June 7, 2019

Top labor and employment developments for May 2019

By Joy P. Waltemath, J.D.

In case you missed the in-depth coverage of Employment Law Daily for May, here’s a recap of some key developments in the L&E community.

In the Supreme Court

Qui tam tolling not triggered until government learns of alleged fraud—even when U.S. doesn't intervene

Whistleblowers, take note: In qui tam actions in which the U.S. government declines to intervene, the three-year limitations period is tolled when the federal government “knew or should have known the relevant facts” of the alleged false claim, not when the private whistleblower obtains such knowledge, a unanimous U.S. Supreme Court held. In a decision authored by Justice Thomas, the High Court resolved a circuit split and adopted the Eleventh Circuit's interpretation of the False Claims Act limitations period for such relator-initiated suits. Moreover, the Justices rejected the defendant's alternative argument that the relator is the “U.S. official” whose knowledge triggers the limitations period in such cases. The decision gives more breathing room for private relators, including in the employment context, to investigate and timely bring suit (Cochise Consultancy, Inc. v. U.S. ex rel Hunt, May 13, 2019, Thomas, C.).

In SCOTUS brief, DOJ argues that a ‘purely lateral’ job transfer is actionable adverse action under Title VII

In perhaps more intriguing Supreme Court news, President Trump’s Justice Department is suggesting a surprising turnabout in Title VII employment law. On May 6, Solicitor General Noel Francisco filed a brief in opposition to a Defense Logistics Agency employee's bid for High Court review of a Fourth Circuit ruling that her request for a lateral transfer, which involved no pay increase or improvement of working conditions, does not rise to the level of a “materially adverse action.” In its unpublished October 2018 opinion, the appeals court concluded that the employee failed to sufficiently allege the elements necessary to state her race and sex discrimination and retaliation claims. But in an interesting twist, the Solicitor General’s brief in opposition to the employee's petition for certiorari, states: “Despite its widespread acceptance by
courts of appeals and its endorsement by the federal government in some cases, the view that a ‘purely lateral’ transfer is not actionable under Section 2000e-2(a)(1) … is incorrect.” Here, although the Solicitor General asserts that the Supreme Court should not take up the case because the employee did not apply for the transfer through the proper procedures, he also appears to agree with the employee on the “material adverse action” issue.

**Developments in federal legislation**

**Restoring Justice for Workers Act introduced**

On May 15, Democratic lawmakers introduced the Restoring Justice for Workers Act, legislation intended to end forced arbitration clauses and protect workers' ability to pursue work-related claims in court, according to its sponsors. The proposed legislation was immediately slated for a hearing the following day. In prepared testimony, witnesses shared sharply differing perspectives on whether forced arbitration serves an important purpose or has grown into something never intended—an impediment to justice. The bill, H.R. 2749, would overrule the Supreme Court's 2018 ruling, in *Epic Systems v. Lewis*, that under the Federal Arbitration Act (FAA), arbitration agreements providing for individualized proceedings must be enforced, permitting employers to continue requiring workers to sign forced arbitration clauses. The bill's proponents contend that these arbitration clauses prevent workers from banding together to enforce their legal rights, including their right to minimum wage, overtime, and to a workplace free of discrimination and sexual harassment, according to the legislation's sponsors.

**Equality Act clears the House with its promise of protections for the LGBTQ community**

On May 17, the House passed the Equality Act of 2019, historic, comprehensive federal legislation that if enacted, would ban discrimination against LGBTQ Americans. The 236-173 vote saw eight Republicans joining Democrats to approve the measure that only Republicans voted against. The Equality Act (H.R. 5; S. 788) would add sexual orientation and gender identity to other protected classes, such as race or religion, in existing federal laws. The bill also would explicitly ban discrimination in a host of areas, including employment, housing, public accommodations, jury service, access to credit, and federal funding. Among other things, in Section 703 of the Civil Rights Act of 1964, the legislation would expand the prohibition against employment discrimination based on "sex" to explicitly state "sex (including sexual orientation and gender identity)." The bill now heads to the Senate, where it continues to face strong opposition.

**PRO Act gets a hearing**

Meanwhile, on May 8, the House Education and Labor Committee held a hearing on the Protecting the Right to Organize Act, H.R. 2474, the so-called “PRO Act,” which is designed to add some bite to the National Labor Relations Act and the Labor-Management and Disclosure Act. Most of the witnesses who testified at the hearing applauded the legislative effort to make the NLRA more effective for workers. Former NLRB Chairman Philip Miscimarra saw it
differently, saying that the PRO Act, “though intended for good—will operate in practice to do significant harm.”

