Answers to 20 of the Biggest Employment Law Questions Facing Employers in 2018

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20 Bothersome Employment Questions:
From New Law to Tough Everyday Issues

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1. Not Us Too! What Issues Will Employers Continue to Face in the #MeToo and TIME'S UP! Era?

As the increasing number of sexual misconduct reports work their way into the national conversation, employers have been on high alert. Particularly egregious stories involving top-level management have had companies, the general public, and lawmakers asking (a) what went wrong? And (b) what do we do now?

Harassment in the workplace has long been a concern. According to the Equal Employment Opportunity Commission's litigation statistics, in fiscal year 2017, nearly 30% of the lawsuits filed involved alleged harassment. To address this issue, the EEOC is expected to soon issue updated Enforcement Guidance on Unlawful Harassment, which will explain the legal standards for unlawful harassment and employer liability and provide a single legal analysis for harassment that applies the same legal principles under all equal employment opportunity statutes enforced by the EEOC. In the meantime, employers are left wondering what to do to address allegations of sexual harassment, and how to prevent future incidents.

The #MeToo uprising has highlighted the importance of conducting a thorough investigation of any harassment charge, and making sure the company has established policies concerning how to handle such claims. It is generally recommended to use an outside investigator, particularly if the accused is a high-level employee. In terms of preventing future harassment, employers across the country are taking a second look at their anti-harassment policies and auditing the effectiveness of their complaint-reporting mechanisms and anti-retaliation precautions.

Legislators, particularly at the state level, are exploring the possibility of requiring employers to provide anti-harassment training for their employees in response to the upsurge in harassment allegations. A small number of states—primarily California and Maine—currently mandate such training for certain employers. New York's 2018-2019 budget also includes some new mandatory training requirements. The relevant agencies in roughly a dozen other jurisdictions strongly encourage anti-harassment training, but the vast majority of states do not require it. Many employers already provide some sort of antidiscrimination instruction. But mandatory training may appeal to lawmakers looking for ways to reinforce civil rights laws and demonstrate a commitment to principles of workplace equality. Relatedly, a new law (SB 6471) in Washington State creates a stakeholder work group that will develop model sexual harassment policies for employers.

In addition to improved training, lawmakers have been examining other ways in which to address sexual harassment and complement existing antidiscrimination laws. A new line of attack that emerged at the end of 2017 and has continued in earnest are nondisclosure agreements (NDAs) and mandatory arbitration agreements involving sexual harassment claims.

NDAs. Many organizations ask employees to sign NDAs for a variety of reasons, such as the protection of trade secrets. Where discrimination allegations are involved, however, employers sometimes insist upon an NDA as part of a settlement package. The NDA may require, for example, that the employee keep confidential all negotiations and the terms of the settlement. Such agreements might prevent the employee from disclosing even the existence of the settlement. Employees who breach these provisions may be obligated to pay some amount back to the employer. Opponents argue that these types of provisions prevent victims from going public with their accusations, thus enabling harassers and limiting transparency.

At the federal level, the Tax Cuts and Jobs Act—enacted on December 22, 2017—specifically addresses the use of NDAs in sexual harassment settlements. The new law amends section 162 of the tax code, which generally allows businesses to deduct certain ordinary and necessary expenses paid or incurred during the year as part of running the business. The amended tax law, however, erases that deduction for a settlement or payment related to a sexual harassment or abuse claim, if the settlement is subject to an NDA. Additionally, no attorneys' fees associated with such a settlement can be deducted.

Another bill pending at the federal level is the Ending Secrecy About Workplace Sexual Harassment Act (H.R. 4729), which would impose an additional disclosure requirement on employers that are obligated to submit an Employer Information Report EEO-1 annually. Although this bill has not advanced—nor is it expected to this term—federal bills often spur similar legislation at the local level.

We are already seeing how state lawmakers are using NDAs as a new avenue to combat sexual harassment. On March 21, 2018, Washington State became the first state to enact a law (SB 5996) that will prevent employers from requiring employees, as a condition of employment, to sign a nondisclosure agreement, waiver, or other document that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at a work-related event, or involving company personnel. The law does not prohibit settlement agreements alleging sexual harassment that contain confidentiality provisions.

More than a dozen other states have introduced similar legislation. Time will tell whether any advance.

Arbitration Agreements. In a similar vein, lawmakers at the federal and state level are taking a second look at agreements that that require employees to arbitrate claims or otherwise waive their rights to pursue claims in court.

In both the House and Senate, lawmakers introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017 (H.R. 4570, H.R. 4734, S. 2203), which would significantly amend the Federal Arbitration Act. The bipartisan bill would invalidate pre-dispute agreements (*i.e.*, those signed before any dispute arose) that require arbitration of any sexual discrimination or harassment claims recognized under Title VII.

Washington State is again at the forefront on this issue, enacting SB 6068, which provides that a nondisclosure policy or agreement (including an arbitration agreement) that limits, prevents, or punishes a person's ability to produce evidence or witness testimony to a civil action relating to sexual harassment or assault, is unenforceable. New York passed similar restrictions in its general funding bill. A handful of other states have introduced bills that would achieve the same end.

It is clear both lawmakers and employers across the country are re-examining their approach to recognizing, addressing, and preventing incidents of sexual harassment. This issue will likely gain momentum through 2018.

2. Pay Equity – Is this STILL an Issue?

A persistent, albeit narrowing, gender pay gap has driven several legislative and administrative initiatives over the past couple of years. During the Obama administration, the EEOC announced that starting in March 2018 it would collect summary employee pay data from certain employers on revised EEO-1 Reports. This effort was short-lived, as in August 2017, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) suspended indefinitely the new report's compliance date. OIRA's decision was likely in response to complaints about the new report's substantial cost of compliance, lack of privacy safeguards, and its questionable utility in promoting pay equity. Many asserted that the revised report called for a broad range of data, which when analyzed, was unlikely to adequately explain pay differentials.

Nonetheless, the EEOC has indicated it will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act (EPA) and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, the Commission will also focus on compensation systems and practices that discriminate on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.

As with many other issues, states have taken the lead in enacting more stringent equal pay laws. State and local measures have been enacted or are pending that broaden the scope of positions to be considered in comparing pay, both functionally and geographically; limit employer defenses for equal pay claims; prohibit or restrict the ability of employers' consideration of the pay history of a job applicant; expand the penalties or remedies for equal pay violations; impose new requirements on employers to increase pay transparency; and provide safe harbors for employers that engage in certain preferred practices.

In the past three years alone, pay equity laws were enacted in California, New York, Maryland, Massachusetts, Oregon, and more recently, New Jersey and Washington State.

Washington's Equal Pay and Opportunity Act, effective June 7, 2018, will prevent employers from enacting pay secrecy policies, prohibit retaliation against employees for discussing their pay, and extend protections to employees who are offered lesser career advancement opportunities based on gender.

On April 24, 2018, New Jersey's governor signed a bill to entitle employees to an equal rate of pay (including benefits) for "substantially similar" work. The determination that work is "substantially

similar" would be based upon a composite of factors, which the proposed law identifies as "skill, effort, and responsibility."

Bills to strengthen an employer's pay equity obligations were introduced in at least a dozen other states.

In addition, some jurisdictions have imposed pay equity requirements on businesses that do business with the state. For example, under Minnesota's Women's Economic Security Act, most businesses entering into contracts in excess of $500,000 with the state are required to obtain an Equal Pay Certificate from the Minnesota Department of Human Rights (MDHR) as a condition of doing business with the state. The required elements of an application for certification are set forth in section 363A.44 of the Minnesota statutes.

To better assess their own pay practices, many employers are conducting privileged pay equity audits. Such audits can help employers discover areas of improvement, or highlight their success in promoting equal pay practices.

3. Are Those Who Learn Salary History Doomed to Repeat Discrimination?

Combating gender-based pay disparities continues to be a legislative priority, particularly at the state and local levels. One method for targeting pay differences is prohibiting inquiries into an applicant's salary history before an offer of employment—with a compensation package—has been made. The reasoning behind salary history bans is that employers should not perpetuate discriminatory compensation levels set by prior employers.

Massachusetts kicked off this trend with its re-vamped Equal Pay Act, set to take effect on July 1, 2018. Among other provisions of this expansive equal pay law, the statute makes clear that employers cannot seek the salary history information of a prospective employee, either from the candidate or from a current or former employer. The only exceptions are where prospective employees voluntarily disclose their wage or salary history, or after an offer of employment, including pay, is made.

A handful of states followed suit in 2017 (California, Delaware, Massachusetts, and Oregon), as well as the cities of Albany, NY, New York City, NY, Philadelphia, PA, San Francisco, CA, and Westchester County, NY. Philadelphia's Wage Equity Ordinance has been stayed pending resolution of litigation about the law's constitutionality.

