Emerging Trends in Employment Practices & What You Need to Know

May 16, 2019

PLUS Southeast Chapter
Underwriting Sexual Harassment Exposures

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Travelers EPL Product Manager
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## Sexual Harassment Statistics

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<td>1. Percentage of EEOC charges filed in 2018 that alleged sexual harassment</td>
<td>10%</td>
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<td>2. Increase in amounts recovered by EEOC for victims of sexual harassment in 2018 compared to 2017</td>
<td>47%</td>
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<td>3. Percentage of harassed employees that never take formal action with regard to the harassment</td>
<td>90%</td>
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<td>4. Percentage of employees that admitted to dating a coworker</td>
<td>41%</td>
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<td>5. Percentage of those relationships that resulted in marriage</td>
<td>33%</td>
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<td>6. Percentage of employees that had a romantic relationship with their boss</td>
<td>5%</td>
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<tr>
<td>7. Percentage of women who have been sexually harassed</td>
<td>33%</td>
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<td>8. Percentage of sexual harassment charges filed by men</td>
<td>17%</td>
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Predictors of Sexual Harassment

• Study Completed by the National Academies of Sciences, Engineering, and Medicine found the following could predict likelihood or sexual harassment within an organization:
  – Corporate Culture
  – Men outnumbering women, particularly at the top of the organization chart

• Employers should:
  – Offer detailed examples of what types of behavior are not acceptable
  – Explain consequences for unacceptable behavior
  – Leaders have to model the behavior expected of employees
How Carriers Identify Sexual Harassment Exposure

- Application Questions
  - # of Employees
  - Industry
  - Sexual Harassment Policies
  - Training
  - Location
  - EEO-1
    - Breakdown of men/women
  - Loss Experience

- Client Meeting
- Internet Search
How Carriers Identify Sexual Harassment Exposure

• Third Party Data
  • Glassdoor Sample Comments
    • “Micromanagement hell. Assistants who became VP’s overnight was too often. Sexual harassment was the norm.”
    • “The HR team is really bias, arrogant and racial.”
    • “The company as a whole is a sinking boat…”
    • “I see good, capable ppl chose to leave within 1-3 years. Whoever left are social loafers.

  • Other Sources
Response from the Market to Sexual Harassment Claims

• Response has been mixed. Potential responses include:
  – Taking no action
  – Decline the account
  – Specific Party exclusions
  – Policy terms (Limit, Sublimit, Retention, Premium)
  – Increased focus for some on anti-harassment policies
  – Exclude certain industries (entertainment/media companies)
  – Additional underwriting questions
Message for Clients

- Carriers have resources (training, checklists, hotlines, policies & procedures, articles) to help organizations combat sexual harassment.

- Litigating Employment Practices Claims is expensive
  - Average Verdict in an employment case is $424,647 per Jury Verdict Report (2011-2017). That figure does not include defense expenses or the plaintiff fees.

- Defense expenses in a sexual harassment claim often reach $100,000-$200,000.

- In 2017, plaintiffs won 50% of employment cases tried.

- As an employer, it is difficult to control every interaction on the shop floor or in the office.
D&O Impact of Sexual Harassment Claims

- Directors and Officers sued by shareholders over:
  - Severance payments to sexual harassers
  - Allowing sexual harassment to occur
  - Loyalty to CEO at the shareholders and employees’ expense
  - Breach of duty of loyalty and care when they engaged in sexual misconduct, and put the organization’s firm and resources at risk
  - Failure to monitor harassment
  - Enabling Harassment to continue
  - Violating securities laws by making misleading statements
Questions?
Biometric Information Privacy: What It Means for Employers

David A. Cole
What Is Biometric Information?

- Scope of definition varies by state law
- Physiological, biological, or behavioral characteristics
  - Facial scans
  - Iris/retinal scans
  - Fingerprints and palm prints
  - Voiceprints
  - DNA
  - Vein patterns
  - Keystroke patterns or rhythms
  - Gait patterns or rhythms
  - Sleep, health, or exercise data
How Are Biometrics Being Used?

- Clocking in/out of timekeeping systems
- Security point access to workplaces
- Logging in/out of computer systems and devices
- Consumer applications (e.g. Facebook, Delta)
  - Employer efforts to identify employees or applicants through photographs or video footage?
Pros and Cons of Biometric Use

- Convenient, reliable, accurate, unique, secure
- But practically immutable and extremely difficult to replace after a security incident
- Could be more accessible to nefarious actors
- Commodification of or intrusion upon individual personhood
- Current technological limitations on accurately identifying people: potential for mistaken identities or racial profiling?
- Legal risk from increasing regulation on collection and use
Illinois Biometric Information Privacy Act

• Must provide notice and obtain *written* consent before collecting or otherwise obtaining biometric data

• May not sell or lease the data for profit, or disclose it, except under limited circumstances

• Must have a written policy on the length and purpose of retention of biometric data, and to protect such data as it would other sensitive data

• Creates private right of action and statutory damages:
  – Negligent violations: greater of $1,000 or actual losses
  – Intentional or reckless violations: increase to $5,000
  – Reasonable attorneys fees and costs, including expert fees
Statutory damages have made it popular for plaintiffs’ class actions

Suits often follow formula of those brought under TCPA
  – Intent of BIPA is to protect interests of plaintiffs
  – Recite essential elements of BIPA claim
  – Allege additional “injuries” like invasion of privacy, mental anguish, etc. from fear of unauthorized disclosure of biometric information
  – Often coupled with other claims: wage and hour, negligence, breach of contract

Initially, courts split on damage requirements for standing
Rosenbach v. Six Flags Entm’t Corp.

