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Top labor and employment developments for January 2020

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In case you missed the in-depth coverage of Labor & Employment Law Daily for January 2020, here’s a recap of some key developments in the L&E community.

SIGNIFICANT AGENCY ACTION

AT THE DOL: Final rule clarifying joint-employer relationships likely to result in fewer joint-employer findings

On January 12, 2020, the U.S. Department of Labor announced its final rule to revise and update its regulations interpreting joint employer status under the FLSA. The final rule provides updated guidance for determining joint-employer status when an employee performs work for an employer that simultaneously benefits another individual or entity. The effective date of the final rule is March 16, 2020. A Fact Sheet about the final rule is also available. As expected, the business-friendly rule will likely limit the circumstances in which a joint-employment relationship is found.

In the final rule, the Department:

• specifies that when an employee performs work for the employer that simultaneously benefits another person, that person will be considered a joint employer when that person is acting directly or indirectly in the interest of the employer in relation to the employee;
• provides a four-factor balancing test to determine when a person is acting directly or indirectly in the interest of an employer in relation to the employee;
• clarifies that an employee’s “economic dependence” on a potential joint employer does not determine whether it is a joint employer under the FLSA;
• specifies that an employer’s franchisor, brand and supply, or similar business model and certain contractual agreements or business practices do not make joint-employer status under the FLSA more or less likely; and
• provides several examples applying the Department’s guidance for determining FLSA joint-employer status in a variety of different factual situations.

In the joint-employer scenario where another person is benefitting from the employee’s work, the Department is adopting a four-factor balancing test derived from Bonnette v. California Health & Welfare Agency to assess whether the other person:
1. hires or fires the employee;
2. supervises and controls the employee’s work schedule or conditions of employment to a substantial degree;
3. determines the employee’s rate and method of payment; and
4. maintains the employee’s employment records.

No single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances.

**FROM THE EEOC: $20.5M is what Jackson National Life Insurance will pay to settle harassment, discrimination, retaliation allegations**

Jackson National Life Insurance Company, Jackson National Life Distributors, LLC, and Jackson National Life Insurance Company of New York have agreed to pay $20,500,000 to 21 complainants and furnish other relief to settle allegations that Jackson violated Title VII by subjecting employees to race, national origin, and sex discrimination and retaliation. Jackson allegedly tolerated harassment and discrimination against female and African-American workers in promotions and pay, and it fired a white VP who refused to discipline employees who had complained. The agreement marks the largest monetary settlement ever reached by the EEOC’s Phoenix District and Denver Field Offices.

In a September 2016 lawsuit, the EEOC alleged that Jackson tolerated a work environment hostile to female and African-American employees at its Denver and Nashville offices. It also contended that Jackson discriminated against African-American and female employees in the terms and conditions of employment, such as paying them inferior compensation and regularly passing them over for promotion, and selecting less-qualified, white male employees over the complainants. Jackson also purportedly retaliated against employees who filed charges of discrimination with the EEOC or otherwise opposed discrimination. In particular, Jackson fired a white vice president who refused to give a negative evaluation and a disciplinary warning to two African-American female employees who had complained, the EEOC said.

The EEOC filed its lawsuit in the District of Colorado; the case is No. 16-cv-02472-PAB-SKC.

*The largest monetary remedy in the history of the NLRB is more monetary relief than the federal agency collects on average in a typical year.*

**NLRB announces CNN will pay $76M to resolve longstanding successor-employer dispute**

CNN has signed on to a settlement under which the cable news giant will pay $76 million in back pay—the largest monetary remedy in the history of the NLRB. The deal resolves a dispute that began in 2003, when CNN terminated a contract with Team Video Services (TVS), a company that had been providing CNN video services in Washington, D.C., and New York City.
The back pay, more monetary relief than the federal agency collects on average in a typical year, is expected to benefit more than 300 workers.

