

## **WHEEL OF MISFORTUNE---EPL CLAIMS TODAY**

### **Panelist**

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### **I. Introduction**

Receiving an EPL claim can feel a bit like playing a game of “wheel of misfortune”. Allegations of inappropriate behavior in the workplace have been in the news with claims against celebrities and powerful corporate leaders. This added attention requires careful consideration on how the claim will play out before a jury in this atmosphere. It also means that there is a potential that upon receipt of one claim, more may follow.

In addition to the heightened media attention, many changes are occurring in the law. The current administration has signed executive orders and issued guidelines effecting existing laws. Governmental agencies presently disagree amongst each other as to who is protected under Title VII of the Civil Rights Act and there is a split in the circuits. Furthermore, states have passed their own employment laws which are at odds with the current administration.

Meanwhile, the Supreme Court issued decisions which will have an impact future claims and actions by employers.

All of this can make practicing in this area as if playing a game of the wheel of misfortune. The panel will discuss recent issues and trends in employment law. While the handout provides the legal information for the topics to be discussed by panel. The panel will address these issues and their impact on carriers, insureds and defense counsel in a fast paced game show format in which we will seek audience participation.

### **II. #MET—M-VEMENT—CHANGES ARE COMING**

I would like to buy an “o” for “oh a claim hot off the front page”.

On October 5, 2017, the New York Times published a report into alleged sexual harassment by movie producer Harvey Weinstein. That report and others reports of sexual misconduct by powerful men have sparked the #MeToo movement, which encourages victims of sexual harassment and sexual assault to come forward. Since then, several other top executives

have faced claims of sexual harassment. Indeed, Time Magazine's Persons of the Year were the "silence breakers" of the #MeToo movement—those that came forward.

### **A. The Impact**

The popular school of thought was that since the movement emboldened people to come forward with claims of sexual improprieties at work, there would be more lawsuits alleging sexual harassment; hostile work environment; sex discrimination and sexual assault. But, despite the media coverage, the U.S. Equal Employment Opportunity Commission ("EEOC") reported in March of 2018, that it has not seen a surge in sexual harassment complaints since the start of the #MeToo movement. Instead, the EEOC has seen a rise in demand letters—threats to sue. The insurance industry has similarly reported that there has been an increase in demands, but not necessarily lawsuits.

Given the present climate, decisions regarding early settlements will be critical. But, Confidentiality may no longer be an option.

### **B. The "Weinstein Tax"**

It was reported that the many of the claims made against Harvey Weinstein were not known to the public because they were "concealed" by non-disclosure agreements. As a result of the media focus on such non disclosure agreements and the #MeToo movement, Congress has passed a provision to the Tax Cuts and Job Tax Act referred to as the Weinstein Tax. The intended purpose of the provision was to provide transparency. No longer would repeated acts of sexual harassment be concealed by non disclosure agreements and if they were, there would be tax consequences. The Weinstein Tax was thus implemented to discourage businesses from offering what had come to be known as "hush money" to those who had come forward with allegations of sexual harassment or abuse.

As of December 22, 2017, employers are now prohibited from deducting any settlement expenses related to sexual harassment and abuse claims when there is a nondisclosure term in the settlement agreement. Prior to the passing of the Weinstein Tax, the Internal Revenue Code allowed employers to deduct ordinary and necessary expenses paid or incurred in carrying on a trade or business, including those expenses used in settling employment disputes.

Now, Section 13307 provides that:

No deduction shall be allowed under this chapter for –

-any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or

-attorney's fees related to such a settlement or payment.

The legislation, however, was passed quickly and several key issues were not addressed. The Weinstein Tax does not define sexual harassment, sexual abuse, and nondisclosure agreement. Therefore, since there is no definition as to sexual harassment or abuse, it is unclear where claims of gender discrimination and bullying that would fall within this legislation.

Further, it is unclear when settling employment claims not involving sexual harassment allegations, whether a general release of all claims, including sexual harassment would be affected by this deduction limit.

A critical term which also is not defined is “nondisclosure agreement”. It is not clear whether Congress intended to encourage only the disclosure of the settlement agreement and the amount, or, whether all confidentiality provisions relating to alleged harassment or abuse (acts) must be removed from the agreement to ensure that the parties can utilize a deduction.

The Weinstein Tax also does not address how to handle multiple claims in a settlement agreement. For example, a complaint or demand letter may allege sexual harassment, and other unrelated claims. In such situations, in order to obtain the benefit of a tax deduction, the parties may be required to enter into two agreements—one to cover the sexual harassment allegations and another for the other unrelated claims.

