated damages under both the NYLL and FLSA for the same course of conduct. The Second Circuit held that the New York State legislature wrote NYLL to cover the same ground as the FLSA, not to allow "duplicative liquidated damages for the same course of conduct."

D. Federal Agency Actions

1. DOL Eliminates the "80/20" Tip Credit Rule

The Department of Labor ("DOL") issued an opinion letter on November 8, 2018, rescinding its previous "80/20" guidance on the use of tip credit. *See* WHD Opinion Letter, Dep't of Labor, FLSA 2018-28 (November 8, 2018). The tip credit allows employers to pay employees in tip-based positions reduced cash wage (currently $2.13) and claim a "tip credit" to make up the difference between the reduced cash wage and the $7.25 hourly minimum wage.

Under the previous 80/20 rule, an employee spending more than 20% of his or her time on non-tip-producing tasks had to be paid minimum wage, rather than at the "tip credit" rate. However, the DOL now advises that it will no longer place a limit "on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties."

The DOL still requires that non-tip-generating work that is unrelated to direct customer-service duties be compensated at full minimum wage. Under the new rule, in order to be related to tip-generating work and eligible for tip credit, duties must be: (1) "listed as core or supplemental for the appropriate tip producing occupation in the Tasks section of the Details

report in the Occupational Information Network;" and (2) performed contemporaneously or immediately before or after direct-services duties.

IV. Other Employment Law Developments

A. Nonsolicitation Provisions

1. Nonsolicits May No Longer Be Enforceable in California

In *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, 28 Cal. App. 5th 923 (2018), a California Court of Appeal held that employee nonsolicitation agreements—even if reasonable and narrowly tailored—are void, unless they fall within one of the narrow statutory exceptions specifically pertaining to the sale of a business or improper use of the employer's trade secrets. In *AMN*, the employer sought to enforce its employee nonsolicitation provision against four former AMN employees, who served as recruiters. AMN alleged that the former recruiters had solicited various nurses to leave their employment with AMN and work for the recruiters' new employer in clear violation of the nonsolicitation agreement. The recruiters countersued, and moved for summary judgment, alleging that the employee no solicitation provision violated Section 16600 of California's Business and Professions Code, which broadly prohibits contracts restraining an individual's right to engage in a lawful profession, trade, or business. The trial court granted summary judgment in favor of the recruiters. Affirming the trial court's grant of summary judgment, the Court rejected AMN's reliance on the seminal case of *Loral Corp v. Moyes* 174 Cal. App. 3d 268 (1985), which had upheld a provision that restrained a former executive from "raiding" his former employer's employees, finding that such a provision was reasonable and limited.

While the *AMN* Court could have stated that the case before it was factually distinguishable from *Loral* since the recruiters were directly restrained from recruiting—their very profession and trade— the Court went even further. The Court emphasized that the *Loral* "reasonableness" standard directly conflicted with the *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937(2008) decision holding that Section 16600 unambiguously "prevents a former employer from restraining a former employee from engaging in his or her 'lawful profession, trade or business of any kind,' absent statutory exceptions . . . ." In other words, the *AMN* court suggested that not only are employee nonsolicits pertaining to recruiters invalid, but that such provisions also would be invalid for any type of employee occupation.

B. No-Rehire Provisions

1. Under Certain Circumstances, No-Rehire Provisions in Settlement Agreements May Violate California Business and Professions Code

In *Golden v. California Emergency Physicians Medical Group, et al.*, 896 F.3d 1018 (9th Cir. 2018), a divided Ninth Circuit panel held that a settlement agreement between a doctor and his former employer violated California Business and Professions Code Section 16600

because a "no re-hire" provision of the agreement placed a "restraint of a substantial character" on the doctor's medical practice. In 2007, Dr. Donald Golden, an emergency room surgeon, sued his former employer, California Emergency Physicians Medical Group ("CEP"), for race discrimination. Following mediation, the parties orally agreed to a settlement. When it came to sign the settlement agreement, Dr. Golden refused arguing that three provisions therein violated the restriction on noncompete agreements embodied by California Business and Professions Code Section 16600.

