2019/2020 – Employment Law Developments

By: Robert Howie and Skylar Sherwood

WAGE AND HOUR/PAY EQUITY

Washington Equal Pay and Opportunities Act – Effective July 27, 2019

- Employers may not:
  - seek the wage or salary history of an applicant for employment (or promotion, so it includes current employees) from the applicant or from the applicant's current or former employer;
  - Require that an applicant's prior wage or salary history "meet certain criteria"
- Employers may:
  - confirm an applicant's wage or salary history if the applicant has voluntarily disclosed his or her wage or salary history;
  - confirm wage or salary history after an offer (including compensation) has been negotiated with the applicant.

Washington Equal Pay and Opportunities Act – Effective July 27, 2019

- Something new (+15 employees)! "Upon request of an applicant for employment after the employer has initially offered the applicant the position, the employer must provide the minimum wage or salary for the position for which the applicant is applying"
- "Upon request of an employee offered an internal transfer to a new position or promotion, the employer must provide the wage scale or salary range for the employee's new position."
- If there is no wage scale or salary range for the job, "the employer must provide the minimum wage or salary expectation set by the employer prior to posting the position, making a position transfer, or making the promotion."

FLSA Salary Increase Is Here

- United States DOL Final Rule Increases Salary Levels for White Collar Exemptions
  - ✓Salary threshold for overtime exemption which was **$23,660** has increased to **$35,568** annually ($684 per week)
  - ✓No changes to duties test
  - ✓Effective January 2020

Washington State L&I – Sky's the Limit

- Final Rules released December 2019
- Salary basis threshold will be 1.25 times the state minimum wage for a 40 hour work week on July 1, 2020 ($35,100 or $675 a week)
- Increase on 1/1/21 depending on employer size: 1-50=$827 a week or $43,004; 51+=$965 or $50,180; then up, up and away
- By 2028 = $83,356

Just the Facts

From	Employer Size [1-50 Employees]	Employer Size [51+ Employees]
July 1, 2020	$675/week ($35,100/year)	$675/week ($35,100/year)
Jan. 1, 2021	$827/week ($43,004/year)	$965/week ($50,180/year)
Jan. 1, 2022	$986/week ($51,272/year)	$986/week ($51,272/year)
Jan. 1, 2023	$1,008/week ($52,146/year)	$1,152/week ($59,904/year)
Jan. 1, 2024	$1,177/week ($61,204/year)	$1,177/week ($61,204/year)
Jan. 1, 2025	$1,202/week ($62,504/year)	$1,353/week ($70,356/year)
Jan. 1, 2026	$1,382/week ($71,864/year)	$1,382/week ($71,864/year)
Jan. 1, 2027	$1,412/week ($73,424/year)	$1,569/week ($81,588/year)
Jan. 1, 2028	$1,603/week ($83,356/year)	$1,603/week ($83,356/year)

Other Changes

- The minimum hourly pay to meet the computer professional exemption rises to $47.25 per hour (about $100,000 annually) by 2021/2022
- Outside sales exemption still different than federal
- Other duties tests are similar to federal tests
- Keep in mind minimum wage rose to $13.50 in Washington and some jurisdictions are higher
- 72 minimum wage increases in various places around US

Key Takeaways

- Minimum wages rising
- Salary basis minimum being tied to minimum wage – in California for instance – salary minimum for larger employers up to $54,000 in 2020 and will increase
- Duties test remaining stationary, but not a lot of help from legislation to make the duties test current (still vague unhelpful language)
- No new exemptions
- Washington rejects “highly compensated employee” exemption

Be Careful About Internal Pay Audit!

