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ALASKA STATE HR CONFERENCE
SHRM

SEPTEMBER 21, 2018

PLEASE SUE ME – ALASKA EDITION: A LEGAL UPDATE

Presented by: Liz Hodes and Kristal Leonard

Agenda

- Trends in State and Federal Government
  - Federal Regulations and Agency Trends
  - Legislative Changes and Agency Trends in Alaska
  - Trends from Other States to Watch
- Litigation Trends and Case Law Update

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Changes to Federal Regulations and Agencies

Slow Shift Toward Conservative (Business-Friendly) Agenda → Few Major New Employment Laws from Congress → Some Changes to Federal Regulations and Agencies

4

Tax Cuts and Jobs Act of 2017

- The Tax Cuts and Jobs Act of 2017 prohibits tax deductions for any sexual harassment/ sexual abuse settlement that requires a nondisclosure agreement and any attorneys' fees related to confidential sexual harassment settlements or payments.
- Remaining uncertainties:
  - Multiple claims
  - General releases
  - Attorneys' fees prior to settlement

5

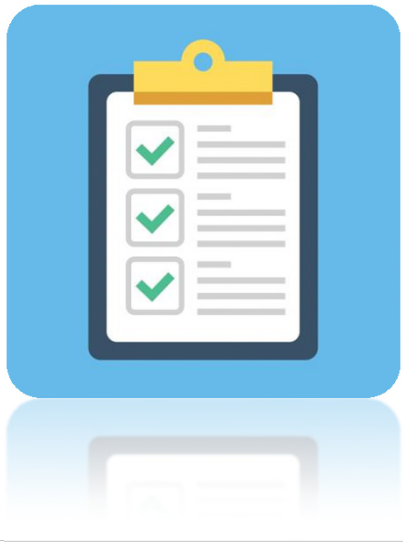
U.S. Department of Labor

- Fact Sheet #71 guidance on unpaid internship programs at "for-profit" businesses.
- New seven-factor test looks to who was the "primary beneficiary" of the internship experience.

6

U.S. Department of Labor

- On September 11, 2018, DOL issued an updated FMLA form.
- The only change in form is the expiration date on the form itself, but employers should now use the new form.



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National Labor Relations Board

- The number of unfair labor practice charges filed with the NLRB declined by 10% in FY 2017 to 19,280, the fewest in a decade.
- In 2018, the DOL is expected to formally rescind the Obama Administration's controversial "persuader rule."

8

National Labor Relations Board

- Under *Browning-Ferris,* two or more employers are joint employers if they share or codetermine those matters governing the essential terms and conditions of employment.
- In December 2017, the Board rejected *Browning-Ferris.*
- February 2018, the Board reversed *Hy-Brand.*
- Now, in May 2018, the Board announced intent to adopt regulations to clarify and clear up the joint employment problems.

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National Labor Relations Board

- In December 2017, General Counsel Robb issued Memorandum GC 18-02, identifying those issues to be reviewed and reconsidered.
- He identified not only "cases that involve significant legal issues," but also "cases over the last eight years that overruled precedent and involved one or more dissents…."

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National Labor Relations Board

- Including:
  - The use of an employer's email systems for union activity
  - Cases in which the Obama Board expanded the definition of "concerted activity for mutual aid and protection"
  - Cases involving "obscene, vulgar, or other highly inappropriate conduct"

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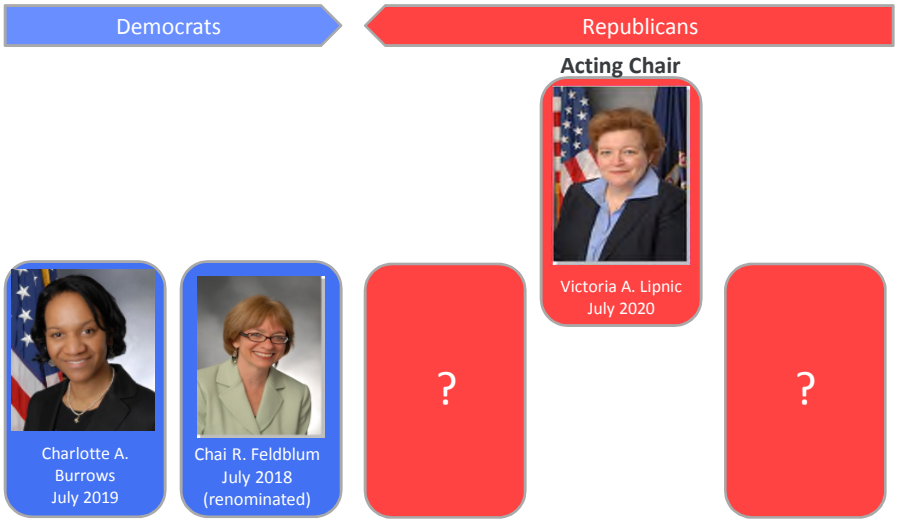
Equal Employment Opportunity Commission



