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I.
INTRODUCTION

Looking back on President Trump's initial time in office, it is easy to observe a trend towards business/employer friendly regulations, laws and executive orders, and see the beginning of Republican-controlled agencies. While labor and employment initiatives took a back seat to key campaign initiatives such as immigration, healthcare, and tax reform, we nevertheless can see signs that business restricting regulations and Executive Orders from eight years of a Democratic administration are being re-evaluated, and in some instances, rolled back entirely.

Although Justice Gorsuch was confirmed in the Supreme Court, at present more than 150 judicial seats remain unfilled, with more than 50 nominees for such seats pending Senate approval. Several agency appointments also remain open. The EEOC also still lacks two commissioners. President Trump has proposed Janet Dhillon as EEOC Chair and Daniel M. Gade as Commissioner, and both are still awaiting confirmation. On April 11, the Senate voted to fill the final NLRB seat confirming John Ring of Morgan Lewis & Bockius to bring the Board to a full five-member complement, clearing the way for the Trump administration to implement business-friendly changes at the Board which many employers have been anxiously awaiting. At the Department of Labor, Cheryl Stanton awaits confirmation as the Wage and Hour Administrator.

In past years, this presentation has often focused on the lack of action and gridlock in Washington D.C. In many ways, despite Republican control of the House, Senate and the White House, that is still where we find ourselves on a number of issues.

II.
2017-2018: AGENCIES, LAWS, REGULATIONS AND EXEUTIVE ORDERS

As noted, some labor and employment initiatives under the Trump Administration have progressed, at least to some degree. The presumed list of current labor and employment initiatives includes:

- Raising the federal minimum wage. (Federal minimum wage for government contracts increased to $10.35 an hour on January 1, 2018, but the overall federal minimum wage remains at $7.25 an hour);
- Promotion of National parental leave program to provide six weeks of paid family leave for new and adoptive parents;
- Closing the gender pay gap;
- Boost of prevailing wage for H-1B workers;
- Adopting a National E-verify system;

- "Blacklisting," is dead for now with final rules published rescinding regulations and Safe Workplaces Executive Orders, as part of bidding process for federal contractors;

- 2015 NLRB Joint Employer Standard was overturned, and the Board's prior "reasonable standard" reaffirmed, then due to a possible conflict for Board member Emanuel, the Board's ruling was vacated, restoring, for now, the 2015 *Browning Ferris* standard;

- Overturning the NLRB "Quickie" Union Election Rules (more than a thousand comments received during the notice and comment period);

- Eliminating or Modifying the DOL "White Collar" Overtime Rules—rules are still on indefinite hold as the appeal is stayed, pending the outcome of new rulemaking;

- Eliminating the DOL Persuader Rule (which was finalized on July 17, 2018 when the DOL rescinded the Obama-era's proposed rule); and

- Repealing and replacing the Affordable Care Act—Individual mandate effectively eliminated with Trump tax reform bill.

A. AGENCY LEADERSHIP:

While appointments for Agency positions are lagging, progress has been made by appointment (and confirmation of) the following:

Department of Labor:

- Secretary of Labor, Alex Acosta – confirmed.

National Labor Relations Board:

- Chairman of NLRB Member Philip A. Miscimarra named Chair;

- New Board Members approved: Bill Emanuel, Marvin Kaplan and John Ring;

- NLRB as of April 11, 2018 has full five-member Board; and

- NLRB General Counsel, Peter Robb, sworn in November 2017.

Equal Employment Opportunity Commission:

- Republican EEOC Commissioner Victoria Lipnic serves as acting Chair;

- Janet Dhillon nominated by President Trump as Chair, not yet approved;

- Daniel M. Gade nominated for Commissioner, still waiting approval;

- Sharon Gustafson has been nominated for EEOC General Counsel and also awaits confirmation; and

- New OSHA director identified: Ondray T. Harris.

Other Key Positions Remaining Open Include:

- Administrator of the Wage and Hour Division, Cheryl Stanton, nominated not yet confirmed;

- Head of OSHA, Scott Mugno, nominated not yet confirmed; and

- Head of EBSA (Employee Benefits Security Administration), Preston Rutledge, nominated.

B. AGENCY DEVELOPMENTS

1. Equal Employment Opportunity Commission:

At present, the EEOC balance is in favor of Democrat-appointed Commissioners, with three current Democrat appointees and one Republican (Acting Chair Lipnic). This balance will change once Congress approves current nominees. But for now, the focus of the EEOC has not changed, and its strategic enforcement initiatives continue to include:

1. Continued focus on systemic investigation and related litigation;

2. Continued focus on attacking barriers to hiring;

3. Continued close review of alternative work arrangements;

4. Focus on sexual and other forms of workplace harassment, including systemic harassment;

5. Focus on diversity in the Tech Sector, including the underrepresentation of women, African Americans and Hispanics in that field;

6. Disability discrimination;

7. Pay equality;

8. Age discrimination (the ADEA turns 50 this year); and

9. LGBT coverage under Title VII.

Fiscal year 2017 EEOC Charge Statistics

There were 84,254 changes filed in Fiscal Year 2017, a reduction of 8% from the 91,503 Charges filed in fiscal year 2016.