- *Novick v. Shipcom Wireless, Inc.* (5th Cir. 2020)
- Shipcom conducted non-privileged internal pay audit to reevaluate whether positions were properly classified as exempt from FLSA – decided to reclassify some
- Various reclassified employees sued for back pay and liquidated damages – and won – affirmed on appeal
- Lessons:
  - Court ruled that internal audit was not a subsequent remedial measure under ER 407 – thus properly admitted
  - Emails and letters confirming reclassification were also properly admitted as evidence – legal compliance was mandated

Meal Periods – Better Ditch the Vigilance

- *Hill v. Garda CL Northwest, Inc.* (Wn. 2018)
- Another bad case for employers involving armored car drivers
- Paid meal break where employees were required to remain vigilant and work through the day – no dice
- Even a paid meal period must involve "work free/on duty"
- Also double damages can be awarded plus pre-judgment interest

RESTRICTIVE COVENANTS

Washington Legislature Weighs In

- New Washington law – effective January 1, 2020
- New Limits on Non-Competition Agreements
  - Employee must earn at least $100K in W-2 wages (250K for contractor) – will increase
  - Longer than 18 months is presumptively invalid
  - Must provide at time of offer (or new consideration if during work)
  - Laid-off employees must get garden leave/pay during restriction
- Old Limits on Non-Competition Agreements
  - Existing Washington common law remains the same (reasonable)

Washington Legislature Weighs In

- New enforcement risks
  - If a court or arbitrator doesn't enforce a non-compete agreement, the "violator" must pay fees and statutory damages ($5,000) or actual damages, whichever is greater
  - If a court or arbitrator reforms, rewrites, modifies, or only partially enforces a non-competition provision, the party seeking enforcement must pay fees and statutory damages or actual damages, whichever is greater
  - No employee can bring a declaratory judgment action against a pre-1/1/20 agreement as long as it is not being enforced (whatever that means)

Washington Legislature Weighs In

- Moonlighting bans – not so fast
  - Complete moonlighting ban cannot apply to an employee earning less than twice the minimum wage ($13.50 in 2020 or $57,000)
  - Only exception is for positions where safety is an issue or where scheduling/attendance are an issue
  - What about working for a competitor? No specific provision.

HARASSMENT/DISCRIMINATION

Model Sexual Harassment Policies And Best Practices Are Here

- WSHRC – Required by 2018 law (all HR/counsel should read)
- #MeToo strongly supported
- Introduction and Best Practices (www.hum.wa.gov/publications)
  - "not mandatory," and don't create an affirmative defense or safe harbor
  - **Understanding** Sexual Harassment (power dynamics; quid pro quo and hostile work environment; risk factors; implicit bias; social media)
  - **Leadership** (organizational climate; clear statement; visibility)
  - **Policy** (clear, simple, consistency, fraternization)

Model Sexual Harassment Policies And Best Practices Are Here

- **Procedures and Investigations** (outside investigator preferred; HR second choice; timing; no "working it out" with the parties; non-employee harassment; interpreters; documentation; privacy)
- **Communications** (frequent; strongly worded; accountability; provide phones or personal safety alarms to employees; hotlines; open door; praise employees who come forward; include harassment prevention in review criteria for managers; corrective action for perpetrators; affinity groups; climate surveys)
- **Contacting Law Enforcement** (let victim know options; their choice)
- **Training** (regular; relevant; interactive; examples; classroom; everyone; bystander; timing; assessment; extra for managers)

State Law Changes

- Mandatory sexual harassment training for all employees annually
  - California
  - Illinois
  - Delaware
  - Connecticut
  - New York (and NYC) - broadest coverage
  - Maine

State Law Changes

- New York State has radically revamped its laws on harassment and discrimination – giving a road map to other states
- No more “severe or pervasive” standard
- Faragher/Ellerth standard rejected
- Punitive damages allowed
- No mandatory arbitration
- California has made similar changes

Oregon Workplace Protection Act

- Prohibits non-disclosure agreements in context of sexual assault, harassment or discrimination unless “requested”
- Requires written anti-discrimination and anti-harassment policy with very specific provisions
  - Provided at time of hire AND again upon complaint by employee
- Extends statute of limitation from one to five years
- Gives employer right to revoke severance for a harasser/discriminatory

