“HEADLINE NEWS”

KEY DEVELOPMENTS IMPACTING EMPLOYERS

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Early in his presidency, President Trump signed the “Buy American and Hire American” (BAHA) executive order, setting into motion changes to the business immigration system in the U.S. Although BAHA is just one of many executive orders signed by the president, it is emblematic of the Trump administration’s immigration goals, to protect U.S. workers and to ensure the integrity of the U.S. immigration system. BAHA has served as the basis for the implementation of a number of regulatory and policy changes. Some of the changes have been welcomed by employers, such as the H-1B electronic registration system which, has the potential to streamline the cumbersome H-1B application process. Others, like the increased vetting of visa beneficiaries, have created additional challenges for employers by increasing evidentiary burdens and significantly slowing visa processing timelines.

I. CHANGES TO THE H-1B CAP LOTTERY

On January 31, 2019, the Department of Homeland Security (DHS) published the H-1B registration rule in the Federal Register, formalizing changes to the H-1B selection process. The regulation alters the process in two noteworthy ways. First, the rule calls for the creation of an electronic registration system that H-1B petitioners must use to register all potential H-1B candidates. Second, the rule reversed the order in which the selection lottery is conducted, giving a preference to H-1B candidates with an advanced degree from a U.S. college or university.

Background

The H-1B visa is one of the most utilized temporary work visas in the United States. H-1B positions require at least a bachelor’s degree, or the equivalent, in a “specialty occupation.” The positions span a number of industries but are often associated with science, technology, engineering and mathematics (STEM) fields. Demand for the H-1B visa usually far exceeds the 65,000 new visas allotted by Congress each fiscal year (an additional 20,000 visas are available to candidates with a master’s degree or higher from a U.S. college or university). In most years, the annual cap for H-1B visas is reached within the first week of April. When U.S. Citizenship and Immigration Services (USCIS) receives more H-1B petitions than visas available, the agency conducts a computer-generated random lottery to determine which petitions will be adjudicated.

Changes

The Advanced-Degree Selection Process

The only change to be implemented for the FY 2020 selection process was the reversal of the H-1B lottery. In the past, USCIS selected the U.S. advanced degree petitions in the first lottery, and then ran a second lottery to select the regular cap petitions. Under the new regulation, however, the first lottery now includes all petitions. After USCIS selects enough petitions to fulfill the 65,000 regular H-1B quota, it then runs the second lottery for the 20,000 spots reserved for those eligible for the advanced degree exemption. DHS believes that the reversal increases the likelihood of selecting a petition for an H-1B candidate with a master’s degree, or higher, from a U.S. university.
Online Registration

The regulation also proposed the creation of an online registration system that would eliminate the need to file complete H-1B petitions on behalf of all candidates. Instead, petitioning employers will register their candidates online for a spot in the selection lottery. DHS suspended the implementation of the online system for the FY 2020 H-1B cap lottery but, once up and running, employers will only be required to submit H-1B petitions on behalf of candidates whose registrations are chosen in the lottery. Upon notice of selection, employers will then have a 90-day filing period to submit an H-1B petition on behalf of the selected candidate.

The registration system is intended to improve the efficiency of the H-1B filing process. Employers will only have to file H-1B petitions for the candidates who have been selected for adjudication instead of preparing and filing for all candidates, as is the case now. This is likely to result in lower costs for employers seeking to hire H-1B workers. In addition, USCIS is expected to process petitions faster since fewer petitions will be filed. It is not yet known when the electronic system will be ready for implementation. Under the rule, USCIS may suspend the electronic registration process during any fiscal year if it experiences technical challenges.

II. THE LABOR CONDITION APPLICATION (LCA) – ELECTRONIC POSTING

The Wage and Hour Division of the U.S. Department of Labor (DOL) published a bulletin highlighting the way in which DOL interprets the H-1B notice and posting procedures with which employers must comply if they elect to provide electronic notice of their intent to hire H-1B nonimmigrant workers. The bulletin places particular emphasis on compliance issues when third-party worksites are involved.

Background

The H-1B regulations require employers to provide notice to employees that it plans to employ H-1B workers. The notice must include information about the job, including the wage and job duties. It must also let employees know that a Labor Condition Application (LCA) has been filed and how to file a complaint with DOL if the employee believes the terms of the employment, as indicated on the LCA, have been violated.

Per the regulations, employers may provide notice in three ways: (1) by posting hard copies at the worksite; (2) by providing notice electronically; or (3) by notifying the collective bargaining representative, if applicable. Employers who fail to provide adequate notice may be debarred or disqualified from sponsoring any foreign workers in the United States for at least a year. The electronic notice provision dates back to 1998 and has not been updated since.

Guidance From DOL

Employers choosing to post H-1B notifications electronically should consider the following guidance from DOL:

1. Electronic postings must be readily accessible by all affected workers. The affected workers must have permission to access the information and know where to find it. A posting on a company’s intranet may not comply with the notice requirement if all affected workers do not have access to the intranet or know where the notice is posted.
2. DOL warns that notice may be deemed insufficient if the affected workers cannot determine which electronic notice applies to their worksite. The electronic posting must specify the terms and conditions of the employment, including the worksite location.

Employers that cannot comply with the electronic posting requirements may default to posting hard copy notices. Employers that elect to post hard copy notices must post the notices in at least two conspicuous locations at the worksite. The notices must be big enough and clear enough that affected workers can easily see and read them.

III. USCIS CHANGES POLICY ON ACCRUAL OF UNLAWFUL PRESENCE FOR NONIMMIGRANT STUDENTS AND EXCHANGE VISITORS

On August 9, 2018, USCIS implemented a new policy that changed the way the agency calculates the accrual of unlawful presence for students (F-1), exchange visitors (J-1), and vocational students (M-1) in nonimmigrant status, and their dependents, while in the United States.

Unlawful presence is defined as presence in the United States after the expiration of the authorized period of stay. According to the new policy guidance, F, J, and M nonimmigrants and their dependents, admitted or otherwise authorized to be present in the United States, start accruing unlawful presence as outlined below.

F, J, or M Nonimmigrants Who Fail to Maintain Nonimmigrant Status Before August 9, 2018

An individual in F, J, or M nonimmigrant status who failed to maintain his or her status before August 9, 2018, will start accruing unlawful presence based on that failure on August 9, 2018, unless he or she already started accruing unlawful presence on the earliest of the following:

- the day after the U.S. Department of Homeland Security (DHS) denied the request for an immigration benefit, if DHS made a formal finding that the person had violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;
- the day after the person’s Form I-94 Arrival/Departure Record expired (if admitted for a date certain); or
- the day after an immigration judge, or in certain cases, the Board of Immigration Appeals (BIA), ordered the person excluded, deported, or removed (whether or not the decision was appealed).

F, J, or M Nonimmigrants Who Fail to Maintain Nonimmigrant Status on or After August 9, 2018

An F, J, and M nonimmigrant begins accruing unlawful presence due to a failure to maintain his or her status on or after August 9, 2018, on the earliest of any of the following:

- the day after the F, J, or M nonimmigrant no longer pursues the course of study or authorized activity, or the day after the person engages in an unauthorized activity;
- the day after completing the course of study or program (including any authorized practical training plus any authorized grace period);
- the day after the person’s Form I-94 Arrival/Departure Record expires (if admitted for a date certain); or
the day after an immigration judge or, in certain cases, the BIA, orders the person excluded, deported, or removed (whether or not the decision is appealed).

Under the former policy, individuals who entered the United States for the duration of their studies and applicable training periods (Duration of Status or D/S) did not automatically begin to accrue unlawful presence if they overstayed or violated their nonimmigrant status. Instead, unlawful presence was triggered only upon a formal finding by USCIS that a nonimmigrant status violation had occurred or on an immigration judge’s ordering the person to be excluded, removed, or deported. The policy provides a catchall date, whereby at the very least, unlawful presence will be viewed to have begun accruing on August 9, 2018, for any F, J, or M nonimmigrant who overstayed or violated status prior to that date.

The accrual of unlawful presence is a significant issue because it may impact a person’s ability to apply for immigration benefits in the future. Individuals who have accrued more than 180 days of unlawful presence during a single stay and then depart the United States may be subject to a 3-year or 10-year bar to admission depending on how much unlawful presence they accrued before leaving the United States. Those who have accrued more than one year of unlawful presence based on their total number of entries into the United States, and who reenter or attempt to reenter without being admitted or paroled, may be deemed permanently inadmissible.

This is of particular interest now that the rule has been in effect for more than six months. Students found to have violated their status on or before August 9, 2018 would now be subject to the three year-bar to admission. That means that the student may not ask for another immigration benefit for three years. The three year period of inadmissibility begins once the student departs the United States. A waiver of the unlawful presence bar may be available to the student but waivers are often very difficult to get.

IV. REQUESTS FOR EVIDENCE (RFEs)

USCIS recently released data confirming that both requests for evidence (RFEs) and denials are on the rise for many nonimmigrant visa categories. The rates for RFEs and denials, which had been gradually increasing for several years, jumped sharply in fiscal year (FY) 2018. The data corroborates what many employers had already suspected—that it is getting more difficult to secure work authorization for foreign nationals, even those that are highly-skilled.

Key Findings

The following is a summary of the key findings included in the report:

H-1B Petitions

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>H-1B Initial Denial Rate</th>
<th>H-1B RFE Rate</th>
<th>H-1B Approved After RFE Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>4.3</td>
<td>22.3</td>
<td>83.2</td>
</tr>
<tr>
<td>2016</td>
<td>6.1</td>
<td>20.8</td>
<td>78.9</td>
</tr>
<tr>
<td>2017</td>
<td>7.4</td>
<td>21.4</td>
<td>73.6</td>
</tr>
<tr>
<td>2018</td>
<td>15.5</td>
<td>38</td>
<td>62.3</td>
</tr>
<tr>
<td>2019 (Q1)</td>
<td>24.6</td>
<td>60</td>
<td>61.5</td>
</tr>
</tbody>
</table>
In the first quarter of FY 2019, the RFE rate jumped to 60 percent, compared to 45.6 percent in the first quarter of FY 2018.

The rate of denials more than doubled between FY 2017 and FY 2018, and it more than tripled in FY 2018 compared to FY 2015.

The approval rate, even after providing additional information via an RFE, has steadily dropped since FY 2015.

### L-1 Petitions

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>L-1 Initial Denial Rate</th>
<th>L-1 RFE Rate</th>
<th>L-1B Approved After RFE Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>16.3</td>
<td>34.3</td>
<td>53.5</td>
</tr>
<tr>
<td>2016</td>
<td>15</td>
<td>32.1</td>
<td>55.6</td>
</tr>
<tr>
<td>2017</td>
<td>19.2</td>
<td>36.2</td>
<td>49.4</td>
</tr>
<tr>
<td>2018</td>
<td>21.2</td>
<td>45.6</td>
<td>52.9</td>
</tr>
<tr>
<td>2019 (Q1)</td>
<td>25.6</td>
<td>51.8</td>
<td>52.7</td>
</tr>
</tbody>
</table>

The increase in RFEs and denials has been more gradual for L-1 visas than it has for H-1B visas.

In the first quarter of FY 2019, the RFE rate jumped to 51.8 percent, compared to 46.1 percent in the first quarter of FY 2018.

### TN Visas

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>TN Initial Denial Rate</th>
<th>TN RFE Rate</th>
<th>TN Approved After RFE Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>4.9</td>
<td>17.3</td>
<td>74.8</td>
</tr>
<tr>
<td>2016</td>
<td>9.3</td>
<td>23.6</td>
<td>64.2</td>
</tr>
<tr>
<td>2017</td>
<td>8.4</td>
<td>22</td>
<td>64.7</td>
</tr>
<tr>
<td>2018</td>
<td>11.8</td>
<td>28.2</td>
<td>59.9</td>
</tr>
<tr>
<td>2019 (Q1)</td>
<td>11.6</td>
<td>27.9</td>
<td>59.8</td>
</tr>
</tbody>
</table>

The overall rate of TN denials increased from 4.9 percent in FY 2015 to 11.8 percent in FY 2018.