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Equal Employment Opportunity Commission

- 84,254 workplace discrimination charges were filed with the EEOC in 2017.
- The EEOC resolved 99,109 charges in 2017.
- The EEOC recovered $398 million for complainants.
- The EEOC received 6,696 sexual harassment charges and obtained $46.3 million in monetary benefits for victims of sexual harassment.

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Legislative Changes and Agency Trends in Alaska

14

Workers' Compensation Efficiencies Bill

- New statutory definition of "independent contractor."
- Eight-part test, including requirements that the contractor:
  - Has an express contract to perform services
  - Is free from direction and control over the means and manner of providing services
  - Incurs most of the expenses for tools, labor, and other operational costs necessary to perform the services
  - Has an opportunity for profit and loss as a result of the services performed
  - Is free to hire and fire employees to help perform the services

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Other Noteworthy Regulatory Changes

- Alaska minimum wage increased to $9.84.
- Alaska employers are no longer allowed to pay less than minimum wage to workers who experience disabilities (repealing 9 AAC 15.120).

16

Alaska Department of Labor and Workforce Development

- Tip credit vs. tip pooling
- Tip credit is where employer adds tips to meet minimum wage requirement (e.g., pays wage of $6.00 then adds tips of $1.25 to meet the minimum wage of $7.25 under Fair Labor Standards Act (FLSA)).
- Alaska does not allow tip credits. 8 AAC 15.907(a). Employers must pay the minimum wage.

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Alaska Department of Labor and Workforce Development

- In Alaska, under new regulations adopted June 2018, employers may not compel tip pooling between wait staff and others.
- Ninth Circuit precedent continuing to evolve on this same subject.

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Alaska State Commission for Human Rights

Closures At-a-Glance

	2015		2016		2017	
Category of Closure	**ASCHR**	**EEOC**	**ASCHR**	**EEOC**	**ASCHR**	**EEOC**
Mediation	22	1	28	0	19	0
Administrative	27	5	35	3	27	0
Not Substantial Evidence	**286**	**18**	**301**	**33**	**233**	**3**
Conciliation and Settlement	**30**	**3**	**28**	**4**	**39**	**1**
Hearing	12	1	22	0	20	0
Subtotal	377	28	414	40	338	4
TOTAL	**405**		**452**		**342**	

*Table based on numbers published by ASCHR in its 2017 Annual Report

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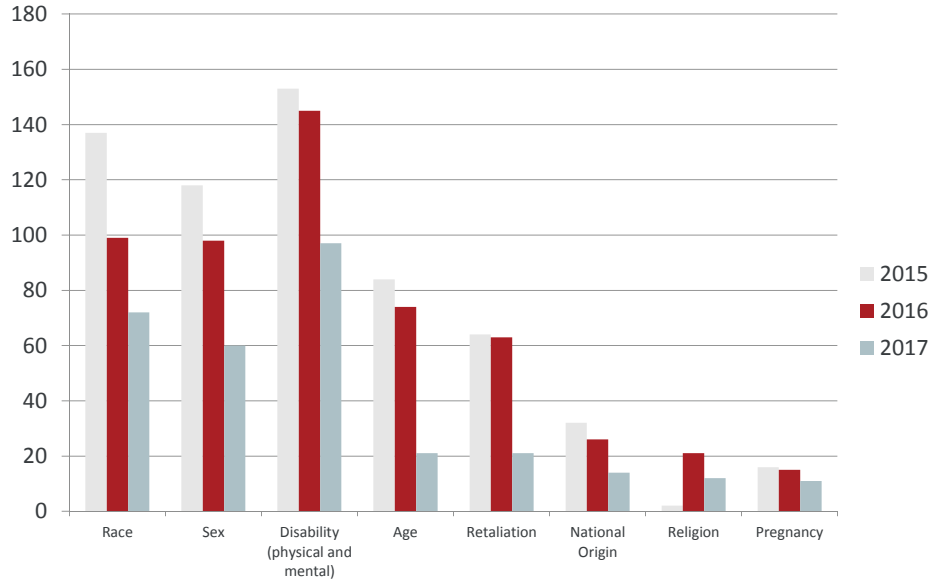
Alaska State Commission for Human Rights