This trend is expected to continue through 2018. Notably, companion salary history inquiry bills (HB 2913, SB 2716) are pending in Minnesota. Both measures would amend Minnesota Statutes, chapter 181, by including the following language:

> Subd. 2. Seeking wage disclosure prohibited. An employer must not:
> (1) seek the wage history or information about past wages of an employee or prospective employee; or
> (2) require that a prospective employee's prior wage or salary history meet certain criteria.

An employer found in violation of this law would have to pay a civil penalty of $1,000 per violation. Aggrieved individuals would be entitled to sue for compensatory and exemplary damages.

Similar bills are pending in the U.S. House of Representatives and nearly 20 other jurisdictions.

Relatedly, a new law in Washington State prevents employers from justifying a pay differential on the applicant's or employee's salary history. Shortly after this state bill was enacted, the 9th Circuit issued a decision in *Rizo v. Yovino*, No. 16-15372 (9th Cir. Apr. 9, 2018), memorializing this idea. Specifically, the court held that an employee's prior salary *does not* constitute a "factor other than sex" upon which a wage differential may be based under the statutory "catchall" exception in the Equal Pay Act.

By contrast, a handful of states have introduced bills that would expressly *prevent* localities from creating restrictions on what an employer can or cannot ask during the hiring process. A couple of such preemption bills have already been enacted, or are expected to be shortly. Wisconsin lawmakers, for example, approved AB 748, an expansive preemption bill that generally prohibits "local government units" (including cities, villages, towns, counties, and other political subdivisions) from enacting or enforcing ordinances addressing key labor and employment matters. The governor is expected to sign it.

Michigan's governor has already signed into law a bill (SB 353) that similarly prohibits local governmental bodies from adopting, enforcing, or administering an ordinance regulating information an employer must request, require, or exclude on an application for employment or during the interview process from an employee or potential employee.

If 2017 is a guide, state lawmakers are more inclined to pass bills regulating salary history inquiries than those establishing more comprehensive equal pay measures.

4. What's the Bare Minimum (Wage)?

The patchwork of state and local minimum wage laws continues to complicate compliance efforts for multi-state employers. Each year, several jurisdictions attempt to push the minimum wage higher than the federal or state counterpart. Many succeed, spurring on legal challenges.

In Minnesota, for example, Minneapolis' Minimum Wage Ordinance recently came under fire. This local ordinance raises the minimum wage, in increments, to $15.00 per hour by July 1, 2020, for employers with more than 100 employees, and by July 1, 2024, for smaller businesses. The minimum wage will be indexed to inflation thereafter.

The plaintiff in *Graco v. City of Minneapolis*, however, alleged that Minnesota state law requires a lower minimum wage than does the Minneapolis ordinance. On February 27, 2018, after a bench trial, a Hennepin County, Minnesota district court judge disagreed, holding that the Minneapolis ordinance was not preempted by state law, that minimum wages are not solely a matter of state concern, and that local regulation of minimum wages would not have an unreasonable adverse effect on the general populace of Minnesota. Accordingly, the court denied the challenger's requests to find the ordinance invalid and unenforceable and to permanently enjoin the city from enforcing it. The decision could be appealed.

Meanwhile, on February 21, 2018, the Saint Paul, Minnesota City Council received a report by a non-government organization, the aim of which was "to identify the key questions, resources, and stakeholders that would need to be part of a larger potential effort in 2018 to . . . propose an implementation plan for" implementing a citywide minimum wage.

In addition, in March 2018, the Minnesota legislature introduced a bill that would require employers of tipped employees to pay $8.00 per hour if the employee earns sufficient gratuities during the workweek so that the sum of $8.00 per hour and gratuities received averages at least $12.00 per hour for the workweek. It would also require that employees receive the full amount of a tip left by credit card. Another pending bill would eliminate the minimum wage rate certain lodging facilities can pay employees working on a J visa (summer work travel exchange visitor). Neither bill has advanced.

Elsewhere across the country, the state or local minimum wage was increased in over 50 jurisdictions in 2018, and bills to further create additional minimum wage obligations are pending.

In the U.S. Congress, bills (H.R. 15, S. 1242) to increase the minimum wage to $15 per hour remain pending, but are not expected to advance this legislative term. However, given the public support for an increase in the federal minimum wage, this issue will be top-of-mind through the mid-term elections. If the Democrats take control of the House of Representatives this fall, a new federal bill to raise the minimum wage is expected to be introduced as one of the first bills of the 116th Congress.

5. You Voted for Whom?! How Can Employers Manage Political Tensions and Protected Speech in the Workplace?

The past year has been particularly polarizing, and the mid-term elections are soon upon us. Political and social tensions inevitably make their way into the workplace, leaving employers unsure of how to handle such hot-button issues.

At the outset, although many employees might cite their First Amendment freedom of speech rights when they speak their mind at the office, this assertion is misplaced. The First Amendment does not apply to private employers, but rather restricts a *government's* ability to interfere with individual liberties, such as freedom of speech, privacy, and religious exercise. But this does not mean an employer can always discipline an employee at work for politically-charged statements.

Certain states prohibit employers from taking adverse actions against employees (*i.e.*, firing, demoting, etc.) because of their lawful, off-duty conduct—including political activity. A handful of state laws prevent employers from discriminating or retaliating against employees because they engage in political activity. States such as California, Colorado, Louisiana, New York, South Carolina, and Utah impose such restrictions on employers. A law in Connecticut goes even further, extending free speech rights to the employees of private employers. The District of Columbia includes "political affiliation" as a protected category under its local equal employment opportunity statute.

Some of these laws provide exceptions for public or religious employers or for off-duty employee conduct that creates a material conflict with respect to the employer's business interests.

Moreover, the National Labor Relations Act (NLRA)—which generally covers both unionized and non-unionized non-supervisory employees working in the private sector—provides under Section 7 that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." The U.S. Supreme Court has interpreted this provision to mean that employees may organize as a group to "improve their lot" outside of the employer-employee relationship. Therefore, protesting the administration's policies, contacting legislators, testifying before agencies, or joining protests and demonstrations can be considered protected activity so long as it relates to labor or working conditions. Thus, employee participation in rallies related to sick leave, minimum wage, or immigration reform, for example, would likely be protected conduct.

In fact, in an advice memo released in March 2018, the NLRB's Division of Advice determined that a company unlawfully threatened to suspend and then fire 18 employees in retaliation for their participation in a "Day Without Immigrants" national protest. The Division of Advice concluded that the employees' participation in this event "was for their mutual aid or protection and constituted a protected strike."

As for rising tensions, social issues have become intertwined with politics this election cycle. Race discrimination, sexual harassment, LGBTQ and abortion rights, and gun control have become everyday topics. But employers—and employees—need to be mindful that federal and state anti-discrimination

laws still apply. Disparaging comments cannot necessarily be cloaked as protected speech or activity. To that end, employers might want to assess their fair employment policies and procedures, and update them as needed. It might behoove some employers to schedule a brief meeting or other training to refresh employees on those expectations and protocols.

In sum, employers still can—and must—insist that their workers refrain from discriminatory or harassing conduct in the workplace. Whether employee participation in protests or other off-duty conduct is protected, is a thornier issue. As always, employers should take seriously all allegations of unlawful conduct and undertake appropriate investigations, which should be consistent, timely, thorough, fully compliant with employer policies, and well-documented.

6. Reversing Course: Can Diversity Initiatives Come Back to Bite?

You can't ignore the headlines: a prominent employer faces a high-profile class action filed by white male employees alleging that they were fired (or suffered some other adverse action) because of their gender and race. Among other things, plaintiffs in such lawsuits sometimes point to corporate diversity initiatives as evidence of the pervasive discrimination they allegedly faced at the office. They may argue that an employer's consideration of gender and ethnicity in hiring and promotions is unlawful and disadvantages those who are not diverse. *See Bissett v. Beau Rivage Resorts, Inc.*, 442 F. App'x 148, 152-53 (5th Cir. 2011) (plaintiff argued "that HR conducted a one-sided investigation so she could be fired to increase diversity" and that she "was a victim of [the] diversity policy," which consisted of a commitment to maintaining a workforce reflective of the community).

Additionally, plaintiffs continue to push the envelope on the scope of reverse discrimination claims. In at least one ongoing lawsuit, for example, plaintiffs contend that their employer embraces ethnic and gender diversity while curtailing "viewpoint diversity," resulting in the alienation, blacklisting, and bullying of politically conservative employees. Moreover, because many maligned diversity initiatives are implemented at high levels of an organization, plaintiffs in reverse discrimination cases may seek discovery from and about senior and C-suite level executives.

Affinity groups and minority recruiting efforts have been touted, and prioritized by many organizations, for several years. Mentorship programs, message boards, and other approaches have been encouraged, all part of a broader effort to recruit and maintain a diverse workforce. Despite the proven benefits of diversity in the workplace, employers might be wondering whether and which initiatives may be worth the potential backlash.

Ultimately, employers must make sensible business decisions about the types of diversity initiatives to promote. In doing so, they should be cautious about how such programs are structured, presented to staff and applicants, and administered. Title VII prohibits discrimination on the basis of *any* race or gender, and employers that overlook the breadth of this law may regret it.