Types of Charges filed in FY 2017 by ranking include:

	2017	2016
Retaliation (all statutes)	48.8%	45.9%
Race	33.9%	33.3%
Sex	30.4%	29.4%
Disability	31.9%	30.7%
Age	21.8%	22.8%
National Origin	9.8%	10.8%
Religion	.1%	4.2%
Color	3.8%	3.4%

While charge numbers decreased, EEOC litigation filings *increased* significantly, with 184 lawsuits filed in 2017, as compared with only 86 filed in 2016.

What About the Revised EEO-1 Form?

While pay equity remained a key focus for 2017 and into 2018, the updated EEO-1 form set to become part of annual reporting in March 2018 has been pulled down by the EEOC. Acting Chair Lipnic did not believe the changed form would aid identification of discrimination in hiring, and believed the new form was based on flawed methodology. Nothing will happen to potentially revive the new form until the balance of the Commission shifts to 3-2 Republican/Democrat Commissioners, making implementation of the current revised form unlikely.

2. Department of Labor:

With key positions unfilled, even with new DOL Secretary of Labor Acosta in place, policy changes are uncertain at present. At a minimum, new rules are in limbo and may never become final. These include

1. OSHA:

- Electronic Accident Reporting Rule currently under reconsideration;
- OSHA Letter of Interpretation re: Union Agents allowed to participate in OSHA inspections of non-union workplaces withdrawn April 27, 2017;

- Crystalline Silica and Beryllium Rules still in place but discussions with OSHA ongoing;

2. EBSA (Employee Benefits Security Administration):

   - Fiduciary Rule broadening definition to advisers of retirement investors

     - Start date extended until July 1, 2019 for DOL to review per direction of administration to ensure that the rule does not adversely affect the ability of retirees to gain access to financial advice. The current projection is that while "tweaks" may occur, the rule will go forward.

3. OFCCP (Office of Federal Contract Compliance Programs):

   - Federal Contractor Executive Order (EO 13673):

     - Blacklisting – dead, but issue could be reinstated with Congressional action;

     - LGBT Anti-discrimination EO 13672 will remain in effect, though LGBTQ groups argue that President Trump's revocation of EO 13673 effectively guts the protection provided by EO 13672 by removing the compliance requirement as to same.

   - Others Initiatives or Executive Orders:

     - $10.35 minimum wage for federal contractors effective January 1, 2018;

     - Paid sick leave of 56 hours a year still in place.

4. Wage and Hour Division:

   - White Collar Overtime Regulations setting the minimum exempt salary at $47,476 annually permanently on hold

     - Notice of proposed rulemaking expected while appeal is stayed

   - Independent Contractor focus;

   - Joint employment focus (including franchises); and

- DOL is publishing again, with 19 new FLSA opinion letters between January 5 and April 12, 2019 (which was the last one published as of the date of this paper);

- **Payroll Audit Independent Determination**: March 6, 2018 Rolled Out PAID initiative designed to streamline resolution process for minimum wage or overtime claims under FLSA;

  - Eleven State Attorney Generals are not following PAID

III.
2017-2018 UNITED STATES SUPREME COURT DECISIONS

A. INTRODUCTION

Until Justice Neil Gorsuch's confirmation on April 7, 2017, the Court operated for over a year without nine justices and a tie-breaking vote. Now, with the retirement of Justice Kennedy onJ July 31, 2018, and the pending nomination of Brett Kavanaugh (which is facing significant pushback), the balance may be shifting sooner than anticipated. In any event, whatever happens with Kavanaugh, Trump will get this appointment, and given the respective ages of Justice Ginsburg (85) and Justice Breyer (80), there could also be opportunities for additional appointments during a Trump presidency.

Despite Justice Gorsuch's appointment and the Court returning to a full complement of nine justices, labor and employment decisions of the Court in the last year were limited:

B. DECISIONS OF THE COURT:

1. Public Sector Employees Cannot Be Forced to Pay Fees to the Union: *Janus v. American Federation of State, County and Municipal Employees*

On June 27, 2018, the United States Supreme Court, in *Janus v. American Federation of State, County and Municipal Employees*, closed out the October 2017 Term by delivering a blow to public-sector unions. The Court held that states can no longer agree with public-sector unions to force public employees who are not union members to pay so-called "agency" or "fair share" fees because such requirements violate the First Amendment. *Janus v American Federation of State, County and Municipal Employees Council 31*, 16-1466 (June 27, 2018). The opinion was 5-4, and authored by Justice Alito. Justice Sotomayor filed a dissenting opinion, and Justice Kagan filed a dissenting opinion, which Justices Ginsburg, Breyer, and Sotomayor joined.