Hairstyles

- New York City has issued Guidance suggesting the following:
  - grooming and appearance policies that ban, limit, or otherwise restrict an individual's natural hair or hairstyle may violate the New York City Human Rights Law (NYCHRL) because they are likely to disparately affect African-Americans.
  - NYCHRL protects an individual's right to maintain natural hair or hairstyles that are closely associated with racial, ethnic, or cultural identities
  - natural, treated, or untreated hairstyles, such as cornrows, twists, braids, Bantu knots, fades, Afros, and/or keeping hair in an uncut or untrimmed state

Hairstyles

- New York City has issued Guidance suggesting the following:
  - Latin-x, Indo-Caribbean, Native American, Sikh, Muslim, Jewish, Nazirite, and/or Rastafarian communities, all of whom may have a religious, cultural, or racial connection with a particular hairstyle.
  - Grooming and appearance policies may give rise to discrimination based on disability (where a medical condition makes shaving painful), gender (where a male server is forced to cut his ponytail while female servers are not), and age (where a 60-year-old employee with gray hair is told to dye his hair to promote the company's image

More Hair

- California now prohibits discrimination at work based on a person's hair texture and "protective hairstyles," such as afros, twists, dreadlocks, braids, or cornrows
- CROWN Act (Creating a Respectful and Open Workplace for Natural Hair"
- Defines "race" as "inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." "Protective hairstyles" include "braids, locks, and twists."

Pronouns

- New York City Human Rights Law
  - Unlawful to refuse to use pronoun or title preferred by employee (including their)
  - Unlawful to require individuals to use bathrooms based on biological sex
  - Unlawful to require individuals to dress in conformance to biological sex
- Same result in Washington?

No No-Rehire Clauses

- California, Oregon and Vermont have banned the use of no-rehire clauses in settlement agreements
- And even in other states, these clauses can be evidence of retaliation – best avoided

Sexual and Reproductive Health

- NYC has banned employment discrimination on the basis of "sexual and reproductive health decisions,"
- Include:
  - Fertility-related medical procedures
  - STD prevention, testing and treatment
  - Family planning services and counseling
  - Use of birth control drugs and supplies
  - Emergency contraception
  - Sterilization procedures
  - Pregnancy testing
  - Abortion

What is "Sex" Discrimination in Title VII?

- What do the following people have to do with one another?
  - A funeral director in Michigan named Aimee Australia Stephens
  - A softball loving court worker in Georgia named Donald Bostock
  - A now deceased Long Island sky diver named Donald Zarda
- All of these individuals had their cases heard by the United States Supreme Court this Term
- Keep in mind, regardless of what the Supreme Court decides, Washington (and many other states) already protects people from discrimination on the basis of sexual orientation or gender expression or identity

Can Employer Be Liable for Harassment by Employee Against Customer?

- *Floeting v. Group Health Cooperative* (Wn. 2019) (7-2)
- RCW 49.60.215 provides it is unlawful for "any person ***or the person's agent or employee*** to commit an act of discrimination" in a place of public accommodation
- Public accommodations are strictly liable for sexual harassment by employee (a form of sex discrimination)
- GHC urged Court to adopt same standard as employment based claim – Washington Supreme court said "no so fast"!

Can Employer Be Liable for Harassment by Employee Against Customer?

- Inquiry focused on "actions" – not whether there is an intent
- WLAD imposes direct and strict liability on a public accommodation/employer for acts of its employees and agents
  - NO requirement that actions be severe or pervasive
  - "a single discriminatory act may violate WLAD"
  - Act must be "objectively discriminatory" in that a "reasonable person who is a member of the plaintiff's protected class, under the same circumstances, would feel discriminated against" – not just subjective
- Court believes this will encourage more training/supervision – dissent believes this will result in "management by lawsuit"

Can Employer Be Liable for Harassment of an Employee by a Non-Employee?