If enacted (and it’s a long shot), the bill would establish penalties on corporations that violate workers’ rights, and combat misclassification of workers as supervisors and independent contractors; strengthen workers’ right to strike for basic workplace improvements, including higher wages and better working conditions; create a mediation and arbitration process to ensure corporations and newly formed unions reach a first contract; authorize negotiated agreements that permit unions to collect fair-share fees that cover the costs of representation; streamline the Board’s procedures; and protect the integrity of union elections against “coercive” captive audience meetings.

**In the federal appeals courts**

**D.C. Circuit:** *McDonnell Douglas* requires more than ‘vague and slippery explanation’ of employer’s legitimate, nondiscriminatory rationale

An employer must do more than just provide the criteria it used to make a decision that has become the subject of a discrimination claim; rather, it must explain how those standards were applied. In an appeal by a federal employee whose national origin discriminatory non-promotion claim was dismissed at summary judgment, the D.C. Circuit concluded that, contrary to the lower court’s determination, the employer did not meet its obligation under the second prong of the *McDonnell Douglas* analysis, because its assertion of why it failed to promote the employee—that other candidates were better qualified—and its proffer of the criteria it used did not satisfy its burden (*Figueroa v. Pompeo*, May 10, 2019, Wilkins, R.).

The appeals court laid out four factors to consider when determining whether the employer’s proffer under the second prong is adequate. But the employer had provided only an outline of the core precepts and skills considered during promotions, without explaining how it applied the standards to the employee's particular circumstances or providing specific reasons. Joining the Fifth, Sixth, Seventh, and Eleventh Circuits, the D.C. Circuit held that the employer “must proffer admissible evidence showing a legitimate, nondiscriminatory, clear, and reasonably specific explanation for its actions.”

**5th Circuit finds heightened pleading standard improperly applied to dismiss Title VII disparate treatment claims**

Reversing and remanding a district court decision that erroneously applied a heightened pleading standard in dismissing Title VII claims of national origin discrimination by a married couple who purportedly faced several adverse actions because they were of Italian descent, the Fifth Circuit found the lower court went too far by scrutinizing whether their coworkers were really similarly situated under nearly identical circumstances and whether superiors' derogatory statements about Italians were mere “stray remarks”—scrutiny more suitable to summary judgment. At this early pleading stage, they needed to only plausibly allege facts going to the ultimate elements of their disparate treatment claim and they met that lower bar (*Cicalese v. The University of Texas*).
Medical Branch, May 16, 2019, Duncan, S.).

9th Circuit allows Section 1981 race bias claims to be forced into arbitration

Addressing the arbitrability of Section 1981 claims for the first time, a Ninth Circuit panel followed the reasoning of the full Ninth Circuit in the context of Title VII claims and held that Section 1981 race discrimination claims are subject to compulsory arbitration. Both statutes seek to bar discriminatory employment practices, the appeal court observed, citing the Supreme Court: “legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination.” As such, what's good for Title VII is good for Section 1981, the appeals court held. Chief Judge Thomas concurred that controlling precedent dictates the outcome here, though he doubted the wisdom of that precedent (Lambert v. Tesla, Inc. dba Tesla Motors, Inc., May 17, 2019, Smith, M., Jr.).

9th Circuit changes course, with new panel finding qualified immunity bars officer’s claim she was terminated in part for extramarital affair

Withdrawing its February 9, 2018, opinion and declaring the sua sponte en banc call moot, a Ninth Circuit panel issued a new opinion, in which it affirmed summary judgment granted in favor of a municipal employer and several individual defendants on a probationary police officer’s Section 1983 claim alleging a violation of her clearly established constitutional rights to privacy and intimate association. Although the previous panel, in a decision authored by Judge Reinhardt, had found a fact issue as to whether the officer was terminated, at least in part, based on her extramarital affair with another officer, this new panel found the individual defendants were entitled to qualified immunity.