Under Illinois law in effect prior to *Janus,* public employees were permitted to unionize, and even non-union members were required to pay what is referred to as an agency fee, which represents a portion of the regular union dues. These fees, which in this case were 78.06% of full union dues, could be used for efforts that were considered "germane" to collective bargaining, but not used for political/ideological efforts. Prior Supreme Court precedent permitted this state law structure to exist. *See Abood v. Detroit Bd. of Ed*., 431 U. S. 209 (1977).

Mark Janus joined a suit originally filed by the Illinois Governor challenging the constitutionality of the Illinois law permitting these fees for non-members of the union. The District Court ultimately dismissed the Governor for lack of standing, but permitted Janus to continue with the case. The State Attorney General moved to dismiss in defense of the law, and the District Court granted the motion, with the Seventh Circuit affirming the dismissal. In considering this case, the Court agreed with Janus that the Illinois law violates First Amendment principles, and that its prior decision in *Abood* was in "poorly reasoned," and was therefore overruled. The Court held that requiring individuals to endorse and support ideas they find objectionable violates the First Amendment, and that some of the concerns that supported the earlier *Abood* decision four decades ago had proven to be unfounded. This finally resolved an issue that had come before the Court three times in the past four years.

Therefore, after *Janus*, "States and public-sector unions may no longer extract agency fees from nonconsenting employees…Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed…Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence…Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Janus*, Slip Op. at 48-49.

Writing in dissent, Justice Elena Kagan argued there is no good reason to overrule *Abood*, observing that more "than 20 States have statutory schemes built on the decision," and that "reliance interests do not come any stronger." Justice Kagan added that "judicial disruption does not get any greater than what the Court does today." Justice Kagan predicted that the majority's decision "will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces."

While it is too soon to fully know the impact *Janus* will have, the decision is considered to wield a significant blow to public sector unions and their ability to support the initiatives of such unions.

2. Class and Collective Action Waivers in Arbitration Agreements are Lawful and Must be Enforced: *Epic Systems Corp. v. Lewis*

In *Epic Systems Corp. v. Lewis*, 16-285, 584 U.S. ____ (May 21, 2018), the Court ended a circuit split and overturned the National Labor Relations Board's position that class and collective action waivers violate employees' rights under the NLRA. Ever since the NLRB's 2012 decision in *D.R. Horton*, courts have wrangled with the enforceability of class action waivers and the interaction between the NLRA and the Federal Arbitration Act (FAA). The Supreme Court's decision in *Epic Systems* brings an end to the dispute. In a 5-4 opinion authored by Justice Gorsuch, the Court held the FAA requires arbitration agreements to be enforced on the same grounds as any other contract, and the NLRA, which was enacted after the FAA, contains no contrary congressional command excluding class action waivers from the FAA's mandate.

The Seventh Circuit in *Epic Systems* and the Ninth Circuit in *Ernst & Young, et al. v. Morris* both held that class action waivers in mandatory, pre-dispute arbitration agreements between employers and employees violate the NLRA by restraining employees' right to engage in concerted activity. Both of these courts held there is no conflict between the NLRA and the FAA due to the FAA's "savings clause," which provides arbitration agreements are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." And because class action waivers contained in mandatory, pre-dispute arbitration agreements are unlawful, they are not enforceable under the FAA.

The Supreme Court disagreed. The FAA's savings clause only recognizes general contract defenses such as fraud, duress, and unconscionability. It does not allow for defenses that apply specifically to arbitration agreements instead of contracts generally. The employees' argument failed because they did not argue that the class and collective action waivers in their arbitration agreements were fraudulent or unconscionable; they simply attacked the agreements because they required individualized arbitration. This specific attack on arbitration is not a defense under the FAA's savings clause.

The Court went on to hold that the NLRA does not grant employees the right to engage in class or collective actions as a Section 7 right. Section 7 instead guarantees employees the right to bargain collectively and organize unions. In reaching this conclusion, the Court noted that when the NLRA was adopted in 1935, the Federal Rules of Civil Procedure had not created the class action, and neither had the Fair Labor Standards Act codified its collective action provision. Thus, the NLRA does not contain a congressional command contrary to the FAA's central purpose, which is to enforce agreements to arbitrate in accordance with their terms. As Justice Gorsuch noted, "it's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done by these other laws."