- *LaRose v. King County* (Wn. App. 2019)
- Public defender represented "Mr. Smith" who began a pattern of harassing calls, letters and visits to her home
- She complained to her supervisors, who were unhelpful and unsympathetic – "I don't know. Call the cops."
- LaRose never asked to be taken off the case
- Court held that County can be liable for harassment by non-employee – if it knew or should have known and failed to take reasonably prompt and adequate corrective action

Labor Rights/Protected Activity

Trump National Labor Relations Board

- *Caesar's Entertainment d/b/a Rio All-Suites Hotel & Casino* (NLRB 2019) (3-1)
  - Overturned *Purple Communications* from 2014
  - Employees have no statutory right to use employer equipment, including IT resources, for purposes of engaging in activities protected by Section 7 (protected concerted activity)
  - Exception if email is the only reasonable means to communicate
  - Board noted that smartphones, personal email and social media exist
  - Dissenting member argued email is essential employee communication tool
- Be cautious: here email was not permitted for non-business purpose

Trump National Labor Relations Board

- *Apogee Retail LLC d/b/a Unique Thrift Store* (NLRB 2019)
  - Can an employer maintain a rule prohibiting employees from disclosing an investigation content with other team members?
  - Board (3-1) held that investigative confidentiality rules are always lawful as long as they are limited to the duration of the investigation
  - Overturned *Banner Estrella Medical Center* (2015), which struck down limits on investigation confidentiality
- Be cautious – cannot limit forever

Work Rules – What's OK and What's Not?

- NLRB General Counsel says (in case involving ADT):
  - OK to demand "professional appearance" – including banning "items of apparel with inappropriate commercial advertising or insignia."
  - OK to advise employees to "exercise a high degree of caution" in handling "Confidential Information." Confidential Information was defined with specific examples (i.e. customer lists) and also referred to information taken from company files (as opposed to information learned by an employee)
  - OK to say that information provided to media on behalf of the company can only be provided by authorized persons

Work Rules – What's OK and What's Not?

- NLRB General Counsel says (in case involving ADT):
  - NOT OK to ban employee use of cell phones in the workplace, other than for "work-related or critical, quality of life activities."
  - Violates Section 7 of the National Labor Relations Act

DISABILITY

$5 Million Dollar Mercedes in WA

- *Coachman v. Seattle Auto Management* (9th Cir. 2019)
- Jury award affirmed in favor of former Finance Director
- Lessons Learned:
  - Owner relied on customer preference (perception)
  - Misleading reasons (position no longer available, but then reappeared)
  - $263K economic; 4.8 million compensatory – fine in WA (no % limit)
  - Company argued it provided six months of leave (didn't work)
  - Company argued Coachman could not be understood (didn't work)

Obesity is Always An Impairment

- *Taylor v. Burlington Northern Holdings* (BNSF) (Wn. 2019)
- Court holds (7-2) that obesity is always an "impairment" under the Washington Law Against Discrimination (WLAD)
  - It is a "physiological disorder, or condition" that affects body systems
  - Distinguishes "obesity" from "being overweight"
  - Under WLAD, employer can be sued for discrimination for not hiring someone who it perceives to be "obese", regardless if they really are
- What's next?
  - Justice Yu pointed out the problem for public accommodations
  - This applies to a discrimination claim, more is required for reasonable accommodation (actually obese and limitations on job performance)

"The Future's Not Ours to See"

- *EEOC v. STME* (11th Cir. 2019); *Shell v. BNSF* (7th Cir. 2019)
- An employer's belief that an employee might develop an impairment in the future does not satisfy the ADA's "regarded as" standard for disability discrimination claim
- Be careful though, as there is often a fine line between a belief that an employee is impaired now and a belief that an employee might be impaired in the future
- Also, is it really prudent to make a decision on this basis?
- State law might be different too

A Reasonable Accommodation – Not Necessarily Employee's Desired One

- *Hazelwood v. Highland Hospital* (2nd Cir. 2019)
- Deaf employee – wanted accommodation – employer provided accommodation of having co-workers relay test results to providers – Employee preferred technology to help her
- Employee is entitled to an effective accommodation, not her preferred accommodation

What Can Be An Essential Job Function?