- “Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party.” 740 ILCS 14/20
- Any person whose statutory rights are impaired by an entity’s violation of a provision of BIPA is an “aggrieved” party
- No additional consequences or injury needs to be pled or proved: the technical violation of BIPA is, in itself, sufficient injury to support a cause of action
• Must give notice and obtain consent before collection
• Cannot be sold, leased, or disclosed to another person unless:
  – Consent for disclosure in event of disappearance or death
  – Needed to complete a financial transaction authorized by individual
  – Required or permitted by federal or state statute
  – Made to law enforcement for a law enforcement purpose or in response to a subpoena
• Stored, transmitted, and protected from disclosure using same care and manner as confidential information
• Only retained while needed and for maximum of one year, unless otherwise required by law. Employers must destroy upon termination.
• Civil penalties up to $25,000 per violation, but only by AG action
• Scope: definition of “biometric identifier” broader than Texas, but does not include “scan of hand or face geometry,” like Illinois BIPA

• Notice and consent: exact form of consent required “is context-dependent” and only notice must only be “given through a procedure reasonably designed to be readily available to affected individuals”

• Sale, lease, or disclosure of information allowed if other requirements of statute are satisfied, including security

• Does not provide private right of action; enforcement through state attorney general action only
Other Local, State, and Federal Proposals

- Florida – would include private right of action
- Massachusetts – combines elements of BIPA and CCPA and would create private right of action, but with exception for collection or disclosure of information on employees if done within scope of role as employer
- New York City – would require “commercial establishments” to disclose collection and retention of biometric information, but not mandate written consent or policies
- Federal: proposed bill of “Commercial Facial Recognition Privacy Act” that would be enforced by FTC
EPL Coverage for BIPA Claims

• “[I]nsurer shall pay on behalf of the Insureds Loss resulting from Claims … for Wrongful Acts.”

• Wrongful act often defined as, among other things, “failure to adopt or comply with adequate workplace or employment policies or procedures”; “breach of any oral, written, or implied employment contract”; “invasion of privacy” and “any other employment-related tort”.

• Duty to defend lawsuit with covered claims, even if particular claim is not covered
Best Practices for Employers

• Determine which laws apply to proposed collection of data
• Evaluate applicable notice, consent, use, and retention requirements
  – Specific form of notice or consent required?
  – Written policy required?
  – Retention schedule required?
• Review restrictions on ability to disclose data
  – Sale or disclosure allowed for profit?
  – Breach notification requirements?
• Confirm if insurance policy provides coverage
Questions?

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Emerging Trends in Employment Practices: Panel Discussion
Panelists

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EPLI Trends, Sexual Harassment Claims and Planning for 2019

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The pace of workplace law change and risk exposure continues to grow. Filing of EEOC and state agency charges, initiation of wrongful discharge and other lawsuits and daily publicity about sexual harassment all contribute to the ever-faster pace of assertion of claims. To help evaluate the workplace law landscape, we have prepared the following trends overview. We would welcome the opportunity to meet with Underwriters, Claims, Product and other EPL team members to discuss what may be in store for 2018 and beyond. With 2018 coming to a close, now is a good time to put something on the calendar for the first quarter of 2019.

Jackson Lewis has advised employers for nearly sixty years about preventive workplace policies and practices. Included in the proactive approach to problem avoidance is management education and employee communications about employers’ prohibitions against sexual harassment and other workplace misconduct. Daily publicity about Hollywood, political and other leaders engaging in sexual harassment has led to increased reports of harassment in workplaces across the country and increased filing of claims. Jackson Lewis can assist your insureds by conducting in-person anti-harassment training or webinars for management team members. If you would like to discuss management education programs, policy development or employee communications, please contact a Jackson Lewis attorney.
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Pay Equity Lawsuits: The Next Wave of Litigation?

Employers should review pay practices in light of the recent trends toward enhanced pay equity laws, accompanied by a noticeable increase in pay equity suits brought by both agencies and private attorneys. In 2016 and 2017, and increasingly more so in 2018, a number of states (including but not limited to California, Maryland, Massachusetts, New York and Oregon) implemented pay equity legislation imposing stricter standards on employers and lessening the burden for plaintiffs alleging wage discrimination. The impact of these new laws – as well as an increased national focus on compensation discrimination – now is being seen. High-profile pay equity cases have been brought against Google, Chadbourne & Parke, Pratt Library, Carolinas HealthCare System, and others. There seems to be heightened focus on the technology industry, with putative class action pay equity suits brought against Qualcomm and Microsoft, in addition to the Google case noted above. Further, the Office of Federal Contract Compliance Programs (OFCCP) has brought two administrative actions alleging pay equity discrimination, against Oracle America, Inc. and LexisNexis Risk Solutions. The action against LexisNexis was resolved for a settlement of $1.2 million, including future salary adjustments.

A more recent analysis from the National Women’s Law Center shows the gender wage gap remains pervasive. In lower wage jobs, women make 71 cents for every dollar paid to men. Even in higher wage jobs, women make 74 cents for every dollar paid to men in the same occupations. The high-wage jobs include lawyers and engineers. According to the report, female physicians make 66 cents on the dollar compared to men.

On September 27, 2017, the EEOC filed three lawsuits in the D.C. metro area, alleging that George Washington University, the National Association for the Education of Young Children and Vador Ventures Inc. paid women workers less than similarly-situated male counterparts, indicating
that, at least for now, pay discrimination will continue to be a focus for the EEOC. To that end, Acting EEOC Chairwoman Victoria Lipnic has recently stated that the EEOC “remains committed to strong enforcement of our federal equal pay laws.”

**Medical Marijuana**

The already complicated landscape for employers who conduct drug testing for marijuana has gotten more complicated. In a recent number of cases, courts have ruled against employers in drug testing cases involving medical marijuana cases. For example:

a. The Massachusetts Supreme Judicial Court held, in *Barbuto v. Advantage Sales & Marketing, LLC*, SJC-12226 (July 17, 2017) that employers, at minimum, have an obligation to engage in an interactive dialogue with medical marijuana users before terminating an employee for testing positive for medical marijuana, they must do so to determine whether the employer could accommodate the employee’s ongoing medical (not recreational) marijuana use. The Court expressly rejected the employer’s argument that, because use of marijuana is illegal under federal law, requiring an employer to accommodate medical marijuana use is per se unreasonable;

b. The Rhode Island Superior Court held, in *Callaghan v. Darlington Fabrics Corp., et al.*, No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017), that employers cannot refuse to hire a medical marijuana cardholder, even if the individual admittedly would not pass the employer’s pre-employment drug test required of all applicants. The Court held that, while employers are not obligated to tolerate employees who report to work under the influence of marijuana, they cannot refuse to employ a person due to his or her off-duty medical marijuana use;
c. In *Noffsinger v. SSC Niantic Operating Co., LLC d/b/a Bride Brook Health & Rehab Ctr.*, No. 3:16-cv-01938 (D. Conn. Aug. 8, 2017), the U.S. District Court for the District of Connecticut held that the federal Controlled Substances Act – which classifies marijuana as a Schedule I substance with no known medicinal purpose – does not preempt the Connecticut medical marijuana statute’s prohibition against firing or refusing to hire qualified medical marijuana patients. This was a case of first impression that might have potentially sweeping implications for state law and the CSA. The same Court later held that refusing to hire a medical marijuana user because she tested positive on a pre-employment drug test does violate Connecticut’s medical marijuana law. *Noffsinger v. SSC Niantic Operating Co., LLC, d/b/a Bride Brook Nursing & Rehab. Ctr.*, No. 3:16-cv-01938, 2018 U.S. Dist. LEXIS 150453 (D. Conn. Sept. 5, 2018).