Finally, Justice Gorsuch also rejected the argument that the NLRB was due any deference for its position on class and collective waivers. By finding class and collective action waivers unlawful, the NLRB was not just interpreting the NLRA, it was interpreting the NLRA along with the FAA, the latter being a statute it does not administer. According to the Court, this type of analysis concerning two different statutory regimes is for the courts, not an administrative agency.

The Court's decision is a great win for employers, and it brings an end to the years of uncertainty created when the NLRB first changed course to challenge arbitration agreements. In reviewing and deciding this case, the Court consolidated *Epic Systems* with *NLRB v Murphy Oil USA, Inc.* (Fifth Circuit), and *Ernst & Young LLP v Morris* (Ninth Circuit).

3. Historically Narrow Construction of FLSA Exemption Rejected by Court in *Encino Motorcars, LLC v. Navarro.*

The Fair Labor Standards Act (FLSA) requires employers to pay overtime compensation to covered employees, but exempts from overtime numerous categories of workers. Traditionally, these exemptions have been construed narrowly against the employer asserting them, and that

narrow construction has been a sword swung by plaintiffs and their attorneys, and the DOL, in nearly every FLSA matter employers have faced—until now.

In its second look at this particular exemption in recent years, the U.S. Supreme Court in *Encino Motorcars, LLC v. Navarro*, 16-1362 (April 2, 2018), considered whether the automotive sales exemption "applies to service advisors—employees at car dealerships who consult with customers about their servicing needs and sell them servicing solutions."[1] But in deciding that the exemption does apply to service advisors, the Court dropped a true bombshell with respect to FLSA jurisprudence: it rejected the longstanding principle that exemptions are to be construed narrowly. As a result, going forward, courts will need to place exemptions on the same statutory and interpretive footing as the substantive overtime requirements in the statute.

Background

Current and former service advisors of a car dealership sued for unpaid overtime, alleging they were misclassified as exempt employees. Service advisors "interact with customers and sell them services for their vehicles." Specifically, they "meet customers; listen to their concerns about their cars; suggest repair and maintenance services; sell new accessories or replacement parts; record service orders; follow up with customers as the services are performed (for instance, if new problems are discovered); and explain the repair and maintenance work when customers return for their vehicles." The service advisors premised their argument for overtime on a 2011 Department of Labor rule that expressly excluded service advisors from the definition of "salesman." The district court found instead that the exemption applied to service advisors. The Ninth Circuit reversed, deferring completely to the 2011 DOL rule. The Supreme Court rejected this conclusion, holding that the regulation was procedurally defective and courts should not defer to it or rely upon it. The Supreme Court remanded the case to the Ninth Circuit for reconsideration. The Ninth Circuit again found that service advisors were entitled to overtime because they do not fall within the exemption.

The Supreme Court again reversed, basing its conclusion on what it called a "best reading" of the statute's text. The text exempts "any salesman, parts-man, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." §213(b)(10)(A). The Court noted that service advisors are "salesm[e]n," and they are "primarily engaged in . . . servicing automobiles." First, because salesman is not defined in the statute, the Court looked to the word's ordinary meaning as found in two commonly used dictionaries, and determined a salesman to be "someone who sells goods or services." The Court found that service advisors "obviously" meet this requirement because they sell customers services for their vehicles. Second, the Court found that even though the service advisors do not spend their time repairing cars, they do spend their time "servicing" automobiles because they are integral to the servicing process.

[1] Section 213(b)(10)(A) exempts from the overtime requirement of the FLSA "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers."

The Court disregarded the Ninth Circuit's use of the distributive canon of statutory construction[2] under which the Ninth Circuit linked salesman to selling, and partsman and mechanics to servicing. The Court found that this analysis ignored the plain meaning and usage of the word "or" in the exemption. Thus, a salesman could either sell or service automobiles and fall within the exemption. Interestingly, the Court noted that the Ninth Circuit's "narrow distributive phrasing is an unnatural fit here because the entire exemption **bespeaks breadth**." (emphasis added).

Finally, and most significantly, the Court rejected the Ninth Circuit's reliance on the commonly held principle that FLSA exemptions are to be narrowly construed. Noting that nothing in the FLSA's text demands a narrow construction of exemptions and that the FLSA contains "over two dozen" exemptions, the Court reasoned that exemptions are as integral to the statute as are the overtime and minimum wage requirements. Thus, quoting language from a decision from last term that "it is quite mistaken to assume . . . that whatever might appear to further the statute's primary objective must be the law," it held that courts "have no license to give the exemption anything but a fair reading."

