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WORKPLACE PERFORMANCE EXPERTS

## **Employment Law Update**

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# What's Trending?



# Summary

- Supreme Court Docket
- State and Federal Law
- ADA and FMLA
- Wage and Hour
- Paid Sick and Family Leave in Washington
- National Labor Relations Board Reconstituted



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**US Supreme Court**

# Epic Systems Corp. v. Lewis

## Opinion TBD

- The Epic Systems case involves the question of whether an employer's use of mandatory arbitration clauses in employment contracts violates the National Labor Relations Act
- Mr. Lewis sued individually and instituted a class action suit in 2015 against Epic in 2015 for overtime wages under the FLSA despite arbitration clause
- 7<sup>th</sup> Circuit held arb clause unenforceable under NLRA and FAA in contravention of rulings from the 2<sup>nd</sup>, 5<sup>th</sup> and 8<sup>th</sup> Circuits
- Note: 9<sup>th</sup> Circuit took NLRB's position in [Morris v. Ernst & Young \(2014\)](#).

# Masterpiece Cakeshop v. Colorado Civil Rights Commission Argument December 2017

- A baker was found to have violated Colorado's Anti-Discrimination Act by refusing to bake a wedding cake for a same sex couple. The baker is seeking Supreme Court review, claiming that the anti-discrimination law violates the First Amendment and religious liberty protections.
- NOTE: February 2017: [State of Washington v Arlene's Flowers, Inc.](#) where Washington court ruled the florist refusal to sell wedding flowers to same sex couple was not protected by state or federal constitutional protections of free speech and free association.



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**State and Federal**

Discrimination

# Hively v. Ivy Tech Community College

## April 2017 (7<sup>th</sup> Cir.)

- Court ruled that Kimberly Hively states a claim of discrimination under Title VII by alleging that employer fired her because she was a lesbian.
- First time federal court opened the door for LGBT employees to use Title VII to seek relief for allegations of employment discrimination and retaliation
- EEOC advanced its interpretation as "sex" under Title VII to include all expressions of gender, resulting in the agency opinions [Baldwin v. Dep't of Transp., Appeal No. 0120133080 \(July 15, 2015\)](#) (Title VII covers sexual orientation) and [Macy v. Holder, EEOC Appeal No. 0120120821 \(April, 20, 2012\)](#) (Title VII covers transgender individuals).



# Zetwick v. County of Yolo

## February 2017 (9<sup>th</sup> Cir.)

- Reversed summary judgment in favor of an employer to allow case to proceed
- Victoria Zetwick, a correctional officer in a California prison said her boss (the county sheriff) greeted her with unwelcome hugs on more than 100 occasions over a 12-year period, along with at least one kiss
- "He is just the hugging type"
- Boss frequently hugged female staffers but used a handshake with male officers
- "[A] reasonable juror could conclude that the differences in hugging of men and women were not,...just 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex'"

# EEOC v. Ultracare Las Vegas

## EEOC March 2017

- Mr. Matlock, male ultrasound tech who performs transvaginal ultrasounds
- No job performance issues
- Co-defendant Nevada Health Centers, Inc. requested that Matlock be replaced by a female ultrasound technician based on customer preference
- EEOC alleged Employer engaged in sex discrimination: “Customer preference is not a defense for discrimination”
- Ultracare settled for \$15k; Nevada Health Centers for \$35k
- See: [EEOC v. Sammy's Gentlemen's Club](#) filed June 2017 where ER refused to allow male bartender to apply

# Duane v. IXL Learning, Inc.

## DC Cal. Filed May 2017

- Transgender employee took FMLA leave for surgery
- Eight days after he returned from FMLA he was fired for making disparaging comments about IXL on Glassdoor, which demonstrated poor judgment and poor ethics:

*If you're not family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball — then you'll likely find yourself on the outside. Treatment in the workplace, in terms of who gets flexible hours, interesting projects, praise, promotions, and a big yearly raise, is different and seems to run right along these characteristics.*

# Duane v. IXL Learning, Inc.

## Timing is Everything

Court denied Motion to Dismiss FMLA interference claim, stating:

*A close temporal proximity between a return from FMLA-protected leave and termination supports an inference of unlawful interference. At the pleading stage, the temporal proximity between Mr. Duane's return from FMLA leave and termination is enough to support a plausible inference that IXL violated the FMLA.*

# Duane v. IXL Learning, Inc.

## What about Section 7 Rights?

- The NLRB's complaint on behalf of Mr. Duane was dismissed on the basis that his actions did not amount to protected concerted activity under the NLRA.
- His Glassdoor review contained "individual gripes posted to hurt IXL's ability to recruit prospective employees" and constituted a "reckless and impetuous reaction" to IXL's hesitation to immediately accept Mr. Duane's request to work remotely 50% of the time.