The TN RFE rate rose from 17.3 percent in FY 2015 to 28.2 percent in FY 2018.

While the rates for all categories in the first quarter of FY 2019 are consistent with the corresponding rates in FY 2018, they do show increased scrutiny when compared to the data for FY 2017.

While the report confirmed what many already knew—that USCIS continues to increase its scrutiny of nonimmigrant visa petitions—it is also a reminder that the majority of petitions are ultimately approved. With that in mind, when applying for a visa benefit on behalf of a sponsored employee, employers are encouraged to provide detailed descriptions of the positions they seek to fill, ideally linking the job duties to the sponsored employee's qualifications.

### V. PROCESSING TIMES

USCIS processing times continue to lag compared to previous years, according to data recently released by the agency. This is especially true for foreign nationals with pending green card
applications whose average wait time has increased from six-and-a-half months in fiscal year (FY) 2015 (October 1 through September 30) to more than a year in the first quarter of FY2019. Wait times are not expected to improve anytime soon.

The chart below represents a sampling of processing times (in months) as represented in USCIS’s table of national average processing times for all USCIS offices for the forms most commonly associated with nonimmigrant visas and those used when pursuing permanent residency through employment.

<table>
<thead>
<tr>
<th>Form Type</th>
<th>FY2015</th>
<th>FY2016</th>
<th>FY2017</th>
<th>FY2018</th>
<th>FY2019: First Quarter</th>
</tr>
</thead>
<tbody>
<tr>
<td>I-129: Petition for a Nonimmigrant Worker (H-1B, L-1, TN, etc.)</td>
<td>2.3</td>
<td>5.5</td>
<td>4</td>
<td>3.4</td>
<td>5.4</td>
</tr>
<tr>
<td>I-131: Application for Travel Document – Advance Parole</td>
<td>2.3</td>
<td>2.3</td>
<td>3</td>
<td>3.9</td>
<td>3.8</td>
</tr>
<tr>
<td>I-140: Immigrant Petition for Alien Workers</td>
<td>5.1</td>
<td>5.7</td>
<td>6.9</td>
<td>7.8</td>
<td>6.1</td>
</tr>
<tr>
<td>I-485: Application to Register Permanent Residence or Adjust Status – Employment Based</td>
<td>6.5</td>
<td>6.8</td>
<td>8.1</td>
<td>11</td>
<td>12.2</td>
</tr>
<tr>
<td>I-539: Application to Extend/Change Nonimmigrant Status</td>
<td>3.3</td>
<td>3.5</td>
<td>3.3</td>
<td>4.5</td>
<td>4.3</td>
</tr>
<tr>
<td>I-765: Application for Employment Authorization</td>
<td>2.4</td>
<td>2.6</td>
<td>3.1</td>
<td>4.1</td>
<td>4.6</td>
</tr>
</tbody>
</table>

What Is Causing the Delays?

Processing backlogs are not a new problem for USCIS; they existed long before President Trump took office. But several of the Trump administration’s policy changes, specifically those focused on the “extreme vetting” of visa applicants, are likely contributing to the steep jumps in processing times that began in FY 2017. Below are examples of policy changes that are thought to have directly contributed to USCIS’s increased wait times:

- In late 2017, USCIS reinstated the requirement that all employment-based green card applicants (and their dependents) attend in-person interviews. Although this requirement was always in place, USCIS had routinely waived the interview requirement for decades, finding that employment-based green card candidates were not high security risks (especially given that they had already undergone in-depth vetting during the lengthy green card process). As a result, there are now more cases in line for interview appointments, and because USCIS cannot approve cases until completing interviews, total processing times have increased.
In October 2017, USCIS rescinded a longstanding policy that allowed immigration officers to defer to prior determinations of visa eligibility when adjudicating extensions of nonimmigrant status (H-1B, L-1, etc.). Petitioning employers must now anticipate that immigration officers will treat every request for an extension as if it were a new case, even if little (or nothing) has changed since the initial filing. As a result, immigration officers must spend more time reviewing each case before they can approve it.

Shortly before the start of filing season for fiscal years 2018 and 2019, USCIS suspended premium processing for new H-1B quota subject cases. Premium processing allows H-1B petitioners the option to pay an additional government filing fee in exchange for USCIS’s agreement to adjudicate the H-1B visa petition within 15 calendar days. While USCIS ultimately reinstated the program during both years, it did so very gradually, often impacting only small numbers of pending petitions at a time. As a result, employers were left waiting months for final decisions on their H-1B petitions, sometimes beyond October 1st. For some H-1B candidates, the lingering petitions contributed to gaps in work authorization and interrupted international travel plans.

On March 22, 2019, USCIS implemented a revised Form I-539, the form used to apply for an extension or change of nonimmigrant status. In addition to the form change, USCIS now requires applicants and their dependents (regardless of age) to attend biometric appointments. This new biometrics requirement is expected to contribute to processing delays for nonimmigrant visa applications (H-4, L-2, etc.). The biometrics requirement may also impact the approval of employment authorization documents filed in conjunction with Form I-539.

Processing delays are likely to persist as USCIS grapples with changing priorities and an increased workload. Employers and employees may want to plan ahead and be mindful of upcoming expiration dates. Employers may find it useful to file for immigration benefits as soon as permitted, which may mean preparing cases in advance (where possible). In some cases, processing can be expedited for a fee by filing a request for premium processing. However, the premium service is not available for all visa classifications and is subject to suspensions by USCIS, as discussed above.

More detailed information about processing times for each service center is available on the USCIS website. It is also worth noting that the processing times provided represent the average processing time across all USCIS offices, and may not reflect the processing time for any individual application.

VII. THE BEGINNING OF THE END OF INFOPASS

Since March 2018, USCIS has been expanding the implementation of its Information Services Modernization Program to field offices across the country. The program puts an end to self-scheduled InfoPass appointments at local offices and instead, redirects applicants to USCIS’ online resources or the USCIS Contact Center (formerly known as the National Customer Service Center). According to the agency, surveys and other data showed that most people who attended the in-person appointments could have accessed the same information by checking its website or by calling the hotline. USCIS believes the program will ultimately help reduce processing times because it will free agency staff to spend more time adjudicating benefit requests. USCIS plans to expand the program to all field offices by the end of September 2019.
Those who need live assistance must call the USCIS Contact Center. Callers who opt for live assistance will be directed to a Tier 1 customer service representative. These are often contractors who are only able to provide basic, non-case-specific information based on scripts provided by USCIS. If the Tier 1 representative cannot answer the caller’s questions, they may transfer the caller to a Tier 2 representative. The Tier 2 representatives are USCIS immigration officers with access to USCIS systems. If the Tier 2 officer still cannot resolve the caller’s issue, the officer has the discretion to initiate an in-person appointment at a field office, if the officer deems it appropriate.

VIII. UPCOMING REGULATORY REFORM

A. Rescission of H-4 EAD

Almost two years after the Department of Homeland Security (DHS) said it would no longer support the H-4 employment authorization document (EAD) program for the spouses of certain H-1B visa holders, the agency has officially commenced the process to rescind the program. On February 20, 2019, DHS submitted its long awaited proposal ending the H-4 EAD program to the White House Office of Management and Budget (OMB). The rescission is not likely take effect until late spring or early summer because the proposed rule must go through the complete rulemaking process before it can be finalized. In the meantime, DHS is expected to continue processing applications for H-4 EADs.

Background

The H-4 EAD program was introduced in 2015. The program allows an H-4 nonimmigrant to apply for employment authorization if his or her H-1B spouse is in the process of getting a green card. Shortly after the program was introduced, a group of U.S. tech workers going by the name Save Jobs USA, filed a lawsuit challenging the legality of the program. The original suit was dismissed but in 2017 Save Jobs USA filed an appeal with the U.S. Court of Appeals for the D.C. Circuit, prompting the Trump Administration to say that they had no plans to defend the program.

B. Anticipated Regulations – Not Yet Formally Introduced

Narrowing the Scope of Specialty Occupations: In a long-anticipated move, DHS is expected to propose a revised definition of an H-1B “specialty occupation,” which the agency says is intended to help focus the H-1B program on only “the best and brightest foreign nationals.” It also intends to revise the definitions of “employment” and “employer-employee relationships.” The changes are expected to take a more narrow view of what qualifies as an employer and what work arrangements qualify as employment. The notice of proposed rulemaking is expected in August 2019.

Ending Concurrent Filing of Form I-485: DHS is expected to propose the end of concurrent filing of Form I-485 with either an I-140 (employment-based) or I-130 (family-based) petition when applying for adjustment of status. Specifics have not been released about how the new policy would be implemented. The proposed rule is not expected to be published in the Federal Register until September 2019.

Establishing a Maximum Period of Stay for F-1 and Other Nonimmigrants: U.S. Immigration and Customs Enforcement (ICE) is expected to propose a rule establishing a maximum period of stay for certain categories of nonimmigrants, such as F-1 students, to be
used in lieu of “duration of status.” No specifics have been announced. It is expected to be published in September 2019.

**Clarification of Criteria for B-1 and B-2 Classification:** DHS is proposing to clarify the requirements for B-1 and B-2 visa classification. This is a carryover item that was originally slated to be published in November 2018 but has now been bumped back to September 2019.
I. Introduction

From a proposed new regulation to increase the salary level for the FLSA white collar exemptions to the continued proliferation of state and local wage/hour laws, it has been a busy year in the wage/hour landscape. Frequent changes, often at the state and local level, continue to make compliance very challenging for employers, especially with the ever-growing patchwork of wage and hour initiatives in the form of paid sick leave, “don’t ask” laws and other legislation.

We encourage you to attend the 2019 Workplace Strategies session Wage and Hour Power Hour: Overtime and Other Happenings for a more detailed discussion of these developments.

II. Proposed New Regulation Raising the Salary Level for the White Collar Overtime Exemptions under the FLSA.

A. 2016 to Present: A Circuitous History.

After the prior attempt by the DOL to more than double the salary level threshold for the FLSA “white collar” overtime exemptions was judicially invalidated in November 2016, the DOL under the new administration announced that it was going back to the drawing board. To refresh, the prior rule doubling the salary level threshold (“Final Rule”) was enjoined by a federal district judge in Texas, who later granted summary judgment to the parties challenging the Final Rule. On appeal to the 5th Circuit, one of the issues was whether the DOL had the authority under the FLSA to even set a salary level threshold in the first place. Even though administrations had already changed following the 2016 general election, the DOL took the position on appeal that it had the statutory authority to set a salary level threshold for the overtime exemptions.¹

On July 26, 2017, the WHD published a Request for Information: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (2017 RFI). Essentially an invitation for public comment, the 2017 RFI was intended to provide the DOL with “information to aid in formulating a proposal to revise the part 541 regulations.” In it, the DOL asked eleven questions, including whether the statutory salary level should be tied to inflation or some other measure, whether multiple salary levels should be imposed, should they automatically increase on a periodic basis, and whether employers increased the salaries for exempt employees in anticipation of the prior Final Rule. The public comment period closed on September 25, 2017 after the DOL received nearly 165,000 comments.

The RFI was not a new overtime rule and did nothing to change the white collar overtime regulations that were last substantially revised in 2004. Following the RFI, the DOL engaged in a series of “listening sessions” in September and October 2018 at locations across the country.

¹ Nevada, et al., v. U.S. Dep’t of Labor, et al., 2018 F.Supp.3d 520 (E.D.Tex. 2016), appeal pending, No. 16-41606 (5th Cir.)


In its NPRM, the Department has proposed to increase the standard minimum salary level for the executive, administrative, and professional exemptions (EAP) to $679 per week or $35,308 annually from the current $455 per week or $23,660 annually. In addition, the Department is proposing to increase the total annual compensation threshold for a highly compensated employee (HCE) to $147,414 per year from the current $100,000 requirement. As with the current regulations, the NPRM keeps in place the requirement that a highly compensated employee receive at least the standard minimum salary level on a weekly, or less frequent basis; consequently, a highly compensated employee would have to be guaranteed a salary of at least $679 per week under the NPRM.