**Successor-employer issue.** After terminating the contract, CNN hired new employees to perform the same work without recognizing or bargaining with the two unions that had represented the TVS employees, according to the NLRB. CNN, which wanted to operate as a nonunion workplace, conveyed to the workers that their prior employment with TVS and their union affiliation disqualified them from employment. In 2008, after a lengthy hearing, an administrative law judge found that CNN was a successor to, and joint employer with, TVS. In 2014, the Board agreed and ordered CNN to bargain with the unions and provide back pay. In 2017, the D.C. Circuit adopted the Board majority’s findings and enforced the earlier order that CNN cease and desist from refusing to recognize and bargain with the unions. However, the appeals court remanded the Board’s joint-employer finding for further clarification, along with the issue of back pay for further consideration by the Board. After remand, the parties agreed to resolve their dispute through the Board’s Alternative Dispute Resolution program.

**NLRB: Employer’s obligation to check off union dues ends when CBA expires**

A health care system did not violate Section 8(a)(5) and (1) of the NLRA by ceasing to deduct union dues after collective bargaining agreements at three hospitals expired, ruled the NLRB, noting its recent return to the longstanding rule that an employer’s statutory obligation to check off union dues ends when the CBA containing the provision expires. The employer had no obligation under the NLRA to continue dues checkoffs after collective bargaining agreements expired, and it did not violate the Act by unilaterally ceasing to do so. Moreover, the employer did not act unlawfully when officials at one of its hospitals removed union flyers from a bulletin board that were "critical" of the employer in violation of the parties’ CBA (Valley Health System, LLC dba Desert Springs Hospital and Medical Center, January 30, 2020).

**Withdrawal of recognition.** The Board agreed with an administrative law judge that the employer violated Section 8(a)(5) and (1) by withdrawing recognition because it failed to prove an actual loss of majority support for the union in any of the three bargaining units. In withdrawing recognition, the employer relied in part on unauthenticated email submissions for which it could not show that the purported email submitters actually supported decertifying the union. Without the email submissions, the employer fell well short of establishing a lack of majority support for the union.

**Cessation of dues deductions.** The ALJ had relied on Lincoln Lutheran of Racine to hold that the employer was required to continue to honor dues-checkoff authorizations after expiration of a CBA. However, in December 2019’s Valley Hospital Medical Center, Inc. dba Valley Hospital Medical Center, the Board overruled Lincoln Lutheran and returned to the longstanding rule that an employer’s statutory obligation to check off union dues ends when the CBA containing the provision expires.
NLRB says security company not required to disclose its service contract to union

Overturning an ALJ’s decision, the NLRB held that an employer lawfully refused to furnish a union with a copy of its contract to provide security services to a waste treatment company, finding that the union failed to provide "objective evidence" of the contract’s relevance. Although the Division of Advice had previously opined that the employer’s predecessor was a joint employer with the waste treatment company for which the employer provided contract security services, the contract governed only the relationship between the predecessor and the waste management company. Further, the union’s speculation that the contract might include provisions that affected employees’ terms of employment was insufficient to support "a reasonable belief that the contract actually included such provisions" (G4S Secure Solutions (USA), Inc., January 9, 2020).

NLRB upholds ‘generous settlement offer’ to discharged union supporter despite ‘colorable basis’ for finding it unlawful

In what it called “an unusual case warranting careful scrutiny” of an employer’s actions, the NLRB found that while there appeared to be a least a colorable basis for finding the employer’s settlement offer to an unlawfully discharged union supporter—$214,270, which was more than four times the amount of remedial back pay he had accrued—was an unlawful bribe, there was also an equally colorable argument that it was a bona fide resolution of multiple claims he had asserted against the employer. Considering the evidence against its longstanding policy to encourage the compromise and settlement of unfair labor practice charges, the Board found that “public policy favoring settlements warrants letting the settlement stand”—even though the employee had to waive his right to reinstatement in exchange for the cash payment. Accordingly, the Board, agreeing with an administrative law judge’s conclusion, found the employer did not violate the NLRA when it proffered and entered into the agreement with the employee (Shamrock Foods Co., January 7, 2020).