# What are Section 7 Rights?

## For Union and Non-Union Employees

- Concerted: Acting together
  - Individual action on authority of other employees
  - Attempting to instigate group action
- Protected: For mutual aid and protection
  - Working conditions
  - Not “mere griping” or “ranting”
- Unprotected: “egregious” misconduct

# EEOC

## Harassment Proposed Guidance

- Sex based harassment includes:
  - Harassment based on gender identity, including transgender or transitioning status and includes using a name or pronoun with the individual's gender identity in a persistent or offensive manner
  - Harassment because an individual is lesbian, gay, bisexual, or heterosexual
  - Retaliation:

Guidance permits employers to promise non-retaliation only for complaints made in "good faith," implicitly permitting adverse action against employees who make bad faith complaints – but I don't recommend using any language that may deter employees from reporting alleged harassment



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**Wage and Hour**



# Department of Labor Obama Overtime Rules... are Withdrawn

- December 2016 Obama Overtime Rules stayed per appeal in 5<sup>th</sup> Circuit
- April 2017, R. Alexander Acosta confirmed as labor secretary
- DOL has rejected salary level of \$913 a week set by Obama administration

# DOL Withdrawal of AIs

## June 7, 2017

- In three sentence press release Labor Secretary Alexander Acosta announced immediate withdrawal of two Wage and Hour Division Administrator's Interpretations
- AI 2015-1 addressed classification of independent contractors stating "most workers are employees under the FLSA's broad definitions"
- AI 2016-1 established new standards for determining joint employer status, stating it should be defined "expansively"
- Signals shift DOL interpretation and enforcement of matters relating to joint employment and independent contractors
- DOL opinion letters are back after 7 year hiatus

# Meal Periods

## Brady v. Autozone Stores

### Washington July 2017

- An employee asserting a meal break violation can establish a prima facie case by providing evidence they did not receive a timely meal break
- No strict liability for employer, affirmative defense of waiver available
- Employee asserting meal break violation under WAC 296-126-092 can establish a prima facie case by alleging they did not receive a timely break
- Burden then shifts to employer to show break was not missed and/or employee waived it



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**FMLA and ADA**

# Abuse of FMLA

## Capps v Mondelez Global, LLC

### February 2017 (3<sup>rd</sup> Cir.)

- Mr. Capps, dough mixer, developed arthritis in hips leading to approved intermittent FMLA for complete bedrest
- Eligible employees are entitled to FMLA for a serious health condition that makes the employee unable to perform one or more of the essential functions of his/her position
- While on leave for bedrest, Mr. Capps went to pub drank 3 beers and 3 shots, got a DUI driving home
- Called in stating, “out on FMLA due to pain” but employer discovered he was in jail or in court those dates
- After investigation and failure to provide medical cert for absences, Mr. Capps fired for dishonesty
- Summary judgment in favor of Employer affirmed - FMLA retaliation claim failed because Employer had an honest belief that employee was misusing the FMLA

# In Loco Parentis

## Coutard v. Municipal Credit Union

### February 2017 (2<sup>nd</sup> Cir.)

- Mr. Coutard was raised by his grandfather after his father died.
- Mr. Coutard asked for FMLA to care for grandfather, he did not tell employer about how he was raised by him.
- Employer denied request stating “grandparents” not covered by FMLA. Mr. Coutard was eventually fired for attendance.
- Employer has duty to seek more information about in loco parentis relationship; burden is not on employee to disclose the history and relationship with his grandfather.
- Summary judgment for Employer reversed.

# In Loco Parentis

- DOL FAQ: “An eligible employee standing in loco parentis to a sibling who is under 18 or over 18 and incapable of self care because of a medical condition, make take care of the sibling under FMLA.”
- Employee tells you she’s going to CA to care for brother who is seriously ill and she’ll be back in a week?
- Employee tells you they have power of attorney for his brother?
- Employee must show they have day-to-day responsibility and financial obligations to support sibling in same way a parent would for a child.