After the officer appealed her reprimands for "Unsatisfactory Work Performance" and "Conduct Unbecoming," she was fired; two weeks later, she received a new reprimand, which reversed the unsatisfactory work performance and conduct unbecoming findings and instead cited a new charge of "Use of Personal Communication Devices." Although the first appeals court panel reversed summary judgment, finding an issue as to whether the termination decision was based, in part, on her private relationship with her coworker, the second Ninth Circuit panel found it not clearly established whether or not a probationary officer who was in an ongoing relationship with another married officer and made personal calls and texts to that officer while on duty could be fired.

“The procedural facts in this case compel en banc consideration.”

Dissenting, Judge Molloy argued that the "procedural facts in this case compel en banc consideration." An en banc call had been made before one of the panel judges died, a call that was not resolved before the judicial substitution, he argued, and the clear purpose of an en banc rehearing is to provide a procedural mechanism to correct the application of the law by a three-judge panel and here, "the substitution of a judge who legitimately disagrees with the original
opinion should not change outcome except as part of an en banc decision”  (Perez v. City of Roseville, May 21, 2019, Ikuta, S.).

In ‘gig economy’ news

9th Circuit allows ABC test from Dynamex to be given retroactive application in franchisee suit against Jan-Pro

The ABC test adopted by the California Supreme Court in Dynamex Operations West, Inc. v. Superior Court for determining whether workers are independent contractors or employees under California wage orders was applicable to a class claim filed by workers for a "three-tier franchising" model. Rejecting Jan-Pro Franchising’s arguments for claim preclusion and against retroactive application of the California Supreme Court ruling, the Ninth Circuit vacated a district court’s dismissal of a class claim seeking to determine whether janitorial workers who purchased unit franchisees were independent contractors or employees. The plaintiffs in this case were not in privity with the plaintiffs in the First Circuit case of Depianti v. Jan-Pro Franchising International, Inc., because their suit had been severed. Moreover, California appellate courts apply intervening state supreme court rules retroactively when reviewing cases, even if the judgment in the trial court was entered prior to the supreme court ruling. Consequently, the Ninth Circuit vacated and remanded the district court’s grant of summary judgment to Jan-Pro (Vazquez v. Jan-Pro Franchising International, Inc., May 2, 2019, Block, F.)

Uber has agreed to pay $146-$170M to resolve driver misclassification claims subject to arbitration

Uber recognizes the risks. In a May 8, 2019, Securities and Exchange Commission (SEC) filing updating its initial prospectus, Uber Technologies, Inc., disclosed that, as of May 8, 2019, the rideshare giant has reached agreements that collectively come to between $146 and $170 million to resolve the majority of the misclassification claims of more than 60,000 U.S. drivers who have either filed or expressed their intent to file arbitration demands. The drivers assert that they are “employees” and not “independent contractors,” as Uber has long maintained. Under those agreements, certain drivers are eligible for settlement payments, subject to a threshold number of the covered drivers entering into individual settlement agreements, according to the “free writing prospectus.” The $146 to $170 million figure includes attorneys’ fees. The company said that it had reserved $132 million to resolve these claims.

Uber also acknowledged that it may not prevail in defending drivers’ independent contractor status in some or all jurisdictions. The company also said that the costs associated with defending, settling, or resolving pending and future lawsuits—including the demands for arbitration by those who signed arbitration agreements—on drivers’ independent contractor status “could be material to our business.” Among other decisions, Uber pointed to the California Supreme Court’s landmark ruling in Dynamex involving the classification of delivery drivers.
Uber drivers are independent contractors, not ‘employees,’ NLRB advice memo finds

The NRLB has given Uber some relief, however. Considering the common-law agency test set forth in SuperShuttle DFW, Inc., both Uber X and UberBLACK drivers were independent contractors, not employees, the Board said in an advice memo released May 14 (Uber Technologies, Inc. (13-CA-163062 et al) and dated April 26, 2019. The Division of Advice considered all the common-law factors through “the prism of entrepreneurial opportunity,” as set forth in SuperShuttle, and concluded that UberX drivers were independent contractors. Their virtually complete control of their cars, work schedules, and log-in locations, along with freedom to work for Uber competitors, gave them entrepreneurial opportunity. They were free on any day, at any moment, to decide how best to serve their economic objectives: by fulfilling ride requests through the Uber app, working for a competing rideshare service, or pursuing a different venture. The surge pricing and other financial incentives that Uber used to meet rider demand not only reflected the company's “hands off” approach, they also amounted to a further entrepreneurial opportunity for drivers.