McDonald’s cases will remain open until ‘new evidence’ issue is resolved

In the latest development of the long-playing McDonald’s saga at the NLRB, an administrative law judge has rejected the General Counsel’s bid to close the books on the cases that were settled by direction of the Board notwithstanding the ALJ’s earlier rejection of the proposed agreements. On January 23, the ALJ ruled that the General Counsel may not withdraw the allegations and answers, effectively closing the cases, until after the motion by the Fast Food Workers Committee and Service Employees International Union to reopen the record and reconsider the latest rulings, including instructions to settle, in light of a newly discovered "supplemental recusal list," has been resolved. The "new evidence" purports to be a newly discovered "supplemental recusal list" for Member Emanuel that included McDonald’s and its franchisees. The list (Exhibit A) purports to have been prepared by the NLRB’s Office of the Executive Secretary, last updated on February 9, 2018.
Earlier, in a 2-1 December 12, 2019, decision, the Board had vacated the ALJ’s order rejecting proposed settlements to resolve unfair labor practice complaints against McDonald’s and 29 franchisees, and instructed her to instead approve the settlements.

THE FEDERAL APPELLATE COURTS

D.C. Circuit: NLRB lacks jurisdiction over adjunct faculty at religiously affiliated university

The religious mission of a Catholic university placed it beyond the jurisdiction of the NLRB, ruled a divided D.C. Circuit. The Board had ordered the university to bargain with a union representing its adjunct faculty. However, the appeals court found that the Board’s 2014 ruling in Pacific Lutheran University runs afoul of its decisions in University of Great Falls v. NLRB and Carroll College v. NLRB. Under the bright-line test announced by the D.C. Circuit in Great Falls, it makes no difference whether or not the adjuncts are faculty members who play a role in Duquesne’s religious educational environment. The test did not permit an examination of the roles played by the faculty members. The Board may not "question[] the sincerity of the school’s public representations about the significance of its religious affiliation" or conduct a "skeptical inquiry" into whether an affiliated church exerts influence over the school. Judge Pillard filed a separate dissenting opinion (Duquesne University of the Holy Spirit v. NLRB, January 28, 2020, Griffith, T.).

2d Circuit: Should Rule 68 offers of judgment in FLSA wage cases get DOL or judicial approval?

The National Employment Law Project (NELP) is weighing in on whether cases brought under the FLSA can be resolved by a Rule 68 offer of judgment without any judicial review or settlement approval, as is typically required in FLSA wage claims. NELP argues that if a Second Circuit panel’s ruling that judicial approval in not required for Rule 68(a) offers of judgment settling FLSA claims, this will become the preferred method for settling, permitting attorneys to make an end-run around the FLSA’s mandatory wage-and-hour protections.

The Second Circuit’s 2015 decision in Cheeks v. Freeport Pancake House, Inc. held that stipulated dismissals settling FLSA claims with prejudice pursuant to Rule 41(a)(1)(A)(ii) require approval of either the district court or the Department of Labor, in explaining that it had to scrutinize the settlement to ensure it was fair and reasonable. But in December 2019, with one judge dissenting, the Second Circuit panel ruled that judicial approval is not required of Rule 68(a) offers of judgment settling FLSA claims. In light of the unambiguously mandatory command of Rule 68(a) for the clerk of the court to enter offers of judgment when they are accepted, and because the appeals court found no indication by Congress or the Supreme Court that the FLSA requires judicial approval of stipulated judgments concerning FLSA claims in the context of ongoing litigation, the appeals court declined to find such a requirement.

Petition for rehearing. Public Citizen Litigation Group has filed a petition seeking rehearing en banc, arguing that the panel’s decision undermines the FLSA’s protections and conflicts with
both Second Circuit and Supreme Court precedent. NELP has filed an amicus brief in support of reversal, citing the importance of judicial or DOL fairness review of wage theft settlements to promote compliance and transparency. The case, Yu v. Hasaki Restaurant, Inc., is No. 17-3388.

