Annual Case and Legislative Update

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Labor & Employment Law Update

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Oregon State Bar

Annual CLE
October 28, 2017

"Labor & Employment Law in a Changing World"

Janus v. AFSCME (Supreme Court)

- On September 28, Supreme Court accepted review.
- Decision likely before the end of June, 2018.
- All indications are that "fair share" will be declared violative of the First Amendment.
- The range of responses from unions.

Zarda v. Altitude Express (2nd Cir.)

- US DOJ filed amicus brief taking position that Title VII does not protect employees from discrimination based on sexual orientation
- No impact on Oregon and Washington state law claims
  - Clear prohibitions in statute
  - Jury trials
  - Broad monetary remedies

Neidigh v. Select Specialty Hosp.

- Court affirmed summary judgment in pregnancy discrimination case
- Employer's extensive record keeping sufficient to overcome allegation of pre-text and discrimination
- Illustrates importance of good documentation and record keeping and last chance agreements

Legg v. Ulster County

- A light duty policy that mandates light duty for work-related injuries but denies light duty for pregnant employees raises a jury question as to whether the Pregnancy Discrimination Act has been violated.
- However, the employee must prove that pregnant women are unable to perform full duty, and evidence that other female employees have worked full duty until late in their pregnancies can be dispositive.

GINA

- Under the Genetic Information Non-Discrimination Act, genetic information does not include "personal health information" such as blood pressure, vision, etc. *Fuentes v. City of San Antonio.*
- Pre-employment 43-question health history form violates both GINA and the ADA. *EEOC v. Grisham Farm Products, Inc.*

Blatt v. Cabela's

- Gender Identity Disorder (Gender Dyshoria) is an ADA disability
- Accommodation by, among other things:
  - Appropriate restroom
  - Appropriate nametag
  - Gender-matching uniform

Bauer v. Sessions

- "An employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each.
- "Men and women pass the PFT at essentially identical rates, and the normalized pushup quotas impose essentially similar burdens on both sexes."

EEOC v. United Health Programs

- New York Federal Court held that employer program of non-traditional beliefs as an "Onion Head" was a valid religion entitled to protection
- Practices included:
  - Keeping the lights dim
  - Burning candles
  - Praying
  - Discussing personal matters with colleagues
  - Reading spiritual texts; and
  - Saying "I love you" to managers and co-workers

Beliefs held to be valid religion because "more than intellectual" as they forced believers to disregard own self interest

Kennedy v. Bremerton

- Coach wanted to pray on 50-yard line after games
- No First Amendment protection since making statements pursuant to official duties rather than as private citizen
- See also *Brandon* and *Coomes*

Masterpiece Cakeshop LTD v. Colorado Civil Rights Commission

- SCOTUS to hear Colorado case relating to conflict between baker refusing to make wedding cake for same sex couple because of religious objection
- Issue of public accommodation, first amendment exercise of religion, and first amendment expression
- In March, Oregon Court of Appeals heard argument in identical "Sweet Cakes by Melissa" case
- In February, Washington State Supreme Court ruled against a florist on a similar challenge

Arias v. Raimondo

- Undocumented worker threatened by employer to reveal status if he worked for another employer
- Employee brought claim and prior to deposition, employer's attorney notified INS of time and location of deposition
- Attorney liable for retaliation even though attorney not an employer, but was acting "in the interest" of an employer

Arbitration Agreements And Class Action Waivers

- SCOTUS to hear trio of cases
- Class actions are a powerful tool for plaintiffs
- Employment agreements may limit by:
  - Requiring arbitration and
  - Waiving class action claims
- Federal Arbitration Act (FAA) v. National Labor Relations Act (NLRA)
- Justice Roberts a strong advocate for FAA

NLRB v. Murphy Oil (5th Cir.); *Epic Systems Corp. v. Lewis* (7th Cir.); *Morris v. Ernst & Young, LLP* (9th Cir.)

Arbitration and the Public Policy Doctrine

- In termination cases, the public policy doctrine looks to whether the arbitrator's reinstatement order violates a clearly established public policy, not whether the employee's underlying conduct violated public policy. *City of Boston v. Boston Police Patrolmen's Association*.

Zuber v. Boscov's

- Releases for workers' compensation claims and general employment claims:
  - A comp release will not settle general employment claims – prepare separate release and allocate money to it
  - A comp release must be separately approved by the comp agency

The FLSA

- The status of the Department of Labor's 2016 exemption regulations.
- Is *Garcia v. San Antonio Metropolitan Transit Authority* still good law?
- The "first responder" regulations after *Morrison v. Fairfax County*.
- Off-duty cell phone use and work after *Allen v. City of Chicago*.
- *Flores v. City of San Gabriel* and cash-back programs.

The BLS

- As of January 1, the Portland CPI will no longer exist.
- Will the existing West—Size A Index survive the BLS reorganization of its CPI indices? Yes, but with a change to the population threshold.
- b. Will there be both a West—Size A Index and a new West—Pacific Index? Yes, both indices will exist. The West—Pacific Index is new in 2018.
- Is there any historical data for the West—Pacific Index? Or is this a completely new index? This will be a new index in 2018. There is no historical data.
- What cities are in the West—Size A Index and the new West—Pacific Index? The West—Size A Index includes all urban areas in the West Census Region over 2.5 million residents. The new West—Pacific Index includes 11 urban areas on the West Coast.

Syed v. M-I, LLC

- The employer-required disclosure under the Fair Credit Reporting Act (FCRA) must be separate from any liability waiver the employer seeks regarding the same pursuant to the clear statutory language that the disclosure document must consist "solely" of the disclosure

NLRB Shift On The Horizon

- Board members have five-year terms
- Board is a five-person appellate panel
- There are two vacancies recently filled
- Miscimarra named Chairman 4/24/17 (announced resignation)
- Chairman Pearce's term ends in 2018
- Member McFerran's term ends in 2019
- General Counsel position also opens up in Nov. 2017
- Expect a more conservative, employer-friendly approach

Potential Reversals

Quickie Elections

- Will it really matter?
  - 42 vs. 23 days
  - 2-3% decrease in petitions
  - 3-4% increase in election wins for unions
  - Employer starts campaign earlier

Specialty Healthcare

- SCOTUS rejected cert and Court of Appeals affirmed
- Could be valuable organizing tool
- Miscimarra strongly opposed

Potential Reversals (continued)

Babcock & Wilcox

- Modifies *Olin* on likelihood of deferral to arbitration

Browning – Ferris

- Authorized or exercised control
- DC Circuit argument 3/9/17
- May be sent back to Board

Miller & Anderson

- Unit of regular and leased employees
- Overruled *Oakwood Care Center*

Potential Reversals (continued)

Columbia University

- Graduate student employees
- Overruled *Brown University*

Confidentiality and Dissemination Rules

- GC's March 18, 2015 memo
- (e.g. *T-Mobile, William Beaumont Hospital, Sabo*)

Purple Communications

- Off-duty use of company email

WKYC-TV

- *Check-off remaining in effect after contract expiration*
- *Overruled Bethlehem Steel*

Federal Bureau of Prisons

- "The purposes of *Weingarten* can be achieved only by allowing the union representative to take an active role in assisting a unit employee in presenting facts in his or her defense. A union representative who disrupts an examination by engaging in abusive or insulting interruptions may have his participation limited.
- "However, we have rejected the notion that an employer is entitled to question an employee without any interruptions or intervention by the union representative. Some interruption, by way of comments re the form of questions or statements as to possible infringement of employee rights, should properly be expected from the employee's representative."

MikLin Enters., Inc. v. NLRB

- Union campaign against Jimmy John's franchises relating to paid sick leave
- Posted signs reading:
  - "Your sandwich made by a sick Jimmy John's worker" and
  - "We hope your immune system is ready because you're about to take the sandwich test"
- Terminations affirmed by the 8th Cir., which found that:
  - Employees violated the "disloyalty principle" of Section 10(c) of the Act
  - Employers permitted to fire an employee for making disparaging attacks against the company when those statements are reasonably calculated to harm the company's reputation or reduce its income

Fred Meyer Stores, Inc. v. NLRB

- Dispute at Hillsboro store over union representatives' access to employees while working
- Situation escalated and police called
- NLRB decision in favor of union overturned by the Court of Appeals for the D.C. Circuit
- Held:
  - Union did not follow CBA "access" terms
  - Employer had right to refuse contact with working employees in violation of the agreement
  - Overturned NLRB decision that "totally disregarded" the facts and findings of the ALJ

Cooper Tire & Rubber Co. v. NLRB

- A van was taking replacement workers across a picket line, many of whom were African American
- A locked-out employee yelled "I smell fried chicken and watermelon" at the van as it passed
- Termination for picket line misconduct is an unfair labor practice, unless it intimidates others from exercising their rights
- Board held that because speech not "threatening," decision to reinstate upheld

Cell Phones and Public Employees

- Government correspondence on private email accounts as well as employee use of private cell phones for public business may well create public records and be subject to disclosure. *City of San Jose v. Superior Court*, 2017 WL 818506 (Cal. 2017).
- But how are the public records identified?

Greenblatt v. Symantec Corp.

- Employee "pleased with a good day at work"
- Went to work recreation area basketball hoop
- Jumped and slapped the backboard, injured his knee
- Brought a workers' compensation claim
- Oregon Court of Appeals affirmed denial of benefits
- Claims excluded when injury occurred while engaging in recreational or social activity primarily for the worker's pleasure

Martin v. Gonzaga Univ.

- Factors:
  - Clear public policy
  - Jeopardy to public policy
  - Conduct caused dismissal
  - "Overriding justification" element as "causation *plus*"
- Fourth element can be proved with after-acquired evidence
- Only previous case to handle "causation *plus*" in depth: *Gardner v. Loomis Armored*

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Go Ducks!!!

OREGON

~Thank You~

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The Year's Update in Labor and Employment Law

2017

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CHAPTER 1. FEDERAL LEGISLATION & AGENCY RULES

Section A. Occupational Safety and Health Administration ("OSHA")

Electronic Reporting Delayed. In May 2016, OSHA issued final rules to "Improve Tracking of Workplace Injuries and Illnesses" and to deter retaliation against workers who report injuries. The rule, which went into effect January 1, 2017, requires certain employers to submit workplace injury and illness data electronically to OSHA. Electronic reporting under the new administration has been delayed until a stated effective date of December 1, 2017, at which point it is expected to be operational.

Anti-Retaliation Requirements. Other OSHA provisions went into effect on August 10, 2016, which seek to deter retaliation against workers that report injuries, including: (1) employers must advise employees of their right to report injuries by posting a qualifying poster or conveying its content; (2) procedures for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and (3) that employers may not retaliate against employees for reporting work-related injuries or illnesses.

Comments: Drug Testing. Although the new rule does not specifically address drug testing, the commentary associated with the rule warns employers that mandatory post-accident testing programs may violate the new rule if they are pretext for retaliation against employees who report injuries. OSHA warns that, although post-accident testing may be reasonable in some circumstances, mandatory drug testing after every accident is a form of intimidation that discourages employees from reporting workplace injuries. OSHA explained that post-accident employee drug testing and incentive programs are still possible under the new rule and that employers do not need to specifically suspect drug use before testing; however, employers should only require drug testing if there is a reasonable possibility that drug use by the employee who reported the accident contributed to the injury. Additionally, if the method of drug testing only indicates recent use of the drug, but not actual impairment, it may also unreasonably deter reporting.

Public Notices of Fines – Drastically Reduced. Under previous administrations, OSHA had posted notices of fines issued to employers who were found to be in violation of a workplace safety rule on a regular basis. The Obama administration averaged 460 such notices a year. The Trump administration had not issued a single notice of a fine until April 21, 2017 when it advised of a $1.5 million fine against a drain cleaning company where two employees had died in an accident. Since that notice, there have been a handful of other notices issued. However, the overall volume continues to be historically low for any administration from either party.

Timing Requirements. For years, OSHA has taken the position that it has up to five and a half years after an alleged violation to issue a citation to a company. In 2012, a court held that OSHA's interpretation was inconsistent with the wording of the law, which only gave the agency six months to bring charges. In December 2016, the Obama administration issued a rule to circumvent the court decision and restored the five-and-a-half-year period. The U.S. House of Representatives, however, recently repealed that rule and the Senate is expected to follow suit. Some have argued

that if the period to bring claims was reduced to six months, injury reporting would become voluntary, because it would be virtually impossible to bring charges within that time frame. Employees would still presumably have a private cause of action if they believed their employers were not following the rules, including whistleblower protections.

Section B. Equal Employment Opportunity Commission ("EEOC")

Guidance Issued on Rights of Employees with Mental Health Conditions. On December 12, 2016, the EEOC issued guidance observing that mental health discrimination claims are on the rise, noting that it processed 5,000 such complaints and obtained approximately $20 million for employees denied accommodations in 2016. The guidance reiterates that individuals with mental health conditions are entitled to accommodations and a harassment-free workplace. The guidance further asserts that, when an employee cannot do his or her job because of mental illness, even with workplace accommodations, that employee may still be entitled to an accommodation in the form of unpaid leave. That unpaid leave may come even after the employee has exhausted federal and state family leave eligibility.

Guidelines on National Origin Discrimination Issued. On November 21, 2016, the EEOC released new enforcement guidance on national origin discrimination. The guidelines apply to employers with 15 or more employees, as well as employment agencies, state and local employers, and unions. Updates respond to workplace situations, such as language issues, segregation, immigration, and human trafficking. The guidelines clarify that an employer may not base an employment decision on an accent unless the ability to communicate in English is required to perform the job effectively and the accent materially interferes with performance. Employees of a certain national origin may not be segregated to work in lower-paying jobs away from public contact because of a customer preference for sales representatives of a different national origin. Individuals are protected regardless of their immigration status or authorization to work. Use of fraud, force, or coercion to exploit workers based on their national origin may violate federal discrimination laws in addition to criminal laws prohibiting human trafficking.

Refreshed Guidance Issued on Retaliation. In August 2016, the EEOC replaced its 1998 Compliance Manual section on retaliation with a new "Enforcement Guidance on Retaliation and Related Issues" section. While there is no substantial change in the guidance offered by the EEOC, the new section provides a consistent EEOC interpretation of the laws it enforces and addresses the sometimes inconsistent lower court decisions. The guidance is a useful resource for employers designing policies, practices, and trainings.

Revised EEO-1 Form Issued. In October 2016, the EEOC released an updated EEO-1 reporting form affecting employers with 100 or more employees, and federal contracts with 50 or more employees. For the first time, the form will require those covered employers to provide employee pay data as reflected in Box 1 of their W-2 forms. Critics of the new form argue that relying on W-2 earnings may show an apparent pay disparity where none actually exists. For example, when one employee exercises stock options in a year and another does not. The new form must be used for 2017, although the date for usage has now been extended to March 31, 2018 to allow employers more time to collect and report data.

Pregnancy Bias Guidelines Revised. In response to the Supreme Court's decision in *Young v. UPS, Inc.*, 135 S. Ct. 1338 (2015), the EEOC has issued new guidance that reflects the Court's holding that women may prove unlawful pregnancy discrimination if the employer accommodated some workers but not pregnant women. The guidelines repeat the Court's holding that even facially neutral employer policies may violate the Pregnancy Discrimination Act if they impose significant burdens on pregnant employees without a sufficiently strong justification.

Claimant's Access to Employer Statements Widened. As of January 1, 2016, the EEOC uniformly allows workers charging unlawful discrimination to obtain the employer's position statement responding to the charge, standardizing a process previously left to the discretion of individual field offices. The statements will exclude confidential information. The EEOC will allow charging parties 20 days to respond to the position statement. The response will not be provided to the employer charged with discrimination during the EEOC's investigation.

Guidance Issued on Employer Provided Leave and the ADA. On May 9, 2016, the EEOC provided employers with guidelines regarding employer-provided leave as an accommodation under the ADA. The guidance emphasizes that employers must offer disabled employees the same leave benefits as non-disabled employees. For example, if the employer offers paid sick leave and paid time off, those options must be available to an employee taking leave for disability purposes. The guidance further states that employers must consider offering unpaid leave to accommodate a disabled employee even if it does not have a policy that otherwise would provide for leave. Furthermore, employers must consider making exceptions to any "maximum leave" policies if a disabled employee is required to take more leave than is otherwise permitted by the employer's policy. An employer would not be required to consider leave as a form of accommodation if providing the leave would be an undue hardship on the business. In addition, employers may request a doctor's note or other documentation, so long as that requirement is consistent for all employees.

EEOC Issues Final Rules Regarding the ADA and Wellness Programs. On May 17, 2016, the EEOC issued guidance regarding what it believes constitutes a permissible wellness plan under the Americans with Disabilities Act (ADA). Generally, pursuant to the ADA, an employer cannot request disability related information from an employee or request that an employee complete a medical examination unless such requests are pursuant to a qualifying "voluntary" wellness program. The EEOC's guidance states that a plan is voluntary if (1) participation is not required; (2) non-participation would not result in denied or limited health coverage; (3) employees are not retaliated against for not participating; and (4) employees are provided with actual notice of changes. The EEOC guidance also states that a wellness plan is only "voluntary" if the financial reward for participation "does not exceed… [t]hirty percent of the total cost of self-only coverage." The EEOC guidance is not consistent with previous interpretations of the ADA's safe harbor provisions as described by the *Flambeau, Inc.* court, *supra.* The EEOC has argued that *Flambeau, Inc.* was wrongly decided. As stated above, the Seventh Circuit recently affirmed that decision, but on procedural grounds, thus leaving this an open question.

Section C. Department of Labor ("DOL")

Final Rule on Paid Sick Leave for Federal Contractors Issued. In October 2016, the DOL issued a lengthy final rule requiring federal contractors to provide up to seven days of paid sick leave to their employees. The rule applies to federal contracts entered into on or after January 1, 2017 with only limited exceptions. Much like the state-wide law that took effect in Oregon in 2016, the DOL rule requires covered contractors to pay accrue paid sick leave at a rate of one hour for every 30 hours worked, and contractors must allow employees to accrue up to 56 hours per year. Alternatively, contractors may choose to frontload at least 56 hours of paid sick leave at the beginning of each accrual year. Contractors must also allow employees to carry over unused sick leave from one year to the next. **Update:** This regulation has survived the initial months of President Trump's administration, though the level of enforcement efforts are unclear.

DOL Will Not Defend FLSA Exemption Salary Floor Increase. In late 2016, the DOL issued new guidelines that doubled the salary floor required for the so-called "white collar" exemption to FLSA overtime laws. That law was blocked by a federal court in Texas prior to implementation. *Nevada v. U.S. Department of Labor* No. 4:16-CV-731, 2017 U.S Dist. LEXIS 140522 (5th Cir. 8/31/17). In a briefing submitted to the Fifth Circuit Court of Appeals, the DOL asserted that although it had the authority to increase the salary floor, the increase proposed by the previous administration overstepped and was not valid. The DOL has since opened the matter of the salary floor to public comment and re-started the rulemaking process.

Section D. Department of Education ("DOE")

Transgender Guidance Withdrawn. A February 22, 2017 "Dear Colleague" letter from the DOE formally withdrew previous department guidance, which asserted that Title IX's prohibition of discrimination "on the basis of sex" providing that students were entitled to use sex segregated facilities based on gender identity. The letter signaled that the DOE under President Trump would not support interpretations of Title IX requiring schools to allow transgender students to use the bathroom or locker room corresponding to their gender identity, instead of the gender of their birth certificate. The letter does not suggest new guidance, but rather asserts that the original guidance lacked "extensive legal analysis." In response, the U.S. Supreme Court vacated and remanded a case it had accepted on the issue, *G. G. v. Gloucester Cnty. Sch. Bd.,* and instructed the lower court to review its decision in the absence of the previously issued guidance.

Campus Sexual Assault Guidelines Under Review. On September 7, 2017, the Education Secretary indicated the DOE would commence a formal notice and comment period to gather information and evidence before making revisions to current college requirements relating to how cases of sexual assault are investigated and prosecuted at schools. Under 2011 guidelines and a "Dear Colleagues" letter to schools that received public funding, including financial aid subsidies, colleges were put on notice that failure to investigate and prosecute claims of sexual assault on a lower evidentiary standard of "preponderance of the evidence" could result in the school losing its federal funding. Critics have argued that the lower standards have made the process unfair to accused students who often are not given the benefit of the doubt in the more common he said/ she said circumstantial type situations that often predicate allegations of campus sexual assault.

Section E. Executive Orders & Actions

"Blacklisting Rule" Blocked. On March 27, 2017, President Trump signed legislation blocking the DOL's "blacklisting rule," which required federal contractors to report labor violations. The blocked regulation required employers bidding for federal contracts over $500,000 to report to the government any labor violations committed or alleged in the last three years. Violations of federal laws regulating workplace safety, wages, and discrimination were considered reportable. The resolution signed by President Trump not only repeals the regulation, it also prevents the DOL from reissuing the rule or a substantially similar rule in the future. The resolution came to the President's desk through the Congressional Review Act (CRA) which allows the President and Congress to block agency rules and prevents a minority in the Senate from filibustering. The CRA allows invalidation of a regulation with a joint resolution of disapproval of the regulation from a simple majority of both Congressional chambers and the President's signature.

CHAPTER 2. OREGON LEGISLATION

Criminal Background Checks. Oregon's statewide ban-the-box law went into effect on January 1, 2016, making it unlawful for employers in Oregon to solicit information from an applicant about criminal convictions prior to an initial interview. The law seeks to improve the prospects for individuals with a criminal conviction by providing them with an opportunity to explain past issues or possible misunderstandings with their employer. The law did not change what employers can screen for, only when they could consider the applicant's criminal background.

Since July 1, 2016, the City of Portland has enforced its own, more stringent, ban-the-box ordinance which requires employers to: (1) delay a criminal background check until after making a conditional job offer; (2) not consider certain criminal records; and (3) perform an analysis before rejecting an applicant on the basis of a prior criminal conviction. Excluded from the ordinance are law enforcement agencies, jobs involving direct access to children, and jobs presenting public safety concerns, among others. If an employer is not exempt, it may not inquire about an applicant's criminal history until after a conditional offer of employment has been made. The ordinance does not require employers to hire individuals with a criminal background, but employers are forbidden from refusing to hire an applicant based on the following: arrests not leading to convictions (unless the matter is pending), expunged convictions, or charges resolved through the completion of diversion or similar program (unless the charge involved attempted or actual physical harm). Before rescinding a conditional job offer, employers must assess the relevance of the job applicant's criminal history in relation to the job. The assessment must take into account the nature and gravity of the criminal offense, the time that has elapsed, and the nature of the job. The ordinance does not suggest that the City would challenge an employer's judgment or reasoning on those issues, so long as there is evidence that the analysis did in fact occur.

Oregon Pay Equity Act of 2017. On June 1, 2017, Governor Brown signed the Equal Pay Act of 2017 into law to address pay disparities among women, minorities, and other protected classes. The Equal Pay Act prohibits employers from compensating certain protected classes at a rate less than other employees for work requiring substantially similar knowledge, skill, effort, responsibility, and working conditions. Protected classes listed in the Act include race, color,

religion, sex, sexual orientation, national origin, marital status, veteran status, disability, and age. The Act provides that pay differences may be lawful only if based on certain factors, including a seniority system, a merit system, measurable differences in quality or quantity of work, work locations, travel, education, training, or experience. Employees who believe that they have been discriminated against on the basis of unequal pay in violation of the Act will have a private right of action beginning January 1, 2019. Additionally, the Act affects hiring practices, as it prohibits employers from seeking information about an applicant's prior compensation or setting compensation based on the applicant's past or current compensation levels. This part of the Act is scheduled to take effect September 9, 2017, at which point BOLI will have the authority to enforce it and issue civil fines. On January 1, 2024, employees will have a right of private action against prospective employers if asked about pay history.