Employers should bear in mind that reverse discrimination claims under Title VII are evaluated in a similar manner as other types of discrimination claims brought by litigants falling within a minority protected class. That being said, reverse discrimination claims sometimes face a heightened pleading standard in federal court. In certain federal circuits—including the Seventh and Eighth Circuits—non-minority plaintiffs must additionally "show that 'background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" *Davis v. Minneapolis Pub. Sch.*, 2011 U.S. Dist. LEXIS 142214 (D. Minn. Oct. 13, 2011) (quoting *Hammer v. Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004)); *see Formella v. Brennan*, 817 F.3d 503 (7th Cir. 2016). Such circumstances could be established, for example, through evidence showing that: (1) the employer has some reason to discriminate invidiously against employees or applicants within a majority group; or (2) "there is

something fishy" about the particular situation that supports an inference of discrimination. (Yes, "something fishy" is the judicially-approved, technical term.)

Complicating matters further, however, not all federal and state courts follow this approach. And additional principles may come into play if an employer maintains an affirmative action plan. Numerous courts, for example, have held that "evidence that an employer followed an affirmative action plan in taking a challenged adverse employment action may constitute direct evidence of unlawful discrimination." *Humphries v. Pulaski Cty. Special Sch. Dist.*, 580 F.3d 688 (8th Cir. 2009).

With all these variables, and the heightened awareness of these claims in the current climate, employers should exercise forethought and care when implementing diversity initiatives. Nonetheless, establishing and supporting diversity in the workplace remains an attainable goal—worth the balancing act required.

7. In Search of a More Perfect Union?

Unionization rates in both the private and public sectors have either been on the decline or have remained stagnant over the past few decades. According to the Bureau of Labor Statistics, the union membership rate—the percent of wage and salary workers who were members of unions—remained at 10.7% in 2017. By contrast, in 1983, the first year for which comparable union data are available, the union membership rate was 20.1%. Moreover, the union membership rate of public-sector workers (34.4%) continued to be more than five times higher than that of private-sector workers (6.5%).

Public sector unions could take a hit in 2018 should the U.S. Supreme Court determine that public-sector employees cannot be forced to pay union dues as a condition of their employment. The Court has already heard oral arguments in *Janus v. American Federation of State, County, and Municipal Employees*, and is expected to issue its opinion shortly. The plaintiff in *Janus* seeks to overturn the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*, which held that public school teachers can be required to pay their fair share of the costs the union is required by law to incur in negotiating and administering collective bargaining agreements on behalf of all teachers it represents, even though teachers cannot be required to join a union or contribute to its lobbying expenditures. The Court is considering whether this type of arrangement (known as an "agency shop") violates the First Amendment rights of public-sector employees, who may not personally support the union but are forced to fund its efforts.

The Court previously deadlocked on this decision in a similar case following the death of Justice Antonin Scalia in 2016. With Justice Neil Gorsuch as his replacement, the union is not expected to fare as well. If the Court does find that such mandatory fees are unconstitutional, public sector unions will suffer a significant reduction in revenue, which could lead to reduced organizing efforts.

Although the Supreme Court decision addresses public-sector unionism only, more than half of the states have already addressed compulsory unionism in the private sector via right-to-work laws. These laws generally provide that no employee may be required as a condition of employment to become, remain, or refrain from becoming or remaining, a union member. Nor may employees be required to tender dues, fees, or assessments of any kind to a labor organization. Many of these laws also bar any requirement that employees make a "dues equivalent" payment to a charitable organization.

At least 28 states, including Indiana, Michigan, North Dakota, South Dakota, and Wisconsin, have enacted right-to-work laws. In 2017, Missouri and Kentucky enacted new right-to-work legislation, although Missouri's statute, Senate Bill 19, which was set to take effect on August 28, 2017, has been put on hold. The Missouri AFL-CIO was successful in garnering enough signatures to place the issue on the November 2018 ballot.

Meanwhile, on March 14, 2018, lawmakers in Minnesota introduced its own right-to-work proposal, HB 3779. This measure would prohibit any requirements that an individual become or remain a member of a labor organization, pay any dues, fees, assessments, or similar charges to a labor organization, or pay to any charity or other third party, in lieu of such payments, any amount equivalent to or pro rata portion of dues, fees, assessments, or other charges of a labor organization. To date, this bill has not yet advanced.

8. Drug-Testing Dilemma: Is It Worth Weeding Out High-Caliber (but High) Candidates?

State law and public perceptions concerning the use of marijuana have shifted dramatically in the last few years. New legislation and recent ballot initiatives have led to the legalization of marijuana for recreational use in about 10 U.S. jurisdictions. Medical marijuana products, meanwhile, are permitted in the vast majority of states (more than 40). This area of the law is developing constantly—despite the lack of change at the federal level, where marijuana remains unlawful.

This unsettled landscape poses practical dilemmas in the employment setting. Employees and candidates may face serious consequences under an employer's policy for failing a marijuana drug test, even in states where their use of the drug, on their own time, is entirely legal. Yet on the other hand, as more employers are realizing, they risk losing otherwise qualified applicants and workers even as companies struggle to fill vacancies in this relatively tight labor market.

Given this tension, some employers are eliminating or relaxing their drug-testing requirements so that they can hire the best-qualified candidates, regardless of any off-duty marijuana habits or medical needs. That determination turns on a variety of factors, including the nature of the employer's operations, the safety requirements or other demands for certain positions, and the overall corporate culture. An employer's decision may also be driven by state law. The Maine Department of Labor, for example, recently removed marijuana from the list of drugs for which an employer may test in its "model" applicant drug-testing policy, as that state will shortly allow recreational use.

Relatedly, several states specifically protect medical marijuana patients from employment discrimination. By Minnesota statute, and unless otherwise mandated by federal law, employers generally may not discriminate against an individual "in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based" on: (1) the individual's status as an enrolled medical marijuana patient; or (2) a positive drug test. Minn. Stat. § 152.32. Evidence of a positive marijuana drug test may be grounds for adverse action only if the individual "used, possessed, or was impaired by medical cannabis" while at work or during work hours. Similar protections for patients exist in Arizona, Arkansas, and Pennsylvania, among other jurisdictions. Some states, such as New York and California, generally prohibit employers from discriminating against workers for engaging in lawful conduct while off-duty; it remains to be seen whether such laws might also protect individuals legally using marijuana.

Laws prohibiting disability discrimination may also be implicated. Applicants may argue that an employer's denial of a job on the basis of a failed drug test equates to discrimination on the basis of the disability justifying the use of medical marijuana. Patients may assert that they could perform their job duties, if only their employers would reasonably accommodate their need to ingest lawful medical marijuana away from work. This theory succeeded within the last year in several state courts, including those in Massachusetts, Connecticut, and Rhode Island.

Even where marijuana patients or recreational users are protected, states typically allow businesses to impose some employment-related restrictions. The Minnesota law does not permit the vaporization of medical cannabis while at work, for example. In Michigan, employees may not perform any task while under the influence of marijuana if doing so would constitute negligence or professional malpractice. Nor

may workers operate, navigate, or control a motor vehicle while under the influence. Additionally, employers that must enforce a drug-free workplace to comply with federal or state regulations or contractual promises may continue to do so.

The pressure surrounding this issue may continue to build, as the U.S. Department of Justice under the Trump administration intends to return to a hard line on marijuana enforcement.

9. Share and Share (Employees) Alike – Are You a Joint Employer?

Determining who is an "employer" when complex working arrangements are at play is crucial for labor and employment law purposes. If an entity is deemed a joint employer with another, it can be held liable for wage and hour, labor, workers' compensation, and other state and federal workplace law violations. To complicate the issue, not all employment laws use identical tests for determining the existence of a joint employment relationship. A number of developments this past year have shifted the approach in making this assessment at the federal level.

The prior administration took a broad view of joint employment. The new administration has reversed course. On June 7, 2017, Labor Secretary Alexander Acosta announced the withdrawal of the Wage and Hour Administrator's Interpretation (AI) on joint employment, which had taken the position that "[t]he concept of joint employment, like employment generally, should be defined expansively under the FLSA . . ." The withdrawal of this AI was the first step in stemming the expansion of who can be considered a joint employer.

The joint employment question under the National Labor Relations Act (NLRA) has also been in flux. The National Labor Relations Board (NLRB) has changed its official position on the standard for joint employment under the NLRA *three times* in the last three years. From 1984 until 2015, the NLRB evaluated joint employment by assessing whether the alleged joint employers "shared or codetermined" the essential terms and conditions of employment, "including hiring, firing, discipline, supervision, and direction," and held that "[t]he essential element in this analysis [was] whether a putative joint employer's control over employment matters is direct and immediate." *TLI, Inc.*, 271 NLRB 798, 799 (1984); *In Re Airborne Freight Co.*, 338 NLRB 597 (2002). Then, on August 27, 2015, the NLRB greatly expanded the scope of relationships that could potentially constitute joint employment, and held that "[r]eserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry," and that "control exercised indirectly—such as through an intermediary—may establish joint-employer status." *Browning-Ferris Industries of California*, 362 NLRB No. 186 (Aug. 27, 2015). This decision was appealed to the D.C. Circuit.