**Second Circuit: RN who performed utilization reviews for health insurer was exempt ‘learned professional’ under FLSA**

A registered nurse who worked for Aetna as an appeals nurse consultant, and in that position approved health insurance coverage as medically necessary after reviewing a patient’s file and applying the insurer’s criteria, was properly classified as exempt under the FLSA’s professional exemption. At issue was whether the professional exemption applied to the employee, who acted in a manner consistent with the central characteristics of her profession but did so outside of that profession’s traditional employment setting. Affirming dismissal of her overtime suit on summary judgment, the Second Circuit held that the plaintiff satisfied the “advanced knowledge” prong of the “primary duty test” for the exemption since her position required the discretion and judgment characteristic of registered nursing. She also satisfied the third prong since her primary duty called on advanced nursing knowledge that was at the core of the prolonged course of study that RNs receive before entering their profession (Isett v. Aetna Life Insurance Co., January 14, 2020, Cabranes, J.).

“The ability to make a final decision about patient care under minimal supervision is precisely what distinguishes registered nurses, whose advanced knowledge is obtained in a prolonged course of specialized study, from licensed practical nurses,” the appeals court explained. Moreover, Aetna required nurse consultants to hold an advanced academic degree in registered nursing, and the plaintiff’s primary duty was consistent with this requirement.

**Fifth Circuit: Evidence of tech company’s FLSA audit admissible in misclassification suit**

Affirming a district court’s award in favor of employees of a supply-chain management company, the Fifth Circuit held that the lower court did not abuse its discretion when it found that evidence relating to the employer’s internal audit was admissible under the Federal Rules of Evidence. After conducting the audit, the employer reclassified three employees who were previously FLSA-exempt. Employees who were reclassified after the audit filed suit alleging that their employer violated the FLSA by previously classifying them as overtime-exempt. The trial court’s decision to admit evidence related to the audit was proper because the evidence did not meet the F.R.E. 407 standard for evidence of subsequent remedial measures, and because information about the audit was relevant with respect to the employees’ job duties and the decision to reclassify (Novick v. Shipcom Wireless, Inc., January 7, 2020, Jolly, E.).

**Fifth Circuit: No error in dismissing as a sanction corporate attorney’s Title VII claims**

The court below did not err in dismissing, as a sanction for misconduct, a deputy general counsel’s Title VII claims against her corporate employer, the Fifth Circuit ruled, citing evidence that she brought her claims in bad faith, concealed evidence, and violated her ethical responsibilities as an officer of the court. The district court found a lesser sanction would do “nothing to address the shocking betrayal of ethical responsibilities perpetrated” by the deputy.
general counsel and would be “too minimal to offset such abuse.” Nor did the court err in granting summary judgment on statute of limitations grounds on the company’s counterclaims against her, a law firm it had retained as outside counsel, and a partner from that firm who had assisted the deputy GC in her claims against the company. The appeals court reversed, however, the grant of summary judgment against the company’s claims regarding legal assistance the partner provided to the deputy GC’s coworker and the deputy GC’s alleged misappropriation of confidential client documents (Paine Snider v. L-3 Communications Vertex Aerospace, LLC, December 31, 2019, Owen, P.).

The district court found a lesser sanction would do “nothing to address the shocking betrayal of ethical responsibilities.”

Seventh Circuit adopts new framework to decide whether employees who signed arbitration agreements may get notice of collective action

In a case of first impression, the Seventh Circuit held that a district court may authorize notice of a collective action to individuals who have signed arbitration agreements waiving the right to join such actions, unless no plaintiff contests the existence or validity of the agreements; or, after the court allows discovery, the employer establishes by a preponderance of the evidence the existence of a valid arbitration agreement for each employee it seeks to exclude from receiving notice. A court may not authorize notice of a collective action to individuals shown to have entered mutual arbitration agreements waiving their right to join the action. Moreover, the court must give the employer an opportunity to make that showing. The decision of the district court was vacated and the matter remanded for application of the new standard. On the merits, however, the appeals court affirmed the district court’s denial of summary judgment in this overtime suit against Facebook (Bigger v. Facebook, Inc., January 24, 2020, Kanne, M.).