The Ninth Circuit concluded that the first clause prohibiting Dr. Golden from working at any facility contracted by, owned, or managed by CEP was valid, as its effect on his ability to practice medicine was minimal. However, the Court held that the second and third restrictions would "easily rise to the level of a substantial restraint, especially given the size of CEP's business in California." At the time, CEP staffed 160 healthcare facilities in California and handled between twenty-five and thirty percent of the state's emergency room admissions. Because the second and third restrictions would affect his "[existing] and future employment at third-party facilities" where CEP provided services (even if the CEP services began after Dr. Golden's employment, and even if CEP's services did not compete with the services he provided) the provisions ran afoul of Business and Professions Code Section 16600.

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

1. Internal Complaints of Securities Violations Do Not Grant "Whistleblower" Status

The United States Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018), resolved a split between the Second, Ninth and Fifth Circuits concerning whether the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) covers only persons who have reported alleged securities violations to the SEC or whether it also includes persons who have made internal complaints without making any type of complaint to the SEC. The Second and Ninth Circuits held that the anti-retaliation provision applied to both categories of persons while the Fifth Circuit restricted the provision's coverage to persons who filed complaints with the SEC.

In a unanimous opinion, the Court held that a person is protected by Dodd-Frank's anti-retaliation provision *only if the person has reported a suspected securities violation to the SEC*. In reaching its holding, the Court rejected the Solicitor General's arguments for a broader reading of the term, and the Court found the definition of "whistleblower" unambiguous because it is defined "clear[ly] and conclusive[ly]" in the statute.

D. Investigative Consumer Reporting Act/ Consumer Credit Reporting Agencies Act

1. Proceed With Caution with Background Checks Potentially Implicating both ICRAA and CCRAA

In *Connor v. First Student, Inc.*, 5 Cal. 5th 1026 (2018), the California Supreme Court held that when background checks potentially implicate both the Investigative Consumer Reporting Agencies Act ("ICRAA") and the Consumer Credit Reporting Agencies Act ("CCRAA"), both must be complied with, including the more stringent requirements of the ICRAA. Employer First Student retained a consumer reporting agency ("CRA") to perform background checks on its employees, which elicited information that included criminal records, sex offender registries, address history, driving records and employment history. Prior to conducting the background checks, First Student issued its employees a "Safety Packet" booklet, which included a notice that stated that a CRA would prepare an investigative consumer report on the employee. The notice provided that the report would contain "names and dates of previous employers, reason for termination of employment, work experience, accidents, academic history, professional credentials, drugs/alcohol use, [and] information relating to [the employee's] character … which may reflect upon [the employee's] potential for employment." The notice also included a check box that generally described the employees' rights under ICRAA, informed them that they could check the box if they wanted to receive a copy of the report, and stated that checking the box would release First Student from all claims and damages arising out of, or relating to, its background investigation. The lawsuit alleged that the notice, and the check box within it, did not satisfy ICRAA's requirement to obtain employees' written authorization to conduct background checks.

The issue in *Connor* was whether employment background checks that potentially implicated both ICRAA and CCRAA, because they procured information relating both to character and creditworthiness, required CRAs and employers to meet the more stringent ICRAA notice and authorization requirements. The trial court granted First Student's motion for summary judgment, finding that ICRAA was unconstitutionally vague because it impermissibly overlapped with CCRAA and failed to put persons of common intelligence on notice of which statute governed their conduct. The Court of Appeal reversed, finding that although the statutes overlap, there is no "positive repugnancy" between them that would render ICRAA unconstitutionally vague and preclude its enforcement against First Student. The California Supreme Court affirmed the appellate court's decision, holding that: (1) partial overlap between ICRAA and CCRAA does not render one superfluous or unconstitutionally vague; (2) ICRAA and CCRAA can coexist, as both Acts are sufficiently clear; and (3) each Act regulates information that the other does not, which supports concurrent enforcement.