Fair Workweek Act. In July 2017, the Oregon Legislature passed a law requiring certain employers to provide employees advanced notice and other accommodations around scheduling. Oregon employers with more than 500 hourly employees worldwide in either retail, food services, or hospitality industries will be required to provide advanced notice to employees of their work schedules or face penalties. The law is set to take effect July 1, 2018, but does not have a mechanism for private enforcement until July 1, 2024. Initially, qualifying employers will be required to provide employees with good faith estimates of their schedules and hours upon hire, and post schedules at least seven days in advance. By January 1, 2020, employers must post schedules 14 days in advance. Further, hourly employees must have 10 hours of "rest" in between shifts and employers cannot retaliate against an employee for expressing scheduling preferences, though the employer is not required to act on those preferences. Under certain circumstances, some employees can participate in a "volunteer" standby list to work on short notice.

Manufacturing Overtime Laws. In July 2017, the Oregon Legislature passed a law clarifying that hourly workers in manufacturing are entitled to receive overtime equal to either time worked over ten hours a day or forty hours a week, *whichever is greater*. The new law seeks to clarify issues raised by a July 2017 case filed by employees of a Portland bakery that alleged they should be entitled to the total sum of daily and weekly overtime hours, meaning that if they work 11 hours one day and 42 hours for the week, they would receive 3 hours of overtime. Under the updated rule, manufacturing workers that work 11 hours in a day and 42 hours for the week would only be entitled to 2 hours of overtime.

What is still unclear is the extent of the reach (for BOLI enforcement purposes) of the definition of "mill, factory, or manufacturing establishment." The court case at the center of the overtime dispute involves a commercial bakery, Portland Specialty Baking. Most would not consider a bakery to fall into one of these three classifications. An expansive reading opens the door for additional enforcement actions against unsuspecting employers engaged in businesses that are not typically considered to be a mill, factory, or manufacturing establishment. This expansive interpretation may go so far as to capture many brewers in Oregon's booming microbrewery industry.

Cap on Weekly Hours Worked. In the same bill that clarified overtime laws, the legislature also limited the amount manufacturers can work in any given week to 55 hours, or 60 hours upon employee request. Manufacturers that work with perishable goods which require employees work

longer hours to avoid lost product may apply for exemptions to the limit, for workweeks up to 84 hours a week for a limited period of time. The weekly caps take effect on January 1, 2018, and the penalties for violating the weekly cap rule are significant with a minimum penalty of $2,000 to $3,000 per claim, and the potential to recover liquidated damages of double damages, and attorney fees.

Paycheck Fairness Act. On January 1, 2016, Oregon's Paycheck Fairness Act went into effect making it unlawful for employers to discriminate against an employee for inquiring about, discussing or disclosing the wages of the employee or of another employee. The law also forbids discrimination based on an employee making a wage claim after learning of wage information from another employee. The goal of the law is to eliminate discrimination in pay by allowing an open discussion of wages among employees. One important exception relates to employees who have access to wage information of other employees as part of their job function and disclose that information to someone not authorized to access it on their own. In other words, someone in HR cannot print everyone's pay information and distribute it around the office; the initial disclosure must have been voluntary and authorized.

OregonSaves Website Active. A new program encouraging Oregon workers to save for retirement, OregonSaves, now has an active web page and takes effect soon, depending on the size of your business. At OregonSaves.com, employers can now find forms, information and opt out steps for the program which requires that employers provide a retirement savings option at work or enroll employees in a new state program. To comply, employers will be required to register their business through the OregonSaves Internet portal or file for exemption from the program. An employer offering a qualified retirement plan (*e.g.* 401k plan) to some or all of its employees may opt out of the program entirely. Employers that do not opt out are required to register employees for automatic contributions to the OregonSaves program to help them plan for retirement. Employees can "opt in" for any percentage of saving from their paychecks, and may affirmatively opt out if the wish not to participate. If an employee does not select a saving amount, it will begin at 5% a year and increase 1% each year until reaching a 10% max. The rollout will take place during the course of the next year and the timing will depend on the employer's size with larger employers being required to comply sooner. Employers with more than 100 employees must comply by November 15, 2017.

Oregon's Minimum Wage Increases. On July 1, 2016, Oregon began pioneering a unique and complex multi-tiered minimum wage system with significant annual increases. No other state has a minimum wage system like this today. Under the new law, the state will be split into three geographic regions with three different minimum wage rates and three different rate increase schedules. Initially, on July 1, 2016, the base state minimum wage increased from the current rate of $9.25 per hour to $9.75 per hour for most counties. Employers within the Portland Urban Growth Boundary ("UGB") are required to pay a minimum wage of $9.75 per hour. However, employers located in the nonurban counties of Baker, Coos, Crook, Curry, Douglas, Gilliam, Grant, Harney, Jefferson, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, and Wheeler are required to pay a minimum wage of $9.50 per hour. The minimum wage rates will steadily increase at different rates in each subsequent year, as described in the chart below. By July 1, 2023, the base minimum wage will rise to $13.50 per hour, while minimum wage for employers in the Portland UGB will be $14.74 per hour and in the nonurban counties will be

$12.50 per hour. After 2023, annual increases for the base minimum wage will be pegged to the cost of living index. Employers in the Portland UGB will pay a premium of $1.25 per hour over the adjusted base rate, while a discount of $1.00 per hour will apply to employers in the nonurban counties. The rate schedule is below:

Date	Base	Portland UGB	Nonurban Counties
~~July 1, 2016 – June 30, 2017~~	~~$9.75~~	~~$9.75~~	~~$9.50~~
July 1, 2017 – June 30, 2018	$10.25	$11.25	$10.00
July 1, 2018 – June 30, 2019	$10.75	$12.00	$10.50
July 1, 2019 – June 30, 2020	$11.25	$12.50	$11.00
July 1, 2020 – June 30, 2021	$12.00	$13.25	$11.50
July 1, 2021 – June 30, 2022	$12.75	$14.00	$12.00
July 1, 2022 – June 30, 2023	$13.50	$14.75	$12.50
After July 1, 2023	CPI adjusted	+$1.25	-$1.00

Employers' first task under the new law is to determine where their business is located for purposes of determining what rate will apply. BOLI has released the final version of rules defining the "employer's location." The rules adopted are substantially different from early drafts, but still focus on the employee, not the employer's location.

For example, if an employee performs more than 50% of his or her work (per pay period) at a permanent fixed business location in Oregon, the employee's wages will be based on the location of the business. On the other hand, if an employee performs more than 50% of his or her work (per pay period) in a location other than the employer's fixed location, the employee is to be paid based on the actual location of work. One exception to this is delivery drivers who begin and end their day at a permanent fixed business location; they will be paid based on the location of the business.

The rules impose a recordkeeping requirement on the employer to track the location of hours worked for each individual employee that works in more than one region during a pay period, so it can be determined which minimum wage rate should apply. Employers are relieved of this recordkeeping requirement if they pay the employee the highest minimum wage for the region in which the employee worked.

Oregon New Itemized Paystub Requirements. As of January 1, 2017, employers in Oregon must include additional categories of information on itemized paystubs. Part of the intention is to provide greater transparency in pay practices. Among other details, the paystub must provide information about: rates of pay; whether the employee is paid by the hour, shift, day or week, or a on a salary, piece or commission basis; the amount and purpose of each deduction made during the pay period; the regularly hourly rate of pay; the overtime rate of pay; the number of regular

hours worked and the pay for those hours; the number of overtime hours worked and pay for those hours; the piece rate, the number of pieces completed at each rate, and the total pay for each rate. The employee must expressly consent for an employer to be authorized to send itemized information in electronic form, and he or she must have the capacity to print or store the statement at the time of receipt. Records must also now be retained by the employer for three years from an employee's date of termination and must be provided to the employee for inspection upon request, consistent with federal rules.

Oregon Sick Leave. As of June 1, 2016, Oregon employers must implement a sick leave policy that will allow an employee to earn and use up to 40 hours of sick time per year. Sick time is protected and employers must not retaliate or discriminate against an employee who inquires about, requests, or uses protected time.

Accrual: Sick time must accrue at a rate of at least one hour for every 30 hours worked, unless the employer elects to frontload sick time. Employees begin to earn and accrue sick time on the first day of employment.

Carryover: An employee may carry over up to 40 hours of unused sick time from one year to the next, but an employer may limit an employee to accruing no more than 80 hours of sick time and to using no more than 40 hours of sick time in a year.

Use: Employees may use sick time beginning their 91st day of employment and it may be used for the employee's own physical or mental illness, injury, or health condition (including routine doctor or dentist appointments), for the care of a family member, for absences due to domestic violence, or in the event of a public health emergency. The employee cannot be required to find a replacement worker or work an alternate shift as a condition of, or to make up for, the use of sick time.

Increments of Use: Employers must allow employees to use sick time in hourly increments unless to do so would impose an undue hardship on the employer and the employer has a policy that allows an employee to use at least 56 hours of paid leave per year that may be taken in minimum increments of four hours.

Paid Sick Time: Employers with 10 or more employees must provide paid sick time. However, the threshold number of employees for paid sick time drops to six for employers that maintain any office, store, restaurant or establishment within the City of Portland. Sick time must be paid at the employee's regular rate of pay.

Unpaid Sick Time: Employers with fewer than 10 employees (or fewer than six for Portland employers) must offer unpaid sick time, but may elect to offer it as paid.

Vacation/PTO: Employers are free to provide for more generous sick leave policies and may comply with the law through vacation or paid time off policies so long as the minimum requirements are met. In the 2017, the Oregon Legislature clarified and reinforced this rule, but emphasized that the first 40 hours of accrued hours, or 80 hours of banked sick leave hours must

meet the strict requirements of the law, such as notice not being required if impractical and leave permitted in hourly increments.

Employee Notice Requirements: For planned sick time use, employers may require that employees comply with the usual notice and procedural requirements for absences and requesting time off so long as those requirements do not interfere with the employee's ability to make use of accrued sick time. However, an employer may not require more than 10 days' advance notice of foreseeable leave and the employer must allow leave without notice for unplanned absences.

Limited Union Exception: The law provides a limited exception for employees whose terms and conditions of employment are covered by a collective bargaining agreement, who are employed through a hiring hall or similar referral system, and whose employment benefits are provided by a joint multi-employee trust or benefit plan. Other unionized workers who do not fall within this exception must be provided sick time in accordance with the law.

The new law pre-empts several local ordinances and rules providing paid sick leave, including in Portland and Eugene.

CHAPTER 3. WASHINGTON LEGISLATION

Washington Paid Sick Leave. As a result of a ballot initiative in November 2016, Washington will have a new sick leave statute effective January 1, 2018. The new statute will be similar to the Oregon statute and requires the following:

- Accrual is 1 hour for every 40 hours worked;
- Employees may begin using paid sick leave on the 90th calendar day after starting employment;
- No requirement to cash out sick time upon termination, but if the employee is rehired within 12 months any unused sick leave must be reinstated;
- And, same as Oregon, employers may provide more generous leave policies or permit use of paid sick leave for additional purposes.
- No cap on the amount of sick time that an employee may accrue, may make frontloading time difficult if schedules hard to predict.

Washington Paid Family Leave. Washington State joins California, New Jersey, Rhode Island and New York in guaranteeing paid family and medical leave for workers. Employees would be eligible to use the benefit for child birth, adoption, or serious medical condition of the worker or worker's family member. Under the law, both employers and employees pay into the system and weekly benefits are calculated based on a percentage of the employee's wages and the state's weekly average wage, currently at $1,082. The weekly amount that could be paid to an employee would be capped at $1,000 a week.

Employees can be eligible for the benefit after working 820 hours (about 103 days). The benefit is paid in the form of an insurance type benefit (i.e. workers comp) which is funded by premiums deducted from employee pay and employer contributions. Premiums of .4% of wages will start being collected on January 1, 2019 with 63% being paid by the employees and 37% paid by the

employers. An employee who makes $50,000 a year would pay $2.42 a week and their employer would pay $1.42 a week for a weekly potential benefit of about $703. The law is scheduled to take effect July 1, 2020.

The Oregon legislature is expected to pass comparable legislation in its next legislative session.

Washington Pregnancy Accommodations Law. In 2017, the Legislature passed a new law providing specific civil rights protections for pregnant employees. If a pregnant employee works for an employer with 15 employees or more, they have the right to the following accommodations:

1. Providing frequent, longer, or flexible restroom breaks;
2. Modifying a no food or drink policy;
3. Providing seating or allowing the employee to sit more frequently; and
4. Limiting lifting to 17 pounds or less.

In addition, a pregnant employee may have rights to other workplace accommodation(s), as long as there is no significant difficulty or expense to the employer. These are:

5. Job restructuring, including modifying a work schedule, job reassignment, changing a work station, or providing equipment;
6. Providing a temporary transfer to a less strenuous or hazardous position;
7. Scheduling flexibility for prenatal visits; and
8. Providing any further accommodations the employee may need.

Employers may not ask for written certification from a healthcare professional for the accommodations in 1–4 above. Employers may request written certification from a health care professional regarding the need for the accommodations in 5–8 above, or for restrictions on lifting less than 17 pounds.

CHAPTER 4. STATE AND FEDERAL CASE LAW

Section A. Age Discrimination in Employment Act ("ADEA")

Guido v. Mount Lemmon Fire Dist., 859 F.3d 1168 (9th Cir. 6/18/17). The Ninth Circuit held that minimum employee requirements for qualification under the ADEA do not apply to political subdivisions in the same way that they do to employers. The district court initially granted summary judgment on the grounds that two firefighters could not bring suit against their Fire District because the District had less than 20 employees and thus was not a qualifying "employer" under the ADEA. The Ninth Circuit reversed and remanded, holding that because the Fire District was technically an unincorporated political subdivision, the 20 employee minimum did not apply and the employees could bring suit under the ADEA.

Merrick v. Hilton Worldwide, Inc., 867 F.3d 1139 (9th Cir. 8/16/17). The Ninth Circuit affirmed that proof of a younger replacement is not required to sustain a case for age discrimination. Instead, a plaintiff may establish a case by showing through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination.

The employer may nonetheless be able to overcome such a showing by proving that they had valid, non-discriminatory reason for the termination.

Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61 (3rd Cir. 1/10/17). The Third Circuit held that workers in their 50s can sue under federal age discrimination law when an employment policy has a disparate impact on them as compared to workers in their 40s. In so doing, the Third Circuit rejected prior contrary rulings from the Second, Sixth, and Eighth Circuits. The ruling opens the door in some jurisdictions for an employee to argue that, statistically, an employer's policy unintentionally discriminates against workers in their 50s, 60s, or 70s as compared to younger employees over 40.

Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958 (11th Cir. 10/5/16) *cert. denied,* 137 S. Ct. 2292 (6/26/17). The Eleventh Circuit held that federal age-bias law does not allow disparate impact claims by older applicants, who can only sue for intentional bias. The case involved a 49-year-old applicant who was not selected for a territory manager position targeted toward applicants "2-3 years out of college" and recruiters were told to avoid applicants "in [the] sales force for 8-10 years." The court held that the EEOC's contrary interpretation of the Age Discrimination in Employment Act (ADEA) was not entitled to deference because it contradicted the plain language of ADEA, which limited disparate impact claims to employees, to the exclusion of applicants.

Section B. Gender Discrimination

Tornabene v. Nw. Permanente, P.C., 156 F. Supp 3d 1234 (D. Or. 12/28/15). A female cardiac-surgery technician terminated by her employer avoided summary judgment on gender discrimination claims, in part, by identifying a male comparator who was not terminated despite having a similar job and similar performance issues. The court found that the plaintiff established a *prima facie* case through her protected status and reported remarks suggesting that her supervisor did not like "strong women." The employer presented the plaintiff's subpar performance reviews as evidence that it had a legitimate, nondiscriminatory reason for terminating her. The plaintiff challenged that explanation as pre-textual by identifying a similarly- situated employee that consistently received poor performance reviews, but had not been terminated.

Nichols v. Tri-Nat'l Logistics, Inc., 809 F.3d 981 (8th Cir. 1/4/16), *reh'g denied*, 2016 U.S. App. Lexis 2438 (8th Cir. 2/11/16). An employee can pursue a sexual harassment claim against her employer when supported by conduct that occurred outside the workplace and during non-business hours. The employee was a female long-haul truck driver partnered with a male employee. She claimed that the male employee's actions created a hostile work environment after she refused to have sex with him for $800. In holding that the employer was not entitled to summary judgment, the court held that there was a question of fact as to when the employee reported the offensive conduct and whether her employer took appropriate action within a reasonable time. The dissent argued that the only credible evidence was that the employer re-assigned the employee within a couple days of her first complaint, and even that delay came after the employee declined the employer's offer to immediately re-assign her.

Section C. LGBT Discrimination

Zarda v. Altitude Express, 855 F.3d 76 (2nd Cir. 4/18/17). In July, the U.S. Department of Justice signaled a significant policy change by filing an *amicus* brief with the U.S. Court of Appeals and taking the position that Title VII of the Civil Rights Act does not protect employees from discrimination based on sexual orientation. At issue was a case brought by the estate of a skydiving instructor that alleged he was fired after he told a client he was to jump tandem with that he was homosexual, so her husband should not be anxious about them being strapped together for the jump. At the present time, there is a circuit split with respect to whether the gender discrimination protections of Title VII extent to protect discrimination on the basis of sexuality.

Hively v. Ivy Tech Cmt. College of Ind., 853 F. 3d 339 (7th Cir., 4/4/17). The Seventh Circuit held that individuals are protected from discrimination on the basis of sexual orientation under Title VII of the Civil Rights Act. The plaintiff was a part-time adjunct professor at the college and had applied for numerous full time positions over the course of several years, and was denied for each. Believing she was spurned based on her sexuality she brought discrimination claims against the school. The court held that any discrimination based on what the proper behavior is for someone of a certain sex is discrimination based on sex and prohibited.

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc, 201 F. Supp. 3d 837 (E.D. Mich. 8/18/16). The Court held that gay and transgender employees were expressly not protected from discrimination by Title VII of the Civil Rights Act, but that those individuals could pursue a theory based on gender stereotype discrimination *ala Price Waterhouse*. The court, however, granted partial summary judgment to the Defendant on the basis that the employer was permitted to prohibit employee cross-dressing under the Religious Freedom Restoration Act (RFRA) and that the EEOC had failed to seek the least restrictive means of reconciling the employee's rights under Title VII and employer's rights under the RFRA.

Section D. Pregnancy Discrimination

Neidigh v. Select Specialty Hosp., 664 Fed. Appx. 217 (3rd Cir. 11/30/16) (not binding precedent). In affirming summary judgment, the court held that an employer's previous documentation of complaints against an employee, final warning, and then a subsequent employee incident provided a sufficient legitimate, nondiscriminatory reason for employee termination. The court held that the employee could not prove the employer's decision was pre-textual discrimination based on her pregnancy solely based on the proximity of her termination to her announcement that she was pregnant. This case illustrates the importance and benefit of having good procedures in place for systematic and consistent disciplinary decisions. In addition to being best-practices, those systems help to avoid situations where an otherwise underperforming employee becomes part of a protected class through circumstances. Note: Oregon does not follow the *McDonnell Douglas Corp. v. Green,* burden shifting analysis on summary judgment that the court of appeals applied here.

Section E. Americans with Disabilities Act ("ADA")

Grant v. County of Erie, 542 F. App'x. 21 (W.D.N.Y. 5/18/17). A federal district court in the New York denied summary judgment in a disability discrimination case where the employer did not

have an "essential job function" that it relied on in its defense in the applicable job description. After the employee sustained an injury to her arm, she was terminated because she could not move or restrain residents at the youth detention center where she worked. The Court denied summary judgment for the detention center, holding that the employee's job description did not expressly mention "an ability to restrain residents" as an essential function of the job.

Erskine v. C. Ross Mgmt., LLC., 33 AD Cases 976 (N.D. Ala. 7/19/17) (Unpublished Decision). An Alabama District Court held that an employer rescinding a job offer after noticing that the plaintiff needed a service dog was not entitled to summary judgment. Plaintiff, who had previously been diagnosed with a number of psychological disabilities, brought a service dog with her to a job interview. After receiving the job offer, the offer was rescinded when a background check revealed that she had a pending misdemeanor charge. After rescinding the offer, allegedly based on the misdemeanor charge, the company offered the position to another candidate whose background check also revealed a criminal charge. In denying summary judgment, the court held that the two candidates were similarly situated with the exception of the plaintiff's disability and need for a service dog.

Credeur v. Louisiana, 860 F.3d 785 (6/23/17). The Fifth Circuit held that a trial attorney with a disability that prevented her from attending trial was not a "qualified individual" under the ADA and therefore she was not entitled to an accommodation. A litigation attorney for the Louisiana Attorney General's office brought suit against the State Department of Justice (DOJ) for failure to accommodate, harassment, and retaliation after the DOJ denied her continued requests to work from home following serious medical complications. To be a qualified individual under the ADA, she had to prove that she was able to perform the "essential functions" of her position with or without reasonable accommodation. In affirming summary judgment for the DOJ, the Court reasoned that the attorney was not a qualified individual within the meaning of the ADA because she could not perform an essential function of her job—regular attendance in the office or at trial.

Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822, 2017 US Dist LEXIS 75665 (E. Dist. of Penn. May 18, 2017). The Eastern District of Pennsylvania held that gender dysphoria is a protected disability under the ADA. Shortly after being hired, the plaintiff was diagnosed with gender dysphoria, also known as Gender Identity Disorder, which limited her major life activities, including interacting with others, reproducing, and social and occupational functioning. The plaintiff alleged that her employer discriminated against her on the basis of her disability by failing to allow her to use the women's restroom, failing to provide the correct nametag, and failing to provide her with a gender-matching uniform. In denying the employer's motion to dismiss the complaint, the Court held that the ADA could be read to protect individuals with gender dysphoria when it inhibits major life activities and that the plaintiff's claims, as alleged, could constitute an actionable claim.

Stevens v. Rite Aid Corp., 851 F.3d 224 (2nd Cir., 3/21/17). The Second Circuit overturned a $2.6 million jury award in favor of a pharmacist who alleged his needle phobia prevented him from administering immunizations, deciding as a matter of law that his termination was not unlawful under the Americans with Disabilities Act (ADA). The ADA requires that employers accommodate qualified individuals with disabilities who can perform the essential functions of their job. Rite Aid had terminated the pharmacist soon after learning he could not administer

immunization shots without a risk of passing out from fear. The Court upheld the termination as lawful, holding that the employer had clearly established that administering immunization shots was an essential function of the job. The Court also rejected the pharmacist's suggested accommodations, which included hiring an assistant to administer shots for him, as that would merely relieve him of an essential function of the work that he was hired to perform.

Barbuto v. Advantage Sales & Mktg., LLC, 477 Mass. 456 (7/17/17). The Supreme Court of Massachusetts held that employers may be required to reasonably accommodate the use of medical marijuana outside of the workplace. The opinion was the first of its kind, in which the Court opined that the classification of marijuana as a Schedule I drug under federal law does not make it per se unreasonable as an accommodation. The Court tempered the scope of its ruling by clarifying that if an employer's policy bans the use of marijuana, then the employer must engage in the interactive process and explore other available options for reasonable accommodations. If no effective alternative exists, the employer would ultimately bear the burden of proving that the employee's use of marijuana would be an undue hardship on the employer. While this case has potential important national implications, Oregon courts have already made clear that no such similar claim is recognized under Oregon law. *See*, *Emerald Steel Fabricators, Inc. v. BOLI*, 348 Or. 159 (2010) (holding that "Oregon employers are not required to accommodate the medical use of marijuana and are not required to engage in the interactive process regarding potential accommodation").

Frazier-White v. Gee, 818 F.3d 1249 (11th Cir. 4/7/16), *cert. denied,* 137 S. Ct. 592 (12/12/16). The court affirmed that an employee has the burden to identify an accommodation for her disability and the burden of demonstrating that the requested accommodation is reasonable. If the employee fails to identify a reasonable accommodation, the employer has no affirmative duty to show undue hardship to provide an accommodation. As applied, the court held that the employer had no duty to search for or suggest another position for the employee that would accommodate her restrictions; rather, it was the employee's duty to identify and suggest alternative arrangements.