In dissent, Justice Ginsburg, along with Justices Breyer, Sotomayor, and Kagan, sought to emphasize how the majority's holding was a stark departure from precedent. Underscoring the importance of the Court's holding regarding the interpretation of FLSA exemptions, Justice Ginsburg wrote that the Court was overruling "half a century" of precedent by rejecting the narrow construction principle.

While the Court's ruling is no doubt welcome news for any automobile dealers that wish to rely on the automotive sales exemption for their service advisors, the Court's decision could have broader implications for all employers that rely on any FLSA exemption for their employees. Going forward, individuals challenging the application of an exemption will no longer have the advantage of arguing that FLSA exemptions must be narrowly construed. Rather, courts must now analyze exemptions through a "fair reading" of the statute, taking into consideration the plain, ordinary meaning of the words on the page. The Court's ruling will have an impact on every case involving the application of FLSA exemptions to employees, whether those cases are brought by individuals or as collective actions on behalf of similarly situated workers. Indeed, it will bear watching whether the decision might also affect how courts going forward adjudicate motions for conditional certification involving these exemptions.

4. Employee Whistleblower Protections under Dodd-Frank Narrowed: *Digital Realty Trust, Inc. v. Somers*:

For publicly traded companies, the recent case from the Supreme Court, *Digital Realty Trust, Inc. v. Somers,* 16-1276 (February 21, 2018) addressed whether someone claiming whistleblower protections under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") was required to have actually reported the concern to the Securities and Exchange

[2] The distributive canon links "each expression to its appropriate referent." Slip Op. at 4-5. As noted by the Court, "[w]here a sentence contains several antecedents and several consequents," courts should "read them distributively and apply the words to the subjects which, by context, they seem most properly to relate." *Id*. at 8 (citing 2A N. Singer & S. Singer, Sutherland Statutes and Statutory Construction §47:26, p. 448(rev. 7th ed. 2014)).

Commission ("SEC"). Dodd-Frank and its whistleblower protections provide a monetary award for whistleblowers along with protections from retaliation by an employer. Dodd-Frank itself defined a whistleblower as one or more individuals who provide information of a securities law violation to the SEC. *See* 15 USC 78u-6(a)(6). However, the SEC's implementing regulations changed this definitional requirement so that it required disclosure to the SEC for a whistleblower to be covered by the award portion of the whistleblower protections but not for the retaliation portion of these protections. In *Digital Realty Trust, Inc. v. Somers,* the Plaintiff, Mr. Somers, had been a vice president of Digital Realty Trust. He was fired shortly after he allegedly reported potential securities law violations. Mr. Somers's report was made to senior management at Digital Realty Trust, but not to the SEC. Among Mr. Somers's several claims, he pursued a claim for retaliation under the whistleblower provisions of Dodd-Frank. Digital Realty Trust moved to dismiss Mr. Somers's claim for retaliation under Dodd-Frank because Somers had not made a report to the SEC.

In support of Mr. Somers argument that he was not required to make a report to the SEC before asserting his claim for retaliation, he pointed to the SEC's final rule, 17 CFR 240.21F-2, which did not require a report to the SEC in order for someone to qualify for the protections against retaliation under Dodd-Frank. The Supreme Court disagreed with Mr. Somers's argument and held that the statutory definition in Dodd-Frank governed, and that this definition included the requirement that the information of a potential securities law violation had to be provided to the SEC before someone would qualify as a whistleblower. In doing this, the Supreme Court simply applied the statutory definition of a whistleblower under Dodd-Frank.

While the *Digital Realty Trust, Inc.* decision could be read to narrow significantly the whistleblower protections for employees of publicly traded companies because it requires employees to know enough law to realize they have to make a report to the SEC before they get fired, it should also be pointed out that The Sarbanes-Oxley Act of 2002 ("SOX") has a similar whistleblower protection from retaliation, and that the SOX protections allow for but do not require reporting to the SEC. In other words, the SOX protections are significantly broader.

SOX Whistleblower Protections

The Sarbanes-Oxley Act of 2002 has its own prohibition against retaliation against a whistleblower, but SOX has a broader group of persons, compared to Dodd-Frank, who can be told of the problem by the purported whistleblower. SOX allows the report from an employee who reasonably believes some conduct constitutes mail fraud, wire fraud, bank fraud or securities fraud to be made to a "[f]ederal regulatory or law enforcement agency[,]" "any member of Congress or any committee of Congress[,]" or "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover or terminate misconduct)." An employee is also protected as a whistleblower under SOX if the employee causes to be filed, participates in or assists with a proceeding that the employer knows about and that relates to mail fraud, wire fraud, bank fraud, securities fraud, any SEC rule or regulation or any other federal law that addresses fraudulent conduct towards shareholders. (18 USC 1514A(a)). Dodd-Frank has similar protections for whistleblower activities with and toward the SEC, and also expressly protects disclosures "required or protected" under SOX. However, under Dodd-Frank, one still has to qualify as a

"whistleblower" as set out in *Digital Realty Trust, Inc.* As is apparent, an employee has more options under SOX to qualify as a whistleblower than would apply under Dodd-Frank.