Although Uber limited the drivers' selection of trips, established fares, and exercised less significant forms of control, overall UberX drivers operated with a level of entrepreneurial freedom consistent with independent-contractor status. Even though Uber retained portions of drivers' fares under a commission-based system that might ordinarily support employee status, that factor was neutral in the Board’s view because Uber's business model avoids the control of drivers traditionally associated with such systems. UberBLACK drivers (who either contracted directly with Uber or worked on behalf of other businesses that did so) operated almost exactly like UberX drivers, according to the advice memo. The few relevant distinctions weighed even more in favor of finding independent-contractor status.

More from the NLRB

Certification bar means it’s back to square one for UAW in Chattanooga

A divided NLRB panel directed the Regional Director to dismiss the UAW International’s election petition to represent a wall-to-wall unit of workers at a Volkswagen plant in Chattanooga. This meant the international union was barred, for now, from seeking to represent the wall-to-wall unit of maintenance and production workers, the latest chapter in the UAW’s continuing effort to represent some 1,700 auto workers at the VW plant. More than three years ago, UAW Local 42 had been certified as bargaining rep of a smaller unit at the plant, but Volkswagen challenged the certification and refused to bargain. Stymied in its efforts, the UAW regrouped; in April 2019, the International filed a petition to represent a larger unit, disclaimed its interest in representing the smaller unit, withdrew its election petition, and filed a joint motion with Volkswagen to dismiss the complaint in the earlier case. The Board granted the motion. Hours later, however, Volkswagen filed an emergency motion to stay the election proceedings related to the International’s petition to represent the larger bargaining unit, and on May 3, the
Board issued an order granting that motion. Nonetheless, the majority held the certification bar was in place and blocked any representation election and instructed the Regional Director to dismiss the International’s petition. Member McFerran dissented; Member Emanuel was recused from the case (Volkswagen Group of America Chattanooga Operations, LLC, May 22, 2019).

UAW will get election at VW’s Chattanooga plant anyway. On May 29, the NLRB slated an election to be held on June 12, 13, and 14, for Chattanooga Volkswagen workers to determine whether they want to be represented by the UAW in the larger, wall-to-wall unit of employees that the parent union was previously barred from trying to represent. The Board had dismissed the petition in Case 10–RC–239234 without prejudice to the filing of a new petition, so the UAW filed a new petition the same day in Case 10–RC–241960. The union will now have its election.

The NLRB found the inflatable balloon “intimidating” and the banner “misleading.”

Will Scabby the Rat—and other inflatables—survive the Trump Board?

On May 14, another significant advice memo was released—not just the memo finding that Uber drivers were independent contractors and not employees. In IBEW Local 134 (Summit Design + Build) (13-CC-225655), the Board’s December 20, 2018, advice memo found that the union, which had erected a large, stationary banner proclaiming a labor dispute with the general contractor, as well as a large, inflatable cat clutching a construction worker by the neck, near the entrance to a construction site, “was tantamount to unlawful secondary picketing, and signal picketing that unlawfully induced or encouraged neutral employees to cease working, or at least constituted unlawfully coercive non-picketing conduct.” The Board’s counsel recommended that the NLRB reverse several Obama-era decisions that permitted the use of such balloons, as well as the erection of stationary banners, suggesting that large banners and inflatables at the entrances of neutral businesses are illegal “coercive” conduct rather than permissible “persuasive” communications. It found the inflatable balloon “intimidating” and the banner “misleading”; each was the “functional equivalent of a picket sign.”

NLRB rulemaking agenda includes election procedures, student ‘employees,’ access to employer property

The NLRB released its rulemaking priorities May 22 by the OMB’s Office of Information and Regulatory Affairs. The release, based on a submission prepared at the direction of the Chairman, is included in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Long Term Actions and Short Term Actions), which issues twice yearly.

In addition to proceeding with its rulemaking regarding the joint-employer standard, the Board will consider rulemaking in the following areas: current representation-case procedures; current standards for blocking charges, voluntary recognition, and the formation of Section 9(a) bargaining relationships in the construction industry; standards for determining whether students
who perform services at private colleges or universities are "employees"; and standards for access to an employer’s private property.