V. Free Speech Issues

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

1. Encouraging Other Employees to Quit and Sue Company Deemed Protected Activity in Anti-SLAPP Motion

In *Bel Air Internet, LLC v. Morales*, 20 Cal. App. 5th 924 (2018), Bel Air Internet sued two if its former employees for encouraging other employees to quit and sue the company for alleged employment violations rather than sign a release of claims as Bel Air had requested. Bel Air sued defendants for intentional interference with contractual relations, breach of contract, breach of the implied covenant of good faith and fair dealing, and conversion. In response, defendants filed a motion to strike under the anti-SLAPP statute (Cal. Code Civ. Proc. § 425.16) arguing that they had engaged in protected conduct under the anti-SLAPP statute by encouraging other employees to quit and sue Bel Air. The trial court issued an order denying defendants' motion to strike. The Court of Appeal reversed and held that defendants could rely upon Bel Air's allegations that they had engaged in what amounted to protected conduct despite submitting declarations denying such conduct. Further, the Court also held that Bel Air failed to show a probability that Bel Air would succeed on its claims because "the litigation privilege applies to [defendants'] litigation-related activity" even though they were simply encouraging other employees to sue.

B. Glassdoor Developments

1. No Retaliation Found After Company Discovered Scathing Glassdoor Post and Terminated Employee

In *U.S. Equal Employment Opportunity Commission v. IXL Learning Inc.*, Case No. 3:17-cv-02979 (N.D. Cal. Oct. 29, 2018), a California federal jury unanimously found that a tech company did not retaliate against a transgender employee after the employee posted a scathing review accusing the company of discrimination on Glassdoor. The employee had alleged that IXL Learning Inc., an educational technology provider that specializes in learning software for K-12 students and educators, gave unequal treatment to employees on the basis of race, sexual orientation, and gender identity. After submitting the post, the employee complained to his supervisor that he was experiencing workplace discrimination because of his gender identity and request for accommodation that he work remotely following his transition surgery. The employee's supervisor immediately alerted IXL's CEO, and the CEO set up a next-day meeting to discuss the employee's complaints. However, between the time the meeting was scheduled and actually took place, the CEO learned about the Glassdoor review, and despite the post's anonymous identity, surmised it was the transgender employee's post. The CEO then confronted the employee about the Glassdoor post during their meeting, and fired him right after the employee confirmed that he was the author.

At trial, IXL's CEO admitted that Human Resources informed him that firing the employee could be against the law, but the CEO maintained that the firing was based on "other parts" of the Glassdoor post that were "generally critical" of the company. Further, IXL also claimed that the employee's post demonstrated "a lack of judgment and ethics." Despite the connection between the Glassdoor post and the employee's termination, the eight-person federal jury found that the termination did not violate the anti-retaliation provisions of Title VII or the ADA.

C. Union Fees

1. Requiring Public Sector Employees to Pay Agency Fees Is a Violation of the First Amendment

In *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the United States Supreme Court held that it is a violation of the First Amendment to require public sector employees who are not members of a union to pay any union dues, including dues attributable to collective bargaining costs on behalf of all employees. Petitioner refused to join the union because he opposed many of its positions. Petitioner then challenged the requirement that he pay any fees to the union, including that portion of the union dues attributable to collective bargaining activities ("agency fees"). He argued that agency fees represent "coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." In a 5-4 decision, the Supreme Court overruled its prior opinion on this issue and determined that the state's "extraction of agency fees from nonconsenting public-sector employees violates the First Amendment."

VI. National Labor Relations Act

A. Proposed Rules

1. NLRB Vacates Prior Joint Employer Standard and Announces Proposed Rule

After extensive political pressure, the National Labor Relations Board ("NLRB") vacated last year's decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017) due to Member William Emanuel's prior participation at Emanuel's former law firm. The *Hy-Brand* decision had reinstated the traditional joint-employer standard that was significantly relaxed under the Obama-era NLRB Board.

