



Welcome

Thank you, Next!
Employment Law (and Pop Culture)
Year in Review
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Topics for Discussion

- Significant labor and employment developments in 2018
- What's in store for 2019
- Pop (culture) quizzes!
- Your questions



U.S. Supreme Court Opinions

Class action waivers in binding arbitration agreements entered into as a condition of employment are enforceable.

- SCOTUS resolved conflict between Section 7 of the National Labor Relations Act (NLRA) and Federal Arbitration Act (FAA) in favor of the FAA.
- Courts will enforce contracts between employers and employees providing for individualized arbitration proceedings ("class action waivers").

Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018)



U.S. Supreme Court Opinions

The Age Discrimination in Employment Act (ADEA) applies to public employers who have fewer than 20 employees.

- ADEA applies to all states and political subdivisions regardless of the number of people the public entity employs.
- The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees.
- The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State.

Mt. Lemmon Fire District v. Guido, 139 S.Ct. 22 (2018)

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U.S. Supreme Court Opinions

Open question: can individuals be directly liable under the ADEA?

(footnote) "We need not linger over possible applications of the agent clause, for no question of agent liability is before us in this case."

Mt. Lemmon Fire District v. Guido, 139 S.Ct. 22 (2018)

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Affordable Care Act

- A federal district court in Texas entered an Order that struck down the entire Patient Protection and Affordable Care Act (ACA) as unconstitutional.

Texas v. United States, U.S. District Court, N.D. Tex. 4:18-cv-167.

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Affordable Care Act

- Case filed by Republican state attorneys general and governors in 20 states.
- Case defended by attorneys general from 16 states and the District of Columbia.
- Court ruled in favor of Plaintiffs. The Individual Mandate penalty is no longer a tax following the Tax Cuts and Jobs Act of 2017 and is therefore unconstitutional.

Texas v. United States, U.S. District Court, N.D. Tex. 4:18-cv-167.



Affordable Care Act

- The Individual Mandate is inseverable from the ACA's remaining provisions.
- Ruling is stayed on appeal.
- Appeals could take years to resolve.

Texas v. United States, U.S. District Court, N.D. Tex. 4:18-cv-167.



Pop (Culture) Quiz #1

- What was the biggest box office hit of 2018?
 - A Star is Born
 - Black Panther
 - Crazy Rich Asians
 - Fifty Shades Freed



EEOC Update

- The EEOC is currently closed during the government shutdown.
- Only two of five Commissioner slots are filled, so there is no quorum.
- It's business as usual at the local level, but the EEOC's ability to make policy is limited.



EEOC Update

- Sexual harassment EEOC Charges and lawsuits have increased since the start of the #MeToo movement.
- In fiscal year 2018
 - The EEOC filed 66 harassment lawsuits, including 41 that included a claim of sexual harassment, which is a 50% increase from FY 2017.
 - Charges alleging sexual harassment in FY 2018 increased by 13.6% (13,055) over FY 2017 (although more charges alleging sexual harassment were filed in FY2010 and FY2011).



EEOC Update

- Reasonable cause findings for charges alleging harassment increased by 23.6% to nearly 1,200 (although cause findings were flat in charges involving sexual harassment).
- No reasonable cause findings for charges alleging harassment and sexual harassment decreased slightly in FY2018.



EEOC Update

- In fiscal year 2018
 - Successful conciliations in charges alleging harassment increased by 43% to 498 (although they decreased slightly for charges alleging sexual harassment).
 - Hits on the sexual harassment page of the EEOC's website more than doubled in the past year.
 - The EEOC collected \$70 million in lawsuits and administrative enforcement actions in which sexual harassment was alleged (up from \$47.5M in FY 2017).



EEOC Update

- Sexual harassment training programs launched in October 2017
 - Leading For Respect (supervisors)
 - Respect in the Workplace (employees)
- Promising Practices for Preventing Harassment issued.



EEOC Update

- Strategic Plan for Fiscal Years 2018-2022 released in February 2018
 - Continued emphasis on systemic claims
 - Securing equitable relief (training, policies, monitoring compliance)
 - Education and Outreach (including sexual harassment training)



EEOC Update

- The "Onionhead" verdict
 - In April 2018, a jury awarded \$5.1 million in damages to 10 individuals who were coerced into religious practices at work and by creating a hostile work environment for 9 of them.

EEOC v. United Health Programs of America, Inc.
(E.D.N.Y. April 25, 2018)



Legislative Update

Tenn. Code Ann. § 50-1-108

- Employers shall not require an employee or prospective employee to execute or renew a non-disclosure agreement with respect to sexual harassment in the workplace as a condition of employment.