d. In contrast, in *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200 (2008) the California Supreme Court held that employers are not required to accommodate an employee’s medicinal marijuana use, despite the Compassionate Use Act of 1996, which provides that persons with certain conditions can use marijuana under the care of a physician. The Court held that the Act did not grant marijuana the same status as a legal prescription drug and noted that, because marijuana is illegal under federal law, it cannot be “completely legalize[d] for medical purposes.” Similarly the Colorado Supreme Court held in *Coats v. Dish Network, LLC*, 350 P.3d 849 (2015) that an employee’s off-duty use of medical marijuana was not protected by the state’s “lawful activities statute,” as the Court determined the term “lawful” refers only to activities that are lawful under both state and federal law.

Employers (including federal contractors) should not rely solely on federal law or their status as a federal contractor when making employment decisions with regard to applicants and employees.
who use medical marijuana. Courts in Connecticut and certain other states will enforce state laws against discrimination with regard to medical marijuana use.

**Expanding Scope of Wage Lawsuits**

An ever-growing number of wage-hour lawsuits allege that workers wrongly were denied minimum wage (especially in tip credit lawsuits or claims by low-wage workers, often in the hospitality and agricultural industries) or overtime pay (usually the result of misclassification of workers as exempt or due to off-the-clock work by non-exempt staff). The scope of wage-hour lawsuits continues to expand. Class action lawsuits increasingly allege denial of wage supplements or wage benefits claims under state or local laws that mandate paid sick days or other paid time off. As local jurisdictions become concerned about federal wage law retrenchment, we expect more states and cities to enact wage supplement laws – employers who do not comply likely will face class action lawsuits. Simply stated, more paid time off laws equals more wage payment suits to come. For example, in September 2017, Hertz and Thrifty Car Rental entered into a $2 million settlement agreement to settle a class action suit brought by rental car workers at the Seattle-Tacoma International Airport, who alleged failure to comply with the SeaTac minimum wage ordinance. In January 2017, Menzies Aviation agreed to a settlement of $8.18 Million to resolve a class action suit brought by employees who claimed they were paid less than the SeaTac minimum wage. The ordinance requires a minimum wage of $15 hour for workers at the Seattle airport. This lawsuit is part of a wave of class actions brought beginning in February 2016, immediately after the ordinance was upheld following legal challenges. The City of Chicago recently enacted a similar ordinance, requiring airline subcontractors at O’Hare International and Midway International airports to pay
employees a minimum hourly wage of $13.45, with annual increases in proportion with the Consumer Price Index.

Prevalence of litigation and public criticism of subminimum wage payments have led some restaurants to eliminate the use of tip credits. Since few restaurants have done so, claims experience in the hospitality sector continues to grow.

**FLSA Opinion Letters Reinstated**

In January of this year, the DOL’s Wage Hour Division (WHD) reinstated seventeen opinion letters originally issued during the George W. Bush administration but subsequently withdrawn during the Obama administration. Four additional opinion letters were recently released and are discussed below:

- **FLSA 2018-20:** Whether time spent by employees voluntarily attending benefit fairs and undertaking wellness activities such as biometric screening, weight-loss programs and use of an employer-provided gym, are considered compensable working time (it is not).

- **FLSA 2018-21:** Whether 29 U.S.C. § 207(i), the commissioned sales employee overtime exemption, applies to a company’s sales force that sells an internet payment software platform (under the facts presented, it does). Notably, this opinion letter is the first acknowledgement by the DOL of the Supreme Court’s recent holding in *Encino Motorcars LLC v. Navarro*, 138 S. Ct. 1134 (2018), that FLSA exemptions are to be given a “fair reading,” rather than a “narrow construction” as previously applied by the Department and many courts.

- **FLSA 2018-22:** Whether members of a non-profit organization who serve as credentialing examination graders for one to two weeks per year, and who are not paid for their services but
are reimbursed for their expenses, may properly be treated as volunteers rather than employees (under the facts presented, they may).

- FLSA 2018-23: Whether 29 U.S.C. § 213(b)(27), exempting from overtime employees who work at a movie theater establishment, likewise applies to those employees who work at dining services operated by, and accessible only within, the theater (it does).

**Website Accessibility Lawsuits on the Rise**

In our e-commerce age, lawsuits complaining that business websites are not accessible to vision-impaired users in violation of Title III of the Americans with Disabilities Act or state laws are on the rise. In 2016, over 240 lawsuits – the majority of them class actions – were filed against companies alleging violations of the ADA for failure to maintain websites accessible to the blind and visually impaired. The industries most susceptible to these lawsuits have been retail, hospitality and financial services. By way of example, on June 13, 2017, the U.S. District Court for the Southern District of Florida ruled after a bench trial that Winn-Dixie Stores, Inc. violated the ADA because its website was inaccessible to a visually impaired customer. The U.S. District Court for the Southern District of New York recently refused to dismiss a website accessibility claim against Five Guys Enterprises LLC, ruling that “the text and purposes of the ADA . . . suggest that defendant’s website is covered under the ADA, either as its own place of public accommodation or as a result of its close relationship as a service of defendant’s restaurants”. *Marett v. Five Guys Enterprises LLC*, 17-cv-00788 (S.D.N.Y. July 21, 2017).

**Background Check Claims**
a. **Salary Inquiry Bans.** States and localities are continuing to enact legislation prohibiting employers from asking applicants about their salary histories. To date, California, Delaware, Massachusetts, Oregon, Puerto Rico, New York City, Albany, Westchester County, Philadelphia, San Francisco, and most recently, Vermont, all have enacted similar measures. Employers must educate recruiters and hiring managers regarding what is not permitted under these laws. At the very least, those in the hiring process should not ask applicants about salary histories until after a conditional offer of employment is made. In some locations (including New York City), such an inquiry can never be made.

b. **Ban the Box.** As of March 2018, 30 states and more than 150 cities have adopted some form of “Ban the Box” legislation prohibiting employers from inquiring about an applicant’s criminal history. Eleven states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont and Washington) have passed laws limiting the use of credit checks in employment. A number of cities (including New York City and Chicago) have implemented similar restrictions. Failure to comply could give rise to claims of wrongful denial of hiring or wrongful discharge, on both individual and group bases. The lack of “paperwork” compliance also could create class action exposure.