While the appeal was pending, on December 14, 2017, the NLRB reversed its 2015 decision, and returned to its pre-2015 standard, though it ultimately found that the companies at issue were joint employers even under the pre-2015 standard. *Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017). However, less than three months later, on February 26, 2018, the NLRB vacated its 2017 ruling due to a finding by the Board's Designated Agency Ethics Official that one of the members should have recused himself from participation in that case. On April 6, 2018, the D.C. Circuit—which had remanded the *Browning-Ferris* case to the NLRB following the *Hy-Brand* decision—agreed to once again consider the case, so the saga continues. In the meantime, the NLRB's more expansive 2015 ruling remains the agency's official interpretation of joint employment under the NLRA.

To help clarify and unify the standards for analyzing joint employment, the U.S. House of Representatives passed a bipartisan bill in November of 2017 called the "Save Local Business Act," which was designed to provide a single definition of joint employment under both the FLSA and NLRA, requiring direct, actual, and immediate control. That bill has not been the subject of any action in the

Senate, so its fate is unclear.

The tests for determining joint employment, therefore, remain a moving target. Employers particularly affected by this issue—e.g., franchisors and those using temporary employees—should take steps to ensure they do not exert the type of control over workers that would trigger an unintended employment relationship.

At the state level, Idaho became the latest jurisdiction to pass a law clarifying that neither a franchisee nor a franchisee's employee shall be considered an employee of a franchisor except under certain limited circumstances. A number of other states have enacted similar legislation over the years, including Indiana, Michigan, North Dakota and South Dakota. This year, bills are pending in at least four other states.

10. Is the Gig Up? Demanding Clarity Over the On-Demand Economy

The swift rise of the so-called on-demand or "gig" economy has left lawmakers and regulators scrambling to keep up. In many instances, gig workers clearly work for themselves as independent contractors, regulating their own hours and choosing which products or services to provide. There will always remain, however, challenges to independent contractor status by those who believe they should instead be treated as employees.

In the much-anticipated case out of California, *Lawson v. Grubhub, Inc*., 2018 WL 776354 (N.D. Cal. Feb. 8, 2018), a U.S. magistrate judge concluded that a driver who sued a food delivery company under the state's minimum wage, overtime and employee expense reimbursement laws was not covered by those laws because he was an independent contractor, not an employee. While this decision does not necessarily have far-reaching national implications, it did count as a significant win for gig economy companies.

A big issue for many on-demand workers and their advocates is the lack of fringe benefits—such as health insurance and retirement savings vehicles—offered to employees. To remedy this lack of benefits, Senator Mark Warner (D-VA) and Rep. Suzan DelBene (D-WA) introduced legislation—which is still pending—to promote innovative ways to offer portable benefits to workers in the on-demand economy. The Portable Benefits for Independent Workers Pilot Program Act would direct the Labor Secretary to provide $20 million in grants to states, local governments, or nonprofit organizations that analyze and/or design the means and methods of delivering employment benefits that independent workers can maintain as they move from job to job. Some states have taken Congress' lead, introducing bills that would create a system of portable benefits for gig workers.

Meanwhile, some states are taking the initiative to proactively classify gig workers as independent contractors under state law. Many jurisdictions have introduced bills focusing specifically on ride-sharing companies, or transportation network company drivers (TNDs). Florida was the latest state to enact such a bill explicitly classifying TNDs as independent contractors. Similar bills have been enacted in Arkansas, Indiana, Mississippi, North Carolina, Utah, and West Virginia.

Other bills approach gig economy worker classification more broadly, defining marketplace contractors that use digital marketplace platforms to connect with clients to provide products or services, and differentiating these workers from employees. This type of bill has grown in popularity over the past few months.

Arizona was the first to enact such a law in 2016, defining a qualified marketplace contractor as a person or entity that contracts to use a digital platform to provide services to third parties. The law defines a

marketplace platform as an entity that operates a website or smartphone app that facilitates a marketplace contractor's provision of a service to a third party and accepts these service requests only through its website or smartphone application. Indiana and Kentucky followed suit in March 2018, enacting laws clarifying the employment relationship between entities that provide internet- or smartphone-based service applications and the actual providers of the requested services. The service providers will be considered independent contractors under certain conditions.

Similarly, Utah enacted the Service Marketplace Platforms Act in March 2018, clarifying the employment relationship between building service contractors who affiliate with service marketplace platforms. Several other states have introduced similar bills defining marketplace platforms, marketplace contractors, and specifying that the latter are presumed independent contractors, not employees, for various state law purposes.

Another bill in New Jersey would require certain contractual rights for freelancers, similar to New York City's Freelancer Bill of Rights. The protections provided in the bill appear to target gig workers. Similarly, a new bill (HB 4285) introduced in Minnesota would require prompt payment of wages to independent contractors.

As on-demand products and services continue to expand, expect federal and state laws to slowly catch up with the 21st Century. The Department of Labor's Bureau of Labor Statistics (BLS), for example, is expected to soon issue a study on the gig economy in an effort to better capture this segment of the working population.

11. Is Your Biometric Timeclock Ticking?

In this modern age, employers need not rely on punch-cards for employees to clock in and out for their shifts. Instead, many employers are implementing some sort of biometric timeclock. This timekeeping technology uses a scan of an employee's body feature, such as a fingerprint, to verify the employee's identity and clock the employee into, and out of, work.

There are many types of biometric timeclocks on the market, and they use differing technology. Timeclocks that require employees to place a finger on the device are most common, but face-scanning and iris-scanning technology is also available. Another key difference is whether the technology collects an image of the body feature itself, such as a photograph of an actual fingerprint, or creates a unique identifier based on the body feature.

The use of biometric timeclocks can help prevent fraud, increase timekeeping efficiency, and enhance the accuracy of wage calculations. Yet, despite these advantages, there are legal complexities associated with biometric timeclocks. Indeed, employers have faced a flurry of class actions challenging their use.

Privacy. The first potential glitch is that a few states specifically regulate the collection and storage of biometric information. While a handful of jurisdictions have entertained bills on this topic, only three states thus far have enacted biometric privacy legislation: Illinois, Texas, and Washington. (Washington's law, effective July 23, 2017, is the most recent, but the law does not apply to an employer's use of a biometric timeclock.) In addition to these biometric privacy laws, New York's Labor Code includes a provision governing fingerprinting of employees that extends to and restricts certain uses of biometric timeclocks. That provision precludes employers from requiring employees to use their fingerprints to clock in, but permits voluntary fingerprint scans, as well as the use of instruments that measure the geometry of a hand that do not scan the surface details of the hand and fingers.

The Illinois law, the Biometric Information Privacy Act (BIPA), is by far the most restrictive. BIPA requires that—before collecting, capturing, or obtaining any biometric information—private entities must first provide employees with written notice informing them of the intent to collect such information, the purpose for doing so, and the length of time that the data will be retained. Employers must obtain employees' written consent before scanning their "biometric identifiers" or collecting "biometric information" using a biometric timeclock. Further, employers must issue a written policy concerning retention and safeguards for this information, including methods for destruction.

Moreover, BIPA is quite expansive; it defines a "biometric identifier" as a scan of an individual's fingerprint, retina, or iris, or a scan of an individual's hand or face geometry. BIPA also applies to "biometric information," which is defined as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." Accordingly, even biometric timeclocks that do not store an image of the biometric identifier, but instead create a template or unique identifier based on the image, fall within the scope of BIPA.

BIPA authorizes employees to sue for alleged violations, and prevailing plaintiffs may recover liquidated damages of up to $5,000 for *each* violation. Since mid-September 2017, more than 50 employers that use "biometric timeclocks" in Illinois have been targeted with class action lawsuits alleging BIPA violations. These lawsuits typically do not allege that employees' biometric data has been unlawfully disclosed, sold, or stored in an unsecure manner. Instead, the actions focus on employers' alleged non-compliance with BIPA's notice and consent requirements; specifically: (1) the employer allegedly failed to provide its employees with written notice that the biometric timeclock would collect their biometric data, and to explain the purpose for the collection, how the biometric data would be stored, and how long it would be retained; and (2) the employer did not obtain employees' prior written consent to the collection and use of their biometric data.