EEOC v. St. Joseph's Hosp. Inc., 842 F.3d 1333 (11th Cir. 12/7/16). Employers are not required to re-assign disabled workers into open positions ahead of more qualified nondisabled employees. The ADA provides that, subject to exceptions, an employer must make a reasonable effort to accommodate a disabled employee. While the ADA suggests that re-assignment "may" be an acceptable accommodation, re-assignment is not mandated, nor always reasonable. Rather, the employer need only allow a disabled person the opportunity to compete equally for a vacant position. The court asserted that, to hold otherwise, would discriminate against non-disabled workers. In sum, businesses should consider re-assignment as an optional accommodation for disabled employees, but are entitled to deference with respect to their business judgment and best practices, and may promote the best qualified applicant for any given position.

Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 10/17/16). The Eighth Circuit held that the employer may have been aware of an employee's need for an accommodation to complete CPR recertification or a job reassignment while she continued to recover from neck surgery. The decision was significant because it reaffirmed, and arguably extended, the concept that an employee need not use "magic words" to invoke the ADA's interactive job-accommodation process. The court held that, in addition to not needing to use specific words, a request for an accommodation may be implied from the circumstances and context of the situation. In this matter,

the employee's doctor's note that the employee would have continuing medical restrictions should have been sufficient to initiate the interactive process and explore potential accommodations. The dissent argued that the court's decision essentially eliminates the standing requirement that an employee take some affirmative action to request an accommodation.

Mendoza v. Roman Catholic Archbishop of L.A., 824 F.3d 1148 (9th Cir. 6/7/16). In affirming summary judgment, the Ninth Circuit held that an employer's failure to have full-time employment for someone taking extended medical leave is not, in itself, discriminatory or actionable. When the plaintiff took a 10-month leave, her supervisor took over her bookkeeping duties and decided that they only needed a part-time employee to do her job when she returned. The plaintiff declined the part-time job and brought an action on the failure to reinstate her, claiming disability discrimination. The plaintiff, however, could not show that the church's legitimate, nondiscriminatory reason for not returning her to work was a "cover" for discrimination and could not show that a full-time job was otherwise available or that the church was motivated by her disability in reducing her work to a part-time position.

Section F. Religious Discrimination

Chavis v. Wal-Mart Stores East, LP, No. 15 Civ. 4288, 2017 U.S. Dist. 111137 (S.D.N.Y., 7/18/17). In granting summary judgment for the defendant, the Southern District of New York held that forcing an employee to use vacation days to avoid working on a religious holiday did not constitute discipline and was therefore not discrimination on the basis of religion. Plaintiff held a position at Wal-Mart that required she work Sundays in violation of her religious beliefs. Wal-Mart offered her the option of transferring to a position that did not require her to work Sundays or using her vacation day to avoid Sunday work. Plaintiff filed a lawsuit alleging that the options provided by Wal-Mart constituted "discipline" and unlawful religious discrimination. The court reasoned that forcing an employee to use vacation days did not constitute an "adverse employment action" under the law because she was not deprived of a material benefit, but simply chose to use the benefit in a particular way."

EEOC v. United Health Programs of Am., Inc., 213 F. Supp. 3d 377 (E.D.N.Y., 9/30/16). When an employer tried to adopt a system of nontraditional beliefs to "bring harmony" to its workplace, that system of beliefs was in fact a religion under the constitution and federal statutes and the court found that a nontraditional system of beliefs may qualify as a religion. The court found that the "Onionhead" practices included keeping the lights dim, burning candles, praying and discussing personal matters with colleagues as well as reading spiritual texts. Employees were also asked to thank god for their jobs and required to say "I love you" to managers and coworkers. The beliefs were "more than intellectual" since they required believers to disregard their own self-interest in favor of adhering to the Onionhead tenants.

EEOC v. United Parcel Serv., Inc., No. 15-CV-4141, 2017 U.S. Dist. LEXIS 101564 (E.D.N.Y., filed 7/15/15). The EEOC alleges that since 2004, UPS has violated Title VII in failing to hire or promote individuals whose religious practices conflict with the company's grooming and appearance policies. Those policies require that male employees' hair not grow below collar length. Title VII requires employers to accommodate the religious beliefs of employees and applicants unless doing so would cause "undue hardship" to the employer.

Update. This case is proceeding through initial motion practice and on June 29, 2017 the court granted in part and denied in part plaintiff's motion to strike certain affirmative motions.

Section G. Free Speech in the Workplace

Kennedy v. Bremerton School District (9th Cir. 8/23/17). The Ninth Circuit affirmed a district court's order denying a preliminary injunction to a high school football coach who was suspended for kneeling to pray on the fifty-yard line after games. The coach brought suit under the First Amendment and Title VII of the Civil Rights Act of 1964, and sought a preliminary injunction to allow the prayer while his suit was pending. Because the coach's speech fell within the technical scope of his job responsibilities as a public school employee, the coach was acting as a public employee at the games and the school district was permitted to order the coach to stop engaging in his prayer. The Court held that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Brandon v. Maricopa County, 849 F.3d 837 (9th Cir. 2/23/17). The Ninth circuit held that the First Amendment of the Constitution protects speech by private citizens on matters of public concern, not by public employees acting in the course of their employment. In the case at hand, a county lawyer alleged she was terminated after having a statement published in the local newspaper suggesting that some cases are settled to save public officials from embarrassing depositions. In holding that the statements at issue related to the attorney's employment, the court noted that her statements "touched on the very matter on which she represented the county" and thus it was not "constitutionally protected free speech."

Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255 (9th Cir. 3/23/16). A school teacher alleged that her employer constructively discharged her in retaliation for comments made to supervisors and students' parents criticizing the school's special-education program. The Ninth Circuit affirmed summary judgment, in relevant part, holding that the teacher's comments were made in her role as an employee, and not as a member of the public, thus her statements were not entitled to First Amendment protection.

Section H. Family Medical Leave Act ("FMLA")

Johnson v. Jondy Chems., Inc., No. 3:16-cv-01734-MO, 2017 U.S. Dist. LEXIS 57284 (4/13/17). Defendant's motion to dismiss the employee's protected leave claims was granted based on fact that employee had not yet worked long enough to be eligible for either FMLA or OFLA (Oregon Family Medical Leave Act). The Court, however, left the door open for the employee to re-plead his claims and allege that he was entitled to protection for his pre-eligibility request in so much that his requested leave would have partially taken place once he was eligible for such leave. Thus, employees on day one may be protected from retaliation for making protected leave request that would begin upon their achieving eligibility under the invoked program.

Section I. Education Law

Fisher v. Univ. of Texas, 136 S. Ct. 2198 (6/23/16). Abigail Fisher, a white high school graduate, applied for admission to the University of Texas's 2008 class and was rejected. At the time that she applied, the University had identified what it considered a compelling interest in having a "critical mass" of minority students enrolled. To achieve that goal, it used race as an explicit plus factor in its application process. Fisher filed suit alleging that the University's consideration of race in admissions violated the Equal Protection Clause of the Fourteenth Amendment. Applying the strict scrutiny test that the Supreme Court articulated in *Grutter v. Bolinger*, 539 U.S. 306 (2003) for race-conscious admissions programs, the district court granted summary judgment to the University. On appeal, the Fifth Circuit affirmed, holding that, under earlier Supreme Court affirmative action cases, the court was required to give substantial deference to the University both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. The Supreme Court vacated and remanded the case back to the Fifth Circuit, holding that the appellate court failed to apply the strict scrutiny standard correctly. The Supreme Court explained that "some, but not complete" judicial deference was proper in evaluating the University's stated goal of diversity. "However, once the University has established that its goal of diversity is consistent with strict scrutiny, the University must prove that the means it chose to attain that diversity are narrowly tailored to that goal. On this point, the University receives no deference." The Fifth Circuit erred in showing any deference in step two of the strict scrutiny test.

Section J. Public Accommodation

Masterpiece Cakeshop LTD et al v. Colorado Civil Rights Commission et al, 137 S. Ct. 2290 (6/26/17). In June, the U.S. Supreme Court granted certiorari to decide whether a Christian baker's refusal to make a cake for a same-sex couple's wedding violates Colorado's Anti-Discrimination Act. At issue in this case, and in similar cases recently heard before the Oregon Court of Appeals (*Sweet Cakes by Melissa*) relating to baker refusing to make a cake for a same-sex couple, and the Washington Supreme Court (*Stutzman*) a florist refusing to provide flowers for a same-sex marriage. At issue is the balance between anti-discrimination statutes, public accommodation laws, first amendment free speech and religious liberty.

Section K. Wage & Hour

Or. Rest. & Lodging Ass'n v. Perez, 816 F.3d 1080 (9th Cir. 2/23/16). Employer tip pooling arrangements with employees that are not customarily tipped (the "back-of-the-house" employees like dishwashers and cooks) are invalid, regardless of whether the employer takes a tip credit. In 2010 the court had held that tip pooling was permitted so long as the employees were paid a base wage above the minimum; that is, the employer did not take a tip credit against employees' wages. In response, the DOL enacted regulations forbidding tip pooling (mandatory tip sharing arrangements) with employees that are not customarily tipped, regardless of whether the employer takes a tip credit. 29 CFR §531.52.

A divided *Perez* court held that the DOL had the authority to enact such a regulation, despite the FLSA's silence on that specific issue. As such, the court held that the regulation superseded its

decision in *Cumbie* and that tip pooling arrangements must be limited to employees that are customarily tipped, such as servers, and exclude employees not customarily tipped, such as dishwashers and cooks. The Ninth Circuit has declined to re-hear the case *en banc,* but a decent to that denial signed by 10 judges argued that the court's decision conflicts with how many other circuits have interpreted the rule originally promulgated by the Ninth Circuit, leading it to conclude that "the only court in the land to misread [our precedent] is our own!" (Emphasis in original). *Or. Rest. & Lodging Ass'n. v. Perez,* 843 F.3d 355 (9th Cir. 9/6/16). The parties to the original action have sought Supreme Court review

Update: In August 2017, the DOL issued notice of proposed rulemaking in which it proposed rescinding the current restrictions on tip pooling by employers that pay tipped employees the full minimum wage directly.

Encino Motorcars, LLC, v. Hector Navarro, 136 S. Ct. 2117 (6/20/16). The Supreme Court held that arbitrary and capricious changes in regulations by the Department of Labor did not carry the force of law and were not entitled to any deference from the Court. In 2011, the DOL changed a longstanding enforcement policy that exempted service providers of vehicles the same as service providers of boats and airplanes when it excluded the latter from the exemption with minimal explanation. The Court refused to enforce the regulation because the change did not appear to have a logical explanation, and an explanation was required where the change would overturn decades of industry reliance.

Update. On remand, the Ninth Circuit re-asserted its original holding that service advisors were not exempt from the FLSA, reviving a Circuit split with the Fourth and Fifth Circuits based on statutory interpretation, setting up a potential repeat review by the Supreme Court. *Navarro v. Encino Motorcars, LLC,* 845 F.3d 925 (9th Cir. 1/9/17).

McKeen-Chaplin v. Provident Sav. Bank, 862 F.3d 847 (9th Cir. 7/5/17). The Ninth Circuit held that mortgage underwriters are entitled to overtime compensation under the FLSA and are not subject to the administrative-employee exemption. Currently, the Circuits are split on this issue. Siding with the Second Circuit, the Ninth Circuit held that because the mortgage underwriters' "primary job duties" did not relate to their employer bank's management or general business operations, the administrative-employee exemption to overtime requirements did not apply, and the mortgage underwriters were entitled to overtime compensation for hours worked in excess of 40 hours per week.

Corbin v. Time Warner Entm't-Advance/Newhouse P'ship, 821 F.3d 1069 (9th Cir. 5/2/16). A rounding policy used for hourly paid call center employees does not violate the FLSA so long as the policy is facially neutral, and neutral as applied, allowing employees to gain overtime compensation just as easily as may cause them to lose it. The Ninth Circuit also affirmed summary judgment in favor of the employer on the basis that the employee's claim to recover one-minute of uncompensated time was *de minimis* and subject to dismissal. The court affirmed that basis for the decision despite the fact that the defendant had not affirmatively pled it in its answer.

Castaneda v. JBS USA, 819 F.3d 1237 (10th Cir. 5/3/16). The employer did not violate the FLSA when it did not compensate employees for time spent walking between a locker room and

production line, where the employees did not present credible supporting evidence of the walk times, and their compensation had been negotiated as part of a collective bargaining agreement and thus was subject to certain FLSA exceptions. Expect Oregon Courts to reach the same decision should this issue arise.

Section L. Retaliation

Arias v. Raimondo, 860 F.3d 1185 (9th Cir. 6/22/17). The Ninth Circuit held that the Fair Labor Standards Act (FLSA) protects plaintiffs from retaliation from their employer and their employer's agents and attorneys. An undocumented worker brought a claim against his employer after the employer threatened to reveal his undocumented status if the worker took a position with another company. After the claim was brought, the defendant's attorney contacted immigration officials to facilitate the plaintiff being taken into custody at a scheduled deposition. The plaintiff then brought claims against the employer's attorney for retaliating against him in violation of the FLSA. The attorney defended solely on the grounds that because he never personally employed the plaintiff, he was not subject to the provisions of the FLSA. The Court disagreed and distinguished the FLSA's economic provisions from the anti-retaliation provisions, which extend to "any person" acting directly or indirectly in the interest of an employer in relation to an employee.

Section M. Employment Agreements & Waivers

Arbitration Agreements / Class Action Waivers. The Supreme Court has consolidated a trio of cases from various jurisdictions so that it may resolve the issue of whether an employer may utilize a mandatory arbitration agreement prohibiting employees from filing a class action lawsuit for employment-related claims. The Supreme Court has announced that oral argument on these cases would be scheduled for the upcoming 2017 to 2018 term.

The circuit dispute began with *D.R. Horton*, when the Fifth Circuit overruled the NLRB and held that an employer could block class action claims through binding arbitration agreements. Thereafter, in *Ernst and Young*, the Ninth Circuit ruled that an employer violates the NLRA by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment. The other two cases in the group are *NLRB v. Murphy Oil* (5th Cir.) and *Epic Systems Corp. v. Lewis* (7th Cir.), with *Murphy Oil* ruling in favor of the employer and *Epic Systems* ruling against the employer. The court declined to grant or deny a Second Circuit opinion, enforcing a class action waiver.

In August, 2017, the Fifth Circuit re-affirmed that a company does not engage in unfair labor practices by requiring job applicants to sign class and collective action waivers as a condition of employment. *Convergy's Corp v. NLRB*, 866 F.3d 635 (5th Cir. 8/17/17).

Release Agreements. In *Zuber v. Boscov's,* No. 16-3217, 2017 U.S. App. LEXIS 17484 (3rd Cir. 9/11/17), the Third Circuit held that a plaintiff did not waive his potential FMLA claims when he accepted a settlement and signed a release relating to his workers' compensation claims. The release language executed related to "all rights to seek any and all …benefits…or any monies of any kind…in connection with the alleged work injury claim." In narrowly interpreting the release

language, the Court opined that it did not specifically cover medical leave claims arising from that injury and that the employee preserved his right to bring the same.

Uniformed Services Employment and Reemployment Act ("USERRA"). In *Ziober v. BLB Res., Inc.*, 839 F.3d 814 (10/14/16) the Ninth Circuit held that USERRA claims are arbitrable under a mandatory arbitration agreement signed with an employer if the employee has not waived any "substantive" rights by going to arbitration rather than selecting one of the methods for resolution specifically stated in the statute. The court finds that going to arbitration is simply a "forum selection" and is not a waiver of substantive rights.

Syed v. M-I, LLC, No. 14-17186, 853 F.3d 492 (9th Cir. 3/20/17). The employer-required disclosure under the Fair Credit Reporting Act (FCRA) must be separate from any liability waiver the employer seeks regarding the same pursuant to the clear statutory language that the disclosure document must consist "solely" of the disclosure.

NLRB v. Long Island Ass'n for Aids Care, No. 16-2325, 2017 U.S. App. LEXIS 16745 (2nd Cir. 8/31/17). The Second Circuit affirmed an NLRB reinstatement of an employee terminated for refusing to sign an unlawful confidentiality agreement. The Court agreed with the NLRB decision holding that overbroad confidentiality agreements unlawfully restrict employees right to concerted activity and violated Section 8(a)(1) of the NLRA. Though the employer contended it terminated the employee for performance reasons, its position was not supported by the facts or evidence.

Section N. Arbitration

Sw. Reg'l Council of Carpenters v. Drywall Dynamics, Inc., 823 F.3d 524 (9th Cir. 5/19/16). When evaluating the sufficiency of an arbitration decision, the trial court may not exceed its narrow authority to determine whether the arbitrator's award was based on the parties' contract and whether it violated an explicit, well-defined and dominant public policy. The union and association assigned to bargain on its behalf executed a Memorandum of Understanding (MOU) expanding the term of a labor agreement without the employer's consent. The arbitrator held that the employer was bound by the MOU; the trial court vacated, holding that the arbitrator's interpretation of the parties' agreement was not possible and contrary to public policy. The Ninth Circuit overturned the trial court's decision holding that it had overstepped its authority and that it can only invalidate an award based on explicit, well-defined and dominant public policy concerns, not general concerns.

Martin v. Yasuda; Amarillo Coll. of Hairdressing, Inc., 829 F.3d 1118 (9th Cir. 7/21/16). Even though employee/students had signed an arbitration clause, they nonetheless proceeded with a lawsuit for 17 months before losing part of a motion and seeking arbitration under the original agreement. Both the trial court and the Ninth Circuit decided that arbitration would be inappropriate since the defendants had knowledge of their existing right to compel arbitration and had litigated for a considerable period of time before seeking arbitration after they had lost a critical motion.

Section O. Proof & Procedure

CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642 (5/19/16). The Supreme Court held that a party need not prevail on the merits to be entitled to recover attorney fees under Title VII's fee shifting statute. The Court found no indication that Congress intended to so limit a defendant's opportunity to recover fees and that the statute permits the recovery of fees expended in defending cases based on the merits, and also when defending frivolous, unreasonable, or groundless litigation.

Green v. Brennan, 136 S. Ct. 1769 (5/23/16). If an employee claims he has been fired or constructively discharged for discriminatory reasons, the "matter alleged to be discriminatory" can include the discharge itself, and the statute of limitations period begins running only after the employee's employment is terminated. Here, plaintiff had worked for the postal service for 35 years. In 2008 he was passed over for a promotion and in 2009 he was accused of the criminal offense of intentionally delaying the mail. Plaintiff signed a settlement agreement that allowed him to avoid charges if he resigned. Plaintiff's resignation, however, was not effective for several more months. When plaintiff brought claims of wrongful/constructive discharge, he was outside the statute of limitations period based on the alleged conduct, including his execution of the release. Plaintiff was within the limitations period if it was based on his date of resignation. In a 7-1 decision, the Supreme Court held that a claim for wrongful or constructive discharge cannot proceed absent the requisite discharge, and therefore the statue will not begin to run until the employee has formally left his post.

Bagley v. Bel-Aire Mech., Inc., 647 Fed. Appx. 797 (9th Cir. 4/8/16). An employee had his 1981 claim revitalized since an employer did not meet its burden of production of proving a bona fide reason for termination by merely stating factors allegedly causing the termination without relating those to the specific case. Notably, the employee was able to show causation through a 36-day span between the date of his complaint and his termination. The case is remarkable in terms of its providing litigant's research on issues of proof and summary judgment, timeliness, retaliation, a prima facie case and pretext. The case is a compendium of Ninth Circuit law on these points.

Matson v. United Parcel Serv., Inc., 840 F.3d 1126 (9th Cir. 11/4/16). In determining whether a hostile work environment case was preempted by the Labor Management Relations Act (LMRA), the district court and the Ninth Circuit ruled that two questions must be answered: (1) whether a particular right inheres or originates in state law or whether it is grounded in a collective bargaining agreement, and (2) whether a state law right was dependent on the terms of a collective bargaining agreement and whether that agreement had to be interpreted to reach a decision. The Ninth Circuit found that the right to work without a gender-based hostile work environment was a state law right independent of any contractual rights and was in fact nonnegotiable in the collective bargaining setting. Therefore, the right did "inhere" in state law. The court further found that any interpretation of the collective bargaining agreement was preferable to the underlying question, even though an employer allegedly showed favoritism in making work assignments under the contract.

Fredrickson v. Starbucks Corp., 840 F.3d 1119 (9th Cir. 11/3/16). This case involved a class action challenge by Starbucks Baristas challenging tax withholdings from their cash tip wages. On review, the Ninth Circuit prevented the district court from hearing the case and ruled that under

the Tax Injunction Act and the Anti-Injunction Act, the district court lacked subject matter jurisdiction over the plaintiffs' claims for declaratory and injunctive relief when the plaintiffs challenged their employer's withholding practices as the employer's withholding of taxes constituted a method of tax collection and the plaintiffs had a speedy and efficient remedy in Oregon State Courts.

Day v. Celadon Trucking Servs. Inc., 827 F.3d 817 (8th Cir. 7/5/16). The defendant purchased a company and as part of the sales agreement agreed to temporarily hire all of the predecessor's employees, but decide within 14 days whether it wished to hire them on a permanent basis. The employees who were not ultimately hired filed a WARN Act claim, and the court found that purchasing a business as an ongoing concern with the employees hired, even on a contingent basis, "creates a presumption that the buyer is the employer for WARN Act purposes if a seller still employs its employees on the date of the sale." Therefore, the successor employer was obligated to send the WARN notice.

Section P. Class Action

Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (3/22/16). Class certification was appropriate under FRCP 23(b)(3) where the employees relied on an expert's study to determine how long various pre- and post-work activities took for purposes of bringing an FLSA wage claim. Employees brought claims against Tyson Foods alleging that it had failed to pay them for time donning and doffing protective gear before and after their work in a pork processing plant. Some employees took very little time to change and get to their workstations, while others took upwards of 30 minutes. The employer argued that the employees that took less than the "average" time devised by the employees' expert would be getting an undeserved windfall based on the class certification. The court disagreed and held that the statistical evidence was properly admitted and that the use of "representative samples" is permitted in determining damages for an individual employee and is thus acceptable for use by the class. The Court further noted that the employer could present its own evidence challenging the statistical evidence proffered by the employees.

The Court distinguished this case from a similar issue in *Wal-Mart Stores, Inc. v. Dukes,* where it held that anecdotal evidence of sexual discrimination could not be generalized across a class of plaintiffs to overcome the absence of a common policy of discrimination because the experience of those employees had little relationship to one another. In contrast, the employees in *Tyson* worked at the same facility, did similar work, and were paid under the same policy. Furthermore, the court noted that the plaintiff had offered to split the trial in such a way so that the most similarly situated employees would be tried together, but Tyson rejected that approach, and in a way created the issue it sought to appeal.

Vaquero v. Ashley Furniture Indus., 824 F.3d 1150 (9th Cir. 6/8/16). The Ninth Circuit affirmed class certification for a group of commissioned sales associate employees bringing a wage claim on the basis that they were required to do many tasks unrelated to sales and entitled to additional pay. The court rejected the employer's argument to decertify the class on the basis of an alleged uniform lack of proof, suggesting that would be an issue for summary judgment. Further, the court reiterated that class certification will not fail solely because of individual questions about the amount of damages allegedly incurred by different class members.

Arizona ex rel. Horne v. Geo Grp., Inc., 816 F.3d 1189 (9th Cir. 3/14/16) *cert. denied,* 137 S. Ct. 623 (1/9/17). The court permitted individual employees to join an EEOC class action after the EEOC had sent notice of class litigation and without attempting conciliation for each of the new employees individually during the course of the reasonable cause determination investigation. The court held that the employees were accounted for by the EEOC when it referred generally to the "class" of female employees and attempted conciliation on that basis.

Section x. Benefits Law

Advocate Health Care Network, et al v. Stapleton, et al, 137 S. Ct. 1652 (6/5/17). ERISA contains a "church plan" exemption and the Supreme Court held that the exemption applies to a plan which is maintained by an organization whose "principal-purpose" is religious regardless of its source of establishment.

EEOC v. Flambeau, Inc., 846 F.3d 941 (7th Cir. 1/25/17). In this matter, the Court of Appeals considered a district court summary judgment decision in favor of the employer which held that the protections set forth in the ADA's safe harbor permits employers to design insurance benefit plans that require otherwise prohibited medical examinations as a condition of enrollment without violating 42 USC §12112(d)(4)(A). In dismissing the claims, the district court had rejected the EEOC's proposed regulations prohibiting any mandatory testing to participate in an insurance benefit plan, as contrary to the intent of the law. On January 25, 2017, the court of appeals affirmed the district court strictly on procedural grounds without reaching the merits of the EEOC's substantive arguments on the issue of wellness programs and the insurance safe harbor.