c. **FCRA.** Employers also must be mindful of class action litigations under the Fair Credit Reporting Act. Though the Supreme Court’s decision in *Spokeo, Inc. v. Robins* requires FCRA plaintiffs to identify at least a “concrete injury,” courts continue to allow FCRA class actions to move forward despite presenting merely paperwork violations. For example, in March 2017, a Florida federal court allowed a putative FCRA class action to continue against Amazon. Since the Supreme Court ruling in *Spokeo*, several class action lawsuits were filed against employers that conduct applicants’ background checks alleging FCRA violations:
i. In November of 2017, ESR News reported that Avis agreed to pay $2.7 million to settle a class action lawsuit that claimed the car rental company allegedly violated the FCRA when conducting background checks on job applicants for employment purposes. On the other hand, in October of 2017, a California federal judge granted a Motion to Dismiss a class action lawsuit against Home Depot claiming a violation of the FCRA because Home Depot allegedly failed to make proper disclosures and failed to obtain proper authorization. In the Order, dismissing the case, Judge Gary Klausner, explained that the lawsuit failed to demonstrate actual harm and did not allege a “concrete” injury as required after the U.S. Supreme Court ruling in *Spokeo*; and,

ii. Consumer lawsuits filed under the FCRA grew by nearly 60 percent in September 2017 over the previous month, an increase that “keeps it in line with the aggressive growth in recent years,” according to litigation statistics reported by WebRecon LLC. The 3,328 filings under the FCRA from January 2017 to September 2017 are a 13.5 percent increase from the 2,932 FCRA filings from January 2016 to September 2016.

**Pregnancy and Lactation Accommodation**

In 2018, South Carolina became the latest state to pass a pregnancy accommodation law, joining 22 states and Washington D.C. While varying by jurisdiction, these laws expand protections for pregnant workers beyond the prohibition against discrimination under federal law. Enactment of these laws followed the Supreme Court’s decision in *Young v. UPS* (2015), which held that a pregnant worker could plead a disparate treatment claim under the Pregnancy Discrimination Act by showing that her employer refused to provide an accommodation despite providing accommodations to employees with restrictions upon their ability to work. For example, in the years since the *Young*
decision, New York amended its Human Rights Law to require that employers provide reasonable accommodations for employees with pregnancy-related conditions unless the proposed accommodation would impose an undue hardship on the employer's business. New York City has gone even further in protecting pregnant women or women who were recently pregnant, by forbidding employers from requiring a doctor’s note. Rhode Island amended its Fair Employment Practices law to require employers to reasonably accommodate an employee’s or prospective employee’s pregnancy-related condition, and prohibits employers from requiring pregnant employees to take a leave of absence if an on-the-job reasonable accommodation could be provided. In June 2015, the District of Columbia’s Office of Human Rights and Department of Employment Services announced that they will work jointly to increase investigation and enforcement of the District’s Protecting Pregnant Workers Fairness Act of 2014, which requires employers to provide reasonable accommodations to employees affected by pregnancy, childbirth, breastfeeding and related medical conditions.

In addition, several state laws (as well as city and local laws) expressly require employers to accommodate lactation and the need to express breast milk while at work, including requirements that employers provide dedicated lactation rooms. In May 2015, for example, the New York City Commission on Human Rights issued a legal interpretive guidance clarifying that the City’s Human Rights Law requires employers to provide a dedicated lactation space (not in a bathroom) with a refrigerator available for employees expressing breastmilk in the workplace. In California, employers are required to make reasonable efforts to provide employees with a private area, other than a toilet stall, to express breastmilk. Failure to comply could lead to claims of denial of accommodation, constructive discharge (i.e., a female worker quit due to lack of a clean, private area in which to express breast milk) or wrongful termination claims, whether on an individual or group basis.
Growth of Federal Court Litigation

Despite the continuing migration of claims to state court in California, New Jersey, New York City and other claimant-friendly jurisdictions, federal court litigation remains a robust threat to employers. 14,093 workplace lawsuits were filed in Fiscal Year 2016, up from 13,976 in 2015. Alarmingly, the number of ADA suits increased by nearly 10%; FMLA suits were up about 30% in recent years (about 8% in the past year alone).

Whistleblower Claims

The number of federal whistleblower suits and settlements continues to grow rapidly. OSHA administers whistleblower claims under the Sarbanes-Oxley Act, as well as under over 20 other federal anti-retaliation/whistleblower laws. For example, under the Dodd Frank Act Whistleblower Program, the SEC has paid out a total of approximately $262MM in “bounties” to 53 whistleblowers who the SEC deemed to have provided original and useful information leading to successful enforcement actions. The SEC recently reported that enforcement actions have resulted in more than $1B in fines and penalties. This number does not take into consideration the fees and costs incurred by publicly traded companies to investigate or otherwise defend SEC enforcement actions.

In-house Counsel and Compliance Personnel as Whistleblowers

The scope of whistleblower protection afforded by anti-retaliation provisions continues to expand. Our Corporate Governance and Internal Investigations Practice Group and litigators have identified a growing trend of in-house attorneys and compliance professionals filing whistleblower
status. The recent $11,000,000 jury award in favor of a former General Counsel of Bio Rad Laboratories in federal court in California brought increased attention to this type of claim. The Company has filed an appeal with the Ninth Circuit. A number of state courts, including New Jersey in its CEPA statute, has rejected the defense that the whistleblower’s job mandated identifying compliance issues. In *Trzaska v. L’Oreal USA, Inc.*, 865 F.3d 155 (3d Cir. 2017), The U.S. Court of Appeals for the Third Circuit held that L'Oreal’s in-house counsel had adequate support in the State’s ethics rules to enable them to pursue a whistleblower retaliation claim against L’Oreal. Further signifying this movement, a magistrate judge in the U.S. District Court for the Northern District of California held that SOX whistleblower protections preempt the attorney-client privilege, allowing general counsel to use otherwise privileged and confidential information as evidence in the lawsuit. Since these cases arise from what would seem violation of the attorney client privilege, it is important for employers to address these issues as soon as they are raised, especially at the pre-litigation stage.