Courts are grappling with how to handle these types of claims, which allege technical violations of BIPA but not necessarily any resultant, quantifiable harm. In recent months, courts have issued contradictory rulings on that issue. Notably, a unanimous panel of the Illinois appellate court addressed whether a plaintiff is "aggrieved" under BIPA "when the only injury he or she alleges is a . . . private entity . . . collected his or her biometric identifiers and/or biometric information without providing him or her the disclosures and obtaining written consent." *Rosenbach v. Six Flags Entm't Corp.*, 2017 Ill. App. LEXIS 812, at *8 (Ill. App. Ct. Dec. 21, 2017). The court held that, by its plain language, the term "aggrieved" as used in BIPA requires "an actual injury, adverse effect, or harm in order for the person to be aggrieved." While the court noted that such harm need not be pecuniary, this holding arguably narrowed the scope of allowable BIPA actions.

That said, a California federal court reached the opposite conclusion in a February 2018 opinion. *Patel v. Facebook Inc.*, 2018 U.S. Dist. LEXIS 30727 (N.D. Cal. Feb. 26, 2018). While not set in an employment context, that case addressed the related question of whether Illinois residents had standing to assert claims against a social media site, which relied on facial recognition technology as part of a "tagging" feature but allegedly did not provide notice to or seek consent from users under BIPA. The federal district court reasoned that "the Illinois legislature codified a right of privacy in personal biometric information" in BIPA, evidencing its "judgment that a violation of BIPA's procedures would cause actual and concrete harm." This threshold issue remains unsettled, complicating employer compliance efforts.

Duty to Consider Accommodations. Beyond privacy regulations, employers considering use of biometric timeclocks should also be aware that they may be obligated to provide reasonable accommodations to certain employees. Employees with disabilities, for example, may need to rely on another method for tracking their hours if they are unable to participate in biometric scanning. The Americans with

Disabilities Act and related state antidiscrimination laws would require employers to assess and implement any reasonable accommodations in that event.

Employers also may need to entertain accommodation requests from employees with sincere religious objections to a biometric scanning system. Failure to do so may run afoul of Title VII.

In short, biometric timeclocks are a powerful tool that employers should handle with care.

12. Sick and Tired of Competing Paid Sick Leave Obligations?

Few laws are as frustrating for multi-jurisdiction employers as paid sick leave requirements. Fifteen states plus the District of Columbia have statewide paid sick leave mandates, cities and/or counties with paid leave ordinances, or both. California, for example, has state-wide paid leave requirements, as do seven of its major cities. New Jersey has not yet enacted its own paid leave law (but is getting close), but at least 13 of its cities or counties have. These leave requirements vary in the number of hours that can be accrued, carryover restrictions, reasons leave can be taken, and employer and employee coverage. As a result, employers operating in multiple jurisdictions face significant compliance challenges.

Minnesota has recently had to contend with new local paid sick leave ordinances. On May 31, 2016, Minneapolis became the first city in the Midwest to enact such an ordinance. The Minneapolis Sick and Safe Time Ordinance requires employers to allow employees to accrue up to 48 hours of sick and safe time leave each year beginning July 1, 2017. Employers with six or more employees must provide paid sick and safe time, while smaller employers must provide unpaid leave.

The leave can be used for various reasons, including for the employee's or the employee's family member's mental or physical illness, injury, or health condition, or when an employee or his or her family member needs to obtain diagnosis, care, treatment, or preventive care, as well as any absence due to domestic abuse, sexual assault, or stalking of the employee or the employee's family member.

This law did not go unchallenged. The Minnesota Chamber of Commerce joined other business groups and individual employers and moved for a temporary injunction to stop the Ordinance from taking effect, arguing the Ordinance was pre-empted by and conflicted with state law, and that Minneapolis did not have the authority to enforce the Ordinance because it inappropriately extended beyond the geographic borders of Minneapolis.

On January 19, 2017, a Hennepin County judge issued an order rejecting the Chamber's preemption and conflict arguments. The judge, however, granted the motion to enjoin Minneapolis from enforcing the Ordinance against companies "resident outside" of the city—*i.e.*, those employers that do not have a physical location within the city limits of Minneapolis. On September 18, 2017, the Minnesota Court of Appeals agreed with the district court that the ordinance should not be applied to employers that do not have a facility in Minneapolis, even if employees perform some work in Minneapolis. In response, the mayor of Minneapolis recently signed an ordinance amending its paid sick leave rules to provide that an employer is only required to allow an employee to use sick and safe time that is accrued when the employee is scheduled to perform work within the geographic boundaries of the city.

The appeals court also agreed with the district court that the remainder of the law was enforceable and *not* preempted by state law. Therefore, as of July 1, 2017, employers were required to have a compliant policy and provide notice of the law. Employers with collective bargaining agreements have until July 1, 2018, to ensure their agreements provide compliant benefits.

Saint Paul, Minnesota followed suit on September 7, 2016, adopting its own sick and safe time ordinance. Covered employers must allow employees who work in Saint Paul to accrue one hour of sick and safe time for every 30 hours worked, up to 48 hours of sick and safe time each year. The Saint Paul Ordinance applies to private employers of all sizes, including employers with only one employee, as long as at least one employee works within Saint Paul city limits. The Saint Paul Ordinance does not exempt small businesses, but it provides them with more time to comply with the paid sick and safe time requirements. This Ordinance took effect on July 1, 2017, for employers with 24 or more employees, and January 1, 2018, for smaller employers.

The Saint Paul Ordinance mirrors Minneapolis' ordinance in many ways, although there are some notable differences related to accrual, definitions of covered family member, and notice requirements, forcing employers with employees in both Minneapolis and Saint Paul to decide whether to create different policies for their employees.

Not to be outdone, the City of Deluth, Minnesota has recently introduced an ordinance (No. 18-009-O) that would require employers with five or more employees to provide employees with one hour of earned sick and safe time for every 30 hours worked.

Although cities in Minnesota were the only jurisdictions in the Midwest to enact new paid leave laws over the past year, jurisdictions elsewhere in the country have been more active in this area.

On September 28, 2017, Rhode Island enacted a state-wide paid sick and safe leave law. The Healthy and Safe Families and Workplaces Act will take effect on July 1, 2018, giving employers little time to review existing or create new policies to comply with the law.

More recently, on January 12, 2018, the Maryland legislature overrode Governor Larry Hogan's 2017 veto of the Healthy Working Families Act, enacting legislation that requires Maryland businesses to provide covered employees with paid sick and safe leave. The Act preempts local sick and safe leave laws that were enacted on or after January 1, 2017.

In addition, Austin became the first Texas city to adopt its own paid sick leave ordinance, although state lawmakers have already threatened to enact a bill that would preempt local sick leave efforts. Meanwhile, final rules to implement other state paid sick leave laws were issued in Washington, Oregon, and Arizona.

By contrast, South Carolina enacted a law within the past year that expands coverage of its preemption laws to prohibit political subdivisions from enacting employment laws that provide greater benefits—including paid leave—than that required under federal or state law.

Bills to create paid leave requirements are pending in a handful of other states.

Another avenue for providing paid sick leave is the creation of a paid family and medical leave insurance program funded by payroll deductions. For example, in July 2017 Washington enacted a law that allows employees to take up to 18 weeks of paid leave beginning January 1, 2020. The new law provides that the paid leave benefits are paid from a percentage of the employee's average weekly wage and capped at $1,000 per week. Payroll deductions to support the program will begin January 1, 2019. Bills to enact similar programs are pending in Hawaii, Massachusetts, and Oregon.

13. Do We at Least Get Extra Credit?

While many jurisdictions have been reluctant to enact local paid leave mandates, lawmakers across the country have recognized the popularity of the issue. A 2017 survey conducted by Pew Research Center found that the majority of Americans support paid leave. Who should bear the cost of providing such leave, however, has been a bone of contention.

In order to encourage employers to provide their employees with paid time off for family and medical leave, the first significant piece of legislation to make it to President Trump's desk, the Tax Cuts and Jobs Act (H.R. 1), includes an employer tax credit as an incentive. The bill does not require employers to provide paid leave, but rather offers a tax credit to employers that provide a certain level of paid family and medical leave to their employees.

Under the new tax code section, eligible employers will be able to claim a general business tax credit equal to 12.5% of the wages they pay to qualifying employees when they take family and medical leave. The credit is available only if the employer pays the employees on leave at least half of their hourly rate (or a prorated amount if they are not paid hourly), and only if the employer provides at least two weeks of paid family and medical leave per year. Employers that pay their employees on leave more than 50% replacement wages will be entitled to a greater tax credit. Specifically, the credit will increase by a quarter percentage point for every percent above the 50% rate the employer pays the employee on leave, up to a maximum tax credit of 25% if the employer pays the employees 100% of their regular wages. This credit is available for up to 12 weeks of paid leave per employee per year.

Both full-time and part-time employees must be offered paid leave for an employer to be able to claim the tax credit. Employers must allow part-time employees to take a commensurate amount of paid leave, determined on a pro-rata basis. A "qualifying employee" is an individual who is employed by the employer for at least a year, and paid no more than 60% of the compensation threshold for designation as a highly compensated employee under the tax code, or $72,000.

The tax credit applies for "family and medical leave," as defined under sections 102(a)(1)(a)-(e)or 102(a)(3) of the FMLA. Other types of leave such as paid vacation leave, personal leave, or other types of medical or sick leave, are not considered family and medical leave for tax credit purposes.