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Alaska State Commission for Human Rights v. Anderson (Alaska 2018)

- ASCHR has a longstanding policy of barring third parties from investigative interviews with limited exceptions.
- ASCHR requested an interview with the complainant's supervisor and the supervisor refused unless the company's EEO manager was also present.
- The Alaska Supreme Court found that the confidentiality of ASCHR's investigations mandated by statute, necessarily entails the authority to conduct confidential interviews.
- Note: ASCHR has indicated it is in the process of developing clarifying regulations.

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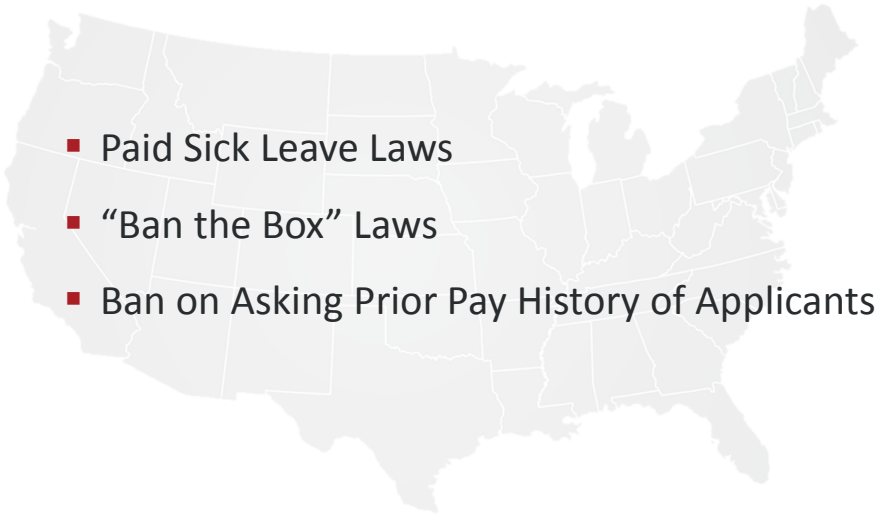
Trends from Other States to Watch



- Paid Sick Leave Laws
- "Ban the Box" Laws
- Ban on Asking Prior Pay History of Applicants

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Litigation Trends and Case Law Update

- Disability Discrimination and the ADAAA (Thank goodness this wasn't you!)
- Sexual Harassment (#MeToo) and the Equal Pay Act (You know we had to talk about these…)
- Other Noteworthy Decisions (the Supreme Court has been awfully busy this past year)

23

Sepulveda-Vargas v. Caribbean Restaurants, Inc. (1st Cir. 2018)

- An assistant manager was robbed at gunpoint when trying to make a bank deposit. Afterwards, he suffered PTSD and depression.
- The assistant manager requested a fixed work schedule and to be moved to a location in an area not prone to crime.
- The employer initially agreed, but afterwards informed him he would have to work a rotating schedule, like all managers.
- The assistant manager alleged his employer failed to reasonably accommodate his disability.

24

Sepulveda-Vargas v. Caribbean Restaurants, Inc. (1st Cir. 2018)

- "Today's opinion is a lesson straight out of the school of hard knocks. No matter how sympathetic the plaintiff or how harrowing his plights, the law is the law and sometimes it's just not on his side."
- Who do you think won?

25

Sepulveda-Vargas v. Caribbean Restaurants, Inc. (1st Cir. 2018)

- The First Circuit agreed that a rotating schedule was an essential function of the assistant manager position.
- The employer's initial, mistaken interpretation of the ADA and the fact that the employer initially granted the employee a set schedule did not waive the employer's right to assert that the rotating schedule was an essential function of the position.

TAKEAWAY: The employer does not necessarily waive a defense under the ADA by originally granting the requested accommodation.

26

Mielnicki v. Wal-Mart Stores, Inc. (10th Cir. 2018)

- Employee worked as a maintenance associate and also had a developmental disability.
- The maintenance associate position job description stated cleaning the restrooms was an essential function of the position.
- For years, the two other maintenance associates did this job. When one maintenance associate left, the employee was directed to clean the restroom. She refused.
- Her accommodation request stated she could not handle being in the men's room and should not be exposed to cleaning products.