**Top 10 EEOC Employment Discrimination Claims in 2017**

While the EEOC’s Fiscal Year 2018 data is not expected to be released until January 2019, the EEOC disclosed receiving 84,254 charges of employment discrimination in Fiscal Year 2017, and securing $398 million for victims of discrimination in private, federal and state and local government workplaces through voluntary resolution and litigation $46.3 million for victims of sexual harassment. A summary of the litigation data released by the EEOC is as follows:

- Charges of employer retaliation (48.8%), racial bias (33.9%) and discrimination due to disability (31.9%) were the most common charges;
EEOC legal staff resolved 184 lawsuits and filed 184 new lawsuits alleging discrimination in Fiscal Year 2016. The lawsuits filed by EEOC included 124 individual claimant suits, 60 suits involving multiple victims or class-action suits alleging discriminatory policies.

At the end of the Fiscal Year 2017, EEOC reported 242 cases on its active docket, of which 30 involved class action allegations of systemic discrimination. An additional 30 are multiple-victim cases. EEOC reports a successful outcome in 90.8% of its lawsuits.

EEOC reports that it continues to work with employers, through mediation, to resolve charges voluntarily. EEOC's mediation program achieved a success rate of over 76% – saving resources for employers, workers and the agency.

Courts continue to wrestle with the scope of sex discrimination (i.e., is it solely gender) under Title VII, (e.g., *Zarda v. Altitude Express*, 15-3775 (2d Cir. 2017) (Second Circuit held an *en banc* to consider whether Title VII prohibits discrimination on the basis of sexual orientation such that their precedents to the contrary should be overruled. They held that sexual orientation discrimination constitutes a form of discrimination “because of . . . sex,” in violation of Title VII, and ruled to overturn *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) and *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-23 (2d Cir. 2005), to the extent they held otherwise. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107, 2018 U.S. App. LEXIS 4608, *1-2, 130 Fair Empl. Prac. Cas. (BNA) 1245, 102 Empl. Prac. Dec. (CCH) P45,990, 2018 WL 1040820); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017), recognizing sexual orientation discrimination as a form of sex discrimination prohibited by Title VII); and, *Evans v. Georgia Regional Hospital*, 650 F.3d 1248 (11th Cir. 2017), holding that sexual orientation discrimination is not protected by Title VII). On the upswing, despite the dramatic decrease in EEOC discrimination charges overall, are LGBT charges. EEOC
resolved 2,016 charges and recovered $5.3 million for lesbian, gay, bisexual and transgender (LGBT) individuals who filed sex discrimination charges with EEOC in FY 2017. Data reflects a steady increase during the five years the Commission has collected LGBT charge data. From Fiscal Year 2013 through Fiscal Year 2017, nearly 6,000 charges were filed with EEOC by LGBT individuals alleging sex discrimination. EEOC recovered $16.1 million for victims of such alleged discrimination.

- The top 10 types of employment charges handled by EEOC in 2017, in descending order, were:
  - Retaliation: 41,097 (48.8%)
  - Race: 28,528 (31.9%)
  - Disability: 26,838 (31.9%)
  - Sex: 25,605 (30.4%)
  - Age: 18,376 (21.8%)
  - National Origin: 8,299 (9.8%)
  - Religion: 3,436 (4.1%)
  - Color: 3,240 (3.8%) (overlaps with race)
  - Equal Pay Act: 996 (1.2%)
  - Genetic Information Non-Discrimination Act: 206 (.2%)

**EEOC Filings Surprisingly Decline**

The US Equal Employment Opportunity Commission received 84,254 charges during Fiscal Year 2017, the lowest in almost 10 years, down from 91,000 charges in Fiscal Year 2016. EEOC
charge filings tend to signal the approximate rate of filing of discrimination and wrongful discharge lawsuits. This is true even in the most litigious jurisdictions (i.e., California, New York City and New Jersey), where claims often are filed under state or local laws.

Like California law, and unlike federal law, the NYCHRL (a) has no cap upon punitive and pain and suffering damages; (b) imposes liability for supervisory misconduct even if the employer is was unaware of the discriminating misconduct; (c) rejects the Ellerth and Faragher defense; and, (d) does not recognize the Kolstad defense. Instead, the City law substitutes statutory criteria, i.e., whether the employer established and complied with policies for the prevention and detection of unlawful discriminatory practices; maintained a meaningful and responsive procedure for investigating complaints; published an anti-discrimination policy that was communicated to employees, as part of a program to educate employees about unlawful discriminatory practices; and, whether the employer has a record of no, or relatively few, prior incidents of discriminatory conduct by the involved employee(s) or agent(s).

**FLSA Developments**

a. The DOL's regulations increasing the minimum salary cut-off for exempt status from $455/week to nearly $50,000/year was enjoined by the United States District Court in Texas. On August 30, 2017, the District Court issued an order granting summary judgment to the State and Business Plaintiffs, holding the overtime rule is invalid. Where does that leave us? (1) the current salary level of $455 remains in place; and, (2) the final rule has been held invalid. The DOL elected to withdraw its appeals, which may end the litigation, because the decision, but that is unlikely since the decision confirmed the DOL’s right to set a minimum salary level of some sort (i.e., the Court held only that here DOL exceeded its authority).
However, the AFL-CIO could appeal denial of its motion to intervene, and if that appeal is granted, the AFL-CIO could challenge the District Court order granting summary judgment. If so, that might take the parties back to square one, but that will take months;

b. On October 2, 2017, the Supreme Court heard oral argument on the issue of whether mandatory pre-dispute arbitration agreements waiving participation in class and collective actions violates the National Labor Relations Act. On May 21, 2018, in a 5-4 decision authored by Justice Neil Gorsuch, the Supreme Court found that requiring employees to agree to arbitration agreements with class waivers does not violate the National Labor Relations Act, finding such agreements fully enforceable. *Epic Systems Corp. v. Lewis* (2018), 584 U.S. __ (2018).