The legislation may also have unintended consequences to the claimants. In particular, there is much confusion over whether Congress intended for a claimant to lose the deduction if a nondisclosure term is contained in the settlement agreement. The legislation specifically states that, there will be no deductions “under this chapter”. This language implies that this provision is applicable to all of Chapter 1 of the tax code covering businesses and individuals alike.

Before the Weinstein Tax legislation was passed, a claimant would include the gross settlement amount as taxable income, and the attorney’s fees amount would be deducted from the taxable income amount. Thus, claimant would be taxed on his or her net recovery after attorney’s fees rather than the gross amount. However, based on the language in the legislation, if the claimant cannot factor in the deduction for attorney’s fees, the claimant will be taxed on 100 percent of the settlement, regardless of the fact that the claimant’s attorney took a significant portion of the settlement amount.

The legislation also fails to take into account the many other considerations that go into settlement negotiations and decisions to settle. Some claimants want to keep the matter confidential. Claimants often send pre suit letters to avoid a lawsuit, its disclosure and the publicity that will follow. Now, a claimant may have to opt for full public disclosure so as to not lose the deduction.

Parties often settle matters for a variety of reasons that do not necessarily include the desire to silence the accuser. There may be financial and business reasons for a settlement. Parties may simply not want to go through protracted litigation. The allegations may be such that to fully litigate the matter may not be in anyone’s interest if there is a possibility of a full recitation of the facts. The claimant may not want those facts revealed and an employer may not want the publicity that will follow.

In the first decision after the #MeToo movement started, a judge went through each and every detail of prolonged harassment and a hostile work environment in its opinion. *Fanchina v. City of Providence*, 881 F. 3d 32 (1<sup>st</sup> Cir. 2018) (Weinstein allegation were made three days before case was argued—decision would be issued after the claims against Weinstein had been made). This opinion is an example of the details that could be published for the entire world to read and which may not be wanted by either the party. It has been argued that confidentiality agreements along with early settlements could avoid such disclosures to the benefit of both sides.

While the Weinstein Tax remains unclear, caution must also be taken to not run afoul of local and state laws regarding non-disclosure agreements. The #MeToo movement has also led to local laws being passed regarding non-disclosure agreements. In New York, for example, Section 5-336 to the General Obligations Law and Section 5003-b to the CPLR prohibit

employers from including a non disclosure clause in any settlement of a sexual harassment claim unless the complainant requests confidentiality. If the complainant requests confidentiality, the complainant must have 21 days to consider the terms, and 7 days to revoke the agreement. (*See also*, Washington, Senate Bill 966, Prohibiting employers from requiring employees to sign NDA agreement as to sexual harassment as part of employment and settlement agreements). New Jersey, Arizona, California and Pennsylvania are considering similar laws.

### **C. Mandated Training**

The #MeToo movement has also spurred legislation requiring anti harassment training by employers. For example, in New York, effective October 9, 2018, Section 201-g, of the Labor Law will require every employer to either adopt the model policy and training program provided by the Department of Labor, or establish a policy and training program that equals or exceeds the minimum standards provided by the models. Employers are also required to provide all employees with a written copy of the policy and training on an annual basis.

Effective April 1, 2019, New York City employers must also provide sexual harassment training. Section 8-107 of the Administrative Code of the City of New York has been amended to now require employers with 15 or more employees to conduct annual, interactive anti-sexual harassment training for all employees employed in New York City, including supervisory and managerial employees. California, Connecticut and Maine have similar laws. *See, e.g.* Cal. Assembly Bill 2053 and Senate Bill 396; Maine Statute Title 26, Chapter 7, Subchapter 4-B.

Underwriters will need to familiarize themselves with the growing legislation requiring different types of training and when it is required. The laws vary depending on the size of the company and also the type of training that is required.

Claims and defense counsel should also make sure that the applicable training laws have been complied with when determining how to proceed with the matter. Violations of the mandatory training laws will no doubt have an impact on the potential exposure to the insured.

## **III. IT IS AGAINST MY R-LI-ION.**

### **a. The New Administration**

In July of 2018, the Attorney General for the United States announced the establishment of the Religious Liberty Task Force. The task force, according to the Attorney General, is to help the Department of Justice fully implement the religious liberty guidance issued in 2017. The guidance which was provided lays out 20 fundamental principles for the executive branch to follow which include abstaining from action and that the government should not impugn on people's beliefs. The guidance, according to Attorney General is to accommodate people of faith.