27

Mielnicki v. Wal-Mart Stores, Inc. (10th Cir. 2018)

- Employee argued she was a maintenance associate in "name only" because Walmart for years did not require her to clean restrooms.
- The Tenth Circuit found no authority to support the proposition that a job function is not essential if an employer excuses an employee from performing it for an extended period.

TAKEAWAY: Employer that goes beyond what is required under the ADA to permit an employee to perform only some of the essential functions of the position is not later prevented from insisting that an employee perform all of the essential functions of the position.

28

Nicolos v. North Slope Borough (Alaska 2018)

- An employee who had worked for the Department informed his supervisor he was having thoughts of harming himself and others.
- The supervisor was fearful of what the employee might do, knowing from previous conversations that he had access to weapons.
- The employee left work to obtain counseling treatment.
- After an investigation by the Department, the employee was terminated for violating the Department's rules prohibiting workplace violence.

29

Nicolos v. North Slope Borough (Alaska 2018)

- The employee alleged the Department discriminated against him because it terminated him on the basis of conduct that arose from his mental disability.
- The Alaska Supreme Court found that an employee who violates an employer's workplace violence policy will generally be considered unable to perform the essential functions of the position.
- The Court also found that compliance with a workplace violence policy is job-related and necessary.

TAKEAWAY: The Alaska Supreme Court has affirmed an employer's ability to terminate an employee for violating its policy against workplace violence even if that conduct resulted from an employee's mental disability.

30

EEOC v. UPS Ground Freight, Inc. (D. Kan. 2018)

- EEOC brought suit under the ADA regarding UPS's collective bargaining agreement.
- Employees with CDL's (commercial drivers' license) whose CDLs are suspended or revoked for non-medical reasons, including convictions for driving while intoxicated, would be reassigned to non-CDL required work at their full rate (100%) of pay.
- For drivers who become unable to drive due to medical disqualifications, including drivers who are individuals with disabilities, UPS provided full-time or casual inside work at only 90% of the rate of pay.

31

EEOC v. UPS Ground Freight, Inc. (D. Kan. 2018)

- The Court granted EEOC's motion for judgment on the pleadings.
- The Court found that the CBA's language was plain and unambiguous, and further, that it was "immaterial whether medically disqualified drivers have other options; paying employees less because of their disability is discriminatory under any circumstance."

TAKEAWAY: It is crucial that businesses examine the compensation for employees provided alternative work for medical reasons to confirm they are not being compensated at a lower rate than other non-medically disqualified employees who are reassigned.

32

Wilcox v. Corrections Corporation of America (11th Cir. 2018)

- Coworker complained of sexual harassment. The company told the other employee not to associate with her or be anywhere around her.
- After another incident, she submitted a second complaint alleging that she was afraid he would touch her again.
- The company hired an outside investigator. The coworker informed the investigator of additional incidents.
- The company terminated the other employee.

33

Wilcox v. Corrections Corporation of America (11th Cir. 2018)

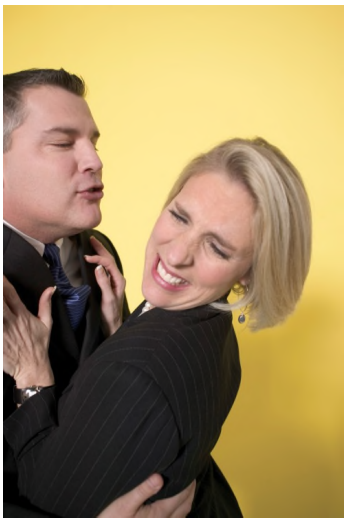
- The Eleventh Circuit reversed the jury's finding of liability against the employer on the employee's sexual harassment claim.
- If the perpetrator is not the plaintiff's supervisor, the employer will be held liable only if it knew or should have known of the harassing conduct but failed to take prompt remedial action.
- The Court found the employee did not complain of the other incidents before she filed the formal complaints, the employer adopted an anti-discrimination policy, and the employer took prompt action.

TAKEAWAY: Even in the era of #MeToo, courts are still willing to limit employer liability if it has an anti-discrimination policy it rigorously enforces and takes prompt and remedial action.