The credit applies to wages paid in taxable years starting in 2018. The credit does not apply to wages paid in taxable years starting after December 31, 2019.

Some state legislatures have taken Congress's lead. Three separate bills introduced in Connecticut (HB 5098, HB 5103, and HB 5134), for example, would establish employer tax credits for providing their employees with paid family and medical leave. On April 9, 2018, Maryland's General Assembly approved a bill (SB 134) to allow small businesses that provide paid sick leave to their employees to be eligible to receive tax credits.

Other bills would provide tax credits for specific types of leave. A bill (HB 1202) introduced in Colorado, for example, would provide employers with an income tax credit equal to 35% of the employer's expenses for paying employees whose leave of absence period is due to an organ donation and does not exceed 10 working days.

A measure (HB 1758) pending in New Hampshire would establish a credit against business taxes for providing paid maternity and paternity leave.

If these bills advance and are adopted by other states, it would indicate that the carrot approach to implementing paid leave policies is an effective one.

14. School's out for Summer: What Does the New and Improved Unpaid Internship Interpretation Mean for Employers?

Employers must be careful when planning any internship or trainee programs to ensure that unpaid interns do not qualify as "employees" (and thus qualify for compensation) under the FLSA. While careful planning is always important, employers can now rely on updated—and more employer-friendly—guidance from the Department of Labor (DOL).

On January 5, 2018, the DOL announced a significant change in its interpretation of the FLSA with respect to interns. For years, the DOL had employed a six-factor test to determine whether the FLSA's minimum wage and overtime requirements apply to interns working for private employers. Under that test, interns would be deemed "employees" by default unless all six of the specified elements were satisfied.

Private employers struggled with this stringent approach. For example, the fourth factor—which essentially required that companies reap no benefit from an intern's efforts—posed a particular challenge for employers intending to offer meaningful, educational, yet unpaid, internships. Moreover, beginning around 2013, employers were faced with a wave of class and collective actions filed by unpaid interns alleging that they had been misclassified.

By 2015, however, federal courts began rejecting this six-factor factor test in favor of a more flexible framework. In *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2015), a case involving unpaid interns in the film industry, the U.S. Court of Appeals for the Second Circuit found that the DOL's six-factor test was too rigid to apply in all workplace scenarios. Instead, the court endorsed the "primary beneficiary" test, which explores the extent to which the employer and the intern benefit from their relationship. This approach "focuses on what the intern receives in exchange for his [or her] work" and grants the courts the flexibility to examine the economic realities as they exist between the parties. The Second Circuit articulated a non-exhaustive list of seven factors for courts to consider in determining whether the FLSA applies to an intern: (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa; (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions; (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit; (4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar; (5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; (6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and (7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The court also clarified that other factors might be relevant as dictated by the circumstances.

Other appellate courts soon followed suit. Most recently, for example, the Ninth Circuit adopted the *Glatt* seven-factor analysis.

Given these developments, on January 5, 2018, the DOL issued an updated fact sheet endorsing the

primary beneficiary framework. In that release, the DOL cited the key appellate cases and adopted the *Glatt* approach verbatim. The DOL stated that the primary beneficiary test is flexible "and no single factor is determinative." As the DOL explained, "whether an intern or a student is an employee under the FLSA necessarily depends on the unique circumstances of each case."

Employers that are covered by the FLSA and wish to offer unpaid internships should review the DOL's position when preparing their programs and hiring interns. Employers—even if not covered by the FLSA—should also remember that state laws and the guidance of state agencies may also affect their decisions about internship programs. In addition, some states consider interns to be "employees" for purposes of their antidiscrimination statutes. Approximately eight jurisdictions (including California, Illinois, Maryland, and New York) offer some protection for interns from discrimination and/or sexual harassment. Finally, all employers should be clear about the scope of their internships and should be consistent in applying all policies and procedures to interns, to ensure they are treated fairly during their time with the company.

15. Will ICE Enforcement Put a Chill on Hiring?

Cracking down on illegal entry into the United States was a cornerstone of President Trump's election campaign. Following a series of immigration-related memoranda and executive orders issued since January 2017, the White House on October 8, 2017, released a list of immigration priorities addressing border security, interior enforcement, and a merit-based immigration system. The priority list calls for the hiring of 10,000 ICE agents, 300 federal prosecutors, 370 immigration judges and 1,000 Immigration and Customs Enforcement (ICE) attorneys. The Department of Homeland Security would be authorized to raise and collect fees from visa services and border crossings to fund border security and enforcement activities.

Employers can expect to be impacted by this shift in focus. For instance, employers have seen—and will continue to see—a significant uptick in worksite enforcement actions conducted by ICE. Acting ICE Director Thomas Homan has reportedly ordered Homeland Security Investigations (HSI, ICE's investigative arm) to increase its worksite enforcement actions by "four or five times" in the new fiscal year. In the past, ICE conducted worksite raids to arrest employees who lacked work authorization in the United States. Such raids have returned, and are targeting aggressively both parties: employers that—even unknowingly—employ individuals without work authorization, and employees who lack work authorization. For example, on January 10, 2018, HSI targeted 98 retail operations in nationwide worksite raids occurring in 17 states and Washington D.C. On April 5, 2018, ICE agents conducted its largest workplace raid in 10 years at a meatpacking plant in Tennessee, arresting 97 workers. Such activity will likely be the first of many future worksite enforcement actions under the current administration.

These new worksite enforcement actions appear to be a combination of both I-9 audits and arrest of unlawful workers and employers that knowingly hiring these workers. Under the Immigration and Nationality Act, employers are required to maintain Form I-9 for all employees hired after November 6, 1986. Employers are required to produce the I-9s within three days of receiving a notice of inspection. Failure to properly maintain I-9s may result in fines, and employers that knowingly employ individuals who are unauthorized face stiffer penalties including increased fines and potential criminal liability.

Some jurisdictions have attempted to push back on these increased enforcement efforts. On January 1, 2018, California's Immigrant Worker Protection Act took effect. This law prohibits employers from giving ICE—and other immigration agencies—permission to enter private areas of a workplace and from obtaining some types of documents without a judicial warrant. The law also requires employers to provide notice to employees and their authorized representative of immigration agency audits, such as an ICE Form I-9 audit. Although the law places restrictions on an employer's ability to cooperate with an

ICE request, forcing ICE to obtain judicial warrants, it still allows ICE to conduct Form I-9 inspections by issuing an administrative Notice of Inspection.

As expected, on March 6, 2018, the U.S. Department of Justice filed a lawsuit challenging California's new law, among others in the state designed to limit the extent state law enforcement and prisons may cooperate with ICE. The DOJ's lawsuit requests injunctive relief against California, and argues that the Immigrant Worker Protection Act and other California laws violate the Supremacy Clause of the Constitution.

Workplace raids aside, employers are feeling other effects from the administration's re-vamped immigration policy. The White House has advocated a merit-based immigration system, as articulated in proposed legislation: Reforming American Immigration for Strong Employment (RAISE) Act. This proposal would reduce the number of eligible family-based green cards and create a new point-based system for awarding green cards. Specifically, the RAISE Act would establish a 30-point threshold for green cards, awarding an applicant higher point totals for higher-salaried jobs, professional degrees, English-speaking ability, younger applicant age, higher future salary, extraordinary achievements, and an applicant's investing $1.35 million or more in the United States.

If such a system were implemented, employers would face higher costs in sponsoring foreign workers for visas. Individuals holding a nonimmigrant work visa would have to meet a high point-based system threshold in order to obtain a green card, and there will certainly be additional delays in visa issuance due to the additional screening required.

In addition, the Department of Homeland Security is reportedly considering ending the ability to extend H-1B visas beyond the six-year limit of authorized stay. Historically, the extensions have been possible pursuant to the American Competitiveness in the Twenty-First Century Act (AC21), which previous administrations have interpreted as allowing such extensions. The current administration is reconsidering this interpretation in light of the administration's "Buy America, Hire American" initiative.

While the administration's policy is still fluid, employers across the country should take extra care to ensure their employees are authorized to work in the United States, and anticipate extra time for the processing of nonimmigrant and immigrant petitions, labor certifications and green cards, as well visa issuance delays due to the additional scrutiny over such documents.

16. Are More Predictive Scheduling Laws in Your Future?

A work trend that made inroads in 2017 and might continue in 2018 is the proliferation of so-called "fair" or "predictive" scheduling laws. San Francisco was the first city to enact its Formula Retail Employee Rights Ordinances in November of 2014. Since then, predictive laws have taken hold—primarily in large cities—on both coasts. In 2017, new laws were enacted in the cities of San Jose, California; Emeryville, California; Seattle, Washington; and New York City, New York. The same year, Oregon became the sixth jurisdiction to adopt predictive scheduling requirements, and the first to do so on a state-wide basis.