CHAPTER 5. NATIONAL LABOR RELATIONS ACT

Cooper Tire & Rubber Co. v. *NLRB*, 866 F.3d 885 (8th Cir. 8/8/17). The Eighth Circuit upheld a National Labor Relations Board ruling that a racially derogatory taunt, yelled by a locked out union member during a picketing activity, was protected speech under the National Labor Relations Act. Here, a locked-out employee was fired after he yelled "I smell fried chicken and watermelon" at a van carrying replacement workers that had just cross the picket line. Many of the replacement workers were African American. The Court affirmed that a firing for picket-line misconduct is an unfair labor practice *unless* the alleged misconduct "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the (NLRA)." Because the words themselves were not accompanied by any threatening behavior or physical acts of intimidation, the Court held that the conduct was protected speech and ordered the company reinstate the employee to his previous position.

MikLin Enters., Inc. v. NLRB, 861 F.3d 812 (8th Cir. 7/3/17). The Eighth Circuit ruled that the National Labor Relations Act does not protect vulgar and disparaging speech that is calculated to hurt the employer. Jimmy John's employees worked with union representatives to distribute posters that crudely described a Jimmy John's franchisee policy of not allowing paid sick leave. The posters included the personal phone number of the franchisee and said "we hope your immune system is ready, because you're about take the sandwich test." It depicted one sandwich made by a "healthy" Jimmy John's employee, and other made by a "sick" Jimmy John's employee. The

Court held that although the employees were engaging in a concerted effort to improve the terms and conditions of their employment, the employee campaign amounted to a level of disparagement intended to hurt the business and that was not protected under the NLRB.

Operating Engineers Local 139 v. Schimel, 863 F.3d 674 (7th Cir. 7/12/17). The Seventh Circuit affirmed a Wisconsin "right to work" statute that forbids requiring workers to join a union or pay union fees as a condition of employment. The International Union of Operating Engineers challenged the right to work law on the grounds that it was preempted by the National Labor Relations Act. The Court affirmed the NLRA's express allowance of state laws prohibiting agreements requiring membership in a labor organization as a condition of employment. The Court also held that the enactment of the right to work law did not effect a taking in violation of the Fifth Amendment, because unions are justly compensated by the federal laws allowance of unions to bargain exclusively with employers.

Fred Meyer Stores, Inc. v. NLRB, 865 F.3d 630 (D.C. Cir. 8/1/17). A United States Court of Appeals for the D.C. Circuit held that anti-union comments and threats to remove union representatives from a Hillsboro, OR, Fred Meyer's location were not sufficiently coercive to violate the NLRA. Here, union representatives wanted to have conversations with store workers on the floor. Management argued that the contact would violate a previous access agreement between the union and the store. In affirming that employers can generally prohibit labor organization activities conducted on business property, the Court upheld management's ability to limit access based on the specific terms of the CBA and that casual comments disparaging the union's representatives did not change that right.

Longshore and Warehouse v. ICTSI Or., Inc., 863 F.3d 1178 (9th Cir. 7/24/17). The Ninth Circuit affirmed the district court's dismissal of an antitrust claim that alleged anticompetitive activities engaged in jointly by a labor union and a collective bargaining association. Two competing labor unions were in a dispute over who was entitled to work at a particular terminal that was leased from the Port of Portland. The Court held that the Port of Portland can't assert antitrust claims against a union and others for alleged pressure, lawsuits, and threats to force the port to assign certain types of work to union longshoreman. The panel affirmed the district court's conclusion that the antitrust issues were discrete and complex, and that the entry of partial final judgment would not result in duplicative proceedings.

NLRB v. Pier Sixty, LLC, 855 F.3d 115 (2nd Cir. 4/21/17). The Second Circuit held that under certain circumstances profane and offensive social media posts can be protected as concerted activity under the National Labor Relations Act. The primary questions for the court were what constituted "opprobrious conduct" in the context of an employee's comments on social media and to what extent such comments are protected under Section 8 of the Act, relating to employees' right to act in concert and discuss working conditions. The employee, Hernan Perez, after a dispute with his supervisor, Robert McSweeney, posted the following on Facebook: "Bob is such a NASTY MOTHER F***ER don't know how to talk to people!!!!!! F*** his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!" Perez was terminated shortly after making that post. Despite the vulgar and offensive nature of the post, the Court determined that it was protected speech because its primary subject matter was regarding working conditions and union activity, the employer otherwise generally tolerated profanity among its

workers, and the online forum was a tool for organizing and not technically a "public outburst."

FedEx Home Delivery v. NLRB, 849 F.3d 1123 (D.C. Cir. 3/3/17). In affirming an earlier holding, the court held that single-route drivers were independent contractors and not subject to federal labor law. The NLRB utilizes a similar but different test than the FLSA to determine whether workers are classified as employees or contractors. Under the NLRB standard, multiple factors are considered under a totality of the circumstances analysis, but the most important considerations are how much control the employer exerts over the performance of the job, and whether the contractor has "significant entrepreneurial opportunity for gain or loss." Though not identical, this ruling and line of cases may have an impact on other aspects of the "gig" economy, such as Uber and Lyft.

Trump Ruffin Commercial, LLC, 364 N.L.R.B. No. 143, Case 28-CA-181475 (11/3/16). On the eve of the presidential election, the NLRB dealt a blow to a major enterprise of Donald Trump by ordering management of the Trump Hotel in Las Vegas to bargain with its newly certified union representatives. Though not significant in itself, this case is another example of now President-elect Trump's long and often tumultuous relationship with the unionization at his properties and businesses and may foreshadow his inclination toward dealing with the NLRB in his administration.

Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (3/29/16), *reh'g denied*, 84 U.S.L.W. 3704 (6/28/16). A 4-4 tie in the Supreme Court resulted in affirmation of the status quo in California, where public school teachers are required to pay certain union dues whether or not they chose to join the union. Some have speculated that Justice Scalia (who died shortly before the decision was announced) would have broken the tie and voted against the unions, which would have had significant consequences on union issues across the country. On June 28, 2016, the Court denied a request for a rehearing by the teachers that challenged the union. They had asked the Court to reconsider once a ninth justice was appointed.

Update. Since the appointment of Justice Neil Gorsuch, several public sector unions have renewed the claims raised in *Friedrichs* seeking to again bring the matter before the U.S. Supreme Court.

Wayron, LLC, 364 N.L.R.B. No. 60 (8/2/16). Prior to the decision in this case, if an employer argued that it could not afford the wage increase sought by the union, the union was entitled to ask the employer to turn over its financial records and, in many cases, to allow the union to conduct a financial audit of the employer's records. However, employers traditionally would argue that the wage increase would simply make it noncompetitive, thereby avoiding the audit requirement. However, in *Wayron*, the NLRB has ruled that a statement of non-competitiveness also would require the employer to subject itself to a union-requested audit of its records.

Pac. Mar. Ass'n v. NLRB, 827 F.3d 1203 (9th Cir. 7/8/16). The NLRB issued, through its administrative law judge, an order that work should go to the IBEW rather than the ILWU. The employer association for the majority of the ILWU work filed a *Leedom v. Kyne*, 358 U.S. 184 (1958) claim stating that the NLRB had exceeded its authority and that PMA would be "wholly deprived" of a means to vindicate its statutory right. The Oregon district court agreed with PMA and enjoined the NLRB action. The Ninth Circuit reversed the district court, stating that PMA was

not wholly without a remedy under the NLRB processes since it could in fact seek to intervene in the action, and the NLRB attorney had stated at the district court level that the Board would grant such a motion. However, the Ninth Circuit also stated that the NLRB "probably exceeded its statutory authority" by issuing the original 10(k) order since IBEW employees were employees of a public employer not covered by the NLRA.

Am. Baptist Homes of the West, 364 N.L.R.B. No. 13 (5/31/16). The NLRB held that it is unlawful for employers to hire permanent replacements for striking workers if the employer's motive is to punish the union and its members and avoid future strikes. In reversing the federal ALJ, the NLRB determined that hiring replacements with a motive to punish was an "independent unlawful purpose" which is forbidden under the NLRA. The board reasoned that the improper motive was retaliatory and would "interfere with employees' future protected activity." Previously, an "independent unlawful purpose" was commonly understood to require action motivated by something outside the bargaining relationship.

Miller & Anderson, Inc., 364 N.L.R.B. No. 39 (7/11/16). In a 3-1 decision, the NLRB made it easier for unions to organize a workforce made up of both regular and temporary employees. In overruling prior precedent, the court held that a union seeking to represent employees in bargaining units that combine both categories of employees is no longer required to obtain the employer's consent, and the Board will apply the traditional community of interest factors for determining the appropriateness of the composite unit. An employer will only be obligated to bargain over the jointly-employed worker's terms and conditions of employment for those employees over which it possess the "authority to control."

Macy's, Inc. v. NLRB, 824 F.3d 557 (6/2/16) *cert denied,* 137 S. Ct. 2265 (6/19/17). The NLRB's "*Specialty Healthcare*" standard for determining appropriate units in representation elections passed a closely watched test in the U.S. Court of Appeals for the Fifth Circuit, which has been historically skeptical of the NLRB's exercise of discretion under federal labor law. The *Special Healthcare* standard arises from the case by the same name and allows for smaller groups of employees within a business to unionize if the proposed unit constitutes a readily identifiable group sharing a community of interest. Such a finding can only be overcome if the employer establishes that the proposed unit excludes other workers who share an "overwhelming community of interest" with the employees covered by the union's petition. In *Macy's, Inc.,* the court upheld a challenge based on the unionization of its cosmetic and fragrance employees, but not other employees. The court rejected the idea that the departmental units would "wreak havoc" on the retail industry based on the lack of empirical evidence to support such a scenario.

Valley Health Sys. LLC, 363 N.L.R.B. No. 178 (5/5/16). The NLRB held that a hospital rule prohibiting "offensive" conduct violated the NLRA because it had the potential to interfere with the right of the employees to discuss the terms and conditions of employment. The Board held that an employer could not prohibit "offensive" conduct in its handbook if it lacks descriptive language that would help employees interpret what types of "offensive" conduct the rule is targeting. A policy prohibiting offensive conduct which also lists serious forms of objectively clear misconduct would likely be permissible.

T-Mobile USA, Inc. 363 N.L.R.B. No. 171 (4/29/16). In a broad restriction on company work rules, the NLRB has essentially confirmed their recent practice of taking a broad approach to rules and section 8(a)(1) of the Act, utilizing their clear standard that an ambiguous rule will generally violate the statute since employees are not expected to be lawyers. Therefore, the Board found the following rules to be in violation of section 8(a)(1):

- Prohibiting employees from permitting "non-approved individuals access to information or information resources, or any information transmitted by, received from, printed from, or stored in these resources" without prior written approval.
- "Commitment to Integrity" provision that prohibits "arguing … with co-workers, subordinates or supervisors; failing to treat others with respect; or failing to demonstrate appropriate teamwork."
- Maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management.
- Requiring employees "to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships" and prohibiting employees from making recordings in the workplace.

William Beaumont Hosp., 363 N.L.R.B. No. 162 (4/13/16). Although the employer proved to the ALJ that it would have terminated nurses for aggressive and disruptive behavior that was unrelated to protected activity, the Board nonetheless found the terminations unlawful due to the overly broad conduct rule which prohibited, among other things, conduct that "impedes harmonious interactions and relationships." The Board majority also found it violated a rule which prohibited "negative or disparaging comments" and "behavior that is counter to promoting team work." The Board decision relies upon *Lutheran Heritage Village-Livonia*, 343 NLRB No. 646 (2004), in which the Board held that an employer violates section 8(a)(1) if it maintains a work rule that employees could reasonably understand to prohibit protected activity.

Columbia Univ., 364 N.L.R.B. No. 90 (8/23/16). The Board overruled its decision in *Brown University* and held that student assistants are covered by the NLRA. The Board explained that it has the statutory authority to treat student assistants as statutory employees where they perform work, at the direction of the university, for which they are compensated. The university argued that applying the NLRA to student assistants would infringe upon First Amendment Academic Freedom. The Board disagreed explaining that unionizing grad students would not control or direct the *content* of the speech, which is protected by the First Amendment. The Board ultimately held that "student assistants who have a common-law employment relationship with their university are statutory employees under the Act."

The decision did not provide much guidance on how to determine whether a student is "compensated." Footnote 100 gives some guidance, explaining that "where an educational institution compensates student assistants for performing services that benefit the institution . . . such compensation encourages the student to do the work for ***more than*** educational benefits and thereby establishes an employment as well as an educational relationship" (emphasis added). However, in footnote 56 of the opinion, the Board specifically declined to decide whether this relationship would extend to student athletes.

CHAPTER 6. OREGON STATE CASES

Section A. Employee Classification

Portland Public Symphony v. Employment Department, 284 Or App 256 (3/8/17). The Oregon Court of Appeals reversed a previous ruling of the employment department finding that, because the musicians at issue made significant investments in their instruments, they were properly classified as independent contractors and did not owe payroll taxes. Under Oregon law, compensation paid to independent contractors is not subject to payroll tax. The inquiry focuses on a number of factors set out on ORS 670.600. Here, the Court of Appeals held that because all but the musicians owned their own instruments, did not perform in the symphony full time, and had the authority to hire and fire, that they were independent contractors for payroll tax purposes. The court held that it was not necessary for each performer to present independent evidence as they were all similarly situated to the two representative members.

Swift Couriers, Inc. v. Emp't Dept., 283 Or. App. 234 (12/29/16). Consistent with its prior decisions, the Court of Appeals has ruled that tax assessments by the Employment Department may be levied since the employer failed to show that the particular person in question was not an independent contractor. Although the employee was shown to be free from direction and control within the meaning of ORS 670.600(2)(a), the employer failed to demonstrate that the employee was customarily engaged in an independently established business under section (2)(b) of that same section. The court also held that, while the ALJ had ruled for the employer on the first issue of direction and control, the facts did not permit the legal conclusion that the employee was free from control as to the means and manner of providing services.

Section B. Workers' Compensation

Greenblatt v. Symantec Corporation, 287 Ore. App. 506 (8/30/17). The Oregon Court of Appeals affirmed that slapping the backboard of a basketball hoop on employee premises is not a proper basis for a worker's comp claim. Oregon law excludes from the definition of compensable injuries an injury incurred while engaging in a recreational or social activity primarily for the worker's pleasure. Plaintiff testified after he was injured that he jumped up and slapped the backboard because he was "pleased with his good day at work." In affirming the order of the Worker's Compensation Board, the Court of Appeals held that the employee was engaged in the activity primarily for his own pleasure. As such, his workers comp claim was barred.

Goings v. Calportland Co., 280 Or. App. 395 (8/31/16). ORS 656.018 provides that the workers' compensation system within the State of Oregon is the exclusive remedy for employees suffering injuries on the job. Section (3)(a), however, provides an exception for "willful and unprovoked aggression" that is a substantial factor in the injury. In the *Goings* case, a particular supervisor had been aware of Mr. Goings' injury and allegedly assigned him to perform work that same afternoon, knowing that the possibility of injury was great. The Court of Appeals allowed his claim to proceed against the supervisor under section (3)(a).

Section C. Procedure

Figueroa v. BNSF Railway Company, 361 Or. 142 (D. Or. 3/2/17). Oregon requires foreign corporations doing business in Oregon to appoint a registered agent for the receipt of service of process. However, when the action filed related to injuries which occurred in Washington, the mere appointment of a registered agent did not constitute implied consent to Oregon of claims not connected to a defendant's activities within Oregon.

Loczi v. Daimler Trucks N. Am., No. 14CV15265 (Mult. Cty. Or. (6/16/16). A jury awarded $1.2 million to a 57-year-old former engineer for alleged age discrimination. Daimler was not permitted to defend itself against the employee's claim because the judge found bad faith in its failure to provide discovery requested by the plaintiff's attorneys. On multiple days of trial, Daimler's attorneys produced boxes of discovery that the court determined to have been previously requested and highly relevant to the claims. The judge took the extraordinary step of sanctioning Daimler with a default judgment on the issue of liability. As the world of electronic information grows in diversity and complexity, where most employees have multiple devices and some use their devices for both business and personal uses, this case highlights the importance of carefully coordinating thorough discovery efforts to comply with the rules of civil procedure and avoid disastrous consequences.

Lacasse v. Owen, 278 Or. App. 24 (5/4/16). A declaration that counsel has retained an unnamed expert may create an issue of fact on the issue of causation. The plaintiff alleged his termination was motivated by his involvement in a complaint of sexual harassment occurring at a different company whose ownership interests were intertwined with the employer's. The defendant prevailed on summary judgment by arguing that the plaintiff had no evidence that his termination was motivated by improper motives as opposed to poor work performance. The Court of Appeals reversed and remanded, reasoning that the trial court did not give due consideration to an expert declaration from plaintiff's counsel that he had retained an unnamed qualified expert to testify to admissible facts or opinions, creating a question of fact. As an issue related to whether the employer had fabricated computer files to create a false pretext, the court believed a computer expert could raise an issue of fact for the jury.

Tri-Cty. Metro. Transp. Dist. of Or. v. Amalgamated Transit Union Local 757, 276 Or. App. 513 (2/18/16) *rev granted* 360 Or 750 (1/13/17). As a matter of law, bargaining sessions between TriMet's negotiating team and the union are not "meetings" for purposes of Oregon's Public Meeting Law (ORS 192.690 *et seq.*), but public meeting laws may still apply because TriMet is a governing body with quorum to transact business in the absence of other members. Under those circumstances, the court held that the Public Meeting Law may still apply in certain situations, and the case was remanded to the trial court for further proceedings.

Couch Invs., LLC v. Peverieri, 359 Or 125 (4/21/16). Failing to request a special finding of fact at the trial court level pursuant to ORCP 62A can result in waiving specific issues on appeal for failure to preserve. Here, a landlord tried to evict a tenant leasing his gas station property for failing to comply with DEQ regulations. The parties arbitrated responsibility for compliance with DEQ regulations under a lease and disagreed about whether assessing damages was within the scope of arbitration. The trial court affirmed the Arbitrator's authority and the Oregon Supreme Court

affirmed that the specific findings of fact had not been preserved pursuant to ORCP 62A, holding that even if there was factual ambiguity, it had been resolved at the trial court level and not properly preserved for appeal.

Section D. Discrimination

Reynaga v. Roseburg Forest Prods., 847 F.3d 678 (9th Cir. 1/26/2017). A father and son were allegedly the only persons of Mexican decent employed as millwrights at one of the defendant's mills. Contending that the lead millwright made racially disparaging comments, they filed an internal complaint and the company remedied the situation by moving the alleged harasser and the two complaining employees to different shifts. However, the movement was not permanent since shortly thereafter they ended up on the same shift and the two complaining employees went home. A few days later, the same event occurred and the employees went home again and were terminated by the employer. Reversing summary judgment of the district court, the Court of Appeals found that the lead millwright's conduct was sufficiently severe to create a hostile work environment, the employer knew of the conduct as a result of a complaint, and the employer failed to take corrective remedial action since an initial separation was not followed by the person handling schedules. The court also found that there was a genuine dispute as to the employer's discriminatory intent.

Medina v. State, 278 Or. App. 579 (6/2/16). A plaintiff's increasingly frequent discipline after complaining about racial discrimination in the Oregon Department of Fish and Wildlife's promotional process raised a sufficient issue of material fact to preclude summary judgment on the plaintiff's discrimination and retaliation claims. The Plaintiff was passed up for several promotions and complained that the process was discriminatory. Following that complaint, the plaintiff was disciplined six times in two years, allegedly for conduct that similarly-situated Caucasian employees were not disciplined for. The court held that evidence was sufficient pretext to overcome the employer's otherwise lawful explanation for the plaintiff's discipline history and termination.

La Manna v. City of Cornelius, 276 Or. App. 149 (1/27/16). The court held that the job applicant, who is gay, may pursue age and sexual orientation discrimination claims against a police department after his longtime friend, the chief of police, asked him to withdraw his application under the alleged false pre-text to avoid the appearance of favoritism. During his interview, comments were made that at 50 years old, the applicant was "getting too old for foot chases." After passing several tests and an interview, the applicant withdrew his candidacy at the request of the police chief who told him that based on their friendship, it would look like favoritism if he was hired. Later the applicant learned the department had a policy that required officers be hired on the basis of merit, without reference to personal friendships. In addition, the chief had previously hired four friends, all of whom were heterosexual. The court held that there were sufficient issues of material fact for the jury presented in the applicant's evidence of unlawful age and sexual orientation discrimination, including the interview comments and comparator officers that had been hired. The court also remanded the applicant's First Amendment freedom-of-association claim based on his allegation that he had been discriminated against for having a friendship with the chief.

Miller v. UPS, Inc., 149 F. Supp. 3d 1262 (D. Or. 1/22/16). In denying summary judgment for the employer, the court distinguished essential job duties, which cannot be reasonably accommodated from job "qualification standards," which can be accommodated. The employee sued UPS for taking more than a year to accommodate his deep vein thrombosis and blood clot issues that prevented him from standing and walking for long periods of time. In its analysis, the court clarified that job qualification standards are an employer's core requirements for a job, but noted that those standards are not necessarily the same as essential job duties and, as such, may need to be accommodated under the ADA when the employer can reasonably do so. UPS claimed that standing and walking were essential job duties, but the court disagreed noting that an employee could complete those duties through other means, such as using a motorized wheelchair or taking frequent breaks to rest.

Hernandez-Nolt v. Washington Cty., 283 Or. App. 633 (02/08/2017). The Oregon Court of Appeals affirmed a directed verdict against the plaintiff in a wrongful discharge claim holding that the plaintiff failed to present evidence she had been constructively discharged, as her only evidence of an alleged intolerable work environment were subjective concerns. The court observed that, to support a constructive discharge claim, the challenged working conditions must be objectively intolerable. In this case, the plaintiff presented no evidence about her working conditions or any act or statement that could have created an objectively intolerable working condition justifying her constructive discharge claim.

Section E. Wage & Hour

Migis v. AutoZone, 282 Or. App. 774 (12/14/16). Oregon's assessment of penalties for unpaid wages (pursuant to ORS §653.055) upon termination requires willfulness, and courts must give weight to that assessment in their decisions. In *Migis,* the lower court had failed to consider whether the employer's failure to pay employee wages upon termination was willful, but still imposed civil penalty wages against the employer. The court clarified that penalty wages are not to be awarded as a matter of strict liability, but rather there must be analysis of the totality of the statute. Based on counterpart wage and hour laws regarding an award of "liquidated damage," the employer should be presented with an opportunity to make an argument that it paid its employees the amount it believed was owed in good faith. Such a showing can be made by demonstrating that the employer consulted with counsel and revised its practices to comply with advice of counsel. Good faith is also more likely to be found when the issue before the court is novel or lacks clear prior precedent. Mere lack of knowledge of wage and hour laws is not sufficient to avoid the willfulness element of the statute, as that would incentivize employers to simply remain "blissfully unaware" of the requirements of the FLSA and other wage and hour statutes. *See, Perez v. Mountaire Farms,* 650 F.3d 350, 376 (2011).

Section F. Whistleblower

Brunozzi v. Cable Communs., Inc., 851 F.3d 990 (9th Cir. 3/21/17). Applying Oregon's whistleblower statute, the Ninth Circuit held that private employees were protected from retaliation for making internal reports of possible violations of law. This is the first case to hold that internal verbal complaints by an employee are protected activity under ORS 659A.199. The case involved a cable installation technician that verbally complained to his immediate supervisor that he

believed the company's overtime formula was improper. He was terminated two days after making the complaint. The statutory language was unclear whether internal complaints were entitled to protection, but the court reasoned that, based on the intent of the statute and public policy, whistleblowers were intended to have protection for all good faith reporting of violations of law, either internal or external.