In addition to these increases in the minimum salary level and total annual compensation amount, the NPRM also would:

- Rescind the 2016 final rule that was enjoined by a federal district court in Texas discussed above.
- Allow non-discretionary bonus and incentive payments, including commissions, to meet up to 10% of the proposed minimum salary level of $679 per week or $35,308 per year.
- Provide a more generous time period (as compared to the 2016 final rule) for employers to make non-discretionary bonus and other incentive payments to satisfy the minimum salary level -- such payment must be made annually or more frequently.

The NPRM is also significant for what it does not propose to do, including:

- The NPRM does not propose to change the standard duties tests for the executive, administrative, professional, outside sales, or computer employee overtime exemptions.
- It does not include a provision automatically increasing the minimum salary level (or total annual compensation for an HCE) on a regular or periodic basis as did the enjoined 2016 final rule.
- It does not allow non-discretionary bonus or incentive payments, including commissions, to meet the minimum guaranteed salary component of the total annual compensation for an HCE.

The NPRM has a 60-day comment period which expires on May 21, 2019.
III. Other Regulatory Wage Hour Developments.

A. Regular and Basic Rates Under the FLSA.

On March 29, 2019, the DOL/WHD announced a proposed rule that would update and clarify the FLSA regular rate requirements. Among other things, the proposed rule identifies certain perks and benefits (such as unused paid leave and reimbursed expenses) which are excludable from the regular rate when calculating an employee’s overtime pay. A welcomed aspect of the proposed rule is that it provides greater clarity and certainty as to what types of compensation and benefits—including more innovative compensation arrangements—are excludable from the regular rate. This helps employers comply with the FLSA while also allowing them to continue to develop innovative incentive and other compensation programs that benefit employees. For example, the proposed rule clarifies that the costs of certain perks, such as fitness club membership reimbursements and student loan repayment programs payments, do not have to be included in the regular rate when calculating overtime.

The notice and comment period for the proposed rule will end on May 28, 2019. Following the notice and comment period, the Department will review all comments and potentially make further adjustments to the proposed rule. At the time this paper went to press, it is unclear when a final rule may be issued by the Department.

B. DOL Opinion Letters Continue to Provide Helpful Information.

For 70 years, the WHD provided specific guidance on how to comply with the FLSA through the use of Opinion Letters issued by the WHD Administrator or his/her designee. Opinion Letters applied the FLSA to a specific set of facts as provided to the agency, usually through a request from an employer or a regulated group. Not only did Opinion Letters clarify aspects of the FLSA, because they were official, written opinions by the WHD of how the FLSA applied to a specific set of facts, employers could rely on the opinion letters to limit or reduce damages in FLSA lawsuits pursuant to the FLSA Portal-to-Portal Act. For example, an employer could preclude or limit liquidated (i.e. double) damages or a longer statute of limitations (for example, a third-year of damages for willful violations) by showing “good faith.” Reliance on an Opinion Letter with highly similar facts may be solid evidence of good faith.

In 2010, the WHD formally stopped using Opinion Letters, opting instead for “Administrative Interpretations” of the FLSA. These Administrative Interpretations were general in nature and applied to large categories of employees as opposed to describing how the FLSA applied to a particular set of facts. As such, they became less useful in particular situations and/or as an affirmative defense in litigation.

Beginning on April 12, 2018, the WHD resurrected Opinion Letters after a 9-year hiatus. U.S. Secretary of Labor, Alexander Acosta, explained that the DOL “is committed to helping employers and employees clearly understand their labor responsibilities so employers can concentrate on doing what they do best; growing their businesses and creating jobs.” The WHD also redesigned its website to allow easy access to the Opinion Letters and guide employers and employees how to request an Opinion Letter. The WHD opinion letters can be found at: https://www.dol.gov/whd/opinion/search/index.htm?

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3 29 U.S.C. 260
In its Opinion Letters, the WHD includes a key disclaimer. Seeking an opinion letter is intended to assist in future compliance and cannot be used to end-run in current litigation (or a current investigation by the WHD):

**The opinion below is based exclusively on the facts you have presented. You have represented that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating, or for use in any litigation that commenced prior to your request.**

One option to establish an affirmative defense in a subsequent FLSA lawsuit is to seek an Opinion Letter on a particular pay practice or set of facts prior to any legal challenge. However, the effort is not without risk. If the WHD does not approve the pay practice or exempt classification detailed in the employer’s request, failure to make immediate changes will increase the likelihood of penalties down the road.

### C. Status of the P.A.I.D. Program.

The Payroll Audit Independent Determination (P.A.I.D.) program is an innovative pilot program by the DOL aimed at encouraging employers to audit their pay practices and self-report minimum wage and overtime violations to the DOL. The program was designed to avoid expensive litigation and make sure that improper pay practices are corrected prospectively. In return for self-reporting under the “protection” of the P.A.I.D. program (and paying all back wages under supervision of the DOL) an employer can avoid liability for double liquidated damages, civil penalties and attorneys’ fees because any employee who accepts the payment must sign a release forfeiting further damages in an FLSA lawsuit. A link to the P.A.I.D. portal is: [https://www.dol.gov/whd/paid/index.htm](https://www.dol.gov/whd/paid/index.htm)

Participating in the P.A.I.D. program has conditions:

- The employer has to be covered by the FLSA, which excludes smaller employers.
- The employer has to be acting in “good faith” (as determined by the DOL) and cannot have violated the FLSA minimum wage or overtime requirements within the last five years.
- An employer is not eligible to participate in the program if it is currently under investigation by the WHD for the same pay practice, or is in threatened or current litigation on the issue.
- The employer has to verify that it reviewed its compensation practices for potential FLSA violations.
- The employer has to self-disclose the specific violations it found, the identity (names, addresses, phone numbers) of impacted employees, the time period of the violations, and the amount of back wages owing.
- The employer has to provide substantial documentation to the DOL about each violation and commit to future compliance.

Participation in the P.A.I.D. program has its risks. The information provided to the DOL could be subject to disclosure under a Freedom of Information Act (FOIA) request. The P.A.I.D.
program applies only to violations of federal law and not parallel state laws, thus any release signed under the P.A.I.D. program would most likely not preclude state law claims for overtime. Employers should seek specific legal advice prior to participating in the P.A.I.D. program.

IV. State and Local Governments Flex Their Wage Hour Muscle.

Historically, states have passed their own laws on a wide variety of wage and hour issues, including:

➢ Minimum wage and overtime requirements
➢ Meal and rest breaks
➢ Minimum pay for reporting to work
➢ Direct deposit and payroll cards
➢ Frequency of pay
➢ Paystub requirements
➢ Advance notice of changes in pay or hours
➢ Deduction from pay, including requirements for final paychecks upon termination from employment
➢ Vacation policies – “use it or lose it” limitations
➢ Wage statement “notice” to employees

More recently, state and local governments have become extremely active in passing laws that impact wage/hour compliance. The key trends at the state and local level that employers are carefully watching include the following:

➢ A growing number of states that have passed pre-emption laws forbidding local governments and municipalities from creating inconsistent wage requirements, such as local minimum wages that differ from the state mandated minimum wage, local paid sick leave, etc.

➢ The rise of “don’t ask” laws at the state level, which prohibit employers from asking job candidates about prior salary or wage information.

➢ The increasing use of ballot initiatives to effectuate change in the wage/hour arena, including paid sick leave, higher minimum wage, etc.

➢ The rise in paid sick leave requirements at the state and local level.

➢ The potential extraterritorial effect of state-level wage and hour laws.

For companies with employees in multiple states, it is becoming increasingly difficult for HR and payroll professionals to maintain wage practices that comply with the patchwork of ever-changing state and local wage rules, especially if there are employees in the same job classification across multiple states with widely varying pay requirements. Employers in the transportation or trucking industry who have employees crossing multiple state (and local) jurisdictions as part of their regular job duties struggle with the potential territorial effect of inconsistent state/local wage laws.

To address the wide variation in state minimum wage rates and in recognition of the demands on busy HR professionals, Ogletree Deakins developed a subscription service OD Comply State Wage and Hour Issues for our clients who have employees in multiple states. OD
Comply provides up-to-date information on common wage and hour laws for each state, including minimum wage, overtime, pay deductions, vacation pay and other issues. The service provides practical information on state wage hour laws, along with citations to statutes, regulatory guidance and can be customized to particular states.

Overview

On June 23, 2016 the UK electorate was asked “Should the United Kingdom remain a member of the European Union?” Against the expectations of most commentators, the electorate voted by a small majority to leave: 51.9% versus 48.1%. That fired the starting gun for a protracted, and acrimonious, process of unravelling 40 years of integration and EU based legislation.

Technically the referendum had “advisory” status and was not a binding instruction on UK lawmakers [European Union Referendum Act 2015]. However, despite the fact that 73% of lawmakers backed “Remain” in the campaign, including Prime Minister Theresa May and most (but not all) of her current cabinet, the Government set to work implementing the will of the people and seeking to negotiate the UK’s departure from the European Union.

The UK Government formally served the required two years’ notice of departure [Article 50 of the Lisbon Treaty] on March 30, 2017, meaning Brexit should have happened on March 29, 2019. The two year period was to allow for negotiation between the UK and remaining 27 EU countries on the future relationship between them. However, acrimonious splits amongst UK lawmakers as to the precise form of Brexit has resulted in paralysis, with the UK Parliament failing to approve terms agreed between the UK Government and the EU by the proposed departure date. As such the EU and UK Government agreed to delay the departure date. At the time of writing the extension is to April 14, 2019, although with UK lawmakers deadlocked further extensions beyond that look inevitable.

Lawmakers in the UK fall into various “camps” (1) those who want a clean break with the EU without agreeing alternative trading terms with the EU (a so-called “hard Brexit”) (2) those who want to retain close trading ties with Europe – possibly to remain in the EU Customs Union and Single Market (a so-called “soft Brexit”) (3) those who back Theresa May’s deal which lies somewhere between a hard and soft Brexit and (4) those who think public opinion has moved and want to re-run the referendum with a view to cancelling Brexit altogether.

The eventual outcome is currently impossible to predict, much to the frustration of businesses who are having to cope with uncertainty over future tariffs and trade relations, as well as uncertainty over the extent to which EU laws and regulations will apply in future. A soft Brexit would probably require UK businesses to follow EU laws in return for favorable trading arrangements.

What is the impact for Employers in the EU and UK?

Despite the uncertainty there are some likely Brexit impacts employers should be considering now. The main areas of relevance to employers are:

- Immigration and Work Permits – all EU member states allow free movement of each other’s citizens who can live and work in any other state. A major factor in the referendum outcome was a perception that the UK, as a small set of islands with 65 million people and net migration adding to this at a rate of approximately 300,000 per year, has “run out of space” and needs tougher immigration rules. Pro Brexit politicians would point out that the UK population is almost identical to that of France, yet France is twice the geographical size of the UK. A survey by Lord Ashcroft Polls of Leave voters immediately after the referendum revealed 80% regarded immigration as a “force for ill”.


What will the impact of Brexit be on immigration? The UK and EU have both made it clear that there will not be any forced repatriation of anyone from one side to the other who were already in place on Brexit date - although concerns have been raised about affected citizens not realizing they may need to file paperwork to remain. However the ease of future immigration across the new border is uncertain. Most likely there will be some form of work permit arrangement – adding bureaucracy to employers dealing with global mobility.

- **Trade** – a key issue is whether tariffs will be introduced on trade between the UK and EU. Few want them, but many citizens and politicians in the UK do not want to accept the EU rules that would be required in return for participation in the EU free trade Customs Union – in particular the free movement of people.

- **Employment Laws** – A substantial proportion of UK employment laws are based on EU law including those relating to working time and anti-discrimination. The UK Government has said that it will “cut and paste” EU based laws into UK law on Brexit [The Repeal Bill]. That will ensure that there are no changes overnight. However UK employment laws may then evolve in a different direction to EU law. Employment laws in the EU may also evolve differently to what might have been if the UK had stayed a member, with many commentators of the view that the UK was a “business friendly” force in negotiations on EU laws that counter-balanced some of the more “pro employee” instincts of other countries, notably France, Italy and Spain.