- *Faidley v. UPS* (8th Cir. 2018) – overtime
  - Best to list essential functions in job description
  - Don't respond to accommodation request with: "Congratulations, your career at UPS is now over"
- *Moses v. Dassault Falcon Jet* (8th Cir. 2018) – concentration
  - At least if you are an aircraft safety inspector
- *Clark v. Charter Comm.* (5th Cir. 2019) – staying awake
  - At least if you monitor a communications network for outages and you fall asleep at random times
  - Clark argued "speedy and accurate performance are admirable and desired qualities . . . But not essential ones."

ADA/Accommodation – Full Time

- *Hostettler v. The College of Wooster* (6th Cir. 2018)
- Key takeaways
  - If you take the position that full time work is an essential function, be prepared to prove it
  - "on its own, however, full-time presence at work is not an essential function. An employer must tie time-and-presence requirements to some other job requirement."
  - An employee might be able to show that he or she can achieve the job's essential functions with a modified schedule

ADA/Accommodation – Remote Work

- *Bilinsky v. American Airlines* (7th Cir. 2019) (2-1 decision)
- Bilinsky worked at AA as a communications specialist since 1991
  - No formal job description
  - Although the team Bilinsky worked with operated out of AA's Dallas headquarters, AA allowed Bilinsky to work remotely from Chicago due to her multiple sclerosis (she claimed heat made her condition worse)
- 2013 AA merged with US Airways – leading to restructure
  - AA felt that her job duties would now require consistent, physical presence
  - AA offered to relocate Bilinsky to the Dallas office or find other positions
- Bilinsky either was not qualified for, or not interested in the positions and AA terminated her employment
- SJ affirmed – barely
- But *Masters v. Class Appraisal* (E.D. Mich. 2019)

ADA – What About Essential Function That Is Unused for a Time?

- *Mielnicki v. Walmart* (10th Cir. 2019)
- Walmart required maintenance assistants to clean rest rooms
  - She refused because of fear of being attacked
  - Walmart permitted her to avoid essential function because another maintenance assistant could do it
  - When the other maintenance assistant departed, Court held that Walmart was within its rights to insist on essential function
- Plaintiff conceded it was an essential function
- Job description was key

New Supervisor As Reasonable Accommodation?

- Working is a major life activity under the ADA, but it refers to the ability to perform "a class of jobs or a broad range of jobs."
- *Tinsley v. Caterpillar Financial Services, Corp.* (6th Cir. 2019)
- Employee with PTSD claimed she was impaired in performing her job as a business system analyst because of her supervisor's management style
- She admitted she could remain in her position and perform her job duties, but only if the company assigned her to another manager
- Court said not reasonable accommodation

The Dangers of Assuming Disability

- *Babb v. Maryville Anesthesiologists, Inc.* (6th Cir. 2019)
- Babb claimed employer fired her because it regarded her as having a disability
- Court reversed SJ for employer
  - Employer kept questioning her medical condition despite her denials of needing help
  - Employer assumed she was disabled, but ultimately didn't ID work deficiencies connected to the "disability"
  - Employer put all eggs in the two mistakes – but questions of facts
  - "smoking gun" email to staff from top CRNA saying "as you know, Babb had major issues with her eyesight" and saying this was one reason for separation

Zamboni Crash

- *Graham v. Arctic Zone Iceplex* (7th Cir. 2019)
- Ice maintainence manager fired – recently had workplace injury
- Failure to accommodate claim rejected
  - Given a job sharpening skates, among other tasks
  - He asked for a sit down job and never complained about it
  - Interactive process is a two way street
- Termination based on legitimate non-discriminatory reasons
  - Zamboni accident
  - Bad customer service and attitude

“I’d like to run an idea by you”