Section G. Pay & Promotion "Systems"

Multnomah Cty. Sheriff's Office v. Edwards, 361 Or 761 (8/10/17). The Oregon Supreme Court affirmed a BOLI decision that Multnomah County failed to comply with the State's Veterans' Preference in Public Employment law by failing to have an established system for providing veterans with a preference in promotions. The Court held that when the law requires a system for promotions or pay preference, that employer must have a clear, written policy in place for compliance. This veteran preference law and its application by the court may provide some insight into how the new pay equity law, which requires that employers create systems to justify pay discrepancies between employees in different protected classes performing the same work.

CHAPTER 7. WASHINGTON STATE CASES

Martin v. Gonzaga Univ., Case No. 34103-8-III, 2017 Wash. App. LEXIS 2094 (9/7/17). In affirming summary judgment, the Court held that an element of a state common law wrongful discharge claim includes an element that the employer did not have an "overriding justification for the dismissal." The employee, a school gym teacher had been promoting funding for padding in the school gym to reduce injuries, but also promoting expanding revenue from the school pool program. After several insubordinate occurrences, the employer ultimately terminated the employee. The Court held that, though there was a factual issue as to whether his termination resulted from his complaint relating to a matter of public concern (school safety) the school had an overriding justification in deterring outrageous behavior and insubordination among its employees. The Court's emphasis and discussion of this element raises the bar for plaintiff's wishing to allege a common law wrongful discharge claim in Washington, in that there must not be some other reason that could have entirely justified the terminated on its own basis.

RECENT DEVELOPMENTS IN PUBLIC SAFETY PERSONNEL ISSUES

By Will Aitchison

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1. HEALTH CARE REFORM

1.1. **Health Care Reform.** Health care reform was produced by the combination of the Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act. Supreme Court upheld constitutionality of PPACA in June, 2012. *National Federation of Independent Business v. Sibelius*, 132 S. Ct. 2566. In *King v. Burwell*, No. 14-114 (2015), the Supreme Court upheld tax credits for the 36 states that have not set up state health care exchanges.

1.2. Beginning January 1, 2020, A 40% excise tax on high cost employer-provided plans is imposed. The first $27,500 of a family plan and $10,200 for individual coverage is exempt from the tax. Higher levels, $30,950 and $11,850) are set for plans covering retirees and people in high risk professions. Employer and employee premiums are included in the calculation of the value of plans.

1.3. On February 23, 2015, the IRS issued an initial "Guidance" on the Cadillac Tax, requesting comments on how the law should be applied. http://www.irs.gov/pub/irs-drop/n-15-16.pdf The Guidance specifically asks for comments on "how an employer determines whether the majority of employees covered by a plan are engaged in a high-risk profession and what the term "plan" means in that context and how an employer determines that an employee was engaged in a high-risk profession for at least 20 years. Comments are also requested on whether further guidance on the definition of "employees engaged in a high risk profession" would be beneficial, taking into consideration that various categories set forth in § 4980I(f)(3) are determined by laws not under the jurisdiction of Treasury or IRS."

2. THE GENETIC INFORMATION NON-DISCRIMINATION ACT.

2.1. **Genetic Information Nondiscrimination Act.** GINA prohibits employers from collecting genetic information or using it in hiring, firing, pay or promotion decisions. The Act bars health insurers from rejecting coverage or raising premiums for healthy people based on personal or familial genetic predisposition to develop a particular disease such as cancer, diabetes, heart ailments or others, and forbids health insurers from requiring a genetic test.

2.2. **What Is Genetic Information?** Under the EEOC's rules, genetic information is defined as as: (1) genetic tests; (2) genetic tests of family members; (3) family medical history; (4) an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or family member; or (5) genetic information of a fetus carried by an individual or by an pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual using an assisted reproductive technology. 29 CFR §1635.3 (c).

2.3. GINA itself defines "genetic information" as including "the manifestation of a disease or disorder in family members of such individual." The terms "disease" and "disorder" are not defined in the statute. *Question*: Would conditions such as obesity be considered a disorder?

2.4. **The Distinction Between Physical Examinations and Genetic Tests.** GINA only applies to genetic information, not "personal health information" such

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as blood pressure, vision, etc. *Fuentes v. City of San Antonio Fire Department*, 240 F. Supp. 3d 634 (W.D. Tex. 2017).

2.5. **Family Medical History.** *Lee v. City of Moraine Fire Department*, 2015 WL 914440 (S.D. Ohio 2015). Employer violated GINA when doctor with whom it contracted to conduct firefighter fitness examinations asked questions about family medical history. *See EEOC v. Grisham Farm Products, Inc,* 191 F. Supp. 3d 994 (W.D. Mo. 2016)(pre-employment 43-question health history form violates both GINA and ADA).

2.6. In a lawsuit resulting in a $50,000 settlement reached with Fabricut, Inc. on May 7, 2013, the EEOC took the position that the employer violated GINA when it asked for an applicant's family medical history during a post-job-offer medical examination. In a lawsuit resulting in a $259,600 settlement with Founders Pavilion, Inc. on January 9, 2014, the EEOC took the position that the employer violated GINA by routinely asking applicants about their family medical history. No. 13-CV-6250 (W.D.N.Y. 2014).

2.7. **The "Crime Lab" Exemption.** What does Section § 2000ff-1(b)(6) of GINA mean? "It shall be an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or a family member of the employee except- - (6) where the employer conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification, and requests or requires genetic information of such employer's employees, but only to the extent that such genetic information is used for analysis of DNA identification markers for quality control to detect sample."

2.8. **What About Wellness Plans?** An exception to GINA exists applies when an employee voluntarily accepts health or genetic services offered by an employer, provided that "individually identifiable genetic information is provided only to the individual (or family member if the family member is receiving genetic services) and the licensed health care professionals or board certified genetic counselors involved in providing such services, and is not accessible to managers, supervisors, or others who make employment decisions, or to anyone else in the workplace."

3. THE AMERICANS WITH DISABILITIES ACT

3.1. *Barnett v. U.S. Air*, 535 U.S. 391 (2002). Under the ADA, a showing of violation of rules of seniority system ordinarily is, by itself, sufficient to show that an accommodation requested by an otherwise qualified individual is not reasonable. The types of cases in which a seniority system could be overcome might include instances where the employer has and routinely exercises the unilateral ability to alter the seniority system, or where the seniority system already has many exceptions.

3.2. *Transport Workers Union of America v. New York City Transit Authority*, 341 F. Supp. 2d 432 (S.D. N.Y. 2004). Under the ADA, employer not allowed to inquire as to why most employees are using sick leave. Limited exceptions exist for employees on a sick leave "control" list who use high levels of sick leave or have suspicious patterns of sick leave use, and for those employees such as bus drivers who might pose significant safety concerns if sick at work. *See Fountain v. New York State Department of Correctional Services*, 2005 WL

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1502146 (N.D. N.Y. 2005)(rule that required doctor slips for all absences greater than three days in length violated ADA. Court *rejected* the following arguments that a business necessity justified the rule: (1) That the rule identified whether officers were fit to perform their duties; and (2) That the rule allowed it to guard against the spread of infectious diseases in correctional facilities. Court found that while these might be legitimate business reasons, the scope of the rule was too broad). *See also Conroy v. N.Y. State Dep't of Corr. Servs.,* 333 F. 3d 88 (2d Cir. 2003)(same); *Ward v. Merck & Co.,* 226 Fed. Appx. 131 (3d Cir. 2007)(same); *Town of Dracut*, ARB 08-2008 (Mass. Div. L. Rel. 2009)(same, interpreting contract clause incorporating the provisions of the ADA).

3.3. In a widely-cited case, *EEOC v. Dillard's, Inc*., 2012 WL 440887 (S.D. Cal. 2012), a court held:

3.4. "Dillard's argues that its Policy simply required a 'general diagnosis' and no detail which would tend to disclose an underlying disability. However, the EEOC has submitted evidence demonstrating that if an employee submitted a physician's note stating her absence from work was necessary because of an underlying medical condition, but failed to specify the underlying medical condition, such absence would not be excused under Dillard's Attendance Policy. Dillard's could have required its employees to submit a doctor's note specifying the date on which the employee was seen, stating that the absence from work was medically necessary, and stating the date on which such employee would be able to return to work. Dillard's Policy, however, required the employee to submit a doctor's note disclosing the underlying condition for which she was treated. Such Policy invites intrusive questioning into the employee's medical condition, and tends to elicit information regarding an actual or perceived disability." **Note: The Court's decision later led to a $2.0 million settlement.**

3.5. An earlier case involving the Pennsylvania State Police held "[Prior cases] set forth the parameters of the business necessity defense when applied to employers such as a department of corrections and the Pennsylvania State Police, which serve law enforcement and public safety functions and whose employees must be prepared to respond definitively to unexpected emergencies. First, the employer must demonstrate that the medical inquiry at issue is vital to the employers' business and is narrowly formulated to prevent unnecessary intrusion into employees' medical information. The ADA forbids overbroad inquiries or those supported by mere convenience. Second, the employer must show that the medical inquiry serves the asserted business necessity *when* the employer chooses to make the inquiry. An employer may implement a broad inquiry after several weeks' leave if the length of absence gives the employer a reasonable basis to question the employee's ability to perform his or her job duties. A broad inquiry, however, is inappropriate at the outset of illness when the employer has little reason to doubt the employee's fitness. Finally, the employer must demonstrate that it has applied the inquiry to a class of employees whose job duties could be impaired by the illnesses it requires employees to report." *Pennsylvania State Troopers Ass'n v. Miller*, 621 F. Supp. 2d 246 (M.D. Pa. 2008).

3.6. The Sixth Circuit takes a different view. In *Lee v. City of Columbus, Ohio*, 636 F. 3d 245 (6th Cir. 2011), the Court held, "We do not find the requirement

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that an employee provide a general diagnosis – or in this case, an even less specific statement regarding the nature of an employee's illness – to be tantamount to an inquiry as to whether such employee is an individual with a disability or as to the nature or severity of the disability under the ADA."

3.7. The EEOC's position poses any number of questions: "An employer is entitled to know why an employee is requesting sick leave. An employer, therefore, may ask an employee to provide a doctor's note or other explanation, as long as it has a policy or practice of requiring all employees to do so." http://www.eeoc.gov/policy/docs/qanda-inquiries.html In May 2016, the EEOC reiterated that "Employers are entitled to have policies that require all employees to provide a doctor's note or other documentation to substantiate the need for leave." However, the EEOC did not indicate whether it would be permissible for an employer to require doctors' notes with diagnostic information. https://www1.eeoc.gov//eeoc/publications/ada-leave.cfm?renderforprint=1

3.8. **Fitness for Duty Evaluations.** *Brownfield v. City of Yakima*, 612 F. 3d 1140 (9th Cir. 2010). Where an employer has "an objective, legitimate basis to doubt an individual's ability to perform the duties of a police officer, it can order a fitness for duty evaluation without violating the ADA. Police officers are likely to encounter extremely stressful and dangerous situations during the course of their work. When a police department has good reason to doubt an officer's ability to respond to these situations in an appropriate manner, a fitness for duty evaluation is consistent with the ADA. Reasonable cause to question Brownfield's ability to serve as a police officer was present here." *Flanary v. Baltimore County*, 2017 WL 1953870 (D. Md. 2017)(police departments have "somewhat greater leeway" to order fitness-for-duty evaluations if they have good reason to doubt an officer's ability to respond appropriately to "extremely stressful and dangerous situations."

3.9. *Franklin v. City of Slidell,* 936 F. Supp. 2d 691 (E.D. La. 2013). As a general proposition, a medical fitness for duty examination is permissible when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties. Courts have established a high standard to satisfy the business necessity exception to guard against employers using medical exams as a pretext to harass employees or to fish for non-work-related medical issues and the attendant unwanted exposure of the employee's disability and the stigma it may carry. Courts have found that the business necessity exception applies if the employer shows that before it required the fitness for duty examination, health problems had a substantial and injurious impact on an employee's job performance, or it reasonably perceived an officer to be even mildly paranoid, hostile, or oppositional. The Court finds, contrary to the City's contentions, that the fact that an employee was a police officer returning to work from sick leave does not alone constitute a legitimate reason to require a fitness for duty examination. Under that rationale, an employer could lawfully require a police officer returning to active duty from sick leave of any duration for any illness to submit to medical and psychological fitness for duty examinations. Such a rule – even with regard to police officers – would easily lend itself to the kind of employer abuse of medical and psychological examinations that the ADA aims to prevent."

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3.10. *White v. County of Los Angeles*, 170 Cal. Rptr. 3d 472 (Cal. App. 2014). So long as employee provides medical certification from his/her health care provider upon returning from FMLA leave, employer has no right under FMLA to compel employee to submit to second evaluation. The ADA, and not the FMLA, applies to the fitness for duty examination process. If the employer has enough information about the employee's fitness so that an examination would be job related and consistent with business necessity, the employer can order the examination without violating the ADA. The information relied upon by the employer can include pre-FMLA leave behavior by the employee.

3.11. On August 7, 2012, Baltimore County settled an ADA lawsuit brought by the Department of Justice challenging the County's policies with regard to fitness for duty evaluations. The consent decree, which must be approved by the court, requires the county to: pay $475,000 to the complainants and provide additional work-related benefits (including retirement benefits and back pay, plus interest); adopt new policies and procedures regarding the administration of medical examinations and inquiries; refrain from using the services of the medical examiner who conducted the overbroad medical examinations in question; cease the automatic exclusion of job applicants who have insulin-dependent diabetes mellitus; and provide training on the ADA to all current supervisory employees and all employees who participate in making personnel decisions. http://www.justice.gov/opa/pr/2012/August/12-crt-982.html

3.12. **Fitness For Duty Evaluations and Disciplinary Arbitration.** *City of Livingston v. Montana Public Employees Association*, 2014 WL 6680579 (Mont. 2014). Court upholds arbitrator's decision overturning discharge based in large part on fitness-for-duty evaluation. Arbitrator criticized evaluation for (1) being conducted in a public venue; (2) considering materials provided to psychologist by employer without allowing the employee to examine or rebut the materials; and (3) serving as a substitute for progressive discipline.

3.13. **Light-Duty Assignments Under The ADA.** *Adair v. City of Muskogee*, 823 F. 3d 1297 (10th Cir. 2016). "The Department, the City, and the State of Oklahoma have weighed the risks of a firefighter's inability to respond when necessary and decided that fire rescue is an essential function for all firefighters, even for those with specialized roles. We will not second guess their decision."

3.14. *Coles v. Erie County Sheriff's Office*, 2014 WL 5901202 (A.D. 2014). "It is well settled that an employer is neither required to create a new light-duty position to accommodate a disability nor to assign an employee with more than a temporary disability to a position in a light-duty program designed to accommodate only temporary disabilities. The fact that an employer has been lax in enforcing the temporary nature of its light-duty policy does not convert the policy into a permanent one *See Coleman v. Pennsylvania State Police,* 2013 WL 3776928 (W.D. Pa. 2013)(no obligation to create limited duty position, particularly for probationary officer).

3.15. *Shreve v. City of Romulus*, 2017 WL 2500999 (E.D. Mich. 2017). Employer is allowed to establish as a prerequisite to a light-duty position that the employee have completed the field training process.

4. PHYSICAL FITNESS STANDARDS AND GENDER DISCRIMINATION.

4.1. Age/Gender-Graded Tests.

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4.2. *Bauer v. Sessions*, 2017 WL 2311748 (E.D. Va. 2017). “An employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each. Men and women pass the PFT at essentially identical rates, and the normalized pushup quotas impose essentially similar burdens on both sexes.”

4.3. *Easterling v. State of Connecticut*, 783 F. Supp. 2d 323 (D. Conn. 2011)(age and gender-graded tests cannot be upheld under Title VII. “The parties agree that the 1.5-mile run is a test that measures an individual's aerobic capacity. The DOC cannot plausibly argue that a time of 12:25 for 21–29-year-old men is a valid predictor of the aerobic capacity minimally necessary for successful completion of the tasks of a Correction Officer, if the DOC also permitted 21–29-year-old women to complete the 1.5-mile run in 14:49, and 50-year-old women to complete the 1.5-mile run in 17:14. By definition, cutoff times that vary by gender and age cannot represent a measure of the minimum aerobic capacity necessary for successful performance as a Correction Officer. Only a single cutoff time could meet this standard.” In August 2013, State of Connecticut settled *Easterling* lawsuit for $3.0 million.

4.4. **What If The Tests Are Required By State Law?** *Conroy v. City of Philadelphia*, 421 F. Supp. 2d 879 (E.D. Pa. 2006). Simply because an employer is using fitness tests mandated by state law does not insulate the employer from liability if the tests are illegally discriminatory.

4.5. **The Validation of Tests.** *United States v. City of Erie, Pennsylvania*, 411 F. Supp. 2d 524 (E.D. Pa. 2005). City’s physical agility test given to new hires had a pass rate of 71% for men and 13% for women. Court found that there was no proper validation of the push-up and sit-up components to the test, nor a proper validation of the score set as passing (the completion of an obstacle course, 17 push-ups, and 9 sit-ups in 90 seconds). *See Conroy v. City of Philadelphia*, 421 F. Supp. 2d 879 (E.D. Pa. 2006)(police applicant stated a claim against the City for violation of Title VII and § 1983 in connection with an allegedly discriminatory “sit-and-reach” test).

4.6. In September, 2013, City of Chicago paid $2.0 million to settle lawsuit claiming that entry-level firefighter physical tests discriminated against women and were not job related.

5. FAMILY AND MEDICAL LEAVE ACT.

5.1. *Ragsdale v. Wolverine World Wide*, 535 U.S. 81 (2002). Court invalidates Department of Labor regulation disallowing an employer from counting leave as FMLA leave if the employer fails to contemporaneously designate leave as FMLA leave. The DOL regulation was beyond the Department’s authority to adopt as it could result in extending FMLA leave beyond the 12 weeks allowed by the law.

5.2. *Escriba v. Foster Farms Poultry, Inc.*, 743 F.3d 246 (9th Cir. 2014). Employee has the right to refuse to use FMLA leave even if underlying condition qualifies for the FMLA.

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6. PREGNANCY DISCRIMINATION ACT

6.1. **Pregnancy and Light Duty**. *Legg v. Ulster County*, 820 F.3d 67 (2nd Cir. 2016). A light duty policy that mandates light duty for work-related injuries but denies light duty for pregnant employees raises a jury question as to whether the Pregnancy Discrimination Act has been violated. However, the employee must prove that pregnant women are unable to perform full duty, and evidence that other female employees have worked full duty until late in their pregnancies can be dispositive. *Legg v. Ulster County*, 2017 WL 3207754 (N.D.N.Y 2017).

7. FREE SPEECH, ON-DUTY SPEECH

7.1. *Heffernan v. City of Paterson, New Jersey* (April 26, 2016). When a public employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment even if the employer is wrong about whether the employee was actually engaged in the political activity.

7.2. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Assistant district attorney alleged that he was the victim of retaliation because of a memorandum he wrote questioning the truthfulness of a deputy sheriff's affidavit. By a 5-4 margin, the Supreme Court concluded that the First Amendment offers no protections to employees for speech made as part of their job duties. "Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities."

7.3. *Lane v. Franks*, 134 S. Ct. 2369 (2014). *Garcetti* rule limited to speech made as part of the employee's job, not merely speech about the employee's work. Thus, the First Amendment protects truthful testimony given in court by an employee about what occurred during his job.

7.4. Cases decided under *Garcetti*.

7.5. **Speech Made In The Internal Affairs Process**. Young v. Township of Irvington, 2015 WL 6123228 (3rd Cir. 2015). Internal affairs complaint against chief for having affairs with subordinates not protected by First Amendment since filing internal affairs complaints was part of the job.

7.6. *Bradley v. James*, 479 F.3d 536 (8th Cir. 2007). Statements made by a police officer in the internal affairs process were unprotected by the First Amendment. During the interview, the officer reported that his police chief had been intoxicated when responding to a call. In dismissing the officer's lawsuit alleging retaliation for participating in the investigation, the Court found that "as a police officer, the employee had an official responsibility to cooperate with the investigation being conducted into the response to the incident. The officer's allegations of intoxication against the chief were made at no other time during this investigation, and thus his speech was pursuant to his official and professional duties. We cannot find that the officer spoke as a citizen, and thus he has no First Amendment cause of action based on his employer's reaction to the speech."

7.7. *See Pearson v. City of Big Lake, Minn.,* 689 F. Supp. 2d 1163 (D. Minn. 2010)(speech made in mandatory internal affairs interview not protected by First Amendment); *Burns v. Borough of Glassboro*, 2007 WL 1672683 (D. N.J.

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2007)(statements made in internal affairs process unprotected by First Amendment); *Morales v. Jones,* 494 F.3d 590 (7th Cir. 2007)(one officer's speech to another officer regarding alleged misconduct by police chief and deputy chief was made pursuant to the speaking officer's official duties and thus was unprotected under *Garcetti;* another officer's speech to assistant district attorney about the same alleged misconduct by the police chief and deputy chief was also made pursuant to that officer's official duties); *Pottorf v. City of Liberty, Missouri,* 2007 WL 2811098 (W.D. Mo. 2007)(statements made in internal affairs process about an officer's excessive force unprotected by the First Amendment).

7.8. **Cooperation With Criminal Investigation.** *Wilson v. Tregre*, 2014 WL 4539424 (E.D. La. 2014)(chief deputy's report of illegal recording by sheriff within his job duties under Lane, and thus unprotected by First Amendment); *Cheek v. City of Edwardsville, Kansas*, 514 F. Supp. 2d 1220 (D. Kan. 2007)(cooperation by two police majors in criminal investigation by attorney general's office unprotected by First Amendment). *But see Tayoun v. City of Pittston*, 39 F. Supp. 3d 572 (M.D. Pa. 2014)(chief's report to attorney general of mayor's criminal conduct was protected speech because AG was not in chief's chain of command).

7.9. *Watts v. City of Jackson*, 827 F. Supp. 2d 724 (S.D. Miss. 2012). Officer cooperated with FBI investigation into charges that mayor was corrupt. Mayor was eventually indicted by federal grand jury. Officer alleged he was transferred to graveyard shift in retaliation for giving interview to FBI.

7.10. *Sigsworth v. City of Aurora,* 487 F.3d 506 (7th Cir. 2007). Police detective's report to his supervisors that he believed members of his task force broke the law by tipping off suspects regarding arrest warrants and jeopardized the success of the operation was speech made pursuant to official duties. *Williams v. Riley,* 481 F. Supp. 2d 582 (N.D. Miss. 2007)(county police officers did not speak as citizens when they submitted a written report which detailed the beating of a restrained prisoner by a fellow officer).

7.11. **Testimony**. *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008)(since the duty to testify is a basic duty of every citizen, a police officer testifying in court about his role in an investigation is testifying "as a citizen," and is potentially protected by the First Amendment); *Winn v. New Orleans City*, 2014 WL 790870 (E.D. La. 2014)(officer alleged he was fired in retaliation for testifying for the defense in the trial of fellow police officers accused of murder); *Walker v. Town of Hennessey*, 951 F. Supp. 2d 1263 (W.D. Okla. 2013)(officer's proposed testimony on behalf of accused in criminal trial involving shooting of mayor's son constituted citizen speech). *But see Deprado v. City of Miami*, 446 F. Supp. 2d 1344 (S.D. Fla. 2006)(testimony by police officer before grand jury as part of job not protected by the First Amendment).

7.12. Complaints About Misconduct Of Fellow Employees.

7.13. *Callahan v. Fermon,* 526 F. 3d 1040 (7th Cir. 2008)(First Amendment provides no protection to a police officer's report to supervisors of a fellow officer's potential misconduct because the report was made pursuant to his official duty to report wrongdoing).

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7.14. *Platt v. Incorporated Village of Southampton*, 391 Fed. Appx. 62 (2d Cir. 2010)(First Amendment not implicated when officer reported to Village trustee affair between lieutenant and other officer).

7.15. *Gibson v. Kilpatrick*, 734 F. 3d 395 (5th Cir. 2013). Police chief acted pursuant to his official job duties when he reported to outside law enforcement agencies that mayor had misused city gasoline card, and thus his report was not protected by First Amendment

7.16. *Whittenbarger v. Kirby*, 2013 WL 3967142 (N.D. Ga. 2013)(First Amendment not implicated when deputy terminated for reporting the criminal conduct of other deputies).