Who Is Covered by SOX and Its Protections

SOX whistleblower protections in section 1514A extend to any employee of a publically traded company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, and this includes a subsidiary or affiliate whose information is included in the consolidated financial statements of a covered company. Section 1514A's prohibition on retaliation also expressly extends to the actions of any "officer, employee, contractor, subcontractor, or agent" of the company.

Even More Protection under SOX

SOX also amended a criminal statute that protects whistleblowers from retaliation in employment. Specifically, 18 U.S.C 1513(e) provides that "[w]hoever knowingly, with intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission … of a federal offense" is subject to fine or imprisonment. These protections apply to publically traded companies and their employees. Parenthetically, section 1513 also applies to private, non-public businesses.

Other Potential Whistleblower Protections

In addition to the retaliation protections contained in Dodd-Frank, SOX and the employment and civil rights laws that human resources professionals deal with regularly, such as Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act of 1967 ("ADEA"), The Americans with Disabilities Act ("ADA"), and the Fair Labor Standards Act ("FLSA"), there are a large number of other federal statutes that also have whistleblower protections for employees. The Occupational Safety and Health Commission ("OSHA") has been tasked with investigating and addressing retaliation claims under many of these statutes. OSHA's *Whistleblower Investigations Manual* catalogues these statutes and the investigation process applicable to claims under them, including such statutes as the Surface Transportation Assistance Act; the Federal Water Pollution Control Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation and Liability Act; the Energy Reorganization Act; the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; SOX; the Pipeline Safety Improvement Act; the Federal Railroad Safety Act; the National Transit Systems Security Act; the Consumer Product Safety Improvement Act; the Affordable Care Act; the Consumer Financial Protection Act of 2010; the Seaman's Protection Act; and the FDA Food Safety Modernization Act. While often overlooked in comparison to such statutes as Title VII, the ADEA, the ADA and the FLSA as employment decisions are being made, these other statutes also provide a federal body of law that touches on many employment decisions. When an employer is analyzing a proposed course of action that involves an employee who could claim to be a potential whistleblower, an employer should assess whether any of these statutes would apply to the potential claim, and the employer should determine what the relevant standard is for the employer to demonstrate its actions were non-retaliatory.

Under these statutes, employees benefit from an employee-friendly investigation process. These same statutes typically require an employee asserting a whistleblower claim to show the employee's protected activity was a contributing factor in the adverse action by the employer. Then the employer has to show it would have taken the same action in any event.

In addition to all these protections, there are also the many and diverse protections under the laws of the various states. In other words, there are many employee whistleblower protections available today, and therefore *Digital Realty Trust, Inc. v. Somers* has not left legitimate whistleblowers without protections.

5. ***Kindred Nursing Centers L.P. v. Clark*: Supreme Court Strikes Down Kentucky Rule Discriminating Against Arbitration and Upholding Arbitration Agreement under FAA.**

Perhaps as a precursor to what the Court would do in *Epic Systems* a year later, On May 15, 2017, the U.S. Supreme Court reiterated the principle that the Federal Arbitration Act (FAA) requires states to treat arbitration agreements just as they treat other types of contracts. In *Kindred Nursing Centers L.P. v. Clark*, the Court reversed in part a decision of the Kentucky Supreme Court, which had instituted a new rule chipping away at the enforceability of arbitration agreements under certain circumstances.[3] Justice Kagan wrote the majority 7-1 opinion and was joined by other liberal-leaning members of the Court, though then-newly-confirmed Justice Gorsuch did not participate.[4]

Background

The case stems from arbitration agreements entered into by relatives of two residents who lived in a nursing home, The Winchester Centre, operated by Kindred Nursing Centers. The two residents in question had executed powers of attorney granting their relatives authority to make contracts on their behalf and otherwise manage their affairs. Pursuant to that authority, the relatives executed arbitration agreements with Kindred Nursing Centers when completing paperwork for the residents to move into The Winchester Centre. Those arbitration agreements required the parties to submit all claims or controversies to binding arbitration.

Those residents died the following year, and their estates (represented by their relatives) separately sued Kindred Nursing Centers for alleged substandard care. Kindred Nursing Centers sought dismissal of the lawsuits based on the arbitration agreements, but the Kentucky courts rejected the motions. The Kentucky Supreme Court consolidated the cases and, agreeing with the lower courts, invalidated the arbitration agreements. The Kentucky Supreme Court first explained that the language of the resident's power of attorney was not broad enough to authorize his relative to enter into an arbitration agreement on his behalf. The court then announced a new rule applicable to both—and all—powers of attorney. Based on the Kentucky Constitution, the Kentucky Supreme Court held that a power of attorney could never grant authority to execute an arbitration agreement unless it specifically said so.