c. The DOL has recovered over $1.8 billion in back pay for about 1.9 million workers since 2009. In Fiscal Year 2016, the DOL found violations in 81% of its audits, and collected $266 million for approximately 280,000 workers (nearly $1,000/employee). In fiscal year 2017, DOL found more than $270 million in back wages for more than 240,000 workers. On average, $1,125 was due back to each employee;

d. On June 7, 2017, the DOL announced withdrawal of the Obama-era “Administrative Interpretations” thus changing again, it seems, rules governing employee/independent contractor classification and joint employer liability. It did so in a three-sentence press release. The Independent Contractor Administrative Interpretation issued by the prior DOL concluded that “most workers are employees” (not independent contractors) and advocated for a revised “economic realities test” that favored a determination of employee status. The Joint Employer Administrative Interpretation stated that joint employment relationships under the FLSA “should be defined expansively,” and favored an interpretation of joint employment even where no
traditional indicia of control existed. The DOL’s decision to rescind these two Administrative Interpretations is a favorable sign for employers. What the courts will do with the ever-changing definitions is uncertain; and,

e. Contrary to the US Supreme Court’s long-standing holding in *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697 (1945), a judge in the Southern District of New York recently held that private settlements waiving FLSA claims entered into prior to a lawsuit being filed are enforceable without approval by the DOL or a Court. *Gaughan v. Rubenstein*, 2017 U.S. Dist. LEXIS 107042 (S.D.N.Y. July 11, 2017). The Second Circuit has not yet ruled on the issue, but courts in other jurisdictions have issued diverging opinions. The Fifth Circuit has held a pre-litigation settlement may be valid and binding without approval where it is the result of a “bona fide FLSA dispute over hours worked or compensation owed,” (*Martin v. Spring Break ’83 Productions, LLC*, 688 F.3d 247 (5th Cir. 2012)), while the Eleventh Circuit reached the opposite conclusion (*Lynn’s Food Stores, Inc. v. U.S. Dep’t of Labor*, 679 F.2d 1350 (11th Cir. 1982)). Aside from the dictum in *Walton*, the Seventh Circuit has not addressed the issue. However, district courts in the Seventh Circuit routinely require approval of FLSA settlements. (*Salcedo v. D’Arcy Buick GMC, Inc.*, 227 F. Supp. 3d 960, 961, 2016 U.S. Dist. LEXIS 63947, *3).

**National Labor Relations Board**

Composition, and thus rulings, of the NLRB will change dramatically as a result of the U.S. Senate confirmation and swearing in of President Trump’s two Republican nominees to fill vacancies on the Board. Likely enhancing the pace of change, President Trump nominated a pro-business labor attorney to replace the NLRB’s chief prosecutor, General Counsel Richard Griffin, whose term
expires in November. While the private sector union rate is just 6.7%, labor’s win rate in NLRB representation elections is around 70%. Perhaps of greater significance, the NLRB may contract what had been an expanded scope of employee rights in non-union workplaces.

a. **Browning-Ferris** – regarding joint employer liability for staffing companies, franchisees, subcontractors and the companies that use them; the Obama NLRB held in its ruling in *Browning-Ferris* that:

i. no ownership, management or financial interrelation is required for joint employer liability to be imposed; and,

ii. the test is “direct or indirect control” – no one is quite sure what constitutes “indirect” control sufficient to cause an employer to have downstream liability.

On a brighter note, in *Saladworks*, the Pennsylvania Supreme Court held that a franchisor was not liable for its franchisee’s failure to obtain and maintain workers’ compensation insurance.

On September 14, the National Labor Relations Board published its greatly anticipated proposed rule joint-employer rule. The proposed rule mirrors the standard that the Board tried to put into place in its now-vacated December 2017 *Hy-Brand Industrial Contractors, Ltd.* decision, which would have overturned the more expansive Obama-era standard installed under the Board’s 2015 *Browning-Ferris* decision.

- Proposed standard
  - The NLRB will consider an employer most likely a joint employer of a separate employer’s employees *only if* the two employers share or codetermine the employee’s essential terms and conditions of employment. This includes hiring, firing, supervision, and discipline.
The putative employer must actually exercise control over the employee’s essential terms in a manner that is unique and not limited.

This departs from *Browning Ferris* because that standard only required the putative employer to reserve the right to exercise control, even so far as indirectly. Whereas the new (well, old) standard requires direct, substantial and immediate control.

**Effect on employers**

- Provides more consistency, predictability and certainty among federal agencies.
- It decreases the possibility of a federal agency from deeming a company a joint employer of individuals it never considered or thought about employing.
- Forces agencies to address the individual facts of each situation, rather than hypothetical scenarios in which the employer may not exercise direct and immediate control over the terms and conditions of the employee.

**b. Recording Devices.**

i. T-Mobile USA, Inc., 363 NLRB No. 171 (2016). Reviewing Board findings, the Fifth Circuit declined to enforce three of the NLRB's findings, including that the company workplace conduct policy, which encouraged employees to maintain a "positive work environment," discouraged discussions of unionizing; and, the commitment-to-integrity policy, which prohibits "arguing or fighting," would inhibit the robust discussion of labor issues and union organizing. However, the Court upheld the NLRB's finding that a recording policy that bans employees from "any and all photography on corporate premises without permission from a supervisor" would discourage employees from engaging in a protected activity T-Mobile USA, Inc. v. NLRB, No. 16-60284 (5th Cir. 2017); e.g., recording unsafe work areas;
ii. Similarly, in Whole Foods, 363 NLRB No. 87 (2015), the Board struck down policies prohibiting workplace audio or video recording without prior approval from management, finding a policy discouraged employees from communicating about unions or engaging in other protected concerted activities. The Second Circuit upheld the Board’s decision, holding that the policy was overly broad, potentially limiting employees’ right to engage in protected concerted activity. Whole Foods Mkt. Grp., Inc. v. NLRB, 16-0002-ag, (2d Cir. 2017) (unpublished); and,

iii. NLRB General Counsel has issued a memo finding football players at private colleges are employees who can engage in collective bargaining.

Class Action Developments

a. ERISA class action settlements involved payments of over $800 million, while wage-hour class settlements were close behind at nearly $700 million (up from about $460 million in 2015);

b. Wage and hour collective action certifications increased in 28% in 2016, up from 175 in 2015 to 224 in 2016. FLSA opt-in collective actions are certified nearly 75% of the time and over half of certification of opt-in classes survived post-discovery decertification motions. Decisions certifying wage and hour classes increased to 11% in 2016. Employers won decertification at a rate of 63% in 2017, which was up from 45% in 2016 and 36% in 2015. As success in litigation often produces copycat filings, nonetheless the value of top wage & hour settlements in 2017 topped $525 million – and over $1.2 billion in the last two years – is likely to prompt more litigation in 2018. Because, compared to ERISA and employment discrimination class actions, FLSA litigation is less difficult and more cost-effective and predictable for plaintiffs;
c. In New York City, California and New Jersey, wage-based class action suits regularly go to State court, and do not include FLSA claims. This explains, we believe, the number of FLSA lawsuits dropping from 8,954 filings in 2015 to about 8,300 filings in 2016. Thus, the slight dip in FLSA filings is misleading and seems to have been reversed in 2017;

d. Under state laws, liquidated damages often are available to prevailing claimants. Liquidated damages also are available under the FLSA to punish willful violations. In Hamza Express Food, the Second Circuit ruled that New York Labor Law and FLSA awards of liquidated damages cannot be piled on top of each other (i.e. no stacking of federal and state liquidated damages) to enable claimants to recover four times the underpayment;