34

Minarsky v. Susquehana County (3rd Cir. 2018)

- Supervisor made unwanted sexual advances towards his part-time secretary for years.
- The County had become aware of the supervisor's inappropriate behavior towards two other women and had reprimanded him.
- After the County became aware of the inappropriate behavior towards his secretary, the County interviewed him and he admitted to the conduct.
- The supervisor was immediately placed on leave and terminated.



35

Minarsky v. Susquehana County (3rd Cir. 2018)

- Several years later, the secretary quit.
- She alleged she was uncomfortable in her role after the supervisor was fired because her workload increased and she received inquiries from her new supervisor asking what had transpired with her former supervisor and "who else she had caused to be fired."
- She filed suit alleging gender discrimination, hostile work environment, and quid pro quo sexual harassment.

36

Minarsky v. Susquehana County (3rd Cir. 2018)

- District Court granted summary judgment because the employer established (1) it exercised reasonable care to prevent and correct promptly and sexually harassing behavior, and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm.
- The Third Circuit, reversed, finding there was a question of fact regarding whether the employer and the employee acted reasonably.

TAKEAWAY: Workplace sexual harassment is "highly circumstance-specific," thus the "reasonableness" of the employer and employee's actions will usually be a question for the jury.

37

Little v. CSRA (11th Cir. 2018)

- Employee was a technician and safety coordinator. She alleged that her manager propositioned her for sex and subjected her to sexual harassment on a continuing basis for ten years.
- She filed a charge with the EEOC only alleging sex discrimination.
- She did not indicate the discrimination was continuing.

38

Little v. CSRA (11th Cir. 2018)

- The Eleventh Circuit found that the employee's allegations were limited to the scope of her EEOC charge.
- The employee in her EEOC complaint only relied upon specific offensive comments the manager made on two dates.
- The Court found her claims did not establish a basis for holding the employer liable—specifically she did not allege sufficient facts to establish actual or constructive notice.

TAKEAWAY: Good news for employers. Courts will limit employees to the allegations made in his/her EEOC complaint.

39

Fassbender v. Correct Care Solutions, LLC (10th Cir. 2018)

- Supervisor made several comments about/to pregnant employees including "What, you're pregnant too?", "I don't know how I'm going to be able to handle all of these people being pregnant at once", and "I have too many pregnant workers[.] I don't know what I am going to do with all of them."
- Pregnant employee was terminated for an alleged violation of the company's anti-fraternization policy.

40

Fassbender v. Correct Care Solutions, LLC (10th Cir. 2018)

- The Tenth Circuit found the comments were not direct evidence of discrimination.
- BUT, the Court found the comments, together with the employers shifting reasons for termination, constituted sufficient circumstantial evidence of discrimination.

TAKEAWAY: This reinforces what you have been telling your employees. Off-hand comments can cause serious trouble!

41

Rizo v. Yovino (9th Cir. 2018)

- A female employee was hired as a math consultant.
- When the employee was hired, the employee's salary was determined in accordance with the County's policy of placing a person within a stepped salary schedule.
- Where an employee enters the scale is determined by the employee's prior salary.
- The employee later learned male colleagues subsequently hired had been placed at higher salary steps.

42

Rizo v. Yovino (9th Cir. 2018)

- The Equal Pay Act forbids difference in wages between men and women at the same location who perform equal work.
- There are four exceptions: seniority, merit, production, or "any other factor other than sex."
- The County argued prior salary fit within the fourth exception.

43

Rizo v. Yovino (9th Cir. 2018)

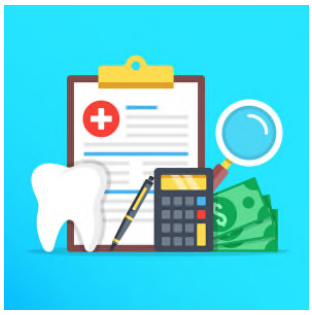
- The Ninth Circuit found that the fourth exception is limited to consideration of job-related factors.
- The Court found that it is impermissible to rely on prior salary to set initial wages.

TAKEAWAYS:
- Employers may not rely upon prior salary history in setting non-discriminatory pay practices.
- The Court expressly did not decide whether or under what circumstances, past salary may play a role in individual salary negotiations.

44

Janus v. American Federation of State, County, and Municipal Employees, Council 31 (U.S. 2018)

- 1977 Supreme Court precedent (Abood v. Detroit Board of Education) considered and rejected a First Amendment challenge to a Michigan law that permitted public employers to require employees who did not join the employee union to pay fees to the union.
- Illinois has a similar law. The governor of Illinois challenged the law, again on First Amendment grounds.