The Labor Department reveals its regulatory plans

DOL mulling FMLA changes, dual jobs, child labor

The Department of Labor will be soliciting comments on potential changes to FMLA regulations, and taking regulatory action related to tip regulations, the definition of "fiduciary," for investment purposes, and rules on worksite exposure to beryllium, according to its Agency Rule List for Spring 2019. The DOL has taken several regulatory actions over the past year that were well publicized, including proposed rules on joint-employer status and regular and basic rates under the FLSA, that are delineated on its Agency Rule List as well.

Some of the items on the Agency Rule List have perhaps been a little more "under the radar," including: an RFI on ways to improve its regulations under the FMLA to better protect the needs of workers and to reduce administrative and compliance burdens on employers; a proposal revising the existing "dual jobs" regulation to provide greater clarity on employers’ ability to take a tip credit; final action on its child labor proposal to amend Hazardous Occupations Order No. 7—occupations involved in the operation of power-driven hoisting apparatus; a notice of proposed rulemaking on the definition of a "fiduciary" under ERISA; and final action on a general industry standard on exposure to beryllium as well as exposure to beryllium and beryllium compounds in the construction and shipyard sectors.

Proposed DOL rule would require unions to file financial reports for trusts

By month’s end, DOL’s Office of Labor-Management Standards (OLMS) had released a proposed rule to establish a form (Form T-1) to be used by labor organizations to file trust annual financial reports with the OLMS. The form would include appropriate instructions and revise relevant sections relating to the reports. The proposed changes, made under Section 208 of the Labor-Management Reporting and Disclosure Act (LMRDA), would apply prospectively, according to the notice and request for comments published in the Federal Register May 30.

Form T–1 would capture financial information pertinent to "trusts in which a labor organization is interested" (Section 3(l) trusts)—information that historically has largely gone unreported despite the significant impact such trusts have on unions’ financial operations and their members’ own interests. This proposal is said to be part of the DOL’s continuing effort to better effectuate the reporting requirements of the LMRDA.

DHS, DOL temporary rule boosts H-2B nonimmigrant visa cap by 30,000

The Departments of Homeland Security and Labor have released a temporary rule to increase the numerical limitation on H-2B nonimmigrant visas by an additional 30,000 visas through the end of Fiscal Year (FY) 2019. Employers that attest that they are likely to suffer irreparable harm may request these supplemental visas only for workers who were issued an H-2B visa or otherwise granted H-2B status in FY 2016, 2017, or 2018, according to a notice published in the
The availability is restricted by prioritizing only those businesses that would suffer irreparable harm without the additional workers, the Departments underscored. This increase is based on a time-limited statutory authority and does not affect the H-2B program in future fiscal years. The Departments are promulgating regulations to implement this determination.

**OSHA seeking information on potential updates to Lockout/Tagout standard**

OSHA is soliciting information on the control of hazardous energy under its Lockout/Tagout standard in two areas where modernizing the standard might better promote worker safety without additional burdens to employers: control circuit type devices and robotics. The goal of the standard is to protect workers from the dangers of hazardous energy. The request for information (RFI) was published in the Federal Register on May 20.

**At the EEOC**

**EEOC will be collecting 2017 EEO-1 pay data starting mid-July 2019**

Early in the month, the EEOC answered the question employers had been asking and announced it will begin collecting 2017 EEO-1 pay data (Component 2) beginning mid-July 2019, with the collection closing on September 30, 2019. That means that private employers with at least 100 employees and certain federal contractors will be filing both 2017 and 2018 pay data beginning in mid-July. The Commission made the announcement in a Federal Register notice published on May 3. As required by an April 25 court order in National Women’s Law Center v. Office of Management and Budget (D.D.C. No. 17-cv-2458), the agency is notifying EEO-1 filers that they should begin preparing to submit Component 2 (pay) data for calendar year 2017, in addition to data for calendar year 2018, by September 30, 2019. The EEOC said that it expects to begin collecting EEO-1 Component 2 data for calendar years 2017 and 2018 in mid-July 2019, and will notify filers of the precise date the survey will open as soon as it is available.

The EEOC is on target to start collecting 2017 and 2018 pay data on July 15.