e. Wage Theft Form Litigation. Failure to provide workers with state or locally mandated wage theft notices also can lead to class action liability. In effect, no forms equal costly fines. Several states (including New York and California) have enacted legislation requiring employers to provide written notification to employees regarding their wage rates, overtime rates, pay dates, and other information upon hire or changes in rates. Failure to provide notification exposes employers to stiff penalties ($5,000 per “ungiven” notice under New York law). Similar laws exist, and impose significant monetary penalties, with respect to what must appear on a pay stub. For example, if proper tip notice forms are not provided, the tip credit is at risk and minimum wage supplements can be obtained on a class-wide basis; and,

f. Class Action Waivers in Employment Arbitration Agreements. Class action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act (FAA), the U.S. Supreme Court held in a much-anticipated decision in three critical cases. *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP et al. v. Morris et al.*, No. 16-300; *National Labor Relations Board v. Murphy Oil USA, Inc., et al.*, No. 16-307 (May 21, 2018).
The comprehensive opinion is succinct in its conclusion that the NLRA does not trump the FAA. Further, the Court stated that Section 7 of the NLRA is focused on employees’ rights to unionize and engage in collective bargaining and that it does not extend to protecting an employee’s right to participate in a class or collective action. Now, employers can be certain that class or collective action waivers in arbitration agreements do not violate the NLRA.

**ERISA/Fiduciary**

ERISA claims continue to represent significant and complex liabilities for Plan sponsors and Plan administrators. Following the U.S. Supreme Court’s 2011 decision in *Cigna Corp v. Amara*, courts have more broadly interpreted claims for equitable relief under Section 502(a)(3) of ERISA (in addition to a traditional claim for benefits under Section 502(a)(1)(B)), which means broader discovery, and more open-ended relief. This expansion of remedies has led to host of new claims in the last couple of years. In particular, we have seen an uptick in fiduciary claims centering around plan fees and company stock issues in employer-sponsored retirement plans. Claims increasingly focus on fiduciary processes and have expanded the bases on which to attack the fiduciary (plan administration) process. Following the U.S. Supreme Court’s 2011 decision in Cigna Corp v. Amara, courts have allowed plaintiffs to make claims for equitable relief under Section 502(a)(3) of ERISA (in addition to a traditional claim for benefits under Section 502(a)(1)(B)), which means broader discovery, and open-ended relief.

One trend in the last couple of years revolves around class actions targeting Section 403(b) retirement plans sponsored by large, private universities. Class actions challenging allegedly excessive investment and plan-administration fees started in 2008 with 401k plans. In 2016, the same firm began bringing similar ERISA class actions against numerous universities. Generally, the
targeted universities’ plans have between approximately 100 and 400 investment options, and between $2.4 billion and $4.7 billion in net plan assets.

Plaintiffs are suing under ERISA for breach of fiduciary related to:

- Administrative recordkeeping fees – typically claim that should have consolidated to just one recordkeeper;
- Investment management fees – typically challenging additional fees charged for actively managed funds and annuities;
- That offer too many funds options;
- Portfolio performance losses; and,
- Failure to monitor.

Although initially most universities lost motions to dismiss, 2018 brought two defense wins. In *Divane v. Northwestern University*, 2018 WL 2388118 (N.D. Ill. May 25, 2018), the court dismissed all claims, and in *Sacerdote v. NYU*, 2018 WL 3629598 (S.D.N.Y. July 31, 2018), the district court ruled in favor of defendants after trial on fiduciary breach claims. Next year should bring even more guidance – *Divane* is on appeal to the Seventh Circuit, *Sacerdote* is being appealed to the Second Circuit, the Third Circuit will be deciding the appeal by Plaintiffs in similar litigation involving Penn State, and District court has certified for appeal to Fourth Circuit its decision not to dismiss all claims in *Kelly v. John Hopkins*.

Another trend is “propriety fee” litigation in 401(k) plans. In these types of cases the plan offers funds in which employer or affiliated company has an interest, e.g., Putman funds in the Putman 401(k) plan. Plaintiffs have generally defeated motions to dismiss if they could allege some fact consistent with acting in the employer/fund provider’s interest, e.g., limiting funds to proprietary
funds, having higher cost proprietary index funds, or using plan investments to seed new proprietary funds. But as evidenced in two recent cases, the tide may be turning.

In *Meiners v. Wells Fargo & Co*, 2018 WL 3685525 (8th Cir. Aug. 3, 2018), the district court’s decision granting Defendant’s motion to dismiss was affirmed on appeal. The Eighth Circuit rejected comparisons to Vanguard funds because they used different investment strategy and had different costs, and held that plaintiffs needed to demonstrate fund under-performance against a “meaningful benchmark” before it would infer imprudent or disloyal conduct.

In a similar case, *Brotherston v. Putman Inv.*, 2017 U.S. Dist. Lexis 93654 (D. Mass. June 19, 2017), Defendants prevailed at trial. The court found it was not a breach of the duty of loyalty for the Defendant to offer its own funds in its 401(k) plan when Putman (i) made more than $40,000,000 in discretionary contributions to plan, and (ii) paid for recordkeeping services. *Brotherston* is pending on appeal to the First Circuit.

Another category of cases filed in the last several years centered on ERISA’s exemption from coverage for “church” plans. On June 5, 2017, the Supreme Court ruled unanimously in *Advocate Health Network v. Stapleton*, 137 S. Ct. 1652 (2017) that a pension benefit plan need not be established by a church in order to qualify as a “church plan” exempt from ERISA funding and other rules, reversing three Court of Appeals decisions to the contrary. A plan qualifies for church plan status if it is a “plan established and maintained . . . for its employees . . . by a church . . .” In 1980, this definition was expanded to include that an “employee of a church” would include an employee of a church-affiliated organization (such as a hospital, school or charity) and to include plans maintained by certain church-associated entities whose main function is to fund or manage a benefit plan for the employees of churches or church affiliates, i.e., a “principal-purpose organization.” Following the Supreme Court’s ruling, several church plan cases are no proceeding on the merits.
On June 5, 2017, the Supreme Court ruled unanimously, in *Advocate Health Network v. Stapleton*, S. Ct., that a pension benefit plan need not be established by a church in order to qualify as a “church plan” exempt from ERISA funding and other rules, reversing three Court of Appeals decisions to the contrary. A plan qualifies for church plan status if it is a “plan established and maintained . . . for its employees . . . by a church . . .” In 1980, this definition was expanded to include that an “employee of a church” would include an employee of a church-affiliated organization (such as a hospital, school or charity) and to include plans maintained by certain church-associated entities whose main function is to fund or manage a benefit plan for the employees of churches or church affiliates, i.e., a “principal-purpose organization.”