In an unconventional departure from the Board's normal practices, which typically overturns prior legal precedent through decision-making, rather than rulemaking, the NLRB has proposed a new rule that states that an employer may be considered a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment in a manner that is not limited and routine. Indirect influence and contractual reservations of authority will no longer be sufficient to establish a joint-employer relationship. The new rule, if adopted, will restore Board law to the

traditional standard for determining joint employer status under the National Labor Relations Act ("NLRA"). Comments must be submitted by Monday, January 14, 2019, and comments replying to the comments submitted during the initial comment period must be received by the Board on or before January 22, 2019.

B. Board Decisions

1. Employee's Mention of Attempts to Contact Union Sufficient to Put Employer on Notice of Weingarten Request

In *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975), the United States Supreme Court established that represented employees are entitled to union representation when facing an interview that could lead to discipline. There are still numerous questions regarding what exactly triggers an employee's *Weingarten* rights. In *Circus Circus, Inc.*, 366 NLRB No. 110 (June 15, 2018), the NLRB was asked to evaluate whether an employee's indirect statement about calling for union representation was sufficient to put the employer on notice that he wished to have a union representative at a disciplinary meeting. Upon entering a disciplinary meeting, a union employee discovered that no union representative was present and stated to the employer representatives, "I called the Union three times [and] nobody showed up, I'm here without representation." The employer continued with the meeting and the employee ultimately was discharged.

The employee filed charges with the NLRB, and the administrative law judge found that the employee's "statement constitutes a request for representation [because] [s]ubsumed in the statement is a reasonably understood request to have someone present at the meeting." The employer appealed, and the Board affirmed. The Board affirmed despite the employee not requesting an alternative representative (even though his shop steward worked right across the hallway) nor did the employee seek any sort of delay so that he could find a representative.

C. Significant General Counsel Memoranda

1. NLRB Clarifies Standard Governing Workplace Policies

On June 6, the NLRB's Office of the General Counsel issued Memorandum 18-04, titled "Guidance on Handbook Rules Post-*Boeing*." In it, the NLRB's General Counsel (GC), provided guidance to the NLRB's regional offices regarding how to analyze the legality of common employer policies in light of the NLRB's decision in *The Boeing Company*, 365 NLRB No. 154 (December 14, 2017). The *Boeing* decision and the GC's memo represent a pro-employer shift away from the NLRB's decidedly more pro-employee positions during the Obama administration.

In *Boeing*, the NLRB announced a new standard for analyzing whether a work rule violates employees' rights under the National Labor Relations Act (NLRA). The prior standard focused on whether an employer's work rules would be "reasonably construed" by an employee

to prohibit the exercise of NLRA rights. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The new *Boeing* standard focuses on "the balance between the rule's negative impact on employees' ability to exercise their Section 7 rights [to engage in concerted activities] and the rule's connection to employers' right to maintain discipline and productivity in their workplace." In *Boeing*, the NLRB delineated three categories of employment policies, rules, and handbook provisions:

- **Category 1** includes "rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule."
- **Category 2** includes "rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications."
- **Category 3** includes "rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule."

In the memorandum, the GC provided examples of common types of employee policies under each of the three *Boeing* categories. According to the GC's memo, **Category 1** rules are generally lawful and regional directors should dismiss charges based on such rules, including:

- ***Civility Rules.*** For example, a rule that prohibits "[r]ude, discourteous or unbusinesslike behavior."
- ***No Photography or Recording Rules.*** Rules that prohibit the use of cameras or audio recording devices, such as the rule at issue in *Boeing* which prohibited the use of camera-enabled cell phones to take photographs, fall in to Category 1. [*Note, however, that the Division of Advice has concluded that a ban on mere possession of cell phones at work may be unlawful where the employees' main method of communication during the work day is by cell phone*].
- ***Rules Re: Insubordination, Non-cooperation, or On-the-job Conduct that Adversely Affects Operations.*** For example, a rule that prohibits "'[b]eing uncooperative with supervisors . . . or otherwise engaging in conduct that does not support the Employer's goals and objectives.'"
- ***Disruptive Behavior Rules.*** For example, prohibitions against "[c]reating a disturbance on Company premises or creating discord with clients or fellow employees."
- ***Confidentiality Rules.*** Rules banning the discussion of confidential, proprietary, or customer information *that make no mention of employee or wage information* are generally lawful. For example: "[I]nformation concerning customers . . . shall not be disclosed, directly or indirectly" or "used in any way."