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[3] *Kindred Nursing Centers L.P. v. Clark*, No. 16-32, 581 U.S. ____ (May 15, 2017).

[4] Only Justice Thomas dissented, based on his longstanding view that the FAA does not apply to state court proceedings.

Supreme Court Decision

The U.S. Supreme Court swiftly dismantled the Kentucky Supreme Court's "clear-statement" ruling. The Court stressed that the FAA requires equal treatment of arbitration agreements and "thus preempts any state rule discriminating on its face against arbitration."[5] The Court went further, stating that the FAA "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have defining features of arbitration agreements."[6] Because the Kentucky Supreme Court's rule was tailored to disfavor arbitration agreements, it "flouted the FAA's command to place those agreements on an equal footing with all other contracts."[7] The Court therefore struck the Kentucky Supreme Court's rule and remanded the case to the Kentucky Supreme Court for further proceedings.[8]

While the Kindred Nursing Centers case arose in a narrow, consumer setting, the Supreme Court's opinion carried broader ramifications. Even without Justice Scalia, the Court showed no interest in retreating from its vigorous defense of arbitration agreements and indicated its willingness to intensify its scrutiny of state laws or other legal interpretations that undermine the enforceability of such agreements. The Court rebuffed an argument, raised by the relatives, that the states should have the liberty to regulate contract formation, if not enforcement. The Court found that this reasoning "would make it trivially easy for [s]tates to undermine the [FAA]—indeed, to wholly defeat it."[9] Overall, the Court seemed put-off by Kentucky's attempts to discriminate against arbitration.

The Court's tough talk should apply with equal force to state law arbitration-related rules in the employment law context as well. For example, the principles espoused in *Kindred Nursing Centers* may bode ill for the newly-enacted section 925 of the California Labor Code. That provision, which took effect January 1, 2017, prohibits an employer from requiring an employee "who primarily resides and works in California, as a condition of employment, to agree to a provision that would … [d]eprive the employee of the substantive protection of California law." The law primarily targets choice-of-law and choice-of-venue provisions. Nonetheless, the legislative history indicates that the new law was intended in part to limit the freedom to enter into arbitration agreements, placing it in the crosshairs of *Kindred Nursing Centers*.[10]

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5 *Kindred Nursing Centers, L.P.*, No. 16-32 at 4.

6 *Id.* at 5.

7 *Id.* at 9.

8 Specifically, the U.S. Supreme Court held that Kentucky courts must enforce the arbitration agreement executed by one of the relatives (Janis) on behalf of one of the residents (Olive), given their ruling that the underlying power of attorney was broad enough to authorize Janis to make such an agreement. The Court vacated the judgment as to the arbitration agreement executed by the other relative (Beverly) on behalf of the other resident (Joe) because the Kentucky Supreme Court had concluded that the underlying power of attorney did not grant Beverly the same authority. The court instructed the Kentucky Supreme Court to review its prior interpretation of that power of attorney, now that the "clear-statement" rule had been eliminated. *Id.* at 9-10.

9 *Id.* at 8.

10 *See Scott McDonald & Jim Hart*, New California Law Prohibits Choice of Law and Venue in Employment Contracts (https://www.littler.com/publication-press/publication/new-california-law-prohibits-choice-lawand-venue-employment-contracts), Littler Insight (Oct. 3, 2016).

The decision and its focus on calling out "covert" attempts to undermine arbitration could also bode well for attacks on California state and federal court's invalidation of Private Attorney General Act (PAGA) waivers. Recently, Bloomingdale's filed a petition for certiorari in *Bloomingdale's, Inc. v. Vitolo*, No. 16-1110. The Petition for Certiorari and Litter's Amicus Brief on behalf of the National Retail Federation argue that PAGA claims are nothing more than manufactured public policy exceptions to the Federal Arbitration Act. The *Kindred* decision reiterates the preeminence of the FAA and the prohibition against states interfering with enforcement of private arbitration agreements.