**DOJ filing appeal, but Commission still opening pay data collection July 15**

In the meantime, the DOJ is filing an appeal of the court orders reinstating the EEO-1 Report pay data collection and setting deadlines. The Trump Administration is appealing the March 4, 2019, D.C. federal district court order that vacated the Office of Management and Budget's August 2017 stay of the pay data collection (Component 2) approved in the Obama-era revised EEO-1 Report, and that reinstated it immediately, as well as the court's April 25 order setting a September 30 deadline to collect at least 2018 pay data. The agency told the court it is on target to start collecting 2017 and 2018 pay data on July 15.
EEOC expects to propose new wellness rules by end of year

By the end of the year, the EEOC expects to issue a notice of proposed rulemaking on the interaction of employer-sponsored wellness programs and Title I of the ADA and GINA, according to the federal agency’s Spring 2019 Agency Rule List. Final rules addressing these interactions were previously published on May 17, 2016. However, on August 22, 2017, a federal district court in the District of Columbia (AARP v. EEOC) ordered the EEOC to reconsider both rules. After doing so, the agency rescinded portions of both the ADA and GINA wellness regulations. Agency staff is in the process of developing notices of proposed rulemaking to address wellness programs. By the end of August 2019, the EEOC expects to finalize updates to its digital charge system to permit electronic transmission of documents.

The EEOC Agency Rule List also includes proposed rules on Federal Sector Equal Employment Opportunity Process; Enforcement of Nondiscrimination on the Basis of Disability in EEOC Programs/Activities and Accessibility of Electronic and Information Technology; and Procedures for Previously Exempt State and Local Government Employee Complaints of Employment Discrimination Under Section 304 of the Government Employee Rights Act of 1991. Revision of Federal Sector Regulation on Time Limits for Filing a Civil Action (3046-AA97) is listed in the final rule stage.

The Department of Justice intervenes in no-poach litigation

The DOJ seeks to intervene in Duke ‘no-poach’ suit

The Department of Justice Antitrust Division announced that it has filed an unopposed motion to intervene in private class action claims accusing Duke University’s medical school and several related entities of violating federal antitrust law through a mutual no-hire agreement with the University of North Carolina School of Medicine. Also, the Justice Department joined the parties’ proposed settlement agreement for the limited purpose of obtaining the right to enforce an injunction designed to prevent the maintenance or recurrence of any unlawful no-poach agreements. If approved by the federal district court in Greensboro, North Carolina, the settlement would give the government the right to enforce an injunction and certain compliance and reporting requirements against Duke (Seaman v. Duke University, Case No. 15-cv-00462, May 20, 2019).

And a few more emerging issues

#MeToo news: New sexual harassment charges, lawsuits filed by 25 McDonald’s workers

The Fight for $15 and a Union, with support from the American Civil Liberties Union and the TIME’S UP Legal Defense Fund™, on May 21 announced the filing of 25 new sexual harassment charges and lawsuits against McDonald’s, as a multi-year effort by cooks and cashiers to press the company to address widespread harassment intensified. The combination of suits and EEOC charges allege illegal conduct in both corporate and franchise McDonald’s
restaurants across 20 cities—including groping, indecent exposure, propositions for sex, and lewd comments by supervisors—against workers as young as 16 years old. The American Civil Liberties Union provided legal support to many of the workers and the TIME’S UP Legal Defense Fund™—housed and administered by the National Women’s Law Center Fund LLC—provided support to investigate and file some of the charges. McDonald’s says it has rolled out, or has in development, various anti-harassment measures, including a new policy and training for managers and crew.

The charges announced May 21 represent the third round of complaints McDonald’s workers in the Fight for $15 and a Union have filed against the company in the last three years, with more than 50 charges and suits filed in total.

**Northern District of California rules FAA didn't preempt California law prohibiting forum-selection clauses**

Is there a chink in the armor of the FAA? A tool manufacturer was unable to convince a federal district court in California to dismiss or transfer a putative state law wage-hour class action brought by one of its distributors since the forum selection clause contained in the parties' distribution agreement was invalidated by a California law that prohibits such clauses in franchise agreements. The plaintiff was a California distributor who alleged that the company misclassified him and other distributors as independent contractors to avoid obligations to employees under California Labor Code and Industrial Welfare Commission wage orders, including overtime pay, off-duty meal periods, and paid rest periods. Because the arbitration clause contained in the agreement was void by its own terms—it contained a nullifying waiver of Private Attorney General Act (PAGA) claims—the federal district court rejected the company's contention that the California law was preempted by the Federal Arbitration Act. The court also rejected the company's contention that the California law was unconstitutional and held that the private and public factors did not support a transfer on “convenience” grounds (*Fleming v. Matco Tools Corp.*, May 3, 2019, Orrick, W.).