- ***Rules against Defamation or Misrepresentation.*** A rule against "[m]isrepresenting the company's products or services or its employees" is a lawful rule.
- ***Rules Requiring Authorization to Speak for Company.*** "The company will respond to media requests for the company's position only through the designated spokespersons" is an example of a lawful rule.
- ***Rules Banning Disloyalty, Nepotism, or Self-Enrichment.*** For example: "Employees are banned from activities or investments . . . that compete with the Company, interferes with one's judgment concerning the Company's best interests, or exploits one's position with the Company for personal gain."

Category 2 rules require an evaluation of the rule on a case-by-case basis using the *Boeing* standard. Examples include:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union.
- Confidentiality rules broadly encompassing "employer business" or "employee information" (as opposed to confidentiality rules regarding customer or proprietary information, which are lawful, or confidentiality rules directed at employee wages, terms of employment, or working conditions, which are categorically unlawful).
- Rules regarding disparagement or criticism of the *employer* (as opposed to civility rules regarding disparagement of employees).
- Rules regulating use of the employer's name (as opposed to rules regulating the employer's logo/trademark).
- Rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media on the employer's behalf).
- Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work, which generally are lawful, or rules specifically banning participation in outside organizations, which are *per se* unlawful).
- Rules against making false or inaccurate statements (as opposed to rules against making defamatory statements).

Category 3 rules, which are unlawful, include:

- ***Confidentiality rules specifically regarding wages, benefits, or working conditions***. Rules prohibiting employees from disclosing salaries or the contents of employment contracts are categorically unlawful.
- ***Rules against joining outside organizations or voting on matters concerning the employer.*** Such rules are *per se* unlawful.

2. NLRB Clarifies "Mere Negligence Defense" in Duty of Fair Representation Cases

On October 24, 2018, the NLRB General Counsel issued a memorandum (Memorandum GC 19-01) clarifying its position on the "mere negligence defense" often asserted by unions in duty of fair representation cases under NLRA Section 8(b)(1)(A). The memorandum provides that a union claiming a mere negligence defense based on its having lost track, misplaced or otherwise forgotten about a grievance (whether or not it had committed to pursue it) should be required to show the existence of established, reasonable procedures or systems in place to track grievances. The memorandum also states that a union's failure to communicate decisions related to a grievance, or to respond to inquiries for information or documents by the charging party, constitutes more than mere negligence. Instead, such conduct rises to the level of arbitrary conduct that constitutes a violation of the duty of fair representation unless there is a reasonable excuse or meaningful explanation.

D. Significant Advice Memoranda

In 2018, the NLRB released several new memos from its Division of Advice, which is part of the NLRB's Office of the General Counsel. The memos resulted from requests for guidance by various NLRB Regional Directors on cases their offices were handling. The General Counsel's office can release advice memos to the general public at its discretion after a case has been closed.

Uber Technologies, Inc. (issued 10/02/18): Plaintiff filed a class action lawsuit against Uber alleging that Uber had not been compensating plaintiff and similarly situated employees in accordance with their agreements. Uber's in-house legal team emailed several employees, including the plaintiff, notifying them that Uber was being sued by the plaintiff, that employees were not to comment on the lawsuit, and that if anyone contacted them about the lawsuit, they should contact the in-house attorney. The plaintiff contacted one of Uber's attorneys and said that the email infringed on employee rights to discuss compensation issues. The attorney responded that employees are free to still discuss compensation, and that the message was sent to the plaintiff in error. However, the same email was sent two times after plaintiff's complaint. Plaintiff again complained, and Uber refused to notify employees that they were still free to discuss compensation issues. Additionally, Uber also informed plaintiff that he received the email in error and should delete it immediately. Later on, Uber sent an internal litigation hold and document preservation email to several employees, but not the plaintiff. This message repeated the earlier language that employees contacted about the lawsuit should not comment on it and should refer all inquiries to in-house counsel. The plaintiff filed an unfair labor practice charge that the litigation hold and earlier directives were unlawfully preventing employees from discussing compensation issues. Division of Advice found that the emails were an unlawful directive to refrain from engaging in Section 7 activity despite Uber's handbook stating that employees are not restricted from discussing compensation. Additionally, the Division of Advice held that the litigation hold does not explicitly address protected concerted activity and