The guidance was a byproduct of the President's executive order that directed agencies to respect religious liberty and protect political speech. This task force is thus to ensure that the components of the Justice Department will support religious liberty in the policies implemented; briefs filed and regulations adopted.

When announcing the task force, the Attorney General referred to Jack Phillips, the baker who took his case up to the Supreme Court. *Masterpiece Cakeshop, et als v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_\_ (2018).

## **B. Objections on Religious Grounds**

The United States Supreme Court ruled 7-2 in favor of Jack Phillips, the Colorado baker who made news when he refused to bake a custom cake for a same-sex couple because he believed doing so would violate his religious beliefs. While the Supreme Court ruled in his favor, it did so pursuant to the Colorado Civil Rights Commission's violation of Phillips' rights under Free Exercise Clause of the First Amendment, rather than the underlying couple's rights to equal treatment.

A same-sex couple, Charlie Craig and Dave Mullins inquired about ordering a cake for their wedding reception. Phillips initially told the couple that he would not bake a cake for a same-sex couple since same-sex marriage was not legal in Colorado at that time. Later, Phillips argued that by baking and "creating" a cake, he would be engaging in behavior that would go beyond his understanding of the Bible.

The couple proceeded to file a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act. The commission found in favor of the couple, and the Colorado state court affirmed the decision. The matter went up to the Supreme Court.

While the Supreme Court ruled in favor of Phillips, its decision was limited. The majority noted that the Colorado Civil Rights Commission had shown a "clear and impermissible hostility" toward Phillips and his sincere religious beliefs. The Supreme Court held that the commission's treatment of Phillips violated the state's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. The Supreme Court pointed to some comments made by the Commission which it deemed showed a bias toward Phillips. The Supreme Court did not address the issue of free speech its decision.

The decision/victory is thus very limited. But, as portrayed in the media, many may view this was a "win" for those who want to refuse providing services because to do so would be against the religious beliefs held. The Supreme Court decision does not go that far.

## **C. The Religious Freedom Restoration Act.**

There is however, the Religious Freedom Restoration Act of 1993 ("RFRA"). The RFRA allows employers to be exempt from provisions of Title VII if (A) the objection is based on sincere religious belief and (B) the federal law substantially burdens the employer's ability to act consistently with the belief unless (C) the federal law serves a compelling government interest and (D) denying the exemption is the least restrictive means of serving that interest. This analysis must be performed so as to determine whether the religious objection can be accommodated.

Initially, the RFRA was used in cases involving minority religions, such as Sikhs and Muslims seeking the right to wear their religious headgear in their driver's license photos. But in recent years, it has been used to protect the rights of Christians who want to abstain from practices they disavow. *Honorable Wendell Griffen v. Arkansas Supreme Court*, (E.D. Ark. 2018) (judge refusing to preside over death penalty case against his religious beliefs); *But, see, E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424, 2018 WL 1177669 (6th Cir. Mar. 7, 2018) (employer could not rely of RFFA to fire transitioning employee from funeral

home--“as a matter of law, tolerating [the employee’s] understanding of her sex and gender identity is not tantamount to supporting it.” The Court further held that, “as a matter of law, a religious claimant cannot rely on customers’ presumed biases to establish a substantial burden under RFRA”).

In *Burwell v. Hobby Lobby Stores*, the Supreme Court allowed the RFRA to be used to challenge the Affordable Care Act’s contraceptive mandate that required all for-profit companies to cover abortion-inducing drugs—even against the religious objections of businesses’ owners. The Supreme Court found that such a mandate violated RFRA because it imposed a substantial burden on the companies that refused to comply because of their religious beliefs. These companies would face substantial fines. The government also failed to demonstrate that there was not a less restrictive means. The Supreme Court found that since the government could assume the cost of providing the subject contraceptives to women unable to obtain coverage due to their employers’ religious objections or extend the accommodation that had already been established for religious nonprofit organizations to non-profit employers with religious objections to the contraceptive mandate. *Hobby Lobby* thus continued to follow the test enunciated for the application of the RFRA.