Most of these scheduling laws apply to large employers in the retail and food services industries, although Oregon's law includes "hospitality establishments." The Emeryville and New York City fair scheduling laws apply to restaurants where patrons order or select food or beverages and pay before eating.

While San Jose's law imposes the narrowest requirements, mandating only that employers give part-time employees the right of first refusal over available work hours before hiring additional personnel, it has the broadest application, applying to all employers either subject to San Jose's business license tax or exempt from such tax but having a place of business within city limits.

Although the predictive scheduling laws vary, they generally require one or more of the following: (1) a good-faith estimate of the employee's anticipated work schedule, (2) the right to request input into one's work schedule, (3) the right to rest between work shifts, (4) advance notice of the work schedule, (5) the right to decline employer-requested changes to the posted work schedule, (6) compensation for schedule changes (if the employee agrees to accept such changes), and (7) a duty to offer available work hours to existing employees before hiring externally.

New York State could be the next jurisdiction to impose fair scheduling requirements. On November 26, 2017, the New York State Department of Labor issued proposed predictive scheduling regulations for employers in the retail, financial services, healthcare, and construction industries. The proposed regulations would revise the Minimum Wage Order for the Miscellaneous Industries and Occupations to limit employers' ability to schedule employees for on-call shifts and require employers to pay employees for cancelled shifts and newly issued shifts. If the proposed regulations become effective, New York State would follow Oregon in implementing state-wide predictive scheduling rules.

Other states could soon follow. Bills requiring an employer to provide advance notice of employee shifts have been introduced in at least seven states. Legislation that would allow employees to request flexible work schedules or make changes in their schedules are pending in the U.S. House and Senate, as well as in California and New Jersey. Many of these bills would require employers to pay for 11th-hour shift changes, and impose a range of scheduling requirements on employers. A bill (AB 866) that recently died in Wisconsin's legislature, for example, would have required employers to provide employees in the retail, food service, and cleaning industries with a written copy of their work schedules at least a day before their first day of work, and provide any changes to these schedules at least 14 days in advance.

On the flip side, some jurisdictions are trying to take a preemptive approach to the proliferation of scheduling laws. In South Carolina, for instance, a bill was introduced that would prevent localities from requiring employers to pay employees additional wages or pay based on any alteration or adjustment of employee scheduling. It remains to be seen whether any of these pending measures will advance in 2018.

17. *Leave* Me Alone! Don't I Need to be Accommodated?

Another thorny question that often plagues employers is whether a leave of absence constitutes a reasonable accommodation under the Americans with Disabilities Act (ADA). This issue typically arises when employees request additional time off following the expiration of leave taken under the FMLA or an employer's internal policy. For example, an employee may check in while on FMLA leave, only to report that a surgery has been scheduled and that he or she cannot return to work until weeks after the FMLA period runs out. So how far does an employer have to go in this situation?

Courts and employers continue to debate whether and how extended leave should constitute a reasonable accommodation. In general, leave qualifies as a reasonable accommodation "when it enables an employee to return to work following the period of leave." *See* EEOC, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016). According to the EEOC, leave must be granted unless: (1) another reasonable accommodation option would be effective (*e.g.*, would enable the employee to perform his/her essential job functions); or (2) the leave would cause the employer undue hardship.

Undue hardship, meanwhile, refers to an action that would require significant difficulty or cost. Whether an accommodation is an undue hardship involves consideration of several criteria, such as: (1) the nature and cost of that accommodation; (2) the overall financial resources of the facility and impact on expenses; (3) the overall resources of the employer; (4) the nature of the employer's operations, including the

composition, structure, and functions of the workplace; and (5) the impact of the accommodation on operations, including any impact on the ability of other employees to perform their work.

Consistent with those principles, an extended medical leave may be a reasonable accommodation under the ADA—but an employer generally does not have to provide a leave of *indefinite* duration. Numerous federal appellate courts have held that an employee is not entitled to leave as a reasonable accommodation if the duration is unknown.

Courts also have rejected requests for leave that have a specific end date but are deemed excessive. The rationale for some of these holdings is that "[a] leave request must assure an employer than an employee can perform the essential functions of her position in the near future." For example, some courts have concluded that a six-month leave of absence is simply too long to be a reasonable accommodation.

A few courts have described these limitations in another way. Some courts have held that individuals seeking excessively long or undetermined leaves need not be accommodated because they are not "otherwise qualified" for their jobs under the ADA. The Seventh Circuit stressed this point in two 2017 cases, beginning with *Severson v. Heartland Woodcraft, Inc*., 872 F.2d 476 (7th Cir. 2017). Indeed, the court bluntly stated in *Severson* that "a long-term leave of absence cannot be a reasonable accommodation." There, the plaintiff had taken his full 12 weeks of FMLA leave due to a back injury that aggravated a preexisting condition. While on leave, he informed his employer that he would require surgery and requested an extension of his medical leave for two or three more months. The employer responded that while the plaintiff would be welcome to reapply in the future, his employment would expire along with his FMLA leave if he failed to return to work. On the final day of his FMLA leave, the plaintiff underwent surgery and later sued alleging failure to accommodate, citing in support the fact that his doctor had cleared him to return to work three months after his surgery. The parties agreed that the plaintiff had a disability but disputed whether the desired multi-month leave of absence constituted a reasonable accommodation.

The plaintiff, supported by the EEOC as *amicus curiae*, argued that long-term medical leave should be considered a reasonable accommodation if it is of a fixed duration, is requested in advance, and is likely to enable the employee to perform his or her essential job functions upon return to the workplace. The Seventh Circuit rejected this approach, however, reasoning that it would transform the ADA into an "open-ended extension of the FMLA." The court relied on prior precedent, explaining that the inability of a person to work for months at a time removes that individual from ADA coverage. Just a few weeks after *Severson*, the Seventh Circuit reiterated this interpretation in *Golden v. Indianapolis Housing Agency,* 698 F. App'x 835 (7th Cir. 2017), holding that the employee's request for an additional six months' leave beyond FMLA leave removed her from the class of individuals protected by the ADA. The Eleventh Circuit followed a similar path in *Billups v. Emerald Coast Utilities Authority*, 2017 WL 4857430 (11th Cir. Oct. 26, 2017), in which the court rejected a request for leave where the plaintiff was not able to perform the essential functions of his job at the time of his termination and could not show that he would become able to work "in the immediate future."

While these cases have helped clarify the outer limits of an employer's duties to provide leave under the ADA, employers should continue to take seriously all accommodation requests. An employer covered by the ADA typically should plan on engaging in the interactive process with an employee upon receipt of a leave request, to assess whether accommodation is necessary, whether it would impose undue hardship, and what accommodations might be both effective and reasonable. Employers should also educate themselves about any applicable state or local law accommodation requirements.

18. Where do LGBTQ Rights Stand?

Federal courts this year issued a number of significant decisions defining the scope of employment protections for workers on the basis of their sexual orientation or gender identity. Meanwhile, the political climate has once again brought this issue to the forefront.

The EEOC's position stems from a July 15, 2015, federal sector decision, *Baldwin v. Department of Transportation* (3-2 Decision). In *Baldwin,* the Commission held that a claim of discrimination on the basis of sexual orientation "necessarily states a claim of discrimination on the basis of sex under Title VII." The EEOC relied on three grounds: (1) sexual orientation discrimination involves sex stereotyping in not conforming to gender norms; (2) such discrimination amounts to gender-based associational-type discrimination; and (3) sexual orientation requires consideration of a person's sex.

Notably, Republican-appointed Commissioners Constance Barker and Victoria Lipnic voted against approval of the decision. When the EEOC shifts to a 3-2 Republican majority, as is expected this year, it remains an open question whether the Commission's current view will endure.

Meanwhile, on April 4, 2017, the Seventh Circuit became the first federal appellate court to hold that discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII. *Hively v. Ivy Tech Community College*, 853 F. 3d 76 (7th Cir. 2017). The Second Circuit followed suit this year in *Zarda v. Altitude Express, Inc.*, No.15-3775, (2d Cir. Feb. 26, 2018). By contrast, the 11th Circuit in *Evans v. Georgia Reg'l Hospital*, 2017 WL 43025, 850 F. 3d 1251 (11th Cir. Mar. 10, 2017), came to the opposite conclusion, finding Title VII affords no such protection. All of the other courts of appeal that have considered this issue have similarly ruled that Title VII does not cover sexual orientation discrimination. This circuit split will likely be resolved by a future Supreme Court decision, although on December 11, 2017, the U.S. Supreme Court declined review in *Evans*.

Another groundbreaking decision was issued in recent months, this time by the Sixth Circuit in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* No. 16-2424 (6th Cir. Mar. 7, 2018). The appellate court held that discrimination based on an employee's transgender status is discrimination based on "sex" in violation of Title VII. While the EEOC made such a determination in 2012 (*Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC Appeal No. 0120120821 (Apr. 20, 2012)), the Sixth Circuit is the first such federal appellate court to so rule. This decision impacts employers in Kentucky, Michigan, Ohio and Tennessee.

