

Government Agency Enforcement Trends

March 7, 2019

Presented by
Joseph T. Clees, Esq.

**Ogletree
Deakins**

Employers & Lawyers. Working Together





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Joe Clees is a founding shareholder of the Phoenix office of Ogletree Deakins and has served in a variety of firm leadership roles, including its Board of Directors. Mr. Clees represents employers throughout the United States in employment litigation and labor relations. He also counsels clients on a wide array of state, federal and tribal compliance laws. Joe has been singled out by *Chambers USA America's Leading Lawyers* as one of the top labor and employment lawyers in the country for many years and as a *Chambers USA Top Leader in his Field*. He has been applauded for his "integrity and common sense" as well as his "pragmatic style." Joe was honored as one of the "100 Most Powerful Employment Lawyers in America" by *HR Executive* magazine each year from 2009 to 2018. He was named an "Eminent Practitioner" by *Chambers* from 2014 to 2018 and he is ranked in the "Number 1" tier among Arizona employment lawyers by *Chambers*, and has been selected as one of *Arizona's Finest Lawyers*. In addition, Joe has been named a "Top 100" Lawyer by *Arizona Business Magazine* from 2015 to 2019.

In 2014, Joe was named a Fellow in The College of Labor and Employment Lawyers. He also has been recognized for several years as one of the *Best Lawyers in America* and honored as one of the *Best Lawyers in the United States*. Joe has been singled out as one of the "The Legal 500" nationally and the *Arizona Business Magazine* has recognized him as an "Arizona Business Leader" and one of the "Top Attorneys of Arizona." He also has been designated as a "Best of the Bar" by the *Phoenix Business Journal* and has been rated as a "Southwest Super Lawyer" for many years. He has been recognized as one of the "Top 50 Southwest Super Lawyers" from 2010 to 2015.

In 2016, Joe was honored as the "Phoenix Lawyer of the Year" for Labor Law-Management by *Best Lawyers* and in 2013 was "Phoenix Lawyer of the Year" for Employment Law-Management. He has served as the Chair of the Executive Committee of the State Bar of Arizona's Employment and Labor Law Section, a member of the Board of Directors of the Arizona Affirmative Action Association and Board of Directors of the Metro Phoenix Human Resources Association (SHRM). He is employment law counsel to many industry and trade groups and he regularly speaks on labor and employment law topics, both regionally and nationally.

Admitted to Practice

- Arizona
- Arizona Court of Appeals
- Arizona Supreme Court
- U.S. District Court, District of Arizona
- U.S. Court of Appeals, Ninth Circuit
- U.S. Supreme Court
- Apache Tribal Court

Education

- J.D., Villanova University, 1984
- B.A., *magna cum laude*, Dickinson College, 1981

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ACC
 Association of
 Corporate Counsel
 ARIZONA


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The Winds of Change...



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Agency Trends

- Increased complexity
- Increased volume of claims
- Increased velocity of change
- Increased stakes
- Increased acrimony/antagonism

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Agency Trends

- Increased coordination by regulators
- Increasingly savvy employees
- Increasingly individualized assessments
- Increased scope of review
- Increased scrutiny of your work product

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Trends in 2019

- Localization of employment law
 - States, cities and counties
 - Ballot referenda/voter initiatives
- Ban the box ordinances
- Salary history prohibitions
- Credit check restrictions
- Predictive scheduling

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Trends in 2019

- Minimum wage and paid leave
- Paid parental leave
- Pay equity
- Paid sick leave
- ADA/workers' compensation/FMLA/sick leave
- #MeToo

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Federal Branch and Agency Update

Courts

Vacancies Galore

- Appellate Courts – 26 of 32 vacancies filled
- District Courts – 41 of 101 vacancies filled

Average age of federal district and appellate court judges – under 51

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Department of Labor



- Alex Acosta, Secretary of Labor
 - Former clerk to Justice Samuel Alito
 - NLRB & DOL



- Cheryl Stanton, Administrator, Wage & Hour Division
 - Former clerk to Justice Samuel Alito
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White Collar Rule Not Dead




- DOL Secretary Acosta hearing testimony
- Salary level should be higher than \$23,660, but not \$47,476
- Suggested more reasonable level would be between \$30,000 and \$35,000

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Other DOL Actions


- Reinstated Opinion Letters Process
 - Including 17 Opinion Letters
- New Unpaid Intern Test
- DOL's Payroll Audit Independent Determination (Paid)





New Unpaid Intern Test - January 2018


- Clear understanding no expectation of compensation.
- Similar training to that given in education.
- Internship is tied to education program by integrated coursework or receipt of academic credit.
- Internship accommodates the intern's academic calendar.
- Internship's duration is limited in time to beneficial learning.
- Intern's work complements, rather than displaces paid employees
- Understanding the internship is without entitlement to a paid job at the conclusion of the internship.