- **Data Privacy / GDPR** – UK law is already fully compliant with EU GDPR legislation so Brexit should not require employers to revisit their GDPR compliance – however some commentators believe that there is a small possibility that the UK could be deemed “not adequate” for the purposes of international data transfers. If this were to happen it would require alternative approaches to transferring employee data to the UK - as is currently the case with transfers to the US.

- **Having an EU base** – It is important for some businesses to base their European operations in the EU. The Finance industry is an example where so-called “passporting” rights enable a financial firm based in an EU country to sell their services across the EU. London’s world leading Finance Industry is very concerned about the loss of passporting access to other EU countries with some banks moving parts of their business from London to other European cities to avoid this issue.

- **Uncertainty** – companies do not like uncertainty and the UK is almost certainly losing business as a result of multinational companies avoiding the UK to focus their business interests and decisions on countries which provide more certainty.

- **Exchange rate depreciation** – Sterling (GBP or “Pound”) depreciated in value by 10% overnight on the announcement of the referendum result. This makes employing people in the UK cheaper, but also reduces the value of UK sales they may achieve. It has since recovered most of that fall against the US Dollar, but remains down against the Euro.

What are the thorny issues in the negotiations?

- **Membership of the EU Single Market and Customs Union** – Opinions are split in the UK on whether the UK should remain in at least one of the Single Market or the Customs Union.
Union. Business leaders are generally in favor of continued membership of both because of the tariffs and bureaucracy which could result from leaving these markets. On the other hand a soft Brexit of this sort is opposed by many politicians who are concerned that the UK would need to follow EU rules and probably maintain the principle of free movement of people as a price of continued membership, and prefer the UK leaves these markets. During the referendum campaign many “leave” campaigners argued that the UK would be able to keep the benefits of tariff free trade without following EU rules or accepting free movement. “Remain” campaigners criticized that claim as unachievable. The Governing Conservative Party is committed to leave the Single Market and Customs Union. The opposition Labour Party has come out in favor of remaining in the Customs Union.

- Immigration – This was a major factor in the referendum result. It is the main reason the UK Government is against continued Single Market participation which would require the free movement of people. Indeed they have made ending the free movement of people one of their “red lines” in the negotiations with the EU.

- Financial Services – the Financial Services industry, primarily based in the City of London, is the UK’s largest industry. It is concerned about loss of so-called “passporting rights” which allow UK Financial Services companies to do business in other EU countries. The UK Government hopes to negotiate a continuation of passporting to avoid a flight of jobs from London to other European financial centers – amid evidence that this migration of jobs is already starting.

- The European Court of Justice – The fact that the ECJ can effectively overrule the UK’s Supreme Court has been a major cause of concern to Brexit Supporters who have opposed any eventual deal under which the ECJ retained any authority in the UK – for example deciding on disputes between the UK and EU.

- Northern Ireland – A major headache is how to avoid a “hard border” between Northern Ireland and the Republic of Ireland – where currently there is no border infrastructure and no border checks. Everyone is committed to avoid that – which could have severe political ramifications in an island that has recovered from many decades of bloodshed during “the Troubles” - but how can that work in reality if the EU and UK start charging each other border tariffs?

- Scotland - Scotland’s Regional Government is a nationalist government who advocate independence from the rest of the UK. The UK Government granted them a referendum on Scottish independence in 2014 during which the Scottish public voted 55% to 45% to remain in the UK. That was before the Brexit referendum during which Scotland voted 62% to 38% to remain in the EU, bucking the trend of other parts of the UK. The regional Scottish Government claims this was a “game changer” and that the earlier referendum on independence from the UK should be re-run in light of Scotland being “dragged out of the EU against its wishes”. This remains a live issue, although opinion polls show most Scottish voters do not want another referendum which was divisive and split families. The regional Scottish Government has parked the issue for now in the light of falling electoral support and pending the conclusion of the Brexit negotiations.

- Fishing rights – the UK has substantial fisheries which all EU nations are currently allowed to fish – much to the displeasure of UK fishermen who see Brexit as a means to
reclaim their fisheries. EU Nations may want continued access in return for any concessions they make in other areas.

- **Veto** – any one of the 27 EU states could collapse the eventual trade deal the EU reaches with the UK and use that threat for other purposes. For example, some commentators foresee Spain threatening to veto any deal unless they are able to make progress on their long stated demand for joint sovereignty over Gibraltar – a UK territory located on the southern tip of Spain.
LEGAL UPDATE: MEXICO – Pietro Straulino-Rodriguez

We are experiencing exciting new times on labor aspects in Mexico. On September 20, 2018 Mexico ratified ILO’s Convention 98, endorsing the right to organize and collective bargaining negotiation. On November 30, 2018 the United States-Mexico-Canada Agreement was signed in Buenos Aires by President Donald Trump, President Enrique Peña Nieto and Prime Minister Justin Trudeau. This agreement increases labor regulations, adding a labor chapter (23). On December 1, 2018 Andres Manuel Lopez Obrador took office as Mexico’s President. His approval rates and support from the population have only increased since then. He is promising fighting corruption and helping the underprivileged part of the Mexican’s population, since they have not been considered until know.

The Mexican Republic was divided in two geographical zones. The “Free Norther Border Zone” and the rest of the country. After the application of new legal minimum wages in Mexico’s Free Norther Border Zone, effective January 1, 2019, substantial collective conflicts (strikes and illegal work stoppages) arose in Matamoros, Tamaulipas. Groups of employees, led by activists, illegally stopped operations in at least 45 “maquiladora” plants, requesting a 20% wage increase and an extraordinary annual bonus of $32,000.00 pesos (approximately USD $1,641.00), per employee. Reports indicate that 43 plants in the region agreed to those demands and 2 intend to close operations, firing approximately 1,500 employees, each. Another 26-29 plants are still evaluating what to do next.

It is important to mention, that this movement was initiated by an outsider activist from Cd. Juarez, Chihuahua, who incited the employees to push against the companies and their union leaders, with illegal work stoppages. This is not a movement initiated by the unions or their leaders themselves, but by the employees under influence of third parties (at the end unions had to file for strike at their representatives demands).

The above mentioned activist is a lawyer who has created many labor issues for many large employers in Cd. Juarez, Chihuahua. The activist utilizing social media, publishes messages with information about labor issues, compensation, overtime, holiday pay and work hours, etc., and is currently utilizing her efforts convincing employees to follow her, by promising them to obtain better salary/benefits, please do consider that normally plaintiff’s attorneys bill their clients for a contingency fee.

It is also important to mention that new important players will be around and are currently “rattling the cage” in order to break the status quo. On February 2019, Mr. Napoleón Gómez Urrutia, long time miners union’s leader and currently a Mexican Senator, incorporated “Confederación Internacional de los Trabajadores” “CIT”, this Confederation currently incorporates 10 Federations and approximately 150 Unions and Mr. Pedro Haces Barba, also a Mexican Senator leads “Confederación Autónoma de Trabajadores y Empleados de México” “CATEM” this new confederations are new options for employees, since long time players CTM and CROC, (long time government partners) are seen as employer friendly Unions since they are promoting protective bargaining agreements.

Finally, a new amendment for the Mexican Federal Labor Law (“FLL”) is currently discussed in Congress. It is important to consider that FLL is one of the most detailed codes in Mexico, it has a Federal application, the current one was incorporated in 1970 with the latest major overhaul been addressed in year 2012. We shall consider the following major modifications:
A. The Labor Boards will be abolished and in their place, new labor courts will need to be incorporated. Labor Boards were part of the executive branch and with the creation of labor courts, the judicial system will oversee the labor process entirely, not only the “Amparo”.

B. A new “Labor Organization” will be incorporated. This super institution will have the following capabilities:

i) It will be a conciliation center, providing a certificate that will be a pre-requirement (that parties tried conciliation) prior employees file a claim before labor courts;

ii) It will be a national center for registration of unions (all unions will be registered under this Labor Organization, detailing their By-laws, members, assets, directives, among others; and

iii) All collective bargaining agreements “CBA” will be filed under this Organization. New requirements will need to be followed in order to have a CBA registered, the first and most important one: having the Labor Organization evidenced the actual and current representation from the union with actual members being employed by the company.

As mentioned, interesting times in Mexico, more to come!
LEGAL UPDATE: CALIFORNIA – Danielle Ochs

I. Introduction

In 2019, California faced a wave of new legislation regulating all aspects of employment in California. Perhaps the most dramatic and timely set of rules include a series of me-too inspired enactments relating to the treatment of harassment and discrimination in California. Below are thumbnail sketches of those rules designed to help you quickly identify if you as a California employer could be impacted.

In addition to keeping up with this panoply of new rules and regulations, California employers should also brace (and prepare) themselves for the 2020 roll out of California’s new Consumer Privacy Act (CCPA), a sweeping piece of legislation sure to change the privacy landscape in California and beyond.

II. California’s Wave of 2019 Legislation

A. SB 1343 – Requires More Sexual Harassment Training

Prior to SB 1343, California employers with 50 or more employees were required to provide supervisor level employees and above two-hour interactive trainings within a specified time period. SB 1343 now requires employers who employ five or more employees, including temporary or seasonal employees, to provide at least one hour of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees by January 1, 2020. The new law requires that the training occur once every two years. California’s Department of Fair Employment and Housing is charged with developing or obtaining one-hour and two-hour online training courses and to post them on its website.

B. SB 820 – Prohibits Non-disclosure Provisions in Sex Harassment and Discrimination Settlement Agreements

SB 820 prohibits a provision in a settlement agreement that prevents the disclosure of factual information relating to certain claims of sexual assault, sexual harassment, harassment or discrimination based on sex, or an action of retaliation for reporting sex harassment or sex discrimination. Such provisions in agreements entered into after January 1, 2019 are void as a matter of law and against public policy. The statute creates an exception for a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, if the provision is included in the settlement agreement at the request of the claimant.

Employers should consult with counsel before entering any California settlement agreement releasing a sex-based claim.

C. SB 826 – Requires Women on Board of Directors

SB 826 requires no later than the end of 2019, a domestic general corporation or a foreign corporation that is publicly held whose principal executive offices are located in California have a minimum of one female on its board of directors. By close of 2021, two female directors are required if the corporation has five directors and three female directors are required if the corporation has six or more directors.
Employers should consult with their corporate counsel on compliance strategies. This law comes with steep fines for non-compliance.

D. **AB 3109 – Prohibits Waivers of the Right of Petition or Free Speech**

AB 3109 provides that a provision in a contract or settlement agreement is void and unenforceable if it waives a party’s right to testify in an administrative, legislative or judicial proceeding concerning alleged criminal conduct or sexual harassment.

Employers should review and update the language contained in existing employment agreements that limit these rights.

E. **SB 224 – Broadens Those Liable for Sexual Harassment**

SB 224 amends Civil Code Section 51.9 and provides that a person is liable for sexual harassment where there is a business, service or professional relationship between the plaintiff and defendant or the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party. The following relationships are included: physician, psychotherapist, dentist, attorney, holder of a master’s degree in social work, real estate agent, real estate appraiser, investor, accountant, banker, trust officer, financial planner loan officer, collection service, building contractor, escrow loan officer, executor, trustee, administrator, landlord or property manager, teacher, elected official, lobbyist, director or producer, or a relationship that is substantially similar to any of the foregoing. The statute also makes it an unlawful practice to deny or aid, incite or conspire in the denial of rights of persons related to sexual harassment actions.

Employers should be aware that the mere absence of an employment relationship may not be a shield against sex harassment claims in California.

F. **SB 1300 – Adds Further Changes to Sexual Harassment and Discrimination Laws**

SB 1300 prohibits an employer in exchange for a raise or bonus, or as a condition of employment or continued employment from (1) requiring the execution of a release of a claim or right under California’s Fair Employment and Housing Act; or (2) from requiring an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment. The statute provides that an agreement or document in violation of either of these prohibitions is contrary to public policy and unenforceable.