The new standard is that when an employer opposes notice by asserting that proposed notice recipients have entered into mutual arbitration agreements, the trial court must take specific steps:

- First, the court must determine whether a plaintiff contests the defendant’s assertions about the existence of valid arbitration agreements entered by the proposed notice recipients. If no plaintiff contests those assertions, then the court may not authorize notice to the employees with whom the defendant allegedly entered valid arbitration agreements.

- However, if a plaintiff does contest the defendant’s assertions that a valid arbitration agreement exists, then—before authorizing notice—the court must permit the parties to submit additional evidence on the agreements’ existence and validity.
If the employer shows that an employee has entered into a valid arbitration agreement, the court may not authorize notice to that employee, unless the record reveals that nothing in the agreement would prohibit that employee from participating in the action.

**Ninth Circuit: Walmart’s California truck drivers survive challenge to multi-million-dollar verdict in wage suit**

In a long-running wage suit brought by long-haul truck drivers employed by Walmart, the Ninth Circuit affirmed a district court’s judgment awarding “tens of millions” of dollars of damages in a class action. After affirming that this case presented an Article III case or controversy because two lead plaintiffs remained in the action after a stay was lifted, the appeals court also agreed with partial summary judgment awarding damages to the drivers for layovers, rest breaks, and inspections after the lower court correctly determined that Walmart’s written policies constituted control as a matter of California law. Whether an employee deserves pay in California turns on whether the employer exercised control over the employee, not whether the employee was actively working. The appeals court further affirmed the district court’s ruling denying liquidated damages to the truck drivers, holding that the lower court did not err in finding that Walmart acted in good faith and with a reasonable belief in the legality of its action. Judge O’Scannlain filed a separate opinion concurring in part and dissenting in part (Ridgeway v. Walmart Inc. dba Wal-Mart Transportation LLC, January 6, 2019, Siler, E.).

**FEDERAL LEGISLATION**

**National Defense Authorization Act includes federal ‘ban-the-box’ provisions**

Tucked inside the National Defense Authorization Act (NDAA), signed by President Trump on December 20, is the “Fair Chance to Compete for Jobs Act of 2019,” also known as the “Fair Chance Act”—a federal “ban-the-box” bill. “Fair Chance Act” provisions bar federal agencies and prime federal contractors from requesting criminal history information from job applicants until after a conditional offer of employment, with certain exceptions. The bicameral, bipartisan legislation was introduced in February 2019 by the late Representative Elijah Cummings (D-Md.), Congressman Doug Collins (R-Ga.), and Senators Cory Booker (D-N.J.) and Ron Johnson (R-Wis.).

**Fair Chance Act.** In Title XI,Subtitle B, of the NDAA (S. 1790), the Fair Chance Act prohibits federal agencies and federal contractors from requesting that an applicant for employment disclose criminal history record information before the applicant has received a conditional offer of employment.

Specifically, the Fair Chance Act’s sponsors said that the legislation would:

- Prevent the federal government, including the executive, legislative, and judicial branches, from requesting criminal history information from applicants until they reach the conditional offer stage;
• Prohibit federal contractors from requesting criminal history information from candidates for positions within the scope of federal contracts until the conditional offer stage;

• Include exceptions for positions related to law enforcement and national security duties, requiring access to classified information, and for which access to criminal history information before the conditional offer stage is required by law; and

• Require the Bureau of Justice Statistics, in coordination with the U.S. Census Bureau, to issue a report on the employment statistics of formerly incarcerated individuals.