When it was passed in 1993, Congress intended RFRA to apply to all branches of government, and both to federal and state law. But in 1997 the Supreme Court ruled the RFRA exceeded federal power when applied to state laws. See, *City of Boerne v. Flores*, 521 U.S. 507 (1997)

#### **D. State Laws**

As a result, states passed state Religious Freedom Restoration Acts that apply to state governments and local municipalities. Currently, there are 21 states that have passed a Religious Freedom Restoration Act that is based on or is similar to the federal act. (Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. Ten other states have religious liberty protections that state courts have interpreted to provide a similar (strict scrutiny) level of protection. (Alaska, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Montana, Ohio, Washington, and Wisconsin).

Considerations for religious accommodations and advancement of religious freedoms were recently announced by the Department of Labor with respect to federal contractors. On August 13, 2018, the Department of Labor, who regularly monitors federal contractors for discrimination told its staff that it must focus on recent executive orders and court order on religious freedom.

#### **E. Refusal to Perform Job**

It thus appears that more cases will have a refusal to perform one’s job or to render services on the grounds that it is against their sincere religious beliefs. But, there has to be more than raising a religious objection. Given the existing precedent, whether an accommodation can be afforded must be reviewed and also whether performing the task is indeed an act that goes against a person’s sincere religious beliefs.

**IV. NO---RE DOES TITLE --- STATE THAT LG—Q IS A PROTECTED CLASS.**

**A. Title VII**

I would like to a “V” please and to buy two “II’s” please.....but what about the rest of the letters? Some argue that nowhere in Title VII does it state that it protects LGBTQ—i.e. discrimination based on sexual orientation or identity . Indeed, the United States Attorney General contends that Title VII does not protect transgender employees. But, some courts disagree. In fact, the EEOC disagrees. We therefore have two governmental agencies taking the opposite position on the same issue.

Discrimination based on sexual orientation and gender identity is specifically prohibited in some states and is not included within Title VII’s protections. In 1964, the Civil Rights Act became the law of the nation and prohibited employers from discriminating against employees on the basis of sex, race, color, national origin and religion. At the time that the Civil Rights Act was passed, the issue of gender identity or sexual orientation was not even discussed. Many have argued that if Congress had intended to include sexual orientation or identity as protected under Title VII, it would have included same. However, that argument has been slowly eviscerated by some courts.....some.

**B. Split Between the Circuits**

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court would expand Title VII to include discrimination based on gender stereotyping. In this now famous case, a woman alleged that she was denied partnership because she did not fit the female stereotype. The woman was described as being "too aggressive". In fact, she was told that if she wanted to improve her chances for partnership she should wear more makeup or have her hair styled and wear jewelry. While the Supreme Court found that this was discrimination based on gender stereotyping, the case did not go so far as to state that sexual orientation was protected under Title VII.

The arguments and rationale behind *Price Waterhouse* have led to decisions expanding Title VII to include discrimination based on sexual orientation and gender identity. *U.S. EEOC v. Scott Medical Health Center* (Case 2:16-cv-00225-CB). *See, also, Lopez v. River Oaks Imaging and Diagnostics Group, Inc.*, 542 F. Supp.2d 653 (S.D. Texas 2008) (gender stereotype); *see also, Michaels, v. Akal Security*, (Colo. 2010), Civil Action No. 09-cv-01300-ZLW (while court dismissed some claims by male to female employee, claims under Title VII for gender stereotyping allowed to proceed).

Expanding the law further, the Sixth and Ninth Circuits have ruled that Title VII includes protections for transgendered as discrimination based on sex. *Roberts v. Clark County School District*, (15-cv-00388 Dis. Nev.) *Michens v. General Electric Co.* 2016 BL 395751 (W.D. Ky. No. 16-603, 2016) and *see, Smith v. City of Salem*, 378 f.3A 566 (6TH Cir. 2004) (discrimination against transsexual no different than discrimination in *Price Waterhouse*).

Following this trend, the U.S. Court of Appeals for the Seventh Circuit recently ruled that discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII.

*Kimberly Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir. April 4, 2017). The Seventh Circuit held that “a person who alleges that she experienced employment discrimination based on her sexual orientation has put forth a case of sex discrimination for Title VII purposes.” The Seventh Circuit noted that although discrimination based on sexual orientation had historically been deemed to be distinct from sex discrimination, the line between sexual orientation and sex had become increasingly blurred. The Court also relied on the *Price Waterhouse* rationale. While the decision did not specifically apply to transgender, it continued the trend of Courts to expand Title VII to include discrimination based on sexual orientation.