SB 1300 also provides that an employer may be responsible for the acts of nonemployees with respect to harassment based on any protected class. The statute also authorizes an employer to provide bystander intervention training to its employees which includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motive bystanders to take action when they observe problematic behaviors. SB 1300 further provides that a prevailing defendant is prohibited from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.

This law is chockful of revisions to the manner in which employers handle and resolve California harassment claims. Employers should consult with its impact on existing cases.
G. AB 2770 Privileged Communications

AB 2770 amends Civil Code adds to Section 47(c) to protect complainants, witnesses and employers from defamation claims by alleged harassers based on internal sexual harassment determinations and complaints, which are now deemed “privileged communications” if they are disclosed without malice. Statements designated as “privileged” cannot be used to support a defamation claim under state law. The act defines privileged communications to include non-malicious statements concerning complaints of harassment based on “credible evidence,” witness statements made during investigations, and statements to harasser’s prospective employers regarding rehire.

While this law extends a privilege to employers concerning representations made about former employees, employers should still be wary of any conduct that could later be deemed malicious or that is designed to intentionally interfere with the rights of the former employee.

H. AB 2822 —Salary History Information

Pursuant to Labor Code § 432.3, California employers are prohibited from seeking salary history information regarding a job applicant, either by directly asking the applicant or by researching through a third party or any other channel. An employer may only consider salary information provided voluntarily, with no prompting by an applicant to determine that applicant’s salary. Salary information cannot be used to determine whether the applicant should be offered employment, even when it is provided voluntarily. Upon reasonable request from an applicant, an employer must provide the pay scale for a particular position.

Labor Code § 432.3 was further amended on July 18, 2018. The amendment provides that for purposes of Section 432.3, “pay scale” means a salary or hourly wage range, “reasonable request' means a request made after an applicant has completed an initial interview with the employer, and “applicant’ means an individual who is seeking employment with the employer and is not currently employed with the employer in any capacity or position. Additionally, the amendment provides that an employer may ask an applicant about his or her salary expectation for the position being applied for.

Employers should ensure that they are not requesting prior compensation information as part of the hiring process, and develop a pay scale for each position, so that the information is available upon reasonable request from an applicant.

III. California’s Consumer Privacy Act (GDPR California style)

On June 28, 2018, California Governor Jerry Brown signed into law the sweeping new California Consumer Privacy Act (CCPA), effective on January 1, 2020. Reminiscent of the European Union’s General Data Protection Regulation (GDPR), which went into effect in May 2018, employers should also anticipate the impact of the broad regulatory scheme envisioned by the CCPA. While the law is expected to be amended and clarified in several ways before its final enactment, there are several key elements in place today.

The law was written to ensure that Californians have knowledge of and say so as to how their private information is being used. Thus, the bill was enacted to secure the following specific rights:
• The right of Californians to know what personal information is being collected about them.
• The right of Californians to know whether their personal information is sold or disclosed and to whom.
• The right of Californians to say no to the sale of personal information.
• The right of Californians to access their personal information.
• The right of Californians to equal service and price, even if they exercise their privacy rights.

A. When to Start Thinking About the CCPA

The CCPA will become effective January 1, 2020. However, businesses will need to begin data analysis immediately, including tracking and mapping, which started January 1, 2019, to comply with the 12-month lookback provision for consumer requests.

B. Who Needs to Comply?

Entities that need to comply include, but are not limited to, any for-profit entity that collects consumers’ personal information, does business in the State of California, and satisfies one or more of the following thresholds:

- Has annual gross revenues in excess of twenty-five million dollars ($25,000,000).
- Alone or in combination, annually buys, receives for the business’ commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices.
- Derives 50 percent or more of its annual revenues from selling consumers’ personal information.

An entity that controls or is controlled by a business that does any of the above would also need to comply. In sum, most businesses that come in direct or indirect contact with California consumers will be impacted.

C. What Is a Consumer?

The CCPA is drafted to protect consumers. According to the CCPA, a “consumer” is a “natural person who is a California resident,” as defined by the California Code of Regulations. According to Section 17014 of Title 18 of the California Code of Regulations, a California resident is “(1) every individual who is in the State for other than a temporary or transitory purpose, and (2) every individual who is domiciled in the State who is outside the State for a temporary or transitory purpose.”

D. What Is Personal Information?

Unlike protected health information (PHI) in the HIPAA context or personally identifiable information (PII) in the context of the California Online Privacy Protection Act (CalOPPA), the
CCPA’s definition of “personal information” (PI) is very broad. Indeed, it does not take a vivid imagination to expand the definition of PI under the CCPA to include everything. For example, under the CCPA, “‘personal information’ means information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or device.” The following are some examples of PI, according to the CCPA:

- Identifiers such as a real name, alias, postal address, unique personal identifier, online identifier Internet Protocol address, email address, account name, social security number, driver’s license number, passport number, or other similar identifiers.
- Characteristics of protected classifications under California or federal law.
- Commercial information, including records of personal property, products, or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.
- Biometric information.
- Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a consumer’s interaction with a website, application, or advertisement.
- Geolocation data.
- Audio, electronic, visual, thermal, olfactory, or similar information.
- Professional or employment-related information.
- Education information, defined as information that is not publicly available personally identifiable information.
- Inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer’s preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.

PI does not include publicly available information. For these purposes, “publicly available information” means information that is lawfully made available from federal, state, and local government records, or that is available to the general public. “Publicly available” does not mean biometric information collected by a business about a consumer without the consumer’s knowledge. Information is not “publicly available” if that data is used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records or for which it is publicly maintained. “Publicly available” does not include consumer information that is de-identified or aggregate consumer information.

E. Consumer Rights/Business Obligations Created by the CCPA

The CCPA creates many new rights for consumers, which in turn create many new obligations for businesses. The following are the top 11 to keep in mind:
1. A consumer shall have the right to request that a business that collects personal information about the consumer disclose to the consumer . . . the categories . . . and specific pieces of personal information it has collected about that consumer.

2. A business that collects a consumer’s personal information shall, at or before the point of collection, inform consumers as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used. A business shall not collect additional categories of personal information or use personal information collected for additional purposes without providing the consumer with notice consistent with this section.

3. A business that receives a verifiable consumer request from a consumer to access personal information shall promptly take steps to disclose and deliver, free of charge to the consumer, the personal information required by this section. The information may be delivered by mail or electronically, and if provided electronically, the information shall be in a portable and, to the extent technically feasible, in a readily useable format that allows the consumer to transmit this information to another entity without hindrance. A business may provide personal information to a consumer at any time, but shall not be required to provide personal information to a consumer more than twice in a 12-month period.

4. A consumer shall have the right to request that a business delete any personal information about the consumer which the business has collected from the consumer.

5. A business that collects personal information about consumers shall disclose . . . the consumer’s rights to request the deletion of the consumer’s personal information.

6. A consumer shall have the right, at any time, to direct a business that sells personal information about the consumer to third parties not to sell the consumer’s personal information. This right may be referred to as the right to opt out.

7. A third party shall not sell personal information about a consumer that has been sold to the third party by a business unless the consumer has received explicit notice and is provided an opportunity to exercise the right to opt out.

8. A business that sells consumers’ personal information to third parties must provide notice to consumers that this information may be sold and that consumers have the right to opt out of the sale of their personal information.

9. A business shall not discriminate against a consumer because the consumer exercised any of the consumer’s rights under this title.

10. A business shall, in a form that is reasonably accessible to consumers provide a clear and conspicuous link on the business’ Internet homepage, titled “Do Not Sell My Personal Information,” to an Internet Web page that enables a consumer, or a person authorized by the consumer, to opt out of the sale of the consumer’s personal information. A business shall not require a consumer to create an
account in order to direct the business not to sell the consumer’s personal information.

11. A consumer may authorize another person solely to opt out of the sale of the consumer’s personal information on the consumer’s behalf, and a business shall comply with an opt out request received from a person authorized by the consumer to act on the consumer’s behalf, pursuant to regulations adopted by the Attorney General.

F. Exposure for Noncompliance

Consumer civil actions are limited to security breaches involving a consumer’s PI. Damages are limited to $750 per consumer per incident or actual damages, whichever is greater. Although this number may seem small in comparison to the General Data Protection Regulation’s (GDPR) €20 million or 4 percent of annual global revenue, whichever is greater, keep in mind that the EU does not allow collective, or class, actions. A class of 1 million people under the CCPA would equal $750,000,000 in potential exposure.

IV. Conclusion

Now more than ever it is important to be aware and get ahead of California’s massive regulatory landscape. Fortunately, Ogletree Deakins’ deep bench of more than 100+ California lawyers across its six California offices are here to help!
A trio of U.S. Supreme Court cases continues the evolution of the law regarding arbitration agreements.

1. **Henry Schein, Inc. v. Archer and White Sales, Inc.**

In the first opinion, issued on January 8, 2019, the Supreme Court of the United States decided whether courts may disregard contractual language calling for an arbitrator to decide questions of arbitrability if the argument that the arbitration agreement applies to the particular dispute is “wholly groundless.” The Court ruled that a “wholly groundless” exception is inconsistent with the Federal Arbitration Act (FAA), and courts are not free to override the terms of parties' agreements to arbitrate. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, Supreme Court of the United States, No. 17-1272 (January 8, 2019).

**Background**

The case involves a business dispute between a distributor of dental equipment, Archer and White Sales, Inc., and the successor-in-interest to a dental equipment manufacturer, Henry Schein, Inc. The contract between the parties provided that any dispute arising under or relating to the contract, but not including actions seeking injunctive relief, “shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.” Archer and White sued in federal district court in Texas, alleging antitrust violations and seeking both money damages and injunctive relief. Henry Schein responded by invoking the FAA and asking the court to compel arbitration. Archer and White opposed the request, arguing that the dispute was not subject to arbitration because the lawsuit included a request for injunctive relief. The question then became whether an arbitrator or the court can decide if a dispute is subject to arbitration. Henry Schein pointed to the rules of the American Arbitration Association, incorporated into the contract, which provide that arbitrators have the power to resolve arbitrability questions. Archer and White, relying on precedent from the Fifth Circuit Court of Appeals, responded that, notwithstanding the contract language, because Henry Schein’s argument for arbitration was wholly groundless (since the action sought injunctive relief) the district court could resolve the threshold question of arbitrability. The district court agreed, and the Fifth Circuit affirmed. The Supreme Court granted certiorari in light of disagreement among the courts of appeals over whether the “wholly groundless” exception is consistent with the FAA.

**The Supreme Court’s Decision**

Writing for a unanimous Supreme Court, Justice Kavanaugh reaffirmed that, under the FAA, “arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms.” The Court noted that, in applying the FAA, the Court has held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also “‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.”

The Court further noted that it had previously “explained that an ‘agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on the other.’”
The Court rejected the reasoning of the Fifth Circuit and some other courts of appeals that the “wholly groundless” exception “enables courts to block frivolous attempts to transfer disputes from the court system to arbitration.” Justice Kavanaugh reasoned that the Court “must interpret the [FAA] as written, and the [FAA] in turn requires that [the Court] interpret the contract as written.” “When the parties’ contract delegates the arbitrability question to an arbitrator,” Justice Kavanaugh concluded, “a court may not override the contract.”

The Court held that the “wholly groundless” exception is inconsistent with both the text of the FAA and the Court’s precedent. As precedent, the Court pointed to a 1986 decision in which the Court held that “a court may not ‘rule on the potential merits of the underlying’ claim that is assigned by contract to an arbitrator, ‘even if it appears to the court to be frivolous.’” Justice Kavanaugh reasoned that the principle in that case “applies with equal force to the threshold issue of arbitrability.”

Key Takeaways

The Supreme Court’s ruling is the latest in a series of decisions supporting a broad interpretation of the FAA. The ruling eliminates a basis for opposing the enforcement of an agreement to arbitrate that existed within some federal circuits. Note, of course, that courts retain the power to decide whether an arbitration agreement exists. However, when a valid arbitration agreement exists—and the agreement gives the arbitrator authority to decide issues of arbitrability—courts do not have the power to usurp the arbitrator’s authority. In light of this ruling, employers may consider reviewing their arbitration agreements to ensure that the agreements make clear that questions of arbitrability are to be decided by the arbitrator (assuming that is the intent of the parties).