- *Samson v. Wells Fargo* (9th Cir. 2019)
- Samson requested leave – granted – but when she came back, Wells Fargo announced she was being terminated
- SJ reversed
  - Her boss (Gwin) sent an invitation for a meeting to his boss one day after Samson went on leave with the title “Samson Displacement Conversation” saying “I’d like to run an idea by you re: Samson”
  - Inconsistent reasons (one person said performance based; another said job change to higher level position and nothing about performance)

SMOKE GETS IN YOUR EYES

Marijuana Laws Abound

- New York City bans most drug testing for marijuana (with safety-sensitive exceptions)
- Nevada bans revocation of conditional job offer where the individuals tests positive for marijuana (with exceptions for safety sensitive positions and government contractors)
- Illinois allows “reasonable” drug free workplace policies, but no longer absolute
- And reality of applicant pool

Pot Use as Reasonable Accommodation?

- Various states (Pennsylvania, Connecticut) have laws preventing employers from taking adverse action against workers based solely on medical marijuana use
- Massachusetts Supreme Judicial Court said that employers might have to accommodate medical marijuana use even though federal law considers it a Schedule I drug
- Efforts in Congress to remove marijuana as Schedule I drug

Pot Use as Reasonable Accommodation?

- New Jersey appeals court determined that even though state medical marijuana law doesn't require that employers accommodate use of medical marijuana . . .

- That doesn't mean that other laws can't require accommodation – namely state disability accommodation law

PRE-EMPLOYMENT CHECKS

A.I.? Not So Fast

- Illinois is the first state to legislate the use of Artificial Intelligence ("AI") in hiring context.
- Applies where employers conduct video interview and utilize AI to analyze the candidate's body language, speech patterns and other characteristics to score and predict a candidate's likelihood of success. In Illinois, employers must:
  - notify each applicant in writing that AI may be used to analyze the applicant's facial expressions and other characteristics as part of evaluating the applicant's fitness for the position;
  - provide each applicant with a written description of how the AI technology works and what characteristics it uses to evaluate applicants; and
  - obtain written consent from the applicant prior to the video interview.

Solely Means Solely

- *Gilberg v. California Check Cashing Stores* (9th Cir. 2019)
- Fair Credit Reporting Act requires that before obtaining a consumer report (background check) on an applicant, the employer must provide disclosure:
  - Clear (shoddy grammar is a no no)
  - Conspicuous
  - In a written document consisting "solely" of the disclosure
- Here, the employer included state law requirements
- What do you think the Ninth Circuit ruled?

Pot Users May Hold the Winning Hand

- Beginning January 1, 2020, employers in Nevada will be prohibited from denying employment to a prospective employee when that individual is required to take a drug test and the results of that drug test indicate the presence of marijuana (plus there is a right to rebut the test results)
- Many exclusions for:
  - federal contractors (Drug Free Workplace Act)
  - safety sensitive positions
  - people who drive

Drug Screens

- NYC Council has enacted an ordinance banning pre-employment drug screens for marijuana
  - Takes effect in one year
- Exceptions
  - Safety positions
  - Commercial drivers license
  - Federal law bans
  - Vulnerable people (children, elderly)
  - Doesn't apply to current employees

DISCRIMINATION/EMPLOYER BURDEN OF PROOF

"Clear and reasonably specific"

- *Figueroa v. Pompeo* (D.C. Cir. 2019)
- Court clarified what an employer needs to show to meet its burden of showing "legitimate non-discriminatory reason"
  - Must be admissible evidence
  - Must be non-discriminatory
  - Must be legitimate/credible
  - Must be clear and reasonably specific such that the plaintiff has a full and fair opportunity to attack the explanation as pretextual
- "You were not the best qualified" is not sufficient

LEAVES

What's New With Leaves?

- Washington Paid Family and Medical Leave – 1/1/20 employees can apply for benefits (voluntary plan option)
- Will be covered later today

Hold Your Frustration!