DOL's Paid Program

- The Payroll Audit Independent Determination (PAID) program, facilitates resolution of potential overtime and minimum wage violations under the FLSA **without lawsuits and liquidated damages**
- **Employee's choice**
- https://www.youtube.com/watch?v=04n_jNbfAY&feature=youtu.be



Equal Employment Opportunity Commission



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EEOC Personnel

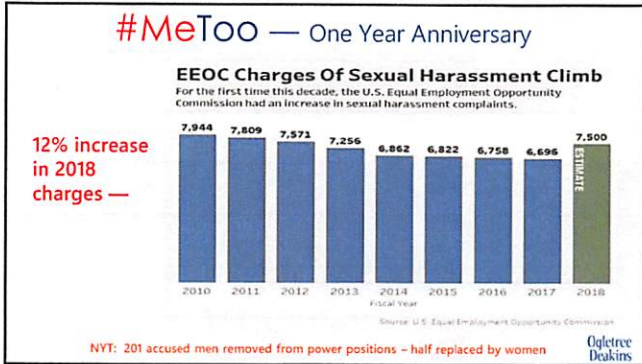


- Commissioner Nominees
 - Janet Dhillon, Chair Nominee (US Airways, JCPenney, Burlington)
 - Daniel Gade (Combat Veteran And Professor At West Point)
 - Chai Feldblum (Third Term?) (Activist For Disability And LGBT Rights)
- General Counsel Nominee
 - Sharon Fast Gustafson (Former Jones Day Lawyer)

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Sexual Harassment Claims on the Rise

- 41 filed by the EEOC in 2018
- 50% increase over 2017
- Recovered \$70 mil for sexual harassment victims
- \$47 mil in 2017
- 66 lawsuits filed in total
- Estimated 7500 claims filed

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EEOC is Focusing on Harassment, Age and Disability Cases

- DoJGen – sexual harassment
- Bath & Body Works – disability
- Norfolk Southern - age
- 2 dozen lawsuits filed in September alone

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IRS Section 162(q)

NON-DISCLOSURE = NON-DEDUCTIBILITY:

➤ Newly enacted *Section 162(q)* to the Internal Revenue Code provides that *no deduction* shall be *allowed for*:

- (1) any settlement *or payment related to sexual harassment* or sexual abuse *if such settlement or payment is subject to a nondisclosure agreement, or*
- (2) *attorneys' fees* related to such a settlement or payment.

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New York and California Sexual Harassment Laws

New York:

- ❖ Employers must:
 - ❖ Adopt and distribute anti-sexual harassment policies.
 - ❖ Conduct sexual harassment prevention training by January 1, 2019.

California Trio:

- ❖ Prohibition against nondisclosure clauses in settlements involving sexual harassment and discrimination/retaliation. Claimant's identity and dollar amounts may be kept private.
- ❖ Prohibition against waivers in exchange for promotions, raises, continued employment, and extends employer liability for third parties.
- ❖ Sexual harassment to entertainment industry.

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The Transition: A New NLRB

Mark Pearce Reappointed 2013 Term ends Aug. 27, 2018 (Union Attorney)	Lauren McFerran Appointed 2014 Term ends Dec. 16, 2019 (Union Attorney)	Chair John Ring Appointed, Jan. 2018 Term ends Dec. 16, 2022 (Management Lawyer)	William Emmanuel Appointed 2017 Term ends Aug. 27, 2021 (Management Lawyer)	Marvin Kaplan Appointed 2017 Term ends Aug. 27, 2020 (Government Attorney)

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NLRB 2018 Highlights

- Flip flop on joint employer standard
 - Everything changed 8/27/16: *Browning-Ferris*
 - *Hy-Brand* (12/17) reversed *Browning-Ferris*