2. New Prime Inc. v. Oliveira

On January 15, 2019, the Supreme Court of the United States held that the FAA did not apply to wage claims brought by an interstate truck driver, even though the plaintiff was classified as an independent contractor. The case, New Prime Inc. v. Oliveira, No. 17-340 (January 15, 2019), presented two narrow issues:

1. When a contract delegates questions of arbitrability to an arbitrator, does the court or arbitrator decide whether the transportation worker exclusion applies?

2. Does the phrase “contracts of employment,” as used in the FAA, refer only to contracts between employers and employees, or does it also reach contracts with independent contractors?

Although the Supreme Court ruled in favor of the worker, it did not address a key issue, namely, who qualifies as a transportation worker “engaged in foreign or interstate commerce” subject to the FAA’s exclusion.

Background

The plaintiff was engaged by New Prime Inc., an interstate trucking company, as an independent contractor driver. Despite signing an arbitration agreement requiring that any disputes be brought in arbitration, the plaintiff filed a class action lawsuit seeking unpaid wages in the U.S. District Court for the District of Massachusetts.
New Prime responded with a motion to compel arbitration. It argued that any questions related to the enforceability of the parties’ agreement were for an arbitrator to decide, with the plaintiff arguing in turn that the arbitration agreement was unenforceable because it fell within the “contract of employment” exemption under Section 1 of the FAA. While the FAA presumes arbitration agreements are valid and enforceable unless a reason at law or equity exists for which a contract can be revoked, Section 1 excludes from the FAA’s coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” The district court denied the defendant’s motion to compel arbitration, holding that the question of the agreement’s arbitrability was for the court, and not the arbitrator, to decide. The district court also concluded that the phrase “contracts of employment” did not include independent contractor agreements.

New Prime appealed that ruling to the First Circuit, which agreed that determining whether the FAA applies is a threshold question that a court decides, including whether the Section 1 exclusion applies. The First Circuit disagreed, however, with the district court and reasoned that “contracts of employment” could apply to agreements between companies and independent contractors. Significantly, New Prime Inc. did not dispute—at the trial court level or on appeal—that the plaintiff was a transportation worker “engaged in foreign or interstate commerce.” The Supreme Court of the United States subsequently granted certiorari.

The Supreme Court’s First Holding:
Courts Decide Whether the Transportation Worker Exclusion Applies

The Supreme Court agreed with the lower courts in finding that a judge—not an arbitrator—decides whether the FAA applies, including the related issue of the transportation worker exclusion. Writing for the court, Justice Gorsuch observed:

> Given the statute’s terms and sequencing, we agree with the First Circuit that a court should decide for itself whether §1’s “contracts of employment” exclusion applies before ordering arbitration. After all, to invoke its statutory powers under §§3 and 4 to stay litigation and compel arbitration according to a contract’s terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§1 and 2. The parties’ private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the [FAA] authorizes a court to stay litigation and send the parties to an arbitral forum.

(Slip Op. at 4.)

The Supreme Court’s Second Holding:
“Contracts of Employment” Include Independent Contractor Agreements

The Supreme Court similarly agreed with the First Circuit that the phrase “contracts of employment,” as used in the FAA, includes contracts with independent contractors, as well as agreements between employers and employees. This ruling was based on an extended discussion as to what “contracts of employment” would have meant in 1925, when the FAA was enacted by Congress. As Justice Gorsuch observed:

> At that time, a “contract of employment” usually meant nothing more than an agreement to perform work. As a result, most people then would have understood §1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work.
Key Takeaways

Although ostensibly a “win” for plaintiffs, *New Prime Inc. v. Oliveira* is limited to the two narrow issues discussed above. Most importantly, the decision does not address the crucial issue of who falls within the transportation worker exclusion. In order for Section 1 to apply, the worker must be “engaged in foreign or interstate commerce,” a phrase that the Supreme Court did not address or interpret. However, the Supreme Court has previously cautioned that Section 1’s exclusion is “afforded a narrow construction” because the “plain meaning of the words ‘engaged in commerce’ is narrower than the more open-ended formulations ‘affecting commerce’ and ‘involving commerce’” that are found in other statutes. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001). Thus, drivers who do not cross state lines and other workers who are engaged in intrastate activities may be unaffected by the decision in *New Prime Inc*.

The *New Prime Inc* decision also does not address the enforceability of arbitration agreements under state laws, as well as the potential impact of choice-of-law provisions. Companies seeking to develop or revise their arbitration agreements should consider consulting with legal counsel experienced in these issues.

3. *Lamps Plus, Inc. v. Varela*

As of the date of this paper, an important arbitration case, *Lamps Plus, Inc. v. Varela*, remains pending before the U.S. Supreme Court. The Supreme Court heard oral argument on October 29, 2018. At issue in this case is whether the FAA precludes a state-law interpretation of an arbitration agreement that authorizes class arbitration when the arbitration agreement is silent as to class actions. The U.S. Court of Appeals for the Ninth Circuit affirmed the district court’s decision that arbitration could proceed on a class-wide basis, applying California law to construe the ambiguous contract language against Lamps Plus. Lamps Plus argued that the FAA requires clearer language before a party can be required to arbitrate on a class basis. The Supreme Court’s decision in this case is important but will have somewhat limited impact given that most arbitration agreements have an express class action waiver. We will update these materials should the decision issue before the Workplace Strategies program.
On January 11, 2019, the National Labor Relations Board issued an employer-friendly decision in *Alstate Maintenance LLC*, 367 NLRB 68 (2019), narrowing the scope of protection for employee complaints. In doing so, it reversed an Obama-era Board decision that had expanded employee protections, and clarified that even if an employee states a gripe referencing coworkers through the plural pronoun “we,” it is not necessarily protected and may be a valid basis for discipline or discharge. The Board also declared that an individual complaint is not elevated to protected status simply because it is made to a manager and in the presence of other employees. This decision narrows the Board’s definition of “protected concerted activity” and distinguishes group complaints from individual gripes in the workplace. The three Board members appointed by President Trump joined in the ruling, while the one member appointed by President Obama penned a very critical dissent.

**Background**

Alstate Maintenance provides ground services at John F. Kennedy International Airport. Employee Trevor Greenidge was employed as a sky cap. Sky caps assist the arriving airline passengers with their luggage outside the terminal and generally accept tips, which constitute the largest part of their compensation.

In July 2013, Greenidge was working with three other sky caps when a manager directed them to assist with a soccer team’s equipment. Greenidge remarked, “We did a similar job a year prior and we didn’t receive a tip for it.” When the van with the team’s equipment arrived, a manager waved the sky caps over to the van to assist, but Greenidge and the other sky caps walked away. Baggage handlers from inside the terminal began assisting with the equipment before Greenidge and the other sky caps helped finish the job. Following this incident, a manager informed the sky caps’ supervisor of the subpar customer service, and the employer fired Greenidge and the other three sky caps.

A regional office of the Board issued a complaint on behalf of Greenidge, alleging that he had been discharged for engaging in protected concerted activity in violation of the National Labor Relations Act (NLRA). An administrative law judge (ALJ) dismissed the complaint, finding that the gripe regarding the tipping habits of the soccer team was neither concerted activity nor undertaken for mutual aid or protection, and was thus a valid basis for the firing. The general counsel appealed to Board.

**The Decision**

The Board majority affirmed the ALJ and upheld the firing. In doing so, the Board overruled *Wyndham Vacation Ownership dba WorldMark* by Wyndham, 356 NLRB 765 (2011), and reconsorted Board precedent from the 1980s in the *Meyers Industries* line of cases. In *WorldMark*, the Obama-era Board concluded that an employee had engaged in concerted
activity when he protested publicly in a group setting, even though he had not previously consorted with coworkers regarding workplace issues. This ruling conflicted with the holdings in the Meyers Industries cases, in which the Board held that an employee's activity is concerted only if he is engaged with other employees and does not solely act on behalf of himself. Unable to reconcile the two cases, the Board in the present case overruled WorldMark and proceeded with the standard set forth in the Meyers Industries cases.

In Alstate Maintenance, the Board explained that "to be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action." Applying the standard to the issue presented, the Board affirmed the ALJ's ruling that Greenidge had not engaged in concerted activity and, even if he had, Greenidge did not make his remark about the soccer team's tipping habits for the purpose of mutual aid or protection of the collective group of employees. The Board expressly rejected the general counsel's argument that Greenidge's use of the plural pronoun "we" in his gripe necessarily made his complaint protected activity.

The decision spells out relevant factors to consider in deciding whether an employee's statement made in a group context is protected concerted activity:

1. whether "the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment";

2. whether "the decision affects multiple employees attending the meeting";

3. whether "the employee who speaks up at the meeting did so to protest or complain about the decision, not merely . . . to ask questions about how the decision has been or will be implemented";

4. whether "the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself"; and

5. whether "the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand."

Although not all of these factors must be present to support a reasonable inference that an employee is seeking to initiate a group action, they can help employers understand when employees who speak out have engaged in protected concerted activity.

**Key Takeaways**

The decision in Alstate Maintenance narrowed the definition of "concerted activity" under the NLRA. In doing so, the Board clarified the difference between group actions and individual complaints, even if made in the group context—two ideas that were easily conflated under the overturned WorldMark holding. As a result of Alstate Maintenance, employers generally have more leeway to use discipline to regulate an individual employee's statement, even if that statement is a work-related complaint that references "we" or "us." Unions and individuals alike may find it more difficult to assert that an individual employee's statement is concerted activity that is protected by Section 7 of the NLRA.
The Board may not be done reshaping Section 7 analysis yet. It also indicated interest in reconsidering other cases that "arguably conflict" with the standard set out in the Meyers Industries cases.
NYC Commission on Human Rights

Legal Enforcement Guidance on Race Discrimination on the Basis of Hair

Anti-Black racism is an invidious and persistent form of discrimination across the nation and in New York City. Anti-Black racism can be explicit and implicit, individual and structural, and it can manifest through entrenched stereotypes and biases, conscious and unconscious. Anti-Black bias also includes discrimination based on characteristics and cultural practices associated with being Black, including prohibitions on natural hair or hairstyles most closely associated with Black people.\(^1\) Bans or restrictions on natural hair or hairstyles associated with Black people are often rooted in white standards of appearance and perpetuate racist stereotypes that Black hairstyles are unprofessional. Such policies exacerbate anti-Black bias in employment, at school, while playing sports, and in other areas of daily living.

The New York City Human Rights Law ("NYCHRL") protects the rights of New Yorkers to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities.\(^2\) For Black people, this includes the right to maintain natural hair,\(^3\) treated or untreated hairstyles\(^4\) such aslocs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed\(^5\) state.\(^6\)

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\(^1\) The phrase “Black people” includes those who identify as African, African American, Afro-Caribbean, Afro-Latin-x/a/o or otherwise having African or Black ancestry.

\(^2\) Hair-based discrimination implicates many areas of the NYCHRL, including prohibitions against race, religion, disability, age, or gender based discrimination. This legal enforcement guidance seeks to highlight the protections available under the NYCHRL for people who maintain particular hairstyles as part of a racial or ethnic identity, or as part of a cultural practice, regardless of the mutable nature of such characteristics. Covered entities with policies prohibiting hairstyles associated with a particular racial, ethnic, or cultural group would, with very few exceptions, run afoul of the NYCHRL's protections against race and related forms of discrimination. While this legal enforcement guidance focuses on Black communities, these protections broadly extend to other impacted groups including but not limited to those who identify as Latin-x/a/o, Indo-Caribbean, or Native American, and also face barriers in maintaining “natural hair” or specific cultural hairstyles.

\(^3\) “Natural hair” is generally understood as the natural texture and/or length of hair; it is defined as hair that is untreated by chemicals or heat and can be styled with or without extensions. The term “natural hair,” which has specific and significant cultural meaning within Black communities, is used throughout this guidance in reference to hair textures most commonly associated with Black people. However, the legal protections available under the NYCHRL extend beyond natural hair, including treated hair styled into twists, braids, cornrows, Afros, Bantu knots, fades, and/or locs.