- So an employee is out on FMLA leave. Is it OK to express frustration with that absence?
- *Ottley-Cousin v. MMC Holdings* (E.D.N.Y. 2019)
- No SJ for employer where:
  - Employer eliminated O-C's position while on leave ("budgetary reasons")
  - Supervisor said leave and disability requests were "unreal"
- Bad timing to decide to eliminate position

When in Doubt . . .

- *Valdivia v. Township High School District* (7th Cir. 2019
- I'm having trouble sleeping, eating and getting out of bed. I'm losing weight, I can't concentrate and I find myself uncontrollably crying.
- I finally quit. I show up at the home of the principal crying and try to recant, but no luck. And then I sue for FMLA interference
- Was I entitled to notice of leave?
- Seventh Circuit said yes.

Avoiding a New England Winter Isn't Leave Abuse

- DaPrato v. Massachusetts Water Authority (Mass. 2019)
- IT Manager who was one year away from retirement took FMLA leave to recover from foot surgery (about two months)
- Prescheduled vacation to Mexico for two weeks at end of leave
- When DaPrato returned, HR found out about leave and launched investigation – fired him
  - Jury awarded DaPrato $2 million in damages
  - Pictures of him holding a big fish on a boat and smiling?
  - Video of him walking, driving, lifting luggage
  - HR Director testified seriously ill or disabled people shouldn't be on vacation

But What About 18 Holes of Golf?

- LaBelle v. Cleveland Cliffs, Inc. (6th Cir. 2019)
- Employer became suspicious of FMLA intermittent leave that was always stacked with other days off – hired P.I.
  - Found LaBelle on the course golf with no sign of distress
  - Spoke to LaBelle who claimed: 1) golf wasn't as stressful on his shoulder as the lab; 2) he was in pain every day so this way, he could maximize time off from work
  - Employer fired LaBelle
- Sixth Circuit affirmed SJ
  - Even if LaBelle was right about the benefits of golf, his leave was not for one of the two qualifying reasons

ARBITRATION

To Arbitrate or Not to Arbitrate, That is the Question!

- United States Supreme Court has issued multiple decisions favoring mandatory arbitration (and allowing mandatory arbitration agreements to preclude class actions)
- States (Washington, California and others) continue to pass laws that bar mandatory arbitration (including “opt out”)
- Federal courts continue to enjoin those laws (for the most part)
- How will this end?

I'll Take a Slice of Pepperoni and an Arbitration Agreement on the Side

- *Burnett v. Pagliacci Pizza* (Wn. App. 2019)
- Arbitration Agreement included in "Little Book of Answers" – referenced in an acknowledgment form – that was OK
- Court refused, however, to enforce arbitration
  - Agreement was procedurally unconscionable (no time to review – not even given the little book at the start)
  - Agreement was substantively unconscionable (tried to require exhaustion of internal procedure and limited statute of limitations)
  - Interestingly, the one-sided nature was not a problem

A ROSE BY ANY OTHER NAME

Joint Employer - DOL

- DOL has just finalized a favorable test for business on who qualifies as a “joint employer” under FLSA
  - Can the business actually hire or fire?
  - Does the business supervise or control the work schedule or conditions of employment to a substantial degree?
  - Does the business determine pay rate and method of payment?
  - Does the business maintain employment records?
- No “finger on the scale” for franchisor, staffing agency relationships

Know Your ABCs

- A.B. 5 codifies the Dynamex decision in California
- ABC Test
  - The worker is free from control or direction in the performance of the work; AND
  - The worker performs work that is outside the usual course of the hiring entity's business; AND
  - The worker is customarily engaged in an independent trade, occupation, profession, or business.
- Will it be upheld in court?

And Finally – Some Irony

- Ex-employee Katherine McMahon sued her employer for sexual harassment by both co-workers and customers
- She was a part-time gallery attendant at a museum
- She alleged that her employer had no policies in place to prevent harassment
- And her employer was . . ?

Thank you and have a great day!

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