# ADA

## Whitaker v. Wisc. Dept of Health

### February 2017 (7<sup>th</sup> Cir.)

- Doctor notes provided by employee who exhausted FMLA:
  - “Medical leave of absence until 11/17/10”
  - “Medical leave of absence until 12/17/10”



# Whitaker, cont.

- Employer terminated Ms. Whitaker after she failed to provide anything more than the two vague notes substantiating her need for more leave
- Court laid out what an employer may require (at a minimum) in a MD note supporting more ADA leave:
  - Whether employee is receiving treatment
  - The likely effectiveness of the treatment
  - The medical likelihood that leave would enable her to return to work regularly



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**It's Here: WA Paid Sick and Family Leave**

# History

## Initiative 1433

- Initiative 1433 included both an increase to the state minimum wage and a requirement that employers provide paid sick leave
  - It was approved by voters on November 8, 2016
  - It passed with 57.42% voting to approve

**Paid sick leave becomes mandatory for all employers on January 1, 2018!**

# The Law

## Who is covered?

- Employer: anyone who employs at least **one** person in the State of Washington
- Employee: all employees who perform work in the State of Washington and who are ***non-exempt under WA. Minimum Wage Act***
  - I-1433 amended the Minimum Wage Act, so that Act's definition of "employee" applies
  - This definition excludes all of those employees who are exempt from minimum wage and overtime requirements

# The Law

## Who is Eligible?

- Employees begin accruing on the first day of employment and are eligible to use paid leave after 90 days of employment

**Regulation:** Employers may allow employees to use paid leave before 90 days

# The Law

## What are the Reasons for Using Paid Leave?

- An employee's own health condition
- To care for a family member with a health condition
  - Child (regardless of age or dependency), including biological, adopted, foster, step, and those to whom the employee is "in loco parentis" or "de facto" parent
  - Parent, with the same broad definition as child
  - Spouse or Registered Domestic Partner
  - Grandparent or Grandchild
  - Sibling

# The Law

## What are the Reasons for Using Paid Leave?

- Absences that qualify under the State Domestic Violence Leave Act
  - Employee or family member victim of domestic violence, sexual assault, or stalking
    - Family member broadly includes child, spouse or domestic partner (current or former), parent, parent-in-law, grandparent, person whom employee is dating, or other household member
  - Leave to take care of legal needs, seek treatment or counseling, obtain shelter or other social services, and plan for future safety
  - “Reasonable” amount of leave

# The Law

## What are the Reasons for Using Paid Leave?

- Employee's workplace has been closed by public health official for any health-related reason
- Employee's child's school or day care has been closed by public health official for any health-related reason

**Regulation:** Does not include closures for inclement weather



# The Law

## How Much Paid Leave is Available?

- Employees accrue at least one hour of paid leave for every 40 hours worked
  - Employers may front load leave as long as it meets or exceeds the law's accrual level

**Regulation:** Employees do not need to accrue leave for time not working (e.g., while on vacation or other paid time off)

**Regulation:** Employers may provide a more generous accrual rate

# The Law

## What About Carryover?

- Employees may carry over 40 hours of unused accrued paid leave into the next year

**Regulation:** Employers may cap carryover at 40, or they may allow more generous carryover

**Regulation:** “Year” means any fixed consecutive twelve-month period established by the employer

- If not otherwise defined, it means calendar year

# The Law

## May an Employer Require Notice?

- An employer may require an employee to give “reasonable” notice of an anticipated absence
- The notice requirement may not interfere with an employee’s ability to use leave

**Regulation:** If need for leave is foreseeable, notice should be provided as early as “practicable,” but the employer cannot require notice more than 14 calendar days in advance

**Regulation:** If need for leave is unforeseeable, the employee or designee must provide notice as soon as possible before the start of the shift, unless it is not “practicable” to do so

**Regulation:** Employers must have a policy or agreement outlining their notice requirements

# The Law

## May an Employer Require Verification?

- Only for absences exceeding 3 days, an employer may require verification that leave is for a covered purpose

**Regulation:** 3 consecutive days on which an employee is scheduled to work

**Regulation:** Employer may not require that verification include the nature of the condition

**Regulation:** Verification may not impose an unreasonable burden or expense on the employee

**Regulation:** Employers must have a policy or agreement outlining verification requirements

# The Law

## May an Employer Require Verification?

- Verification must be provided within a “reasonable” time

**Regulation:** “Reasonable” is the period of time identified by the employer in policy or agreement, but may not be less than 10 calendar days