**Prevailing Wage Laws**

Federal and state laws require government contractors to pay prevailing wages to employees when working on government contracts. Employers sometimes do not realize they are required to pay prevailing wages or classify the work in the wrong category, which can result in significant underpayments and exposure to unpaid wages (and possibly loss of the contract itself). This exposure is likely to expand if an enhanced federal infrastructure program takes place.

Due to the recent hurricanes, these laws may be suspended in areas hard hit by Irma, Maria or Jose.

**Privacy / Data Breach**

In June of this year, Governor Jerry Brown signed into law the California Consumer Protection Act of 2018 (CaCPA). As we reported previously, here, CaCPA will apply to any entity that does business in the State of California and satisfies one or more of the following: (i) annual gross revenue
in excess of $25 million, (ii) 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, OR (iii) Derives 50 percent or more of its annual revenues from selling consumers’ personal information. Under CaCPA, key consumer rights will include:

- A consumer’s right to request deletion of personal information which would require the business to delete information upon receipt of a verified request;
- A consumer’s right to request that a business that sells the consumer’s personal information, or discloses it for a business purpose, disclose the categories of information that it collects and categories of information and the identity of any 3rd parties to which the information was sold or disclosed;
- A consumer’s right to opt-out of the sale of personal information by a business prohibiting the business from discriminating against the consumer for exercising this right, including a prohibition on charging the consumer who opts-out a different price or providing the consumer a different quality of goods or services, except if the difference is reasonably related to value provided by the consumer’s data.

At the end of August, several substantive amendments to the CaCPA were accepted by the California Senate and Assembly. The amended bill is now waiting the signature of Governor Brown. These amendments provide:

- A clarification to the definition of personal information: The data elements listed in the definition are personal information, not automatically, but to the extent that they identify, relate to, describe, are capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household;
• An expansion of exempt information to include protected health information collected by a business associate governed by HIPAA/HITECH;

• A clarification that personal information governed by the Gramm-Leach-Bliley Act, the California Financial Information Privacy Act, and the Driver’s Privacy Protection Act of 1994 is exempt regardless of whether the CaCPA conflicts with these laws;

• A clarification that information collected pursuant to the Gramm-Leach-Bliley Act and the Driver’s Privacy Protection Act of 1994 will not be exempt from a consumer’s cause of action relating to certain data breaches;

• A clarification that a private cause of action exists only for data breaches;

• Incorporation of a provision that businesses, service providers, or persons who violate the CaCPA and fail to cure such violation within 30 days shall be liable for a civil penalty under the laws relating to unfair competition in an action brought by the state Attorney General; and,

• A provision that the state Attorney General shall not bring an enforcement action under CaCPA until 6 months after publication of the final implementation regulations or July 1, 2020, whichever is sooner.

With an effective date of January 1, 2020, it is expected that additional amendments will be negotiated, drafted, and published as consumers and industry groups advocate for additional changes.

Following on the heels of the European General Data Protection Regulation (“GDPR”) (See Does the GDPR Apply to Your U.S. Based Company?), the CaCPA is a reminder that data privacy protection initiatives are spreading across the U.S. and globe. Brazil, India, Indonesia, and the Cayman Islands recently enacted, upgraded, or drafted comprehensive data protection laws. In May,
Vermont passed a law requiring data brokers to implement a written information security program, disclose to individuals what data is being collected, and permit individuals to opt-out of the collection. In April, the Chicago City Council introduced the Personal Data Collection and Protection Ordinance, requiring opt-in consent from Chicago residents to use, disclose or sell their personal information. This fall, San Francisco is scheduled to vote on its “Privacy First Policy”, an ordinance requiring that businesses disclose their data collection policies to consumers as a predicate for obtaining city and county permits or contracts. On the federal level, several legislative proposals are being considered to heighten consumer privacy protection, including the Consumer Privacy Protection Act, and the Data Security and Breach Notification Act.

Given this legislative climate, it is important that organizations continue to develop a set of best practices to ensure the privacy and security of the personal information they collect, use, or store. Key to this process is creating a data inventory to identify what personal information is collected, how it is used, where it is stored, and when it is destroyed. Once this “data mapping” is completed, attention should be paid to drafting and implementing a written information security program (WISP). WISPs detail the administrative, technical and organizational policies and procedures an organization has in place to safeguard the privacy and security of its data. These initial steps will help any organization identify and streamline its data processing activities, reduce its exposure in the event of a data breach, and prepare itself for upcoming data protection legislation.
Event Outline

“Emerging Trends in Employment Practices & What You Need to Know”

PLUS Southeast Chapter
May 16, 2019 | Westin Buckhead Hotel
Coordinators: Kym Hadzick, De’Andrea Douglas, Lauren King

The objective of this course is to provide an overview of emerging trends in employment practices liability. In addition to shedding light on these trends, this course will also aim to show how these trends have the potential to be cross-claims into other lines of coverage.

1:30-2:00 pm | Registration

2:00-3:00 pm | Biometric Information Privacy Act
- What is the BIPA?
- How does it work?
- What is the impact of the BIPA on EPL coverage?
- Are there any current developments to be aware of? Corporations impacted?

3:00-3:45 pm | Sexual Harassment and D&O
- What are the recent developments within EPL coverage due to the ongoing #METOO movement?
- How is the #METOO movement having an impact on D&O coverage?
- What corporations serve as examples of sexual harassment claims bleeding into D&O coverage?
- How should carriers approach their underwriting process from an EPL & D&O perspective to mitigate against claim severity?

3:45-4:30 pm | Panel discussion about additional trends such as the Equal Pay Act and ADA Extension for FMLA; Q&A
4:30 pm | Networking Reception begins
6:30 pm | Conclusion of event
Emerging Trends in Employment Practices & What You Need to Know

Thursday, May 16, 2019 | 2:00 - 6:30 p.m.

1:30 - 2:00 - Registration / Check-in
2:00 - 4:30 - EPL Seminar
4:30 - 6:30 - Cocktail Reception

This course will shed light on EPL trends and demonstrate how those trends have the potential to be cross-claims into other lines of coverage. Stay for the reception with drinks and hors d’oeuvres following the seminar.

3 CE credits in Georgia; CLE pending approval

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