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NLRB 2018 Highlights

- GC Memo 18-04 (June 6, 2018)
 - Provides further guidance regarding enforceability of rules under *Boeing* standard legitimate business justification
- Types of rules addressed
 - Civility
 - No Photography/Recording
 - Insubordination
 - Disruptive Behavior
 - Confidentiality
 - Rules against Defamation or Misrepresentation
 - Conflicts of Interest
 - Logos/Employer Name

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Traditional Unit Test Returns

- PCC Structural, Inc. (Dec. 15, 2017)
 - Overrules Specialty Healthcare
 - Restores the traditional analytical framework for determining the "appropriate unit"
 - Even if the petitioned-for unit constitutes a "readily identifiable group"
 - Share a sufficient community of interest with the petitioned-for group to warrant their inclusion for bargaining purposes

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Another Case to Watch

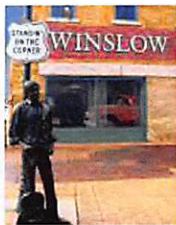
- Caesars Entertainment Corporation, 28-CA-060841 (NLRB has requested comment on overturning Purple Communications)
 - May limit or expand employees' use to company email

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Localized Protections Continue

- Winslow non-discrimination ordinance (No. 1327)
- Municipal Code 9.11
- 1 or more employee
- Gender identity, sexual orientation, familial status
- <https://ogletree.com/shared-content/content/blog/2018/november/winslow-arizona-city-passes-nondiscrimination-ordinance>



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Arizona's New Mini-COBRA Law

- ARS 20-2330
- Effective 1/1/19
- AZ employers with 20 employees or less if employer has a health plan (but SB 1035 introduced to clarify less than 20)
- Required to provide COBRA-like continuation coverage if employee enrolled
- Required to provide separate COBRA notice if employee is enrolled
 - <https://insurance.az.gov/arizona-sample-notice-continuation-coverage-mini-cobra>

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Arizona's New Minimum Wage

- \$11 per hour 1/1/19
 - House Dems introduced bill \$15 per hour
- New posters
 - <https://www.azica.gov/divisions/labor-department>
- Salaried exempt employees must be paid AZ minimum wage



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Enforcement Scheme

- Industrial Commission of Arizona
 - Employee complaint
 - Exhaustion not required
 - ICA Enforcement
 - Investigation
 - Questionnaire
 - Hands off CBA covered employees?
 - Informal letter and email follow-up
 - Determination
 - Appeal of ICA determination
 - Administrative Law Judge
 - Appeals taken to Superior Court (currently Judge Starr)
 - Subject to Judicial Rules for Administrative Decisions (JRAD)
 - Recently amended and complex at best

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Paid Sick Leave Claims In The Pipeline

SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA

Case No: CV2017-011800

CLASS ACTION
CLASS ACTION COMPLAINT
FOR:
1. VIOLATION OF THE FAIR
WAGES AND HEALTHY
FAMILIES ACT, A.R.S. §12-375(C)
2. VIOLATION OF THE FAIR
WAGES AND HEALTHY
FAMILIES ACT, A.R.S. §12-364 ET
SEQ.

JURY TRIAL DEMANDED

Plaintiff,
DONALD GILBERT, Individually
and On Behalf of All Others
Similarly Situated,
v.
KELLY SERVICES, INC.,
Defendant.

- Failure to pay PSL when used
- Failure to reflect earned PSL on paystub
- Failure to reflect paid PSL on paystub
- Failure to correctly report PSL on paystub
- Allegedly "hundreds" in class
- But Class Waiver
- But Arbitration Agreement
- BEHOLD THE GLORY OF EPIC SYSTEMS

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Paid Sick Leave Claims In The Pipeline

SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA

Case No. CV2018-005144

COMPLAINT

Plaintiffs,
MANDY BEGAY, an individual, and
DELRAY DALE SHEEN, an individual,
v.
AMERICAN FOCUS CARE, INC., an
Arizona corporation, NISE ROGERS-
OROBITY, an individual, and
MICHAEL OROBITY, her husband,
Defendants.

- Alleged failure to implement PSL policy
- Alleged complaints about lack of policy/PSL
- Individual manager's alleged conduct:
 - Avoid discussion of PSL
 - Blamed payroll provider
 - Employees should "go back to work"
- Unlawful retaliation
 - Complaining employees terminated/demoted or scheduled within 90 days of protected activity
 - Clear and convincing standard
- Note: individual owners and individual manager named as personally liable

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