7.17. *Jones v. District of Columbia*, 879 F. Supp. 2d 69 (D. D.C. 2012)(no free speech protection for filing of reports recounting comments made by a fellow officer demeaning gays and lesbians during an arrest).

7.18. *Hamilton v. Mayor & City Council of Baltimore*, 807 F. Supp. 2d 331 (D. Md. 2011)(complaints about overtime abuse by fellow employees not protected by First Amendment).

7.19. *Carter v. Incorporated Village of Ocean Beach*, 693 F. Supp. 2d 203 (E.D. N.Y. 2010)(First Amendment does not protect complaints about other officers who were drinking on duty).

7.20. *Sillers v. City of Everman, Texas*, 2008 WL 2222236 (N.D. Tex. 2008)(officer who reported illegal conduct of other officers not protected by First Amendment).

7.21. *Baranowski v. Waters*, 2008 WL 728366 (W.D. Pa. 2008)(First Amendment does not protect a police officer's complaints to his supervisors about other officers' potential misconduct in a shooting).

7.22. *Hoover v. County of Broome*, 2008 WL 1777444 (N.D. N.Y. 2008)(corrections officer's report of excessive force of other officers unprotected by First Amendment); *Wesolowski v. Bockelman*, 506 F. Supp. 2d 118 (N.D. N.Y. 2007)(First Amendment does not protect a sheriff's department employee's report that a corrections officer used excessive force on an inmate).

7.23. *Burns v. Borough of Glassboro*, 2007 WL 1672683 (D. N.J. 2007)(First Amendment does not protect a police officer's report to internal affairs that the chief sexually harassed another officer).

7.24. **Complaints About Policies**. *Haynes v. City of Circleville, Ohio*, 474 F.3d 357 (6th Cir. 2007). The First Amendment offers no protections to canine officer allegedly fired in retaliation for writing critical memorandum about cutbacks in canine unit. *See Isaiah v. City of Pine Lawn*, 2014 WL 3928270 (E.D. Mo. 2014)(complaints about police chief's unusual enforcement priorities, including assigning officers to protect out-of-city businesses); *Taylor v. Pawlowski*, 551 Fed. Appx. 31 (3d Cir. 2013)(raising through chain of command protests of quota system part of corporal's job, and thus unprotected); *Matthews v. City of New York,* 957 F. Supp. 2d 442 (S.D. N.Y. 2013)(no First Amendment protection for officer who complained to precinct commanders that City's stop-and-frisk policies were inappropriate); *Roman v. Velleca*, 2012 WL 4445475 (D. Conn. 2012)(no First Amendment protection for major crime scene detective who

criticized department procedures concerning the operation of the unit); *Irons v. City of Bolivar*, 897 F. Supp. 2d 665 (W.D. Tenn. 2012)(no First Amendment protection for police chief who complained to mayor about policies concerning detaining individuals without probable cause).

7.25. **Handling Of Public Funds**. *Mantle v. City of Country Club Hills*, 2008 WL 3853432 (E.D. Mo. 2008). Police Chief's report to judge of theft of public funds by mayor unprotected by First Amendment since reporting theft was part of his job.

7.26. *Gibson v. Kilpatrick*, 773 F.3d 661 (5th Cir. 2014)(no protection for police chief's report to state authorities of mayor's misuse of credit card).

7.27. **Complaints About Safety**. *Cory v. Basehor*, 2015 WL 7003365 (10th Cir. 2015). Officer's safety complaints about the manner in which other officers handled firearms were made in the course of the officer's job, and thus unprotected by the First Amendment.

7.28. *Foraker v. Chaffinch,* 501 F.3d 231 (3d Cir. 2007). Police firearms trainers who reported health and safety concerns about the firing range up the chain of command acted pursuant to job duties, and were unprotected by the First Amendment.

7.29. *Hagen v. City of Eugene,* 736 F.3d 1251 (9th Cir. 2013)(report of negligent discharge of firearms by SWAT Team officers).

7.30. *Brown v. County of Cook*, 661 F.3d 333 (7th Cir. 2011)(complaints that firearms instructors lacked proper certification).

7.31. *Spiegla v. Hull,* 481 F.3d 961 (7th Cir. 2007)(no First Amendment protection for a prison guard's internal reports about security problems because the reports were part of her duties to keep prison facilities secure).

7.32. **Internal Memoranda On Operation Issues**. *Kocher v. Larksville Borough*, 548 Fed. Appx. 813 (3d Cir. 2013)(since officer completed police report as part of his job duties, the First Amendment does not prohibit the employer from terminating him for the report, even if the report is true and accurate).

7.33. **Performance of Job.** *Buehrle v.City of O'Fallon, Mo.*, 695 F.3d 807 (8th Cir. 2012). First Amendment does not prohibit retaliation against sergeant who, pursuant to instructions of mayor, reported results of corruption investigation to City Council).

7.34. **The Scope Of The Job.**

7.35. *Dahlia v. Rodriguez*, 735 F. 3d 1060 (9th Cir. 2013). The scope of a police officer's job is a "practical inquiry" that involves more than simple analysis of a job description: ". Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." Relevant factors include whether the employee communicated the concerns outside of the chain of command, whether the speech is contained in a routine report, and whether the speech contravenes the specific orders from the employee's supervisors.

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7.36. *Nixon v. City of Houston*, 511 F. 3d 494 (5th Cir. 2007). Police officer's comments to media after police pursuit and suspect crash were unprotected under *Garcetti* rule even though the officer was not authorized to speak to the press. "The fact that Nixon's statement was unauthorized by the Department and that speaking to the press was not part of his regular job duties is not dispositive – Nixon's statement was made while he was performing his job, and the fact that he performed his job incorrectly, in an unauthorized manner, or in contravention of the wishes of his superiors does not convert his statement at the accident scene into protected citizen speech."

7.37. *Vose v. Kliment*, 506 F. 3d 565 (7th Cir. 2007)(*Garcetti* applied to repeated complaints by sergeant in drug unit about possible illegal activities of major crimes unit, where complaints were made at three levels of chain of command and to mayor. "While Vose may have gone beyond his ordinary daily job duties in reporting the suspected misconduct outside his unit, it was not beyond his official duty as a sergeant of the narcotics unit to ensure the security and propriety of the narcotics unit's operations.")

7.38. **Union Speech.** *Ellins v. City of Sierra Madre*, 710 F. 3d 1049 (9th Cir. 2013)(Given the inherent institutional conflict of interest between an employer and its employees' union, we conclude that a police officer does not act in furtherance of his public duties when speaking as a representative of the police union); *Fuerst v. Clarke*, 454 F. 3d 770 (7th Cir. 2006)(*Garcetti* does not apply where statements made in deputy sheriff's capacity as union president).

8. OFF-DUTY SPEECH

8.1. *Roe v. City of San Diego,* 543 U.S. 77 (2004). While off duty, an officer sold X-Rated videotapes of himself on eBay, under the user name of Codestud3@aol.com. One of the videos showed him stripping off a police uniform and masturbating. The officer, identified in the court records as "John Roe," also sold custom videos, as well as police equipment, including official uniforms of the San Diego Police Department, and various other items such as men's underwear.

When the Department learned about Roe's activities, it terminated him. The Ninth Circuit held that since Roe's conduct was off-duty, it was within the protections of First Amendment's free speech guarantees.

The Supreme Court unanimously decided otherwise. In the words of the Supreme Court, "Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer. The use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as "in the field of law enforcement," and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute."

8.2. *Dible v. City of Chandler*, 502 F. 3d 1040 (9th Cir. 2007). Maintenance of web page by officer and his wife not protected by First Amendment. Web page allowed users, for a fee, to view sexually explicit videos of Dible and his wife. Web page did not identify Dible as a police officer, though when the Department began investigating the matter, the media featured the story prominently. "Whatever a periplus of the outer limits of public concern might show, it was

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pellucid that Roe's vulgar behavior would be discovered to be outside of those borders."

8.3. *Thaeter v. Palm Beach County*, 449 F. 3d 1342 (11th Cir. 2006). Appearance by off-duty deputies in video on group sex not a matter of public interest. Video did not identify deputies as law enforcement officers.

8.4. *Locurto v. Giuliani*, 447 F. 3d 159 (2d Cir. 2006). Off-duty firefighters had no First Amendment right to participate in a holiday parade that featured mocking racial stereotypes.

9. POLITICAL SPEECH

9.1. *Lodge No. 5 of the Fraternal Order of Police v. City of Philadelphia*, 763 F. 3d 358 (3d Cir. 2014). Ban on police contributions to political action committees violates First Amendment, particularly where (1) ban only applied to police officers, and not other City workers; and (2) there was no showing that the 53-year-old ban actually had any impact on political corruption and patronage.

10. SOCIAL MEDIA ISSUES

10.1. *City of Newark*, #CO-2016-045 (N.J. PERC 2015). New policy regulating private use of social media negotiable because of impacts on employees' off-duty lives.

10.2. *Bland v. Roberts*, 730 F. 3d 368 (4th Cir. 2013). Merely "liking" a Facebook page amounts to speech protected by First Amendment.

10.3. *Three D, LLC (Triple Play)*, 361 NLRB No. 31 (2014). NLRB overturns (1) discharge of employee who commented on former employee's Facebook post complaining of employer's improper tax deductions; and (2) discharge of another employee who merely "liked" former employee's comment. Activities were protected under Section 7 of the NRLA because the discussion related to terms of employment and was intended for employees' mutual aid and benefit.

11. UNION DUES/MEMBERSHIP

11.1. A Supreme Court divided 4-4 on the issue of the constitutionality of fair share in *Friedrichs et al, v. California Teachers Association, et al*, 136 S. Ct. 1083 (2016). The result was the upholding of a lower court opinion reaffirming the constitutionality of fair share.

11.2. *Harris v. Quinn,* 134 S. Ct. 48 (2014). Court does not accept request to hold all fair share payments violative of First Amendment rights of non-members. Instead the Court found that home health care workers nominally employed by the State of Illinois could not be forced to make fair share payments where they were hired and fired by their patients (and not the State), did not receive State benefits such as health insurance or pensions, had their job duties set by patients, were supervised by patients, and their union could not bargain over wages.

11.3. *Ysursa v. Pocatello Education Association,* 555 U.S. 353 (2009). The First Amendment prohibits government from "abridging the freedom of speech"; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression. The question is whether the State

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must affirmatively assist political speech by allowing public employers to administer payroll deductions for political activities. The answer is no."

11.4. *Wisconsin Educ. Ass'n Council v. Walker*, 705 F. 3d 640 (7th Cir. 2013). Wisconsin's virtual elimination of collective bargaining rights for general employees does not violate Constitution, nor do provisions eliminating dues deduction for general unions but retaining deductions for public safety unions, and requiring annual recertification for general unions but not for public safety unions. "Wisconsin could rationally believe that Act 10's passage would result in widespread labor unrest, but also conclude that the state could not withstand that unrest with respect to public safety employees."

11.5. *Montero v. Police Association of the City of Yonkers, NY*, 224 F. Supp. 3d 257 (N.Y. Sup. 2014). So long as it follows the procedures laid out in its own bylaws, a labor organization has the right to expel an employee from membership. Member provided confidential union emails to media, and punched another union member at a union meeting. Consequences of expulsion included barring from union meetings and participation in union elections.

12. TATTOO POLICIES.

12.1. **Tattoos and the Constitution.** *Inturri v. City of Hartford*, 165 Fed. Appx. 66 (2d Cir. 2006)(no constitutional violation when police department ordered officers to cover spider web tattoos. Because there was no fundamental liberty interest in personal appearance in the context of public employment, only rational basis scrutiny, rather than a heightened scrutiny standard, would apply to determine whether order violated officers' right to equal protection. Rational basis existed because tattoos could reasonably have been perceived as racist symbols).

12.2. **Tattoos and Bargaining.** A change in existing practices concerning tattoos is a mandatory subject of bargaining, requiring the employer to negotiate through the relevant impasse procedure. *Fraternal Order of Police Chicago Lodge #7*, No. 129-15-007 (Zimmerman, 2016).; *Fraternal Order of Police and Anne Arundel County*, Case No. 08-51355 (Simmeljkaer, 2008); *FOP Lodge No. 123 and City of Oklahoma City*, No. 06-552-02 (2006); *Laurel Baye Healthcare of Lake Lanier*, 352 NLRB No. 30 (NLRB 2008); *Department of Homeland Security*, 62 FLRA 267 (2007). However, a rule requiring undercover officers to obtain approval before obtaining a visible tattoo was not negotiable. *Pennsylvania Liquor Enforcement Association*, Case No. PERA-C-09-1-E (Pa. LRB ALJ 2010).

13. EQUIPMENT, CELL PHONES, AND PRIVACY RIGHTS.

13.1. **Employer-Owned Equipment.** *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). A governmental body does not engage in an unreasonable search when it reviews text messages sent through the employer's pagers, when it has the business purpose of determining the purposes for which the messages were sent. Law enforcement officers should anticipate that on-duty text messages would be subject to later disclosure either under a public records law or through criminal or civil discovery.

13.2. **Employee Cell Phones.** *Riley v. California*, 134 S. Ct. 2473 (2014). Cell phones are unlike other forms of property for purposes of searches incident to

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an arrest, and the search of a cell phone will almost always require probable cause and a warrant.

Larios v. Lunardi, 2016 WL 6679874 (E.D. Cal. 2016). Employee had privacy interest in personal cell phone, and sufficiently stated claim for violation of Fourth Amendment where employer searched phone without warrant and probable cause. In addition, employer failed to show that search of phone was confined to specific allegations of misconduct against employee.

13.3. **Email.** The personal emails of public employees are not "public records" even if sent or received on government e-mail accounts, and stored on government servers. *Schill v. Wisconsin Rapids School District*, 786 N.W. 2d 177 (Wis. 2010). To the same effect are *Griffis v. Pinal County*, 156 P. 3d 418 (Ariz. 2007); *Pulaski County v. Ark. Democrat-Gazette*, Inc., 260 S.W. 3d 718 (Ark. 2007); *Denver Publ'g Co. v. Bd. of County Comm'rs*, 121 P. 3d 190 (Colo. 2005); *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003); *Cowles Publ'g Co. v. Kootenai County Bd.*, 159 P. 3d 896 (Idaho 2007); *Howell Education Ass'n v. Howell Bd of Educ.*, 789 N.W. 2d 495 (Mich. Ct. App. 2010); *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't*, 693 N.E. 2d 789 (Ohio 1998); *Brennan v. Giles County Bd. of Ed.*, 2005 WL 1996625 (Tenn. Ct. App. 2005); *Tiberino v. Spokane County*, 13 P. 3d 1104 (Wash. Ct. App. 2000); *Associated Press v. Canterbury*, 688 S.E. 2d 317 (W. Va. 2009).

13.4. However, government correspondence on private email accounts as well as employee use of private cell phones for public business may well create public records and be subject to disclosure. *City of San Jose v. Superior Court*, 2017 WL 818506 (Cal. 2017); *Adkisson v. Paxton*, 459 S.W. 3d 761 (Tex. App. 2015).

13.5. **Who Owns Personnel Files?** *Roberts v. Mentzer*, 382 Fed. Appx 165 (3d Cir. 2010). Police officers claimed a Fourth Amendment violation based on the Department's release of their personnel records to attorneys working on a case in which the officers were going to testify as witnesses. In rejecting the officers' Fourth Amendment claims, the Court explained that the officers failed to provide the court "with any case law indicating that employees have a privacy interest in the personnel files maintained by their employers," and ultimately concluded that the officers lacked a reasonable expectation of privacy in their personnel files. *See also Olivera v. Vizzusi*, 2011 WL 1253887 (E.D. Cal. 2011)(no constitutional violation when police department disclosed an internal affairs report to other law enforcement agencies).

13.6. **Residency Rules.** *Black v. City of Milwaukee*, 2016 WL 3448194 (Wis. 2016). Because of statewide impact of residency rules, state statute prohibiting residency rules for local jurisdictions prevails over contrary city charter provisions. *City of Pittsburgh v. FOP*, 161 A. 3d 160 (Pa. 2017)(residency rule produced by arbitration through collective bargaining process under state law prevails over more restrictive residency rule in city charter).

14. THE FAIR LABOR STANDARDS ACT

14.1. **What's Work?** *Integrity Staffing Solutions, Inc. v. Jesse Busk and Laurie Castro*, 135 S. Ct. 513 (2014). The time spent clearing security for employees of an Amazon.com subcontractor is not compensable work under the Portal-To-

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Portal Act amendments to the FLSA. Employees spent as much as 25 minutes a day on the activity.

14.2. **The Use Of Comp. Time.** *Christensen v. Harris County, Texas*, 529 U.S. 576 (2000). The Court held that the FLSA's compensatory time off provision, § 207(o)(5), "is more properly read as a minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it. As such, the proper inference is that an employer may not, at least in the absence of an agreement, deny an employee's request to use compensatory time for a reason other than that provided in §207(o)(5). The law simply does not prohibit an employer from telling an employee to take the benefits of compensatory time by scheduling time off work with full pay. At bottom, we think the better reading of §207(o)(5) is that it imposes a restriction upon an employer's efforts to prohibit the use of compensatory time when employees request to do so; that provision says nothing about restricting an employer's efforts to require employees to use compensatory time. Because the statute is silent on this issue, Harris County's policy is entirely compatible with §207(o)(5)." In passing, the Supreme Court rejected the Department of Labor's opinion letter that concluded that the forced use of compensatory time off violated the FLSA. The Court seemed to question the practice of issuing opinion letters, noting that "Here, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant a high level of deference. Instead, interpretations contained in formats such as opinion letters are "entitled to respect" but only to the extent that those interpretations have the "power to persuade." As explained above, we find unpersuasive the agency's interpretation of the statute at issue in this case." The Supreme Court's opinion did not address the possibility of overruling *Garcia*, something many employer groups had been advocating.

14.3. The Lower Courts And Use Of Compensatory Time Off.

Houston Police Officers' Association v. City of Houston, 330 F. 3d 298 (5th Cir. 2003)(rejects DOL's opinion, and holds that an employer need not grant an employee's request to use compensatory time off on the particular day the employee requests so long as it does so within a reasonable period after the employee requests its use).

Mortensen v. County of Sacramento, 368 F. 3d 1082 (9th Cir. 2004)(adopts *Houston* rationale).

Beck v. City of Cleveland, 390 F. 3d 912 (6th Cir. 2004)(payment of overtime to a substitute officer in order to honor an officer's request for compensatory time did not alone qualify as unduly disruptive under the FLSA).

DeBraska v. City of Milwaukee, 131 F. Supp. 2d 1032 (E.D. Wis. 2000)(rejects *Aiken* opinion, and holds that an employer may not deny compensatory time off requests on the grounds that no compensatory time "slots" remain open, even if

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it offers the requesting employee another compensatory time off option within one week of the requested date).

Canney v. Town of Brookline, 2000 WL 1612703, 142 Lab. Cas. ¶34,169 (D. Mass. 2000)(the payment of one officer overtime to allow another officer to use compensatory time does not constitute an "undue disruption" justifying denial of the compensatory time off request.

Heitmann v. City of Chicago, 560 F. 3d 642 (7th Cir. 2009). "On Chicago's view, the employee cannot ask for a particular date or time, but only for *some* leave; and if any time off within a reasonable time after the request would cause undue disruption, then the employee must wait longer – must wait, by definition, for an *un*reasonable time. That can't be right. Chicago's view produces an implausible relation between the 'reasonable time' and 'undue disruption' clauses. The regulation makes sense when specifying that the employer must ask whether leave on the date and time requested would produce undue disruption, and only if the answer is yes may the employer defer the leave – and then only for a reasonable time."

On July 28, 2008, the Bush Administration proposed to amend 29 C.F.R. § 553.25(c) and (d) so that employees could no longer designate the date and time for leave. 73 Fed.Reg. 43654, 43660-62, 43668 (July 28, 2008). On August 5, 2011, the Obama Administration withdrew the proposed rule, and reiterated the DOL's prior position on comp time.

14.4. **The "Agreement" Necessary To Use Comp Time.** Under Section 7(o) of the FLSA, an agreement between a labor union and the employer is necessary before comp time can be used as a substitute for cash compensation for overtime for employees represented by a union. The necessary agreement cannot be produced by interest arbitration. *Muttontown Police Benevolent Association*, 49 PERB ¶ 4520 (N.Y. PERB ALJ 2016).

14.5. **Who's Exempt Under The FLSA?** New regulations, published on May 18, 2016 and intended to be effective on December 1, 2016, would have brought about four major changes. However, on November 22, 2016, a federal court judge in Texas granted a preliminary injunction barring the implementation of the regulations on the theory that the DOL has no authority to set a "salary test". *Nevada v. Department of Labor,* 227 F. Supp. 3d 696 (2017). The regulations would have done the following:

1. The salary threshold for the "professional, executive, and administrative" overtime exemptions would have risen from $23,660 per year to $47,476 a year effective. Standard would be set at the 40th percentile of earnings of full-time salaried employees in the lowest "wage Census region" (the South).

2. The highly-compensated employee threshold would have increased from $100,000 annually to $134,004, the 90th percentile of worker income.

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3. The exemption salary thresholds would increase every three years rather than remain unchanged for long periods of time, and would be set according to the listed percentiles

4. For the first time, employers would be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Such payments might include, for example, nondiscretionary incentive bonuses tied to productivity and profitability.

14.6. **The "First Responder Regulation."** *Mullins v. City of New York*, 653 F. 3d 104 (2d Cir. 2011). A case in which the question was whether sergeants are exempt from overtime, court defers to the Department of Labor's "First Responder Regulation." Under the regulation, if mid-level supervisors the executive exemption does not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

14.7. *Morrison v. County of Fairfax*, 826 F. 3d 758 (4th Cir. 2016). Follows *Mullins* and concludes that fire captains are not exempt as executive or administrative employees under the FLSA.

14.8. **Shift Trades.** *Senger v. City of Aberdeen, South Dakota*, 466 F. 3d 670 (8th Cir. 2006). When Firefighter #1 agrees to work a shift for Firefighter #2, the hours worked count as if they were worked by Firefighter #2, even if that means, because of Firefighter #2's other work hours, Firefighter #2 is compensated at an overtime rate.

14.9. **Gap Time.** *Whenry v. Board of Commissioners*, 2015 WL 500914 (W.D. Pa. 2015). Pure 'gap time' is not compensable under the FLSA provided that employees receive at least the minimum wage over the Section 7(k) work period.

14.10. **The FLSA and State Law.** *Rogers v. City of Richmond, Virginia*, 851 F. Supp. 2d 983 (E.D. Va. 2012). The FLSA does not preempt state law that requires more generous treatment for employees. Though the FLSA does not require a police employer using the 14-day work period under Section 207(k) to pay overtime before the employee works 86 hours, state law can require the payment of overtime after 80 hours.

14.11. **Mandatory Counseling Sessions.** *Gibbs v. City of New York*, 87 F. Supp. 3d 482 (S.D. N.Y. 2015). Mandatory alcohol counseling sessions are not compensable "work" under the FLSA in the absence of evidence that employer derived particular benefit from employee's attendance at the counseling.

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14.12. *Sehie v. City of Aurora*, 432 F. 3d 749 (7th Cir. 2005). Dispatcher's mandatory counseling held compensable under FLSA as employer was short-staffed and gained benefit from employee's presence at work.

14.13. **The FLSA and Calculating The Overtime Rate.** *Chavez v. City of Albuquerque*, 630 F. 3d 1300 (10th Cir. 2011). Payments through a *sick-leave* sellback program must be included in the regular rate of pay for purposes of overtime calculations. *See also Acton v. City of Columbia, Mo.,* 436 F. 3d 969 (8th Cir. 2006)(same); *see* 29 C.F.R. § 778.221; Wage & Hour Div. Op. Ltr., 1986 WL 1165429, at *2 (February 24, 1986). *But see Featsent v. City of Youngstown,* 70 F. 3d 900 (6th Cir. 1995). Also, in *Balestrieri v. Menlo Park Fire Protection District*, 800 F.3d 1094 (9th Cir. 2015), the Court ruled that though sick leave could be sold back, as the sick leave would be converted to general leave if not sold back, the sellback payments need not be included in the regular rate of pay.