IV.
CASES WHERE CERT WAS DENIED

As outlined more fully above, the 2017-208 Supreme Court term included a couple of very important labor and employment decisions. But there has also been considerable press coverage of cases where the court denied cert petitions. These have included cases involving the following issues:

- Denial of review of award of $600,000 for failure to grant religious accommodation regarding hand-scanning ID device allegedly branding employee with "mark of the beast." *Consol Energy v. EEOC.*

- Grant of $100 million in benefits to class of 16,000 workers whose benefits were temporarily frozen when there was a shift in benefit plans and Foot Locker hid changes from workers. *Foot Locker v. Geoffrey Osberg, et al.*

- Dismissal of retaliation/whistleblower claims where employee claimed he was fired for reporting errors of team in compliance with pharma marketing laws. *Kerrigan v. Otsuka Pharmaceutical Inc., et al.*

- Review of legal standard for certification of an overtime collective action of cable installers, where a split exists between the Sixth and Seventh Circuits. *FTS USA LLC, et al. v. Edward Monroe, et al.*

- A retaliation case based on cat's paw theory where decision-maker was influenced by a low-level employee. *Terry Smyth-Riding v. Sciences and Engineering LLC, et al.*

- Whether employers can implement a temporary medical plan following good faith bargaining pending resolution of a complete collective bargaining agreement under the principle of economic exigencies. *Oak Harbor Freight Lines Inc. v. NLRB*

- Whether a Forum Choice provision in an ERISA plan that directs litigation to particular venues overrides the legal direction that suits "may be brought" in certain courts tied to the affected plan beneficiary or the plan. *George Mathias v. USDC CD IL.*

- Whether a magistrate judge has authority to enter final judgment when an unserved defendant has not consented to proceed before a magistrate. *Labor and Industry Review Commission of Wisconsin v. Coleman.*

- Whether the doctrine of qualified immunity precludes constitutional and common law contract claims in suit by professor for his removal as department chair. *Crosby v. University of Kentucky.*

- Whether sexual orientation discrimination is prohibited by Title VII.

V.
SEXUAL ORIENTATION AND TITLE VII—NOT YET BEFORE THE COURT

Title VII makes it unlawful for employers to discriminate on the basis of a person's race, color, religion, sex, or national origin.[11] Therefore, an employer may not take an adverse employment action, such as a termination or refusal to hire, on the basis of a protected characteristic, such as sex. Historically, many lawsuits brought under Title VII alleging discrimination on the basis of sexual orientation have been dismissed on the grounds that Title VII does not identify sexual orientation as a protected category. In recent years, however, social and judicial understanding of sex discrimination has expanded to include sex-based assumptions and stereotypes.

On December 11, 2017, the Supreme Court declined to review the Eleventh Circuit's decision in *Jameka Evans v. Georgia Regional Hospital*, dismissing the claims of a lesbian security guard that the hospital violated Title VII by firing her because of her sexuality. *Evans v. Georgia Reg'l Hosp*., 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (Dec. 11, 2017). In doing so, the Court upheld the lower court's reliance on the Fifth Circuit decision in *Blum v. Gul Oil Corp.*, finding that a discharge due to homosexuality is not protected under Title VII. The Supreme Court's decision leaves in place a circuit split over whether federal law bars discrimination claims based on sexual orientation. Thus far, the Eleventh Circuit in Evans held that such discrimination was not prohibited by Title VII, while the Second and Seventh Circuits have held that it is.

- ***Second Circuit***—because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected. *Zarda v. Altitude Express Inc.*, 15-3775 (2nd Cir. Feb. 26, 2018). *Zarda* had been the focus of attention because in *amicus* briefing the EEOC and DOJ took opposing positions, with the EEOC advocating for Title VII coverage and DOJ arguing against.

- ***Seventh Circuit***—discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII. *Hively v. Ivy Tech Community College of Indiana,* 853 F.3d 339 (7th Cir. 2017).

[11] 42 U.S.C. § 2000e-2(a).

Related cases are also making their way through the courts, and provide additional insight into the courts' views of sexual orientation, sexuality, and gender identity.

- *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424 (6th Cir. Mar. 7. 2018)—the Sixth Circuit became the first appellate court to decide that discrimination based on transgender status is discrimination based on sex in violation of Title VII.

- *Turner, et al. v. Pidgeon, et al.*, Case No. 17-424 (Dec. 4, 2017)—the City of Houston sought review by the Supreme Court of the Texas Supreme Court's decision finding that the Supreme Court's decision in *Obergefell v. Hodges* did not resolve whether the City of Houston can grant employment benefits to workers who are in same sex marriages. The Texas Supreme Court acknowledged that *Obergefell* recognized a constitutional requirement that states license and recognize same sex marriages to the same extent as opposite sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons. The Supreme Court denied cert without decision on December 4, 2017.

Thus as of the date of this paper, the issue of sexual orientation discrimination under Title VII remains unsettled by the Court. Employers grappling with these issues should be mindful of the jurisdictions in which they operate, but also mindful of the EEOC's openly stated position that such discrimination does indeed violate Title VII, and the Agency's willingness to pursue these cases and move the courts toward a similar philosophical and judicial position.

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