\(^4\) Hairstyles most commonly associated with Black people include hairstyles that involve some form of heat or chemical treatment or none at all (i.e., “natural hair”).

\(^5\) For communities that have a religious or cultural connection with uncut hair, including Native Americans, Sikhs, Muslims, Jews, Nazirites, or Rastafarians, some of whom may also identify as Black, natural hair may include maintaining hair in an uncut or untrimmed state.

\(^6\) This is not an exhaustive list of hairstyles most closely associated with Black people. For more background, see Section II of this legal enforcement guidance.
While grooming and appearance policies adversely impact many communities, this legal enforcement guidance focuses on policies addressing natural hair or hairstyles most commonly associated with Black people, who are frequent targets of race discrimination based on hair. Accordingly, the New York City Commission on Human Rights (the “Commission”) affirms that grooming or appearance policies that ban, limit, or otherwise restrict natural hair or hairstyles associated with Black people generally violate the NYCHRL’s anti-discrimination provisions.

I. The New York City Human Rights Law

The NYCHRL prohibits discrimination by most employers, housing providers, and providers of public accommodations. The NYCHRL also prohibits discriminatory

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7 Grooming or appearance policies that generally target communities of color, religious minorities, or other communities protected under the NYCHRL are also unlawful. Examples of religious, disability, age, or gender based discrimination with respect to hair include: a Sikh applicant denied employment because of his religiously-maintained uncut hair and turban; an Orthodox Jewish employee ordered to shave his beard and cut his payot (sidelocks or sideburns) to keep his job; a Black salesperson forced to shave his beard despite a medical condition that makes it painful to shave; a 60 year-old employee with gray hair told to color their hair or lose their job; or a male server ordered to cut his ponytail while similar grooming policies are not imposed on female servers.

8 The NYCHRL prohibits unlawful discriminatory practices in employment and covers entities including employers, labor organizations, employment agencies, joint labor-management committee controlling apprentice training programs, or any employee or agent thereof. N.Y.C. Admin. Code § 8-107(1). Under the NYCHRL:

“The term ‘employer’ does not include any employer with fewer than four persons in his or her employ ... [N]atural persons employed as independent contractors to carry out work in furtherance of an employer’s business enterprise who are not themselves employers shall be counted as persons in the employ of such employer.”


“The term ‘employment agency’ includes any person undertaking to procure employees or opportunities to work.” Id.

“The term ‘labor organization’ includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms and conditions of employment, or of other mutual aid or protection in connection with employment.” Id.

9 The NYCHRL prohibits unlawful discriminatory practices in housing, and covers entities including the “owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agent or employee thereof.” N.Y.C. Admin. Code § 8-107(5). Covered entities also include real estate brokers, real estate salespersons, or employees or agents thereof. Id. The NYCHRL defines the term “housing accommodation” to include “any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings. Except as otherwise specifically provided, such term shall include a publicly-assisted housing accommodation.” N.Y.C. Admin. Code § 8-102. However, the NYCHRL exempts from coverage: “the rental of a housing accommodation, other than a publicly-assisted housing accommodation, in a building which contains housing accommodations for not more than two families living independently of each other, if the owner [or] members of the owner’s family reside in one of such housing accommodations, and if the available housing accommodation has not been publicly advertised, listed, or otherwise offered to the general public; or (2) to the rental of a room or rooms in a housing accommodation, other than a publicly-assisted housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the
harassment\textsuperscript{11} and bias-based profiling by law enforcement.\textsuperscript{12} Pursuant to Local Law No. 85 (2005) ("Local Civil Rights Restoration Act of 2005"), the NYCHRL must be construed "independently from similar or identical provisions of New York State or federal statutes," such that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City’s Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."\textsuperscript{13} In addition, exemptions to the NYCHRL must be construed "narrowly in order to maximize deterrence of discriminatory conduct."\textsuperscript{14}

The Commission is the City agency charged with enforcing the NYCHRL. Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission’s Law Enforcement Bureau within one (1) year of the discriminatory act and within (3) years for claims of gender-based harassment, or file a complaint in court within three (3) years of the discriminatory act.

II. Background on Natural Hair Textures and Hairstyles Associated with Black People

While a range of hair textures are common among people of African descent, natural hair texture that is tightly-coiled or tightly-curled as well as hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, and Afros are those most closely associated with Black people.\textsuperscript{15} The decision to wear one’s hair in a particular style is highly personal, and reasons behind that decision may differ for each individual. Some wearers may embrace a certain hairstyle as a “protective style,” intended to maintain...
hair health; as part of a cultural identity associated with being Black; and/or for a myriad of other personal, financial, medical, religious, or spiritual reasons.\textsuperscript{16}

Hair may naturally form into locs, known as freeform locs, which are grown without manipulation.\textsuperscript{17} Hair may also be manipulated into locs, known as “cultivated locs,” a cultural hairstyle predominantly worn by people of African descent.\textsuperscript{18} Whether hair naturally forms or is manipulated into locs, this and other protective or cultural hairstyles often have great personal significance for the wearer. Black hair may also be styled into cornrows – hair that is rolled or closely braided to the scalp – or in twists, Afros, and other formations, with or without chemical or heat treatment.\textsuperscript{19} Hair may also be worn in a manner that showcases its natural texture with little additional styling. In addition, protective styles may include braids, locs or extensions of various types that are integrated into an individual’s hair (\textit{e.g.} box braids or weaves), wigs, or covering one’s hair with a headscarf or wrap.\textsuperscript{20}

There is a widespread and fundamentally racist belief that Black hairstyles are not suited for formal settings, and may be unhygienic, messy, disruptive, or unkempt.\textsuperscript{21} Indeed, white slave traders initially described African hair and locs as “dreadful,” which led to the commonly-used term “dreadlocks.”\textsuperscript{22} Black children and adults, from schools to places of employment, have routinely been targeted by discriminatory hair policies.\textsuperscript{23}

\textsuperscript{16} Locs may also be worn by some Black people for religious purposes, such as Rastafarians. See \textit{generally} Brief for NAACP Legal Defense and Educational Fund, Inc. \textit{et al.}, as Amici Curiae Supporting Appellants, \textit{EEOC v. Catastrophe Mgmt. Solutions}, No. 14-13482 (11th Cir. Dec. 28, 2016), https://www.naacpldf.org/files/about-us/EEOC_v_CMS_Final.pdf.


\textsuperscript{18} See id.

\textsuperscript{19} See id.

\textsuperscript{20} See generally, Greene, supra note 15 at 1000-01; see also Perrie Samotin, \textit{A Banana Republic Employee Says She Was Told Her Box Braids Looked Too “Urban”}, Glamour (Oct. 7, 2017), https://www.glamour.com/story/banana-republic-employee-destiny-tompkins-says-she-was-told-box-braids-looked-too-urban.


\textsuperscript{22} Because of this history, the Commission is utilizing the term “locs” in this guidance but recognizes that some members of Black communities, including Rastafarians, may still use the term “dreadlocks” or “dreads.” The term “locks” is an alternative term. See Shauntae Brown White, \textit{Releasing the Pursuit of Bouncin’ and Behavin’ Hair: Natural Hair as an Afrocentric Feminist Aesthetic for Beauty}, 1 INT’L J. MEDIA \& CULTURAL POL. 295, 965 n.3 (2005).

\textsuperscript{23} For examples in employment, see, \textit{e.g.}, Complaint, \textit{Tompkins v. The Gap, Inc.}, No. 17 Civ. 09759 (S.D.N.Y. 2017) (Black employee claimed that her white manager had refused to assign her shifts because of her hairstyle and allegedly told her that her box braids were too “unkempt,” “urban,” and not “Banana Republic appropriate.”); \textit{EEOC v. Catastrophe Mgmt. Solutions}, No. 14-13482, 2016 WL 7210059 (11th Cir. 2016) (holding that employer did not engage in race discrimination under Title VII when it refused to hire a Black customer service representative who styled her hair into locks, a violation of the company’s grooming policy.); \textit{Pitts v. Wild Adventures}, No. 7:06-CV-HL, 2008 WL 1899306 (M.D. Ga. Apr. 25, 2008) (Black employee terminated for styling her hair into twists; employer not liable for race
For example, in 2014, the U.S. Department of Defense, the nation’s largest employer, enacted a general ban on Black hairstyles, including Afros, twists, cornrows, and braids, which was later reversed after Black service members expressed wide outrage. In 2017, the Army lifted its ban on female soldiers wearing locs, citing feasibility for Black soldiers, and noting that “[f]emales have been asking for a while, especially females of African-American descent, to be able to wear dreadlocks and locks because it’s easier to maintain that hairstyle.” The Army also removed the terms “matted and unkempt” from its description of Black hairstyles in its appearance regulations. These changes reflect a shift in American society in re-evaluating the basis for longstanding appearance norms, in light of their discriminatory nature, and the harm and burden placed on Black people who maintain prohibited hairstyles.

Race discrimination based on hair and hairstyles most closely associated with Black people has caused significant physical and psychological harm to those who wish to maintain natural hair or specific hairstyles but are forced to choose between their livelihood or education and their cultural identity and/or hair health. Due to repeat manipulation or chemically-based styling (i.e., using straighteners or relaxing hair from its natural state), Black hair may become vulnerable to breakage and loss, and the development of conditions such as trichorrhexis nodosa and traction alopecia. Trichorrhexis nodosa is a medical issue where thickened or weak points of hair break off easily. Traction alopecia is defined as gradual hair loss, occurring from applying tension to hair. In some cases, altering hair from its natural form by way of discrimination under Title VII even though its grooming policy only prohibited Afrocentric hairstyles); For examples in schools, see, e.g., Michael Gold & Jeffrey Mays, Civil Rights Investigation Opened After Black Wrestler Had to Cut His Dreadlocks, N.Y. TIMES (Dec. 21, 2018), https://www.nytimes.com/2018/12/21/nyregion/andrew-johnson-wrestler-dreadlocks.html; Mandy Velez, ‘Discriminatory’: ACLU, NAACP Go After Florida School That Banned Child for Dreadlocks, The Daily Beast (Nov. 29, 2018), https://www.thedailybeast.com/aucl-naacp-take-on-florida-schools-discriminatory-hair-policy-after-boy-banned-for-having-locs; Amira Rasool, A Black Student’s Elementary School Reportedly Sent Her Home for Wearing Box Braids, Allure (Aug. 22, 2018), https://www.allure.com/story/black-student-sent-home-for-box-braids; Kaitlin McCulley, Waller high school [Black] student suspended for having long hair [and locs], ABC (Mar. 28, 2017), https://abc13.com/education/waller-hs-student-suspended-for-haircut/-1823098/.

See Christopher Mele, Army Lifts Ban on Dreadlocks, and Black Servicewomen Rejoice, N.Y. TIMES (Feb. 10, 2017), https://www.nytimes.com/2017/02/10/us/army-ban-on-dreadlocks-black-servicewomen.html; Other military branches, including the Air Force and the Navy, have also lifted bans on locs for service members.


See id.

See id.
repeat manipulation or chemically-based styling may also expose individuals to risk of severe skin and scalp damage. Medical harm may also extend beyond the skin or scalp; for instance, a 2012 study published in the American Journal of Epidemiology linked the use of hair relaxers to an increase in uterine fibroids, which disproportionately impact Black women.

Black people with tightly-coiled or tightly-curled hair textures face significant socio-economic pressure to straighten or relax their hair to conform to white and European standards of beauty, which can cause emotional distress, including dignitary and stigmatic harms. Because of these expectations, in addition to the physical harms noted above, Black people are more likely than white people to spend more time on their hair, spend more money on professional styling appointments and products, and experience anxiety related to hair. These experiences highlight the unique and heavy burden and personal investment involved in decision-making around hair for Black communities, and the consequences of being compelled to style one’s hair according to white and European beauty standards or be stigmatized for wearing one’s hair in a natural style.