Discrimination based on an individual's LGBTQ status will remain a hot issue throughout 2018. There currently exists a patchwork of employment laws governing protections for individuals on the basis of sexual orientation and/or gender identity.

Currently, 20 states (including Minnesota, Iowa, and Illinois) and the District of Columbia prohibit discrimination based on sexual orientation and gender identity. Two states (including Wisconsin) Prohibit discrimination based on sexual orientation only; six states (including Michigan and Indiana) prohibit discrimination against public employees based on sexual orientation and gender identity; five states prohibit discrimination against public employees based on sexual orientation only.

To compound these varying laws, many municipalities have enacted their own anti-discrimination ordinances that include sexual orientation and/or gender identity as protected classifications. In Michigan for example, at the state level, an executive order prohibits discrimination on the basis of sexual orientation and gender identity for state *public* employees. In addition, while there is not a statewide law governing private employment, employers in the state are covered by the recent Sixth Circuit decision in

EEOC v. R.G. & G.R. Harris Funeral Homes. And over 40 cities and townships in Michigan have enacted local anti-discrimination laws covering employers in those jurisdictions.

Similarly, in Wisconsin, there is a statewide statutory prohibition of discrimination on the basis of sexual orientation for both public and private employees, as well as local prohibitions against sexual orientation and gender identity discrimination in at least two counties and seven cities within Wisconsin's borders.

Bills to expand employment discrimination protections based on an individual's sexual orientation and/or gender identity are pending in roughly a dozen states.

19. Wait Wait ... Don't Tell Me! Do You Have a Criminal Record?

Laws limiting pre-employment criminal history inquiries and an employer's use of such information in making employment decisions remain a hot employment law trend. A couple of "ban-the-box" laws, so named because they usually prohibit an employer from asking an applicant to check a "yes" or "no" box on an employment application about whether they have ever been convicted of a crime, have already been enacted in 2018, and several more are pending.

Although there is no federal ban-the-box law in place, in 2012 the EEOC issued enforcement guidance on the consideration of arrest and conviction records in employment decisions under Title VII. It is the EEOC's position that although Title VII does not protect ex-offenders as a protected class, unlawful discrimination may result from the administration of a facially-neutral policy or procedure—specifically, criminal-record-screening policies that disproportionately affect protected class members. If a disparate impact resulting from these policies is shown, the EEOC maintains that the employer can be liable for discrimination unless it can demonstrate that its policy is job-related for the position in question and consistent with business necessity. Even then, a Title VII plaintiff may prevail by demonstrating that there is a less-discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the challenged practice.

Although the EEOC continues to bring pattern-or-practice discrimination lawsuits against employers for their alleged discriminatory use of criminal background checks, the validity of its enforcement guidance is in question. On February 1, 2018, a federal judge enjoined the EEOC and U.S. Attorney General from enforcing the guidance against the State of Texas on the narrow basis of the EEOC's issuance of the guidance without providing notice to the public and an opportunity to comment, as required under the Administrative Procedures Act (APA). Although the injunction itself is specific to the State of Texas, the order opens the door to other similar lawsuits against the EEOC and is likely to push the EEOC to reconsider the guidance.

Meanwhile, states and localities persist in enacting their own measures designed to limit criminal history inquiries until later in the hiring process. In March 2018, Washington became the latest state to enact a ban-the-box law. The Washington Fair Chance Act, effective June 7, 2018, provides that an employer cannot include any question about an applicant's criminal record on any application for employment, inquire about an applicant's criminal record either orally or in writing, receive information through a criminal history background check, or otherwise obtain information about an applicant's criminal record. The cities of Seattle and Spokane had already enacted their own local ban-the-box ordinances.

A month prior, on February 1, 2018, the Kansas City, Missouri, City Council similarly passed restrictions on employers' inquiries into, and use of, criminal record information. The ordinance becomes effective on June 9, 2018.

Jurisdictions in the Upper Midwest are already familiar with these restrictions. In Minnesota, for instance, current law prohibits an employer from inquiring into, considering, or requiring disclosure of the criminal record or criminal history of an applicant for employment until the applicant has been selected for an interview by the employer, or if there is not an interview, before a conditional offer of employment is made to the applicant. An employer is not prohibited from notifying applicants that law or the employer's policy will disqualify an individual with a particular criminal history background from employment in particular positions. Minn. Stat. § 364.021.

In neighboring Wisconsin, the state's Fair Employment Act prohibits an employer from requesting an applicant or employee, on an application form or otherwise, to supply information regarding any arrest record of the individual except a record of a pending charge. The law also prevents employers from refusing to hire, employ, admit or license any individual; barring or terminating from employment; or discriminating against any individual in promotion, compensation or in terms, conditions or privileges of employment because of the individual's arrest or conviction record. The city of Madison has its own ordinance stipulating an employer cannot request an applicant or employee, on an application form or otherwise, to supply information regarding any arrest record, except a record of a pending charge. Madison Code of Ordinances § 39.03(8)(f).

Legislation to either impose new ban-the-box requirements or strengthen existing protections is pending in about nine other states.

On the flip side, Michigan has enacted a law that prohibits local governmental bodies from adopting, enforcing, or administering an ordinance regulating information an employer can request or require on a job application or during the interview process. This measure is likely in reaction to the proliferation of ban-the-box bills enacted at the local level.

Employers operating in multiple jurisdictions should ensure their employment applications reflect the variations in the law, as well train their HR personnel regarding permissible interview questions.

20. Whistle While You Work?

The scope of whistleblower protections keeps evolving. The "bounty" portion of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)—which entitles individuals who provide original information to the Securities and Exchange Commission (SEC) to a portion of the proceeds of any successful enforcement action—continues to encourage whistleblowers to come forward. According to the SEC's Annual Report to Congress, since the bounty program's inception, the SEC has awarded approximately $160 million in whistleblower awards to 46 individuals whose information led to successful enforcement actions. In FY 2017 alone, the SEC received over 4,400 tips, an increase of nearly 50% since FY 2012, the first year for which the SEC started collecting full-year data. Although the majority of whistleblowers hailed from New York and California, the upper Midwest had its share of whistleblowers. Of those FY 2017 reports, 151 were made in Illinois, 61 in Michigan, 33 in Minnesota, and 27 in Wisconsin.

Regardless of whether a bounty is actually awarded, the anti-retaliation provisions of Dodd-Frank protect those employees who blow the whistle from termination or other adverse employment actions. When those anti-retaliation provisions kick in was a recent question before the U.S. Supreme Court. On February 21, 2018, the Court issued its decision in *Digital Realty Trust, Inc. v. Somers*, Case No. 16–1276, resolving a circuit split on whether the Dodd-Frank Act requires employees to report externally to the SEC in order to be protected by the Act's anti-retaliation provision. The Court sided with the employer in this case, finding that Dodd-Frank's definition of "whistleblower," which requires a person to report "to the Commission," means that an employee must report the alleged illegal activity to the SEC—and not

just internally—in order to be covered by the Act's anti-retaliation protections. However, employers should be aware that there are other anti-retaliation protections under other statutes, such as the Sarbanes-Oxley (SOX) Act and some state laws.

The SOX anti-retaliation provisions are particularly expansive. In fact, an August 2017 decision by the U.S. Department of Labor's Administrative Review Board (ARB) held that the SOX whistleblower provisions have extraterritorial application, therefore covering adverse actions against a whistleblower that take place outside the United States. *Blanchard v. Exelis Systems Corp*., ARB Case No. 15-031, ALJ Case No. 2014-SOX-020 (Aug. 29, 2017).

In addition to the growing reach of federal statutes, employers must be mindful of state whistleblower statutes. A recent Minnesota Supreme Court decision found that an employee's whistleblower protections under the Minnesota Whistleblower Act (MWA) are fairly easily triggered. In *Friedlander v. Edwards Lifesciences, LLC*, 900 N.W. 2d 162 (Minn. 2017), the court unanimously held that the purpose of an employee's report is irrelevant for determining whether that report can form the basis for a whistleblower claim. In fact, the employee need not have been attempting to expose an employer's suspected illegal activity in order to bring a subsequent retaliation claim under the MWA. This decision significant expands the universe of protected disclosures that trigger MWA protection.

This decision, combined with the 2016 Minnesota Supreme Court decision in *Ford v. Minneapolis Public Schools*, 874 N.W. 2d 231 (Minn. 2016), which expanded the statute of limitations for whistleblower claims to six years, means that employers in Minnesota can be subjected to potential MWA claims for a longer period of time, for a greater variety of whistleblower reports.

State legislatures are also interested in expanding whistleblower protections. In Michigan, for example, a pending bill (SB 789) would prohibit employers from discharging, threatening, or otherwise discriminating against an employee due to the employee's participation in an investigation, hearing, or inquiry held by the state.

The legislative and judicial interest in whistleblowing activity indicates this issue will remain active.