14.14. *Flores v. City of San Gabriel*, 824 F. 3d 890 (9th Cir. 2016). Cashback payments under flexible benefits plan must be included in the regular rate of pay. *See Callahan v. City of Sanger*, 2015 WL 2455419 (E.D. Cal. 2015). Health insurance cashback and merit pay increases must be included in the overtime rate.

14.15. *Caraballo v. City of Chicago*, 969 F. Supp. 2d 1008 (N.D. Ill. 2013). Fitness pay, education pay, and specialty pay received by paramedics all must be included in the overtime rate.

14.16. *Balisteri v. City of Menlo Park*, 2012 WL 1110011 (N.D. Cal. 2012). Payments through an *annual* leave buyback program need not be included in the regular rate of pay because the payments do not "reward an employee for consistent and as-scheduled attendance and is not analogous to attendance bonuses.

14.17. What to do with the regular rate of pay fraction when employees work more than 40 hours in a week? The DOL suggests that the denominator of the fraction should float upwards with each additional hour worked. 29 C.F.R. § 778.110. Two courts that have recently disagreed on the issue. In *Scott v. City of New York*, 592 F. Supp. 2d 475 (S.D. N.Y. 2008), the Court found that the DOL's approach will result in an ever-decreasing regular rate of pay with each additional hour of overtime worked, producing a result it saw as counterintuitive. *Scott* held that the regular rate calculation must look exclusively at what happens during non-overtime hours. To the contrary, the Court in *Chavez v. City of Albuquerque*, 630 F. 3d 1300 (10th Cir. 2011), upheld the DOL's approach.

14.18. **Payroll Systems.** A defective payroll system that failed to compensate employees for overtime is no defense to an FLSA action. *Souryavong v. Lackawanna County,* 159 F. Supp. 3d 514 (M.D. Pa. 2016). In a case involving Nueces County, New Mexico, the DOL established that the employer routinely altered time sheets to record scheduled rather than actual hours worked. The County was ordered to pay $769,000 and to Implement a bio-metric sign-in system for all county employees to track working hours, train all elected officials, supervisors and HR staff in the FLSA, provide a method for employees to file anonymous complaints, and advise employees of their rights under the FLSA's anti-retaliation provisions.

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14.19. The FLSA and Donning and Doffing.

14.20. *Sandifer v. United States Steel Corp*, 134 S. Ct. 870 (2014). Section 203(o) provides an exception from the FLSA for the time spent changing "clothes" if employees are covered by a collective bargaining agreement and if either the agreement or a pattern and practice does not require compensation for the changing time. "If an employee devotes the vast majority of that time to putting on and off equipment or other non-clothes items, the entire period would not qualify as "time spent in changing clothes" under §203(o), even if some clothes items were also donned and doffed. But if the vast majority of the time is spent in donning and doffing "clothes" as defined here, the entire period qualifies, and the time spent putting on and off other items need not be subtracted. Here, the Seventh Circuit agreed with the District Court's conclusion that the time spent donning and doffing safety glasses and earplugs was minimal. 'Clothes' denotes items that are both designed and used to cover the body and are commonly regarded as articles of dress."

14.21. *Rosano v. Township of Teaneck*, 754 F. 3d 177 (3d Cir. 2014). Since 14 out of 27 items donned and doffed by police officers were clothing and not equipment, court could not say that vast majority of time was spent donning and doffing equipment, and thus none of the time was compensable. Court appears to have simply counted the number of items donned and doffed, and did not calculate the time spent on each item.

14.22. *Balestrieri v. Menlo Park Fire Protection District*, 800 F. 3d 1094 (9th Cir. 2015). No compensation for time spent by visiting firefighters traveling to "home" station to pick up turnouts and other protective gear. "The FLSA says expressly what firefighters are employed to do: they are employed by a fire department of a municipality, have the legal authority and responsibility to engage in fire suppression and are engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk. Loading up turnout gear to report to a shift at a visiting station is two steps removed from that activity, not integral and indispensable" to it."

14.23. *Edwards v. City of New York*, 2011 WL 3837130 (S.D. N.Y. 2011). Corrections officers not entitled to compensation for donning and doffing because their uniforms are analogous to "generic clothing," which under Second Circuit case law is exempt from normal donning and doffing compensation rules.

14.24. *IBP, Inc. v. Alvarez; Tum v. Barber Foods Inc.*, 546 U.S. 21 (2005). The time spent donning and doffing protective clothing and gear in meat and poultry processing plants is compensable work under the FLSA, as is the time spent walking from the dressing site to the employee's work site. The workday is defined as the time between the employee's first "principal" activity (in this case, donning the clothing and gear) and the last "principal" activity (in this case, doffing the clothing and gear).

14.25. *Bamonte v. City of Mesa*, 598 F. 3d 1217 (9th Cir. 2010). Donning and doffing of the police uniform is not compensable work if the employer allows the donning and doffing to occur at home.

14.26. *Perez v. City of New York,* 832 F. 3d 120 (2d Cir. 2016)(whether officers can don and doff at home is only one factor among many in assessing whether

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the work is compensable under the FLSA); *Rogers v. City and County of Denver*, Civil Action No. 07-cv-00541-RPM (D. Colo. 2010)(rejects *Bamonte* and finds donning and doffing compensable).

14.27. **The FLSA and Special Detail Work.** *Clark v. City of Ft. Worth*, 800 F. Supp. 2d 781 (N.D. Tex. 2011). Special detail work performed by police officers at city facilities, but for private licensees, is excluded from compensation under Section 207(p) of the FLSA.

14.28. **The FLSA and Canine Programs.** *Diorio v. Village of Tinley Park*, 2012 WL 2681298 (N.D. Ill. 2012). Time spent by canine officers feeding, grooming, and otherwise maintaining dogs is compensable work under the FLSA. It is permissible to have a reasonable agreement between the employer and the employees (or union) as to how much time is involved in the dog care activity. Whether an agreement is reasonable depends upon a variety of factors, including the amount of time actually spent caring for the dog, whether the rate is fixed or a percentage, what types of discussions were held on the rate, and whether the rate produces compensation below the minimum wage.

14.29. **The FLSA and Corrections Meal Periods.** *Babcock v. Butler County*, 2014 WL 688122 (W.D. Pa. 2014). Even though corrections officers not allowed to leave prison for their meal periods, the time spent during the meal periods was not primarily for the benefit of the employer. “Moreover, the ‘confinement’ of the corrections officers to the prison does not rise to the level of predominantly being of benefit to the employer from a common sense standpoint. By keeping the officers on call, in uniform, and in close proximity to their gear, the County is able to include these corrections officers in their calculation of a safe inmate-to corrections-officers ratio. If a prison riot occurs while some corrections officers are in the midst of their meal periods, the meal-period officers’ ability to dress quickly into riot gear and assist their fellow officers in quelling the riot largely benefits those fellow officers pp – as well as the safety of the meal-period officers. Thus, the Court finds that the ability to respond to an emergency in the quickest fashion possible – by remaining inside the prison during meal breaks – at a minimum, is of equal benefit to the corrections officers and their employer.” Officers were not required to take their meal break in the areas to which they were assigned; nor did they argue that they were required to work from any sort of assigned work stations where their routine paperwork is completed.

14.30. **The FLSA and Off-Duty Smartphone Use.** *Allen v. City of Chicago*, 865 F.3d 936 (7th Cir. 2017).While off-duty job-related Blackberry use is work under the FLSA, officers failed to prove that City knew or reasonably should have known of the work. Several officers who testified did submit time-due slips for BlackBerry work done off-duty and were paid for it, and no officer was ever told they should not seek compensation for the work.

14.31. **The FLSA and Statistics.** *Jiminez v. Allstate Insurance Co.*, 2014 WL 688122 (W.D. Pa. 2014). Case involved claimed off-the-clock work by insurance adjusters. Statistical sampling of class members for liability purposes does not violate due process rights of employer so long as employer allowed to raise individual defenses at damages phase.

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15. THE *MIRANDA* RULE AND THE WORKPLACE

15.1. **Custody For Search and Seizure Purposes.** *Gwynn v. City of Philadelphia*, 719 F. 3d 295 (3d Cir. 2013). Detention of officers in Captain's office pending arrival of internal affairs and preliminary IA investigation. "Characterizing work-related demands as seizures whenever an officer feels compelled to obey them would not further any interest protected by the Fourth Amendment, and it would significantly interfere with the effective management of police forces. To determine whether a police officer has been seized for purposes of the Fourth Amendment, our sister courts of appeals have recognized that the distinction between situations in which the police department issues orders in its capacity as an employer and those in which it acts as the law enforcement arm of the state. An officer is seized if a reasonable person in his position would believe that he were not actually free to disobey the command – that is, if he feared he would be detained if he attempted to leave."

15.2. *PenaDeLa v. State*, 2011 WL 723485 (Tex. App. 2011). Questioning of prison guard in warden's office does not amount to "custody" for *Miranda* purposes. "Although the security measures inside of the prison unit created a unique situation for leaving the building, PenaDeLa was free to terminate the interview and leave the premises at any time. "We find that a reasonable person would not believe his freedom of movement was restrained to the degree associated with a formal arrest."

15.3. *McDonald v. Salazar*, 831 F. Supp. 2d 313 (D.D.C. 2011). "The determination of whether an officer has been seized for the purpose of a criminal or an administrative investigation should focus on the totality of the circumstances, including: (1) the nature of the encounter, its setting, and its preparation; (2) whether the police department followed the applicable collective bargaining agreement's provisions for administrative investigations; and (3) the statements made by the questioning detectives. Here, the nature of the encounter was a "meeting," at which McDonald believed that he would be disciplined. In the absence of any additional allegations, the setting and preparation of the encounter do not support an inference that McDonald believed he would be subject to a criminal investigation. Further, defendant Beck honored McDonald's request for Union representation and summoned a Union representative to the location. Finally, after defendant Beck blocked McDonald from departing at the conclusion of the meeting, Beck's alleged questioning and commands related solely to Beck's suspicions about the tape recorder in McDonald's pocket, and did not concern criminal charges."

16. THE *GARRITY* RULE

16.1. **Can An Employee Be Compelled To Give A Statement?** *Homoky v. Ogden*, 816 F. 3d 448 (7th Cir. 2016). So long as the appropriate immunity is given to the statement and notice of the immunity to the employee, *Garrity* does not prohibit a public employer from ordering an employee to provide a statement with potential criminal implications.

16.2. **When Is An Employee Compelled To Give A Statement?** *Thompson v. State*, 702 S.E. 2d 198 (Ga. 2010). An employee can be considered "compelled" to give a statement even if not explicitly ordered to do so by the employer: "In the absence of a direct threat to Thompson for failing to cooperate, the trial court

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properly focused on Thompson's subjective belief that he could lose his job, and whether that belief was objectively reasonable. The trial court answered these questions affirmatively. That Thompson testified he wanted to tell the detective what happened does not undercut his subjective belief that he would be punished if he did not cooperate. After all, Thompson would have been anxious to tell what happened because he believed that the shooting was justified. Still, he would not have spoken to the detective but for his fear of being punished."

16.3. *People v. Grabowski*, 46 Misc.3d 1218 (N.Y. Sup. 2015). Corrections officer reasonably believed that discharge could result from his failure to answer questions in a field interview. Factors that made the belief reasonable included (1) that investigators never told him he was free to leave; (2) investigators never told him he would face no consequences for failing to answer; (3) one of the questioners was a captain; and (4) that the interview was recorded.

16.4. *United States v. Gosy*, 2017 WL 1963580 (W.D. N.Y. 2017). Voluntary response to "warning letter" not a compelled statement under *Garrity*. *See United States v. Parry*, 2017 WL 1386336 (D. Md. 2017) (employee who was advised that interview was voluntary cannot be heard to contend that she was compelled to participate in the interview).

16.5. *State v. Reps*, #25-CR-14-2971 (D. Minn.. 2015). Indictment dismissed where prosecutor introduced in grand jury proceedings written report from trooper involved in collision where two motorists died. Court finds that trooper could reasonable believe that his report, which he was ordered to give by his commander, was required as a condition of employment.

16.6. **Routine Reports and *Garrity*.** *United States v. Smith*, 821 F. 3d 1293 (11th Cir. 2016). *Garrity* does not stand for the proposition that a statement made in a standard report is coerced whenever an officer faces both the remote possibility of criminal prosecution if he files the report and arguably even speculative possibility of termination if he declines to do so. Rather, the touchstone of the *Garrity* inquiry is whether the defendant's statements were coerced and therefore involuntary.

16.7. ***Garrity* and Huddling.** In *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*, 83 Cal. Rptr. 3d 494 (Cal. Ct. App. 2008), the Court found that neither California's Peace Officer Bill of Rights nor the Constitution restricted an employer from policy precluding deputies who witnessed or were involved in a shooting incident from consulting collectively with lawyers or labor representatives before speaking with homicide or internal affairs investigators.

16.8. ***Garrity* and the Need For a Grant of Immunity.** *Spielbauer v. County of Santa Clara,* 199 P. 3d 1125 (Cal. 2009). A thorough review of the rule in *Garrity v. New Jersey,* 385 U.S. 493 (1967), and its analogue under California law, *Lybarger v. City of Los Angeles,* 221 Cal. Rptr. 529 (1985). First, the Court observed that "many lower federal court cases have held since *Garrity* that the Fifth Amendment does not require a formal, affirmative grant of immunity before a public employee may be dismissed for his or her blanket refusal to answer official questions about performance of the employee's public duties, so long as the employee is not required to surrender the constitutional privilege against the direct or derivative use of his or her statements in a subsequent criminal prosecution." Second, the Court found that the immunity that flows from the

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Garrity rule is self-executing. In other words, whenever a public employee is compelled upon pain of potential job loss to answer questions, the employee's answers and the fruits of the answers are immediately immunized from use in a subsequent criminal prosecution of the employee.

16.9. The Court also made clear that "the employer may discipline, or even dismiss, a public employee for refusing, on grounds of the constitutional privilege, to answer the employer's job-related questions, so long as the employee is not required, as a condition of remaining in the job, to surrender his or her right against criminal use of the statements thus obtained – at least where, as here, the employee is specifically advised that he or she retains that right." NOTE: Though the California Supreme Court ducked the issue in a footnote, the clear implication of its opinion is that a public employer must warn employees that a refusal to answer questions will subject them to disciplinary action up to and including termination, and must advise the employees that their statements and the fruits of their statements will not be used against them in a subsequent criminal proceeding.

16.10. ***Garrity* and *Miranda*.** *United States v. Smith*, 821 F. 3d 1293 (11th Cir. 2016). The giving of *Miranda* warnings is a strong indicator that an employee cannot reasonably believe that his/her answers to questions were compelled as a condition of employment.

16.11. **Who Has *Garrity* Rights?** *Evangelou v. District of Columbia*, 901 F. Supp. 2d 159 (D.D.C 2012). "The defendants argue that because Mr. Evangelou was a probationary employee and therefore had no property right in his continued employment, he could be fired for refusing to incriminate himself. That is not the law. Here, as in many contexts, the government is barred from acting on the basis of an unconstitutional motive, even if it could have taken the same action for countless licit reasons – or for no reason at all."

16.12. **What Does "Use" Mean for *Garrity* Purposes?** *State of Ohio v. Jackson*, No. 2010-Ohio-721 (Ohio 2010). The review by a prosecutor of an internal affairs file is a "use" of the file within the scope of *Garrity*. "We note that a public employer can ensure that it does not violate the defendant's right against self-incrimination only by refraining from providing a compelled statement to the prosecutor when a criminal proceeding ensues. A bright-line prohibition against providing a compelled statement to a prosecutor is both workable and practical. First, because a prosecutor is not permitted to make any use of a compelled statement, denying the prosecutor the opportunity to view the Statement will not hinder the prosecutor's ability to prepare for trial. Second, when a defendant cannot allege that the prosecutor has made use of the Statement, there is no need to conduct a time-consuming hearing. Finally, when there is no threat that a prosecutor will eventually see the contents of a compelled statement, public employees will be more willing to comply with internal investigations."

16.13. *Vogt v. City of Hays, Kansas*, 844 F. 3d 1235 (10th Cir. 2017). *Garrity* applies to probable cause hearings, not just criminal trials.

16.14. *Chasnoff v. Mokra*, 466 S.W. 3d 571 (Mo. Ct. App. 2015). *Garrity* only provides immunity in a criminal context, and does not create a privilege prohibiting disclosure under a public records law. *See Townsend v. United*

States, 236 F. Supp. 3d 280 (D.D.C. 2017)(*Garrity* is not implicated unless compelled statements are used in a criminal context).

16.15. *In re: Misc. 4281*, 231 Md. App. 214 (Md. Ct. Spec. App. 2016). *Garrity* does not prohibit a grand jury from subpoenaing internal affairs records. Instead, *Garrity* is triggered only when employees are actually prosecuted.

16.16. *United States v. Brown*, 492 Fed. Appx. 57 (11th Cir. 2012); *U.S. v. Holland*, 417 Fed. Appx. 359 (4th Cir. 2011); *United States v. French*, 216 F. Supp. 3d 771 (W.D. Tex. 2016). *Garrity* rule does not prohibit use of false statements made in internal affairs process in later prosecution for obstruction of justice for the making of false statements: "An accused may not abuse *Garrity* by committing a crime involving false statements and thereafter rely on *Garrity* to provide a safe haven by foreclosing any subsequent use of such statements in a prosecution for perjury, false statements, or obstruction of justice." *See also United States v. Hendricks*, 2015 WL 224747 (D. Or. 2015)("false statements, even when compelled, may be used in a prosecution for the falsity of the statements).

16.17. **Reverse-*Garrity* Warnings.** *Franklin v. City of Evanston*, 384 F. 3d 838 (7th Cir. 2004). Employer violated due process by terminating a public employee who held a property right to the job when it refused to give reverse-*Garrity* warnings to the employee (thus immunizing the employee's statements) during a pre-disciplinary hearing. The Court concluded: "Pursuant to an express policy, the City refused to continue Franklin's disciplinary hearing until after his criminal case was resolved, and the City asked Franklin to respond at the hearing to the charges against him without advising him that his responses could not be used against him in his pending criminal proceedings. Franklin was thus forced to effectively choose between his job and his Fifth Amendment rights, and this was an impermissible violation of his Fourteenth Amendment right to procedural due process." *See City of Palm Beach Gardens, Florida* (Anthony Redwood, 2004)(arbitrator reinstated officer fired for refusing to answer questions in internal investigation while she faced pending criminal charge of second-degree murder for killing her husband)(unreported decision; copies available from LRIS).

16.18. ***Garrity* and Non-Testimonial Evidence.** *People v. Guitierrez*, 2015 IL App (3d) 140194-U (Ill. App. 2015). *Garrity* does not apply to non-testimonial evidence such as a portable breath test.

16.19. **Waiver of *Garrity* Rights.** *United States v. Smith*, 821 F. 3d 1293 (11th Cir. 2016). *Garrity* immunity may be later waived by an employee, and prior immunized statements used by the prosecution, if the waiver is knowing and voluntary.

16.20. **Suing Employers for Violation of *Garrity* Rights.** *Townsend v. United States*, 236 F. Supp. 3d 280 (D.D.C. 2017). *Garrity* violated only results in suppression of information in criminal case, and does not create cause of action to sue employer civilly.

17. USE OF FORCE AND SECTION 1983.

17.1. *Mullenix v. Luna*, 136 S. Ct. 305 (2015). *Graham v. Connor* reaffirmed again in a *per curiam* decision: "The mere fact that courts have approved deadly

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force in more extreme circumstances says little, if anything, about whether such force was reasonable in the circumstances here. The fact is that when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards Officer Ducheneaux's position. Even accepting that these circumstances fall somewhere between the two sets of cases respondents discuss, qualified immunity protects actions in the 'hazy border between excessive and acceptable force.'"

17.2. *County of Los Angeles v. Mendez*, 581 U.S. __, 2017 U.S. LEXIS 3396 (2017). No basis in Section 1983 cases for "provocation rule." Force is evaluated on the basis of whether it was reasonable at the time it was used, and earlier mistakes by officers that led up to the use of force are not relevant in judging the reasonableness of force.

18. POLYGRAPHS.

18.1. *Dixon v. City of Coeur d'Alene*, 547 Fed. Appx. 817 (9th Cir. 2013). The results of polygraph examinations are not admissible under the Federal Rules of Evidence. Court upholds $3.2 million judgment on behalf of police lieutenant who was fired for, among other things, failing a polygraph examination.

19. TRAINING COSTS, REPAYMENT.

19.1. In re Acknowledgement Cases, 239 Cal. App. 4th 1498 (Cal. Ct. App. 2015). A "repayment of training costs" requirement is enforceable only to the extent it applies to POST-mandated training and not supplemental training provided by the employer.

20. ARBITRATION AWARDS, AND THE *BRADY* RULE.

20.1. **The Finality of Arbitration.** *Eastern Associated Coal Corporation v. United Mine Workers of America, District 17*, 531 U.S. 57 (2000). Arbitrator's decision will only be overturned in "rare instances" and only where arbitrator's award does not "draw its essence" from the collective bargaining agreement. "As long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision."

20.2. **Public Policy.** In termination cases, the public policy doctrine looks to whether the arbitrator's reinstatement order violates a clearly established public policy, not whether the employee's underlying conduct violated public policy. *City of Boston v. Boston Police Patrolmen's Association*, 477 Mass. 434 (Mass. 2017)(reinstatement of officer who improperly used "chokehold"); *State of Alaska v. Public Safety Employees Association*, No. S-14701 (Alaska 2014)(reinstatement of trooper who had sex with domestic violence victim the day after responding to her call); *State of Alaska v. Public Safety Employees Association*, 257 P. 3d 151 (2011)(no violation of public policy in arbitrator's decision reinstating trooper who lied about horseplay during motorcycle training class.

20.3. **Arbitration and Dishonesty Charges Against Law Enforcement Officers.** *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 219 P. 3d 675

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(2009). Despite the *Brady* rule, not against public policy to reinstate deputy sheriff who had been terminated for untruthfulness. The question is not whether the employee's conduct violates public policy, but rather whether the order of reinstatement violates a clearly-defined public policy.

20.4. *Town of Stratford v. AFSCME, Council 15, Local 407*, 315 Conn. 49 (Conn. 2014). No violation of public policy doctrine with arbitrator's opinion reversing termination of epileptic officer who lied about his physical and mental condition during medical examination. Court cited the fact that the officer did not lie under oath and his dishonesty was not disruptive or repeated, and that the officer he was not dishonest before his fellow police officers or while performing his official duties. *Contra AFSCME, Council 15, Local 407,* 140 Conn. App. 587 (Conn. App. Ct, 2013)(does not engage in two-stage conduct/remedy public policy analysis).

20.5. **The *Brady* Rule and Arbitration.** The general trend among arbitrators is that placement on a *Brady* list, absent clear proof of an officer's underlying dishonesty, is an insufficient basis to terminate an officer. *City of Elma, Washington* (Levak, 2013); *Wyandotte County/Kansas City, Kansas*, FMCS #130114-52556-7 (Diekemper, 2013); *Franklin County Sheriff's Office*, 127 LA 283 (Felicio, 2010); *County of Stanislaus*, 128 LA 592 (Pool, 2010).

20.6. *City of Hutchinson*, 134 LA 1683 (Kossof, 2015). Arbitrator overturns discharge of officer who initially lied during IA interview as to whether he had received a text message from another officer, but 15 minutes later corrected his testimony and admitted to the lie. Arbitrator was convinced that officer's initial dishonesty would not be repeated, and that officer understood the importance of truthfulness. Arbitrator also rejected employer's *Brady* argument, finding that under Kansas law, the officer's initial untruthfulness would not amount to impeachment evidence.