**Regulation:** If the absence is also covered by FMLA, then FMLA verification requirements govern

# The Law

## How is it Paid?

Employees must be paid their normal hourly rate

**Regulation:** If the time taken as paid leave would have been overtime if worked, it does not need to be paid at the overtime rate

**Regulation:** If the hourly rate fluctuates, the employer must pay the hourly rate that would have applied during the specific hours that the employee used paid sick leave

- If the specific rate cannot be identified, then the employer must make a “reasonable” calculation (e.g., the employee’s average hourly rate)

# The Law

## How is it Paid?

**Regulation:** Paid leave may be used in increments equal to the employer's smallest payroll increments (e.g., 15 minutes)

- Employers may request approval for a variance to allow greater increments
- Variance may be granted for “good cause”
  - Smaller increments are infeasible
  - There is no harm to employees' health or welfare

**Regulation:** If verification is required, pay for leave time may be delayed to the pay period in which verification is provided

# The Law

## What Happens at Separation?

- If employee leaves employment and is rehired by the same employer within 12 months, then previously unused accrued paid sick leave must be reinstated and immediately available for use

**Regulation:** If the separation extends into the next year, reinstatement does not need to be more than 40 hours (or the employer's established carryover amount)

**Regulation:** Rehire may be at the same or different location



# The Law

## What Happens at Separation?

**Regulation:** Employers are not required to cash out accrued, unused paid leave

**Regulation:** If an employer chooses to cash out any or all accrued, unused paid leave at separation:

- Terms of the cash out must be mutually agreed by the employee (or representative) or employer
- If employee is rehired within 12 months, the employer does not need to restore any cashed out sick leave

# The Law

## Are there Employer Notice Requirements?

- Employers must provide notices to employees
  - Entitlement to paid sick leave
  - Accrual rate
  - Authorized purposes for use of paid sick leave
  - Retaliation for lawful use of leave is prohibited
- Notices may be written or electronic
  - At commencement of employment for employees hired on or after January 1, 2018
  - No later than March 1, 2018 for current employees
- At least monthly notice of accrual and usage

# The Law

## Does a PTO Policy Comply?

- An employer may comply with the new law via an existing PTO or Vacation leave policy if:
  - The policy provides at least as generous accrual and carryover provisions
  - The policy allows usage of PTO or Vacation leave for all of the law's covered purposes

**Regulation:** If an employee uses all accrued PTO for purposes other than covered paid sick leave, and later needs leave for a covered purpose, the employer is not required to provide additional paid sick leave

# The Law

## No Retaliation

- Employers with attendance/disciplinary policies may not count paid sick leave covered absences against employees
  - **Regulation:** Employers may still discipline employees for proven misuse of paid sick leave
- Employers may not discriminate or retaliate against employees for using paid sick leave or exercising any other rights under the law

# The Law

## Collective Bargaining

- The law applies equally to unionized employees
- Collective Bargaining Agreements that do not currently provide for leave that would meet the law's requirements should be renegotiated to meet such requirements
  - Do you already have a past practice of allowing use of existing paid leave for all covered purposes?
  - Attempt to resolve compliance issues with a labor-management MOU rather than reopening contract
- **PERC off-the-record:**
  - The minimum requirements should be implemented, and the parties could negotiate above that
  - Employers should at least make good faith attempt to bargain new law before implementing



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**NLRB and Union Activity**

# NEW NLRB MEMBERS

- Phillip Miscimarra – Chair December 2017 (R)
- Mark Gaston Pierce – August 2018 (D)
- Lauren McFerran – December 2019 (D)
- Marvin Kaplan – August 2020 (R)
- William Emanuel – Pending (R)



# General Counsel

- NLRB General Counsel Richard Griffin, Jr. since 2013
- Former General Counsel of the Int'l Union of Operating Engineers (IUOE)
- Term expires this month
- Trump will appoint new GC



# Cuts in Funding

- House Appropriations Committee 2018 budget:
  - NLRB to receive \$249 million, a \$25 million decrease from 2017
  - Restrict NLRB from applying Joint employer standard and micro unions
  - Bar jurisdiction over Tribes
  - Proposals to close Anchorage, Little Rock and San Antonio regional offices, Alaska

# Major Obama NLRB & Labor Initiatives to be Undone...

- The Campaign to Increase Unionization
- Joint Employer
- Right To work
- Protected Concerted Activity
- Arbitration Rights
- Civility rules
- Confidentiality
- Employer Email
- Micro Units
- Quickie election rules

# Thank You!

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