III. Employment

The NYCHRL prohibits discrimination in employment, which in most circumstances covers employers with four (4) or more employees. Disparate treatment occurs when a covered entity treats an individual less favorably than others because of a protected characteristic. Treating an individual less well than others because of their actual or perceived race violates the NYCHRL. To establish disparate treatment under the NYCHRL, an individual must show they were treated less well or subjected to an adverse action, motivated, at least in part, by their membership in a protected class. An individual may demonstrate this through direct evidence of discrimination or indirect evidence that gives rise to an inference of discrimination.

Black hairstyles are protected racial characteristics under the NYCHRL because they are an inherent part of Black identity. There is a strong, commonly-known racial association between Black people and hair styled into twists, braids, cornrows, Afros,
Bantu knots, fades, and/or locs, and employers are assumed to know of this association.

Covered employers that enact grooming or appearance policies that ban or require the alteration of natural hair or hair styled into twists, braids, cornrows, Afros, Bantu knots, fades, and/or locs may face liability under the NYCHRL because these policies subject Black employees to disparate treatment. Covered employers are engaging in unlawful race discrimination when they target natural hair or hairstyles associated with Black people, and/or harass Black employees based on their hair.

By way of example, while an employer can impose requirements around maintaining a work appropriate appearance, they cannot enforce such policies in a discriminatory manner and/or target specific hair textures or hairstyles. Therefore, a grooming policy to maintain a “neat and orderly” appearance that prohibits locs or cornrows is discriminatory against Black people because it presumes that these hairstyles, which are commonly associated with Black people, are inherently messy or disorderly. This type of policy is also rooted in racially discriminatory stereotypes about Black people, and racial stereotyping is unlawful discrimination under the NYCHRL.

Consequently, employers may not enact discriminatory policies that force Black employees to straighten, relax, or otherwise manipulate their hair to conform to employer expectations. The existence of such policies constitutes direct evidence of disparate treatment based on race and/or other relevant protected classes under the NYCHRL. Notably, employers that enact these types of grooming or appearance policies do not typically target hair characteristics associated with individuals with white, European ancestry.

Examples of violations of include:

- A grooming policy prohibiting twists, locs, braids, cornrows, Afros, Bantu knots, or fades which are commonly associated with Black people.
- A grooming policy requiring employees to alter the state of their hair to conform to the company’s appearance standards, including having to straighten or relax hair (i.e., use chemicals or heat).

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38 This is not an exhaustive list of hairstyles most commonly associated with Black people. See supra pg. 3.
39 See Williams, 872 N.Y.S.2d at 39.
40 See, e.g., Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164 (7th Cir. 1976) (en banc) (holding that a Black employee had sufficiently charged race discrimination under Title VII after she was denied a promotion for wearing an Afro; the employer was engaging in racially discriminatory stereotyping that Black hair was inappropriate when it told her that she could “never represent them” because of her Afro.).
41 This is not an exhaustive list of violations and they are not limited to employment. Such policies are also prohibited when enacted by housing providers and places of public accommodation. Additionally, related violations that implicate religious groups, and other protected classes include: a grooming policy prohibiting employees from maintaining uncut hair or wearing untrimmed beards, which may impact Rastafarians, Native Americans, Sikhs, Muslims, Jews, and other religious or cultural minorities; or a
• A grooming policy banning hair that extends a certain number of inches from the scalp, thereby limiting Afros.

Discrimination can also come in the form of facially neutral grooming policies related to characteristics that may not necessarily be associated with a protected class but that are discriminatorily applied. For instance, an employer violates the NYCHRL when it enforces a grooming policy banning the use of color/dye, extensions, and/or patterned or shaved hairstyles against Black employees only.\textsuperscript{42}

The NYCHRL also prohibits covered employees from harassing, imposing unfair conditions, or otherwise discriminating against employees based on aspects of their appearance associated with their race. Examples of discrimination include:

• Forcing Black people to obtain supervisory approval prior to changing hairstyles, but not imposing the same requirement on other people.\textsuperscript{43}
• Requiring only Black employees to alter or cut their hair or risk losing their jobs.
• Telling a Black employee with locs that they cannot be in a customer-facing role unless they change their hairstyle.
• Refusing to hire a Black applicant with cornrows because her hairstyle does not fit the “image” the employer is trying to project for sales representatives.
• Mandating that Black employees hide their hair or hairstyle with a hat or visor.\textsuperscript{44}

Finally, employers may not ban, limit, or otherwise restrict natural hair or hairstyles associated with Black communities to promote a certain corporate image, because of customer preference, or under the guise of speculative health or safety concerns. An employee’s hair texture or hairstyle generally has no bearing on their ability to perform the essential functions of a job.

Where an employer does have a legitimate health or safety concern, it must consider alternative ways to meet that concern prior to imposing a ban or restriction on employees’ hairstyles. There exist a number of options that may address such concerns related to hair, including the use of hair ties, hair nets, head coverings, as well as alternative safety equipment that can accommodate various hair textures and hairstyles. Alternative options may not be offered or imposed to address concerns unrelated to actual and legitimate health or safety concerns.

\textsuperscript{43} Hollins v. Atl. Co., 188 F.3d 652 (6th Cir. 1999).
\textsuperscript{44} See, e.g., Eatman v. UPS, 194 F. Supp. 2d 256, 259, 262 (S.D.N.Y. 2002) (UPS’s policy required Black male drivers to wear hats to cover “dreadlocks,” “braids,” “corn rolls,” a “do rag,” and a “ponytail”). Such a policy would violate the NYCHRL.
IV. Public Accommodations

The NYCHRL prohibits discrimination in places of public accommodation, defined as “providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available.” This guidance focuses on schools because reports of racially discriminatory policies on grooming and appearance have proliferated in educational settings.

The NYCHRL prohibits discrimination in most public, private, and charter schools. The United States Supreme Court has established that students in public schools do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Schools may not infringe on students’ free expression rights “unless school authorities have reason to believe that such expression will ‘substantially interfere with the work of the school or impinge upon the rights of other students.’”

Schools may not, intentionally or unintentionally, target students of a particular protected category, including in after school activities or programs. Because natural hair and locs, cornrows, twists, braids, Bantu knots, fades, and Afros are a form of hair maintenance and cultural identity and expression most closely associated with Black people, no school covered under the NYCHRL may prohibit such styles in New York City. No sound pedagogical rationale justifies this disparate treatment of Black students, nor would students’ free expression to wear their hair in natural, protective, or other styles commonly associated with Black people ever “interfere with the work of the school or impinge upon the rights of other students.”

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49 *Id.* at 509 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).
50 Similarly, banning characteristics associated with other cultures, including Native Americans, may violate the NYCHRL. Native Americans, who maintain long hair, wear braids, or wear other hairstyles for cultural reasons have also routinely faced discriminatory hair policies and practices in educational settings. See, e.g., Cat Schuknecht, *School District Apologies for Teacher Who Allegedly Cut Native American Child’s Hair*, NPR (Dec. 6, 2018), https://www.npr.org/2018/12/06/673837893/school-district-apologizes-for-teacher-who-allegedly-cut-native-american-childs-(last visited Jan. 29, 2019); Zac Whitney, *Dress Code Collides With Culture as Native American Student With Mohawk Sent to Principal’s Office*, Fox (Sept. 17, 2015), https://fox13now.com/2015/09/17/dress-code-collides-with-culture-as-native-american-student-with-mohawk-sent-to-principals-office/.
51 *Tinker*, 393 U.S. at 506.
Similarly, it is unlawful under the NYCHRL to harass, subject to adverse treatment, or otherwise discipline any student because they choose to wear their hair in a style commonly associated with Black people. Further, it is no justification to prohibit natural hair or hairstyles because they are perceived to be a distraction or because of speculative health or safety concerns. These protections extend to all users of public accommodations, including businesses such as restaurants, fitness clubs, stores, and nightclubs, and other public spaces, like parks, libraries, healthcare providers, and cultural institutions.52

Examples of discrimination include:

- A private school has a policy prohibiting locs or braids.
- A public school athletic association prohibits a Black student athlete with locs from participating in an athletic competition because his hair is below his shoulders but allows white student-athletes with long hair to tie their hair up.
- A charter school informs a Black student that she must change her Afro because it is a “distraction” in the classroom.
- A children’s dance company requires girls to remove their braids, alter their Afro, and only wear a “smooth bun” to participate in classes.
- A nightclub tells a patron she is not welcome because her natural hairstyle does not meet their dress code.

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As a best practice, the Commission encourages employers and other covered entities to evaluate any existing grooming or appearance policies, standards, or norms relating to professionalism to ensure they are inclusive of the racial, ethnic, and cultural identities and practices associated with Black and historically marginalized communities. The Commission further recommends that public and private schools assess any workplace preparation programs geared toward helping students find employment to ensure that they do not intentionally or inadvertently send the message that natural hair or hairstyles associated with Black communities are “unprofessional,” “messy,” or “unkempt.”

The Commission is committed to eradicating anti-Black and other forms of discrimination in New York City. If you believe you have been subjected to unlawful discrimination on the basis of your race or membership in another protected class, please contact the Commission at 311 or at 718-722-3131 to file a complaint of discrimination with our Law Enforcement Bureau.

“Headline News”—Key Developments Impacting Employers

Moderator
Joseph L. Beachboard (Torrance)

D.C. UPDATE

James J. Plunkett
(Washington, D.C.)
IMMIGRATION

Gregory C. Nevano, Assistant Director, Investigative Programs, ICE
Marifrances Morrison (Raleigh)
Jennifer R. Shapiro, Executive Director and Associate General Counsel, JPMorgan Chase & Co.

Gregory C. Nevano, Assistant Director, Investigative Programs, ICE
Marifrances Morrison, 
Ogletree Deakins (Raleigh)

Jennifer R. Shapiro, 
*Executive Director and Associate General Counsel*, 
JPMorgan Chase & Co.
WAGE AND HOUR

Margaret Carroll Alli
(Detroit (Metro))

Here We Go Again...

Proposed FLSA minimum salary level for the white collar overtime exemptions:

$35,308.00

Proposed total annual compensation for highly compensated employee (HCE) exemption:

$147,414.00
Viewing the FLSA Horizon...

- Changes to the regular rate calculation for overtime pay
- More FLSA Opinion Letters by the WHD
LABOR

Ruthie L. Goodboe
(Detroit (Metro)/Pittsburgh)

Obama Board vs. Trump Board
- Ambush Election Rules
  - Organizing
  - Strikes
- NLRB Case Decisions
- Makeup of the Board
- Stay Tuned
GLOBAL ROUNDUP

Roger James (London)
Pietro Straulino-Rodriguez (Mexico City)
Danielle Ochs (San Francisco)
Aaron Warshaw (New York City)

BREXIT

Roger James (London)
MEXICO

Pietro Straulino-Rodriguez
(Mexico City)

CALIFORNIA

Danielle Ochs
(San Francisco)
NEW YORK

Aaron Warshaw
(New York City)

LITIGATION TRENDS

Michael D. Mitchell
(Houston/Miami)
SURPRISE!

EEOC Discrimination Charges Fell To 12 – Year Low In FY 2018

Suits Commenced in Federal District Courts (FY 2008-2018)
Cases Tried in Federal Courts

- Of all 31,156 federal labor and employment lawsuits terminated in FY 2018, only 1.4% reached trial (304 jury trials and 133 nonjury trials)
  - 1.6% of all employment lawsuits (23,222) were tried (293 jury trials and 83 nonjury trials)
  - 1.4% of FLSA cases (7,883) were tried (60 jury trials and 51 nonjury trials)

Jury Verdicts in Employment Lawsuits

- Plaintiff’s Probability of Recovery in Federal and State Court:
  - 2015: 44%
  - 2016: 47%
  - 2017: 50%

- Categories Most Favorable for Plaintiffs:
  - Age: 53%
  - Sex: 54%
ARBITRATION

Ron Chapman, Jr. (Dallas)

U.S. Supreme Court Cases

- *Henry Schein, Inc. v. Archer and White Sales, Inc.* (1/8/19)
- *New Prime, Inc. v. Oliveira* (1/15/19)
- *Lamps Plus, Inc. v. Varela* (4/24/19)
“Headline News”—Key Developments Impacting Employers

Moderator
Joseph L. Beachboard (Torrance)