### **C. Conflict Amongst the Agencies**

The EEOC previously set forth its policy as to LGBT rights and its enforcement priorities. And today, the EEOC continues its aggressive push toward expanding the definition of sex discrimination under Title VII to include discrimination on the basis of sexual orientation. The EEOC remains on the forefront; to that end, its Strategic Enforcement Plan for 2013-2016 included seeking coverage of LGBT employees under Title VII’s prohibition on sex discrimination. In an article published on its website, entitled “What You Should Know About the EEOC and the Enforcement Protections for LGBT Workers,” the EEOC states:

“While Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases, the Commission, consistent with case law from the Supreme Court and other courts, interprets the statute’s sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.”

This position still remains on the EEOC’s website. In fact, the EEOC still has on its website guidance for “Bathroom/Facility Access and Transgender Employees.”

The tension between the position taken by the Attorney General and the EEOC was recently displayed when the EEOC stood by its position in an *amicus* brief filed for a second Circuit litigation. *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018). The EEOC stood by its position that Title VII protects transgender employees. But, the Justice Department rejected the EEOC’s position and filed an *amicus* brief arguing to the contrary. So not only is the law in flux, but two federal agencies are thus at odds over the issue.

### **D. Discrimination Based on Sex**

In the meantime, while the issue remains unresolved, the EEOC continues to bring actions under Title VII for discrimination against transgender employees. Recently, the EEOC found that Sam’s Club violated Title VIII when it discriminated against a transgender employee. The EEOC issued a letter with its findings which included a finding the medical coverage was improperly denied because employee was transgender. And in September of 2017, the EEOC filed a lawsuit against a tire company for failing to hire a transgender man because of his sex. *EEOC v. A&E Tire, Inc.*, 17-cv-02362 (U.S.D.C. Colo. 2017). Thus, despite the conflict between the two agencies, the EEOC, continues to enforce its position that transgender employees are afforded protections under Title VII.

The Supreme Court has not resolved the issue. So in the meantime, more and more lawsuits are being filed pleading not only discrimination based on sexual orientation, but discrimination based sex because of not conforming to stereotypes and those case are surviving

motions to dismiss. *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) (discussing split in circuits and arguments on discrimination based on sex and sexual orientation).

## V. A-CT—V- SHOOTER

### A. Definitions & Statistics

Active shooter incidents have been on the rise. While we often hear of shooting incidents, an active shooter event is a particular event for which employers must be prepared. The Department of Homeland Security has defined an active shooter as an individual actively engaged in killing or attempting to kill people in a confined other populated area. The FBI reports that between the years 2000 to 2017 that have been 250 active shooter incidents in the United States. From 2016 to 2017 the active shooter events increased from 20 to 30.

During that same time period of 2000 to 2017, the FBI reports that commerce/businesses are where 42% of the active shooter incidents occurred. 20.8% of the active shooter incidents took place in educational facilities. Not far behind were open spaces and government agencies. But, when one discusses any of these locations, one is talking about a place where there are employees. Consequently, after an active shooter event, lawsuits follow against employers.

### B. OSHA

Every year nearly 2 million Americans are victims of workplace violence according to the Occupational Health & Safety Administration (“OSHA”). Workplace violence is the second leading cause of death on worksites.

Section 5 A1, the general duty of OSHA requires employers to provide their employees with the place of employment that is free from *recognized hazards* that are causing or likely to cause death or serious physical harm. (emphasize added). Courts have interpreted the general duty clause to mean that an employer has a legal obligation to provide a workplace free of conditions or activities that **the employer or the industry recognizes as hazardous** and that is likely to cause death or serious physical harm to the employees where there is a feasible method by which to abate the hazards. Failure to do so could result in a finding of OSHA violations under the OSHA act.

Active shooter events are now considered a recognized hazard and indeed OSHA has active shooter guidelines on its web site for employers.

The penalty for a violation is a fine. But, the general duty clause is being used in connection with a negligence claim. Did the employer do what it needed to do to maintain a safe workplace?

### C. Negligent Retention & Supervision

An example of the potential claims against an employer can perhaps be found in the lawsuits and invitations to join in a lawsuit in the aftermath of the shootings in the 2013 active shooter event that occurred in the Naval Yards in Washington, DC. An employee went into a building where he worked at the Naval Yards and killed 14 people. It has been alleged and reported that the shooter had a prior conviction for a shooting; arrests and reprimands and often complained about voices that he heard and transmissions that he thought were being made to him.