**Southern District of New York finds HR rep’s testimony that he followed advice of counsel waived attorney-client privilege**

In a case presenting “a thorny issue of attorney-client privilege” in the context of internal investigations, a federal district court in New York found an employer waived attorney-client privilege as to conversations between an HR representative and in-house counsel. Although communications between the HR rep and in-house counsel about decisions to discipline and terminate two employees were privileged, that privilege was waived because the HR rep’s testimony that he acted on advice of counsel opened the door for the employees to inquire into those conversations. This indirect assertion of reliance on legal advice as a defense waived attorney-client privilege partially, allowing the plaintiffs to question the rep about the legal advice he received in connection with his decision to issue a final warning to the manager who had allegedly sexually harassed them, as well as his (ostensibly unrelated) decision to terminate the employees. For similar reasons, the court denied the employer’s motion for a protective order for documents related to both investigations (*Barbini v. First Niagara Bank, N.A.*, April 29,
Abortion and employment law

The highly controversial issues surrounding abortion, much in the news of late, have found their way into employment law.

HHS proposes rule that would drop abortion, gender identity from inclusion in sex discrimination

"On the basis of sex" discrimination would not include gender identity and abortion under regulatory reform proposed by the Department of Health and Human Services (HHS) under section 1557 of the Affordable Care Act (ACA), where Congress required HHS to apply civil rights laws and regulations to healthcare and the ACA Exchanges, including the law prohibiting discrimination on the basis of sex in certain federally funded programs. In 2016, HHS issued a new rule redefining discrimination "on the basis of sex" to include termination of pregnancy and gender identity—one’s internal sense of being "male, female, neither, or a combination of male and female." The advance release of the proposed rule outlined the changes.

After the 2016 rule that redefined discrimination on the basis of sex to include gender identity and termination of pregnancy, several states and healthcare entities filed federal lawsuits against HHS. The Northern District of Texas issued an opinion in Franciscan Alliance, Inc. v. Burwell, in December 2016, which preliminarily enjoined HHS’s attempt to prohibit discrimination on the basis of gender identity and termination of pregnancy as sex discrimination in sec. 1557. HHS stated that since the preliminary injunction continues to be in effect, HHS cannot (and has not since the injunction), enforce those portions of the rule.

According to HHS, the proposed rule would revise the provisions subject to those injunctions to conform with the plain understanding recognized by the court. It would not create a new definition of discrimination "on the basis of sex." However, definitions are changed so that sex discrimination does not include gender identity and termination of pregnancy.

Abortion is protected under Title VII, the Eastern District of Louisiana agrees, but bartender was fired for drinking on the job, not because of her abortion

An employee who obtains an abortion is protected by the pregnancy language of Title VII, as amended by the Pregnancy Discrimination Act, a federal magistrate in Louisiana held (in accordance with the two circuit courts to have ruled on the question, and the EEOC's position). However, a bartender could not prevail on her Title VII and state-law pregnancy discrimination claims that alleged she was fired because she had an abortion on the same day she had the abortion. Granting summary judgment, the court found documented evidence that the employee drank on the job, which was a terminable offense according to the employee handbook. Several coworkers also were fired for drinking on the job, and there was no evidence her manager had any animus concerning her abortion (Ducharme v. Crescent City Déjà Vu, LLC, May 13, 2019, Meerveld, J.).
Anti-abortion employees fired after sharing video of patient from neighboring abortion clinic not subjected to religious discrimination, Middle District of Florida concludes

Two healthcare workers for an oncology clinic that was located next to an abortion clinic will not take their claims of religious discrimination to a jury, ruled a federal district court in Florida. The employees, one of whom recorded and provided a video of an abortion clinic patient to a known violent felon, both engaged in anti-abortion activities while on the job, which they did not dispute, including violating workplace policies regarding harassment, workplace violence, professionalism, and social media use. No jury could conclude that their actions could not have led a reasonable employer to fire them, especially as they had been repeatedly counseled and warned about engaging in personal activities regarding abortion at work. The vice president’s statement that not everyone had the same belief about abortion did not raise a reasonable inference of religious discrimination on the part of the employer, which was granted summary judgment (Passmore v. 21st Century Oncology, LLC, May 30, 2019, Howard, M.).