Pop (Culture) Quiz #2



- Grammy for Best Song?
 - Despacito (Luis Fonsi & Daddy Yankee Featuring Justin Bieber)
 - 4:44 (Shawn Carter & Dion Wilson)
 - That's What I Like (Bruno Mars)
 - 1-800-273-8255 (Logic Featuring Alessia Cara & Khalid)



DOL Update

- The Department announced in the spring of 2018 that it intends to issue a Notice of Proposed Rulemaking (NPRM) in January 2019 to determine the salary level for the EAP exemptions.
- Proposed rule is now with the Office of Information and Regulatory Affairs (OIRA) for review.



DOL Update

- DOL also announced forthcoming proposed amendment to 29 C.F.R. part 778 to clarify, update, and define “regular rate of pay” requirements. NPRM had been scheduled for September 2018.



DOL Update

- The return of opinion letters
 - **FLSA 2018 – 19** (Whether a non-exempt employee’s FMLA-qualifying 15-minute rest breaks, which are required every hour due to the employee’s serious medical condition, are compensable or non-compensable time under the FLSA.).
 - **FMLA 2018 – 1 – A** (Whether employer’s no-fault attendance policy, which freezes the employee’s points while the employee is on FMLA leave, violates the FMLA.).
 - **FMLA 2018 – 2 – A** (Whether organ donation surgery qualifies as a “serious health condition” under the FMLA.).



DOL Update

- Launch (and extension) of the Payroll Audit Independent Determination (PAID) program.
 - Employers may self-report a wage violation to the DOL, along with a calculation of wages owed.
 - DOL does not have to accept the employer in the program.
 - Subject to the employer paying 100% of back wages owed over a two-year term, the DOL supervises the settlement and issues a release of the claim.
 - Employers avoid liquidated damages, penalties, and litigation costs.



Pop (Culture) Quiz #3

- Oscar for Best Movie?
 - The Post
 - Lady Bird
 - The Shape of Water
 - Call Me By Your Name



NLRB Update

General Counsel memo from June 2018 provides guidance on employee handbooks post-*Boeing*.

- New standard focuses on balance between workplace rule's negative impact on employees' ability to exercise their Section 7 rights and the rule's connection to employer's right to maintain discipline and productivity into the workplace.



NLRB Update

- Three categories of rules
 1. Generally lawful to maintain
 - Civility rules
 - No photographing or recording in the workplace
 - Rules against insubordination, non-cooperation, disruptive behavior
 - Protecting confidential, proprietary, and customer information or documents



NLRB Update

- Generally lawful to maintain
 - Rules against defamation or misrepresentation
 - Rules against using employer logos or intellectual property
 - Rules requiring authorization to speak for the company
 - Rules banning disloyalty, nepotism, or self-enrichment



NLRB Update

2. Rules warranting individualized scrutiny
 - Broad conflict of interest rules that do not target fraud or self-enrichment
 - Confidentiality rules broadly encompassing "employer business" or "employee information"
 - Rules prohibiting disparagement of the company
 - Rules against making false or inaccurate statements (as opposed to defamatory statements)



NLRB Update

3. Unlawful to maintain

- Confidentiality regarding wages, benefits, or working conditions
- Rules prohibiting joining outside organizations or voting on matters concerning the employer (both clearly encompass union activity)



Pop (Culture) Quiz #4

- Which rapper won a Pulitzer Prize in 2018?
 - Kanye West
 - Kendrick Lamar
 - Cardi B
 - Travis Scott



Cases to Watch in 2019

- Whether Title VII's prohibition of sex discrimination includes sexual orientation discrimination. *Altitude Express v. Zarda*
- Whether Title VII's prohibition of sex discrimination includes gender identity discrimination. *R.G. & G.R. Harris Funeral Homes, Inc.*
- Whether employers can rely upon salary history as a legitimate justification for wage disparities between workers of different genders. *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018)



Pop (Culture) Quiz #5

- What was the best-selling book in 2018?
 - *Fear: Trump in the White House* by Bob Woodward
 - *The Wonkey Donkey* by Craig Smith
 - *Fire and Fury: Inside the Trump White House* by Michel Wolff
 - *Becoming* by Michelle Obama



Pop (Culture) Quiz #6

- Who is Gritty?



Pop (Culture) Quiz #6

- Babadook's cousin
- The top selling toy in 2018
- Philadelphia Flyer's new mascot
- New Sesame Street character



Pop (Culture) Quiz Answers

- Biggest box office hit – Black Panther
- Best Song Grammy – That's What I Like
- Best Movie Oscar – The Shape of Water
- Pulitzer Prize – Kendrick Lamar
- Best-selling Book - *Becoming*
- Who is Gritty? – Philadelphia Flyers' new mascot



Questions?



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