After the shooting, some of the claims that are being made are:

Negligent hiring by the IT consulting company;

Negligent retention and monitoring by the IT consulting company for failing to notify security officials of the shooter's deteriorating mental state and allowing him to return to work despite his poor mental health and complaints of hearing voices;

Negligent supervision by the Department of Defense for permitting the shooter to retain his security clearance despite his violent behavior and deteriorating mental health;

Negligence or failures of the third-party company that conducted a background check on shooter;

Negligent and inadequate security at the Navy Yard on the day of the shooting.

These are some of the potential claims that a firm seeks to assert on behalf of potential plaintiffs in the aftermath of the shooting. The claims of negligent hiring; supervision and retention may trigger a claim under the employer's EPLI policy.

#### **D. Other Causes of Action**

In the lawsuits that followed the San Bernardino shooting, a claim was made of a hostile work environment. The San Bernardino shooter was reported to be married a woman who had been radicalized. There was a long debate as to whether the shooting incident was an act of terrorism or workplace violence. But, while some choose to debate the matter, a claim was asserted that the employer knew or should have known that its employee was predisposed to commit acts of violence and thus maintained a hostile work environment.

Another often filed claim is for negligence in the failure to provide proper training. For example in 2013 a court in Minneapolis Minnesota found fault with the employer for negligence. In this case, an individual walked into his place of employment and shot and killed numerous individuals before taking his own life. Following the OSHA guidelines as set forth in the general duty clause, the court found that, "*Liability is on the employer to train their employees to recognize the indicators of the potential active shooter and how to respond when they are faced with an actual active shooter incident*" *Beneky v. Accent Signage Systems*, Appeals Court. September 2014. This thereby making an active shooter event a "recognized hazard".

Employers must also be careful in how the training is conducted or possibly face a claim. *See, e.g. Mclean v. Pine Eagle Charter School*, (teacher filed action against school; school board; security agency and security officer alleging PTSD from unannounced active shooter training).

#### **E. Workers Compensation**

Many of the claims that will come after an active shooter event will be for workers compensation. Employees who were not physically injured but witnessed the event may be eligible for workers compensation benefits for post-traumatic stress disorder (PTSD) and other psychological effects. Benefits can vary by state.

In most states, workers compensation statutes include an "exclusive remedy" provisions that prevent injured employees from making tort liability claims against their employers, meaning that workers compensation benefits are the sole remedy available to these employees.

A targeted, personal attack on an employee with a clear motive that is unrelated to the workplace — for example, a domestic dispute — could negate workers compensation for that employee because it falls outside of the “scope of employment.” Other employees injured during such an attack, however, would typically be able to file claims.

Worker’s compensation claims can prove costly. City of Kirkwood, Mo., has incurred over **\$9.9 million** in workers compensation costs from shooting where gunman opened fire at a city council meeting, killing five and wounding two. Gunman dissatisfied with treatment by city officials.

## **VI. THE SUPREME COURT**

This term the United States Supreme Court issued several important decisions regarding employment. For the purposes of the conference, we shall review two of them which may have a significant impact in the future in the area of employment law and appear to be favorable to employers.

### ***Epic Systems v. Lewis*, 584 U.S. \_\_\_\_ (2018).**

On May 21, 2018, the United States Supreme Court ruled by a 5-4 vote that employers are not violating the National Labor Relations Act by including class waiver provisions in arbitration agreements that workers must sign as a condition of their employment. The decision is said to have cleared the path for businesses to limit their exposure to class action claims.

### ***Encino Motorcars LLC v. Navarro et al.*, 584 U.S. \_\_\_\_ (2018).**

In, *Encino Motorcars LLC*, the Supreme Court found that auto service advisers are overtime-exempt under the Fair Labor Standards Act and in so doing, scrapped a half century old process that called for narrowly construing exemptions to the FLSA.

The 5-4 decision from Justice Clarence Thomas revolved around a specific exemption in the FLSA for service advisers. But, the portion upon which everyone is focusing, is the majority’s rejection of the Supreme Court’s long-standing principle that FLSA exemptions should be narrowly construed against employers seeking to assert them. Instead, the Supreme Court created a standard under which lower courts give those exemptions a fair reading.

While employers will still have the burden of proving that the employee is exempt, now they may be afforded a broader construction of what constitutes and exempt employee.

The impact of these two decisions remains to be seen. But, the two decisions present somewhat of a win for employers.

## **VII. QUESTIONS**