45

Janus v. American Federation of State, County, and Municipal Employees, Council 31 (U.S. 2018)

- The Supreme Court decided that requiring individuals to endorse ideas they disagreed with runs counter to First Amendment principles.
- The Court determined that neither of the justifications used in *Abood* (labor peace and eliminating "free riders") could survive the standard.

46

Janus v. American Federation of State, County, and Municipal Employees, Council 31 (U.S. 2018)

- The Court rejected other alleged justifications for infringing on First Amendment rights (funding agents to support bargaining; increasing workplace efficiency).

TAKEAWAY: Although limited to public employers, private employers may see impact of decision through lower funding to unions.

47

Epic Systems Corp. v. Lewis (U.S. 2018)

- Epic Systems Corporation (Epic) is a Wisconsin-based healthcare data management software company that requires its employees to resolve any employment-based disputes with Epic through individual arbitration and to waive their right to participate in collective proceedings.
- The employees claimed that they had been denied overtime wages.
- Epic moved to dismiss based on its waiver clause in the arbitration agreement.

48

Epic Systems Corp. v. Lewis (U.S. 2018)

- Congress' instructions in the Federal Arbitration Act (FAA) require courts to honor agreements as written.
- The NLRA does not discuss class or collective action procedures, and therefore cannot displace the FAA.
- The FAA's savings clause does not supersede Congress' instructions in the FAA.

TAKEAWAYS:
- Waivers that require dispute resolution in employment agreements will be upheld.
- It remains unclear whether other general contract defenses may be used to prevent enforcement of class waivers.

49

Encino Motorcars, LLC v. Navarro (U.S. 2018)

- Encino Motorcars, LLC sells and services Mercedes-Benz cars, and employed Hector Navarro and others as "service advisors."
- Navarro and the other plaintiffs alleged in Federal District Court that Encino Motorcars violated the FLSA by failing to pay them overtime.

50

Encino Motorcars, LLC v. Navarro (U.S. 2018)

- The Supreme Court held that the FLSA exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" from an employer's general obligation to pay overtime.
- Because the DOL's 2011 interpretation was issued without the reasoned explanation that was required, in light of the department's change in position and the significant reliance interests involved, the provision must be construed without placing controlling weight on that interpretation.

TAKEAWAY: DOL Interpretations will require reasoned explanations.

51

Digital Realty Trust, Inc. v. Somers (U.S. 2018)

- Paul Somers worked as Vice President of Digital Realty Trust (DRT).
- Somers filed several reports to senior management regarding possible securities law violations by the company. He was later fired.
- Somers sued DRT under state and federal laws, but particularly alleged that DRT violated Section 21F of the Dodd-Frank Act.
- DRT claimed Somers did not qualify as a "whistleblower," because he did not report the violations to the SEC.

52

Digital Realty Trust, Inc. v. Somers (U.S. 2018)

- The Supreme Court found the Dodd-Frank Act explicitly defines whistleblowers as persons who reports to the SEC.
- The purpose of Dodd-Frank also supports this definition, since Dodd-Frank is supposed to help SEC enforcement efforts.
- The language is not ambiguous and therefore not entitled to *Chevron* deference.

TAKEAWAY: An employee who wants to take advantage of the anti-retaliation protections of Dodd-Frank must report the violations to the SEC, not internally or to some other organization.

53

Masterpiece Cakeshop v. Colorado Civil Rights Commission (U.S. 2018)

- Wedding cake case. A baker refused to bake a wedding cake for a same sex couple.
- The Court held 5-4 that Colorado Civil Rights Commission infringed on the baker's religious freedom by the openly hostile comments and statements made during hearing.

TAKEAWAY: Stay tuned… how/if this will impact employment law remains unknown.

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U.S. Supreme Court

- Current Term
  - More cases about employee arbitration agreements
  - Public employees and union membership
  - Free speech vs. religious rights
  - Overtime and FLSA

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THANK YOU!

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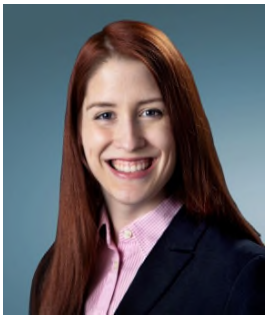

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