simply asks employees to preserve their communications, which reduces the possibility that potential that the hold will chill employees from engaging in protected communications.

Lyft,Inc. (issued 6/14/18): The NLRB's Division of Advice agreed with the conclusion by the Regional Director of the NLRB's San Francisco field office that two rules in Lyft's terms of service agreement involving intellectual property and confidentiality were lawful. The intellectual property rule barred use of the company's logo without written permission, and the confidentiality rule barred individuals from using or disclosing so-called "user information" and other proprietary material relating to Lyft's business. A union challenged the rules, alleging that they were illegally overbroad under the NLRB's *Boeing* standard. In *Lyft*, the Division of Advice determined that, under the *Boeing* standard, the intellectual property rule qualified as a Category 1 rule under the *Boeing* standard. Specifically, the Division of Advice stated that employees would not interpret such a rule to prohibit Section 7 protected activity, and that even where employees would reasonably interpret such a rule to apply to fair use of an employer's trademarks/logos as part of protected concerted activity (i.e. picket signs), it is unlikely that the rule would actually cause them to refrain from so doing so. Additionally, with respect to the confidentiality rule, although deemed to be a Category 2 rule, the Division of Advice stated that employees would not reasonably interpret the rule to prohibit the sharing of information about working conditions or of employee names and contact information. Lyft drivers regularly use employer-created on-line forums to discuss their wages and other working conditions, which suggests that neither Lyft nor its employees could interpret the confidentiality rule to bar discussions on working conditions and the like.

Kumho Tires (issued 06/11/2018, released 6/13/18): The employer's social media policy was facially valid under the *Boeing* standard and the employer did not violate Section 8(a)(1) of the NLRA by discharging an employee for violating that policy where the employee took a picture of a bonus form and posted it on Facebook, knowing the colleague from whom the employee had received the form had improperly taken it off the team leader's desk to photocopy.

Prime Source Building Products (issued 10/20/2017, released 6/13/18): A lawsuit by the employer seeking to enforce a non-disclosure provision in employment agreements against its former employees violated Section 8(a)(1) where the Region determined that: (1) the non-disclosure provision was unlawfully overbroad; and (2) portions of the lawsuit had or have the illegal objective of seeking to enforce the non-disclosure provision's overbroad language. Specifically, the Division of Advice found that Count 2 of the lawsuit (alleging that the employees had violated the nondisclosure provision) and Counts 3 and 4 (alleging violations of a federal and a state statute protecting trade secrets) sought to enforce the overbroad non-disclosure provision and had or have an illegal objective and would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. In addition, portions of the lawsuit were preempted because they sought to enforce a contractual provision that was at least arguably prohibited by the NLRA. Here, the Division of Advice again focused on Count 2 of the lawsuit as well as Count 7 (alleging that the new employer unlawfully induced the employees to breach their employment agreements).

United States Postal Service (issued 5/21/2015, released 6/13/18): The USPS improperly failed to bargain with the union when it reached a deal with Staples Inc. that would have resulted in Staples workers performing bargaining unit work in its stores, such as selling stamps and providing certain mail services. "[T]his outsourcing of bargaining unit work under the Staples agreement was a mandatory subject of bargaining and [] the employer's unilateral action constituted a mid-term contract modification in violation of Section 8(d) [of the NLRA] or, in the alternative, an unlawful unilateral change in violation of Section 8(a)(5) and (1)."