20.7. **The *Brady* Rule and Statutes**. On October 12, 2013, California Governor Jerry Brown signed S.B. 313, which amends California's Peace Officer Bill of Rights to provide that: "A punitive action, or denial of promotion on grounds other than merit, shall not be undertaken by any public agency against any public safety officer solely because that officer's name has been placed on a *Brady* list, or that the officer's name may otherwise be subject to disclosure pursuant to *Brady v. Maryland* 373 U.S. 83 (1963). This section shall not prohibit a public agency from taking punitive action, denying promotion on grounds other than merit, or taking other personnel action against a public safety officer based on the underlying acts or omissions for which that officer's name was placed on a *Brady* list." In 2014, the Maryland legislature adopted similar legislation through H.B. 598.

20.8. **The *Brady* Rule and Personnel File Laws**. California's "*Pitchess*" laws, which require a case-by-case hearing before the personnel or internal affairs files can be released to a third party, prohibit the prospective release by a sheriff's department of a "*Brady* list" to local prosecutorial agencies. *Association for Los Angeles Deputy Sheriffs v. Superior Court*, 13 Cal. App. 5th 413 (Cal. Ct. App. 2017).

20.9. **The *Brady* Rule and Courts.** *Wetherington v. N.C. Department of Crime Control & Public Safety*, 752 S.E. 2d 511 (N.C. Ct. App. 2013). Court overturns

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discharge of trooper fired for lying about how he lost his hat. “Wetherington is not barred from testifying in court. The Patrol’s argument depends upon at least two assumptions that the Patrol does not address: (1) that defense counsel will elect to impeach Wetherington using the finding; and (2) that defense counsel’s impeachment will necessarily influence a jury to the point that a jury will disregard the entirety of Wetherington’s testimony. The possibility of impeachment and the possibility of the impeachment’s success must both occur in order to diminish Wetherington’s performance of the duty to testify successfully. The Patrol presents no argument that the likelihood of the two possibilities justifies dismissal.” On appeal, North Carolina Supreme Court remands to Highway Patrol to reassess original decision: “While dismissal may be a reasonable course of action for dishonest conduct, the better practice, in keeping with the mandates of both Chapter 126 and our precedents, would be to allow for a range of disciplinary actions in response to an individual act of untruthfulness, rather than the categorical approach employed by management in this case.” No. 22PA14 (N.C. 2015).

20.10. *Association for Los Angeles Deputy Sheriffs v. Superior Court*, 13 Cal. App. 5th 413 (Cal. Ct. App. 2017). *Brady* does not mandate the release of personnel and internal affairs records – even if otherwise *Brady* material – unless the officer’s testimony is “material” to the criminal case. For example, the testimony of an arresting officer who took no further action with respect to the suspect other than the arrest, might not be “material” to the criminal prosecution.

20.11. *Brown v. Nero*, 477 S.W. 3d 448 (Tex. App. 2015). When officer fired for dishonesty and using mescaline, police chief notified local DA, who placed officer on *Brady* list. When hearing officer overturned the termination, finding a lack of proof on both issues, City again fired officer, this time citing the officer’s placement on the *Brady* list. Court overturns termination, concluding “according to the City, prosecutors have unbridled discretion to declare that they will not accept cases from an officer, and the police chief may—and, in fact, has a duty to—terminate that officer. Furthermore, according to the City, this termination is completely insulated from review by anyone—the Commission, a hearing examiner, or the courts. This cannot be how the Civil Service Act works, as this interpretation would allow the defendants to nullify Brown’s statutory right to appeal merely by relabeling her termination as non-disciplinary.”

20.12. *Hubacz v. Village of Waterbury, Vermont*, 2014 WL 1493981 (D. Vt. 2014). State statute allowing discipline where an officer is negligent or derelict or guilty of conduct unbecoming an officer does not allow discipline of officer solely on basis that local prosecutor announced he would not prosecute officer’s cases. Court concludes that statute “clearly contemplates officer misconduct. Instead of reviewing the officer’s actions, the Trustees considered the actions of a third party that impacted the officer. Nothing in the statute suggests that such third-party conduct is a valid basis for termination under its terms”.

20.13. *Johnson v. Lansdale Borough*, 105 A. 3d 807 (Pa. Cmwlth 2014). Reinstatement of officer fired for dishonesty when he told judge he missed court because he was sick, and department that he missed court because he forgot about the appearance. Officer established in appeal that he forgot about the appearance because he was sick, and thus was not dishonest.

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20.14. **Removal From A *Brady* List.** *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774 (N.H. 2015). Case involves bar brawl involving three off-duty officers. Court grants request (opposed by prosecutor) to remove officers from *Brady* list after arbitrator determined there was no just cause for discipline for the officers' underlying conduct, and Attorney General concluded that officers committed no crimes.

20.15. **The *Brady* Rule And Discrimination/Whistleblower Lawsuits.** *Cleavenger v. University of Oregon*, 2016 WL 814810 (D. Or. 2016). Wrongful release to a prosecutor of potential *Brady* material is an "adverse action" that can support a discrimination lawsuit.

20.16. **The *Brady* Rule And Prosecutorial Immunity.** *Barnett v. Marquis*, 662 Fed. Appx. 537 (9th Cir. 2016). Doctrine of prosecutorial immunity shields prosecutor who designated sergeant as untruthful after sergeant had written article critical of prosecutor. Court holds that the prosecutor's motivation is irrelevant so long as the action taken by the prosecutor is part of the prosecutorial process.

20.17. **Arbitration After Expiration Of Contract.** *Baltimore County Fraternal Order of Police Lodge No. 4 v. Baltimore County*, 57 A. 3d 425 (Md. 2012). Duty to arbitrate can survive expiration of contract if the dispute (1) involves facts and occurrences that arose before expiration of the agreement, (2) where the rights that are the subject of the dispute accrued or vested during the life of the agreement, or (3) where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement. In this case, an arbitrator could legally conclude that the duty to arbitrate a grievance challenging changes to post-retirement health insurance survived the expiration of the contract.

21. *WEINGARTEN* AND OTHER UNION REPRESENTATION RIGHTS

21.1. **Does The Employee Reasonably Believe That Discipline Could Result From The Interview?** *City of Boston*, 2017 WL 930097 (MA LRC 2017). *Weingarten* does not apply where employer assured employee that she would not be disciplined as a result of the investigation. *Rowland v. City of Quincy*, Decision 11103 – PECB (Wash. PERC 2011). Despite the fact that the employer told the employee at the start of the interview that the interview was not disciplinary in nature, *Weingarten* rights applied where "nearly everything the employer did before and during the meeting led her to reasonably believe that the purpose of the meeting was to develop facts related to a disciplinary action."

21.2. ***Weingarten* and *Witnesses*.** *New York State Correctional Officers*, 48 PERB ¶ 4546 (NY PERB ALJ 2015). Though corrections officer told he was a witness into a use of force complaint against other officers and would not need union representation, tone of interview, rank of questioning supervisor, and "fishing expedition" nature of questions all led to reasonable belief that discipline could result from questioning. Employer's rules required employees to report inappropriate uses of force, and officer failed to document incident in question. *See New York State Correctional Officers and PBA,* 48 PERB ¶ 4602 (NY PERB ALJ 2015) (*Weingarten* implicated when investigators referenced employee's probationary status and her inability to file a grievance challenging her termination).

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21.3. ***Weingarten* and *Garrity*.** *Pennsylvania State Troopers Association v. Pennsylvania Labor Relations Board*, 71 A. 3d 422 (Pa. Cmwlth. 2013). Once employee was read *Garrity* warnings, employee reasonably believed that discipline could result from interview and *Weingarten* rights attached.

21.4. ***Weingarten* and *Miranda*.** *Sheriff of Cook County*, 2015 WL 3623618 (Ill. LRB Gen. Coun. 2015). The giving of *Miranda* warnings to an employee, in and of itself, gives rise to a reasonable belief that discipline could result from the interview, and that belief is not dissipated by later assurances by investigators that the employee's "career was not in jeopardy."

21.5. **Layoff Meeting.** *Manor Township*, Case No. PF-C-10-63-E (Pa. LRB 2011). No right to representation when employer met with officers to announce layoffs. No reasonable belief that meeting was disciplinary in nature.

21.6. **Drug Testing.** *Ralph's Grocery Co.*, 361 NLRB No. 9 (2014). Drug and alcohol test, ordered as part of the employer's investigation into the employee's conduct, triggered the employee's right to a *Weingarten* representative.

21.7. **Role Of The Representative Under *Weingarten***. *Federal Bureau of Prisons*, 2017 WL 1862381 (FLRA 2017). "The purposes of *Weingarten* can be achieved only by allowing the union representative to take an active role in assisting a unit employee in presenting facts in his or her defense. A union representative who disrupts an examination by engaging in abusive or insulting interruptions may have his participation limited. However, we have rejected the notion that an employer is entitled to question an employee without any interruptions or intervention by the union representative. Some interruption, by way of comments re the form of questions or statements as to possible infringement of employee rights, should properly be expected from the employee's representative."

21.8. **Notice Of Charges Under *Weingarten*.** *Illinois State Toll Highway Authority v. Illinois Labor Relations Bd., State Panel*, 941 N.E. 2d 166 (Ill. App. Ct. 2010). *Weingarten* allows employee to demand notice of charges prior to investigatory interview.

21.9. **Right To Copy Of Complaint.** *Foothill De Anza Faculty Association*, 40 PERC ¶ 14, 40 (Cal. PERB ALJ 2015). "Ultimately, while employees generally have a legally protected privacy interest in their home addresses and contact information, they do not have a right, or even an objectively reasonable expectation of anonymity from their exclusive representative when filing workplace misconduct complaints against coworkers. Nor is the correlation of an employee's identity with the filing of a complaint a serious intrusion into an employee' s privacy right, especially in the circumstance presented here, where both the complainant and respondent employees are represented by the union. The same conclusion is inevitable when dealing with witness identity and contact information."

21.10. **Choice Of Representative under *Weingarten*.** *Williams County Sheriff's Office*, Case No. 2011-ULP-12-0323 (Ohio SERB 2012)(union has right to choose representative for *Weingarten* meeting; *Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board*, 916 A. 2d 541 (Pa. 2007)(in a *Weingarten* setting, an employee has the right to specify the representative that

he or she wants, and the employer is obligated to supply that representative absent some extenuating circumstances).

21.11. *City of Tacoma*, Decision 11064-A (Wash. PERC 2012). Employee not allowed to select union representative who was fact witness to incident under investigation.

21.12. **Confidentiality of Statements Made To Representative.** *Peterson v. State*, 280 P. 3d 559 (Alaska 2012). "The union-relations privilege we recognize today under PERA extends to communications made: (1) in confidence; (2) in connection with representative services relating to anticipated or ongoing disciplinary or grievance proceedings; (3) between an employee (or the employee's attorney) and union representatives; and (4) by union representatives acting in official representative capacity. The privilege may be asserted by the employee or by the union on behalf of the employee. Like the attorney-client privilege, the union-relations privilege extends only to communications, not to underlying facts.

21.13. **Can A Union Conduct A Concurrent Investigation?** *State - Washington State Patrol*, Decision 11863-A (Wash. PERC 2014). Union's representational rights include the right to interview witnesses concurrently with the employer's investigation provided the union's investigation is "reasonable" and does not interfere with the employer's.

21.14. **No-Contact Orders.** *Perez v. L.A. Comm. College Dist.,* LA-CE-5839-E, PERB Decision No. 24 (December 24, 2014). Boilerplate no-contact orders given to employees who are the subject of internal affairs investigations or fitness for duty evaluations interfered with the organizational rights of employees. No-contact orders must be justified by business reasons, and must be specific to a particular employee investigation. A generalized concern for the integrity of investigations does not outweigh the rights of employees to communicate with other employees about wages, hours, and working conditions.

21.15. ***Weingarten* Rights Apply To Written Statements.** *City of New Haven*, *City of New Haven*, Decision No. 4720 (Conn. SBLR 2014). "An employer should not be able to deny employees their Weingarten rights merely because it has chosen to require that they produce written statements instead of, or in addition to, submitting to oral interviews. Our conclusion that a compelled written statement in this context constitutes an investigatory interview is consistent with the policies articulated by the Supreme Court in Weingarten as employees have the same need for a supportive witness and assistance communicating relevant information."

22. PUBLIC SAFETY BILLS OF RIGHTS.

22.1. *D'Agastino v. City of Miami*, 220 So. 3d 410 (Fla. 2017). "We cannot reconcile the [civilian review board's] subpoena power – as it pertains to the officer under investigation – with the bill of rights. Any holding otherwise would render the rights conferred upon officers by the bill of rights meaningless because the [civilian review board] provides the police department with a mechanism to circumvent the operation of the bill of rights' protective measures, ultimately rendering the bill of rights an initial investigatory protection façade."

22.2. *Los Angeles Police Protective League v. City of Los Angeles*, 2013 WL 6073501 (Cal. Ct. App. 2013). Because complaints adjudicated as "Not Resolved" could potentially be used to discipline or transfer officers in the future, they amount to "punitive action" under California's Bill of Rights, and require a hearing if requested by the officer.

22.3. *White v. County of Los Angeles*, 2016 WL 2910095 (Cal. Ct. App. 2016). Memoranda questioning employee's fitness for duty are "files used for personnel purposes" to which the employee has the rights of access and rebuttal. "The results of a peace officer's medical reevaluation can lead to significant changes in his or her employment status."

22.4. *Poole v. Orange County Fire Authority*, 61 Cal. 4th 1378 (Cal. 2015). Daily log kept by supervisor to assist him with completing performance evaluations is not a "file used for personnel purposes" even though it contained negative comments, so long as file is not provided to those empowered to make punitive personnel decisions.

22.5. *Chronister v. City of Oxnard*, 2017 WL 1056115 (Cal. Ct. App. 2017). Bill of rights does not apply when interrogation is conducted by a different agency than the employer, and where the employer does not require the employee to answer the agency's questions.

23. PRIVATE DISHONESTY.

23.1. *Doe v. Department of Justice*, 565 F. 3d 1375 (Fed. Cir. 2009). "This Court recognizes the difficulty in drawing the line between the types of conduct that can justify discipline and those that cannot. This conundrum does not justify the Board's failure to articulate a meaningful standard. This conduct that is private in nature and does not implicate job performance in any direct or obvious way is often insufficient to justify removal from a civil service position. Without a predetermined standard to clarify when the Agency may and may not investigate the personal relationships of its employees, it is conceivable that employees could be removed for any number of 'clearly dishonest' misrepresentations, from those made to preserve the sanctity of a romantic relationship to cheating in a Friday night poker game. The danger here is twofold; federal employees are not on notice as to what off-duty behavior is subject to investigation and the government could use this overly broad standard to legitimize removals made for personal or political reasons. A clear articulation of a standard is therefore essential to the government's ability to reasonably and legitimately remove an agent for off-duty conduct relating to personal relationships. In the absence of a violation of criminal law, the FBI is permitted the disciplining of an employee for off-duty personal conduct only if the conduct impacts the Agency's ability to perform its responsibilities or if the conduct constitutes violation of an internal regulation."

24. RETIREMENT BENEFITS.

24.1. Bankruptcy and Pension Obligations.

24.2. *In re City of Detroit*, 2013 WL 6331931 (E.D. Mich. 2013). While pensions may be a contract between an employer and employee, the contract may be subject to amendment through the municipal bankruptcy process, even if it means that the benefits of retirees are cut.

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24.3. *City of Stockton*, Case No. 12-32118-C-9 (E.D. Cal. 2015). A city's pension contract with a statewide retirement system is not insulated from adjustment in bankruptcy. "First, the California statute forbidding rejection of a contract with CALPERS in a chapter 9 case is constitutionally infirm in the face of the exclusive power of Congress to enact uniform laws on the subject of bankruptcy under Article I, Section 8, of the U.S. Constitution - the essence of which laws is the impairment of contracts - and of the Supremacy Clause. U.S. CONST. art. I, § 8 & art. VI. Second, the $1.6 billion lien granted to CALPERS by state statute in the event of termination of a pension administration contract is vulnerable to avoidance in bankruptcy as a statutory lien. Third, the Contracts Clauses of the Federal and State Constitutions, as implemented by California's judge-made "Vested Rights Doctrine," do not preclude contract rejection or modification in bankruptcy." However, because of reductions in other areas of total compensation, court approves bankruptcy plan that did not impair pensions.

24.4. Changes In Retirement Benefits.

24.5. *Marin Association of Public Employees v. Marin County Employees' Retirement Association*, 2 Cal. App. 5th 674 (Cal. Ct. App. 2016). Decision to not include standby and other forms of supplemental pay in pension calculations did not violate the contract rights of existing employees as the changes were "reasonable" in light of the pension system's unfunded liability.

24.6. *Berg v. Christie*, 225 N.J. 245 (N.J. 2016). Cost-of-living escalators to pensions were not "unmistakably" a contract protected by the contracts clause of the constitution; *Puckett v. Lexington-Fayette Urban County Government*, 833 F. 3d 590 (6th Cir. 2016)(same).

24.7. *In re Pension Reform Litigation*, 2015 IL 118585 (Ill. 2015). Pension protection clause in state constitution prohibited five changes to vested pensions. The changes struck down by the court included delaying retirement ages, eliminating a cost-of-living escalator, and capping pension benefits.

24.8. *Fields v. Elected Officers Retirement Plan*, 234 Ariz. 214 (Ariz. 2014). Pension protection clause in state constitution provided greater protections for benefits than federal "contracts clause," and prohibited legislature from altering post-retirement benefit calculation formula.

24.9. *Moro v. State of Oregon*, 357 Or. 167 (Or. 2015). Changes in COLA formula cannot be applied to service rendered before effective date of law.

24.10. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013). No violation of law when legislature eliminated retirement COLA for future service worked by current employees who were already vested in the retirement plan. "We hold that the preservation of rights statute was not intended to bind future legislatures from prospectively altering benefits for future service performed by all members of the System. We further hold that the 2011 amendments requiring a 3% employee contribution as of July 1, 2011, and continuing thereafter, and the elimination of the COLA for service performed after that date are prospective changes within the authority of the Legislature to make. The preservation of rights statute does not create binding contract rights for existing employees to future retirement benefits based upon the System's plan that was in place prior to July 1, 2011."

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24.11. *Protect Our Benefits v. City and County of San Francisco*, 235 Cal. App. 4th 619 (Cal. Ct. App. 2015). Employer allowed to modify COLA provisions for employees who retired prior to enactment of COLA provision in 1996; amendments violated contract rights for all other retirees and for current employees. *See Moro v. State of Oregon*, 357 Or. 167 (Or. 2015)(COLA changes can only constitutionally apply to service rendered after date of legislation).

24.12. *Bartlett v. Cameron*, 316 P. 3d 889 (N.M. 2013). COLA provisions created in separate section of statute creating the pension plan, and was thus not part of the pension plan for constitutional purposes.

24.13. *Justus v. State of Colorado*, 336 P. 3d 202 (Colo. 2014). Legislature did not intend to create a non-changeable COLA benefit, and thus could subsequently reduce the COLA benefit.

24.14. **Contribution Rates.** *Taylor v. City of Gadsden*, 767 F. 3d 1124 (11th Cir. 2014). Because employee pension contribution rates had been increased several times in the past, new employees were on notice that they could be increased again in the future, and an increase in rates did not violate any employee contractual rights.

24.15. **Post-Retirement Health Insurance.** *Kanerva v. Weems*, 2014 IL 115811 (Ill. 2014). Post-retirement health insurance is a form of pension benefits, and cannot be diminished under the "pension protection clause" of the state constitution.

25. DRUGS AND ALCOHOL.

25.1. **Marijuana.** On September 21, 2011, ATF issued a notice that "any person who uses marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition."

25.2. **Drug Testing.** *In re Boston Police Department Drug Testing Appeals*, Case No. D-01-1409 (Mass. Civil Serv. Comm. 2013), affirmed 59 N.E. 3d 1185 (Mass. App. Ct. 2016). Hair test for drugs has not been shown to be reliable enough or consistent with scientific principles to use as the sole justification for termination of police officers. Decision reverses terminations of six of ten officers who had been fired for testing positive on random drug tests. Officers whose terminations were upheld had other indicia of drug use. However in *Jones v. City of Boston*, 118 F. Supp. 3d 425 (D. Mass. 2015), a federal court considering the same drug testing program found that the presence of false positives on hair tests did not mean that the employer did not have a "business necessity" for the tests.

25.3. **Post-Incident Alcohol Testing.** *Lynch v. NYPD*, 737 F. 3d 150 (2d Cir. 2013). Post-shooting breathalyzer test falls with the "special needs" exception to the Fourth Amendment, and requires neither probable cause nor a warrant. Primary purpose of the rule requiring the test was not the enforcement of the law, but rather deterrence of officers working under the influence of alcohol.

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26. EQUIPMENT.

26.1. **Body-Worn Cameras.** *City of Oklahoma City* (Lumbley, 2016)(unreported opinion). Ability of supervisors to randomly review body-worn camera videos is an "enormous" change in working conditions that must be bargained before it is implemented. *See Montgomery County, Maryland* (Jaffe, 2015 and 2016)(various aspects of body-worn camera systems are negotiable); *Boston Police Patrolmen's Ass'n v. City of Boston* (Mass. Superior Court 2016) (unreported opinion)(under Massachusetts law, Boston police commission has non-delegable authority over "equipment," and thus, decision to implement body camera program may be non-negotiable. However, there may be negotiable impacts of the decision); *City of Jacksonville*, No. CA-2017-012 (2017)(decision to implement body-cam system non-negotiable, though there are likely negotiable impacts, particularly in the area of discipline). See *Mountlake Terrace*, #11702-A (Wash. PERC 2014). Employer used recording from "public safety" video camera to discipline an employee. The disciplinary use of recordings is mandatory for collective bargaining because it is a "substantial change to employee working conditions."

26.2. **GPS Systems**. *City of Springfield,* MUP-12-2466 (Mass. DLR ALJ 2014). Employer unilaterally installed tracking devices in vehicles driven by City employees and recorded the employees' location, idle time, distance driven, number of stops and speeding events in those vehicles. Matter negotiable because it involved new means of assessing employee performance.

27. BARGAINING.

27.1. **Release Time.** On September 9, 2013, California Governor Jerry Brown signed into law a bill expanding paid release time for union representation. The new law mandates paid release time for testifying or serving as a union representative in a PERB proceeding and testifying or serving as the union representative in a personnel or merit commission hearings. In the past, paid release time was only mandated for collective bargaining negotiations.

27.2. **Effects Bargaining**. *County of Santa Clara*, Case No. 2321-M (Cal. PERB 2013). Where an employer exercises a management right that has an impact on mandatory subjects of bargaining, the employer has an obligation to engage in "effects bargaining." The employer must thus follow these procedures:

1. The employer has a duty to provide reasonable notice and an opportunity to bargain before it implements a decision within its managerial prerogative that has foreseeable effects on negotiable terms and conditions of employment.

2. Once having received such advance notice, the union must demand to bargain the effects or risk waiving its right to do so. The union's demand must identify clearly the matter(s) within the scope of representation on which it proposes to bargain, and clearly indicate the employee organization's desire to bargain over the effects of the decision as opposed to the decision itself.

3. Having received such advance notice and an opportunity to bargain, a union's failure to demand effects bargaining may waive the right to bargain the reasonably foreseeable effects. Waiver remains, however, an affirmative defense. Where a union alleges that the employer did not provide reasonable notice and an opportunity to bargain prior to the employer's implementation of a

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change in a non-negotiable policy having a reasonably foreseeable impact on a matter within the scope of representation, a prima face case of failure to bargain in good faith is established. The union need not allege as well that it made a demand to bargain such effects as a condition to seeking PERB enforcement of its right to be free of an employer's failure to provide notice and an opportunity to bargain effects. The employer may raise an affirmative defense of waiver or otherwise challenge the union's claim that the employer did not provide sufficient notice of the change.

27.3. 4. Where the employer implements the change without giving the union reasonable notice and an opportunity to bargain over foreseeable effects on matters within the scope of representation, it acts at its own peril. If the employer is ultimately found to have had a duty to bargain over effects and thus to have provided the union reasonable pre-implementation notice and an opportunity to bargain, its implementation without giving such notice and an opportunity to bargain constitutes a refusal to bargain.

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