The prohibition does not apply where consideration of criminal history record information prior to a conditional offer is otherwise required by law. Nor does it apply to:

• A contract requiring an individual hired under the contract to access classified information or to have sensitive law enforcement or national security duties; or

• A position that the Secretary of Defense identifies in regulations pursuant to this subsection.

Bipartisan bill would expand FLSA nursing mother protections to salaried workers

A bipartisan group of senators introduced legislation that would provide salaried employees in traditional office environments—about 13.5 million executive, administrative, and professional women—with reasonable break time and a private place to pump breastmilk. The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act, S. 3170, would expand a 2010 law, authored by Senator Jeff Merkley (D. Oregon) and Representative Carolyn Maloney (D-N.Y.), which provides space and time for hourly employees who are nursing. The legislation would also, for the first time, include an anti-retaliation enforcement provision to grant women whose workplaces flout the law with pathways to fight for fair compensation and enforcement of the law.

The U.S. Breast Feeding Committee (USBC) has explained in a fact sheet that the PUMP for Nursing Mothers Act would strengthen the 2010 Break Time law by:

• Closing the coverage gap. The bill would protect 9 million employees unintentionally excluded from the 2010 Break Time law by extending the law’s protections to cover salaried employees as well as other categories of employees currently exempted from protections, such as teachers.

• Providing employers clarity on when pumping time must be paid and when it may be unpaid. The bill clarifies that, in accordance with existing FLSA regulations, employers are not allowed to deduct pay from a salaried, exempt employee for time spent pumping, and they must pay an hourly employee for any time spent pumping if the employee is also working.
STATE LAW ISSUES

Trucking association gets preliminary injunction barring enforcement of California AB 5

A trucking association obtained a preliminary injunction barring the enforcement of California’s AB 5 against motor carriers and owner-operators in the trucking industry. The federal district court in California concluded that Prong B of the ABC test adopted by AB 5 requires motor carriers to artificially reclassify all independent contractors as employee-drivers for all purposes under the California Labor Code, the Industrial Welfare Commission wage orders, and the Unemployment Insurance Code. While the ABC test does not expressly state that motor carriers cannot contract with independent contractors, Prong B permits motor carriers to contract with independent contractors only if they classify and treat those independent contractors as employees under California law. Ninth Circuit precedent shows the FAAAA likely exempts “all or nothing” state laws like AB 5 that categorically prevent motor carriers from exercising their freedom to choose between independent contractors or employees (California Trucking Association v. Becerra, January 16, 2020, Benitez, R.).

California’s A.B. 51—effectively banning mandatory arbitration in employment—is preliminarily enjoined

Following a hearing on the U.S. Chamber of Commerce’s and other plaintiffs’ motion for a preliminary injunction that would enjoin enforcement of California’s controversial new law that effectively outlaws mandatory arbitration in the employment context, a federal district court in California on January 31 granted the motion in full. A TRO issued on December 29, 2020, was set to expire the same day the judge issued the preliminary injunction. A full written order on the preliminary injunction against A.B. 51 will soon follow. Effective immediately, relevant California state officials are

- Enjoined from enforcing Sections 432.6(a), (b), and (c) of the California Labor Code where the alleged “waiver of any right, forum, or procedure” is the entry into an arbitration agreement covered by the Federal Arbitration Act (FAA); and

- Enjoined from enforcing Section 12953 of the California Government Code where the alleged violation of “Section 432.6 of the Labor Code” is entering into an arbitration agreement covered by the FAA.

TRO previously entered. On December 29, 2019, the court had previously entered a temporary restraining order in the case, finding there were serious questions about whether the new law was preempted by the FAA and that the balance of hardship tipped in the favor of the U.S. Chamber of Commerce and other plaintiffs, particularly in light of the potential for the imposition of criminal penalties. In addition to granting a temporary restraining order, the court at that time had set an expedited hearing on the plaintiffs’ motion for a preliminary injunction for January 10, 2020. On January 10, 2020, the court had ordered the TRO previously imposed to remain in effect until January 31, 2020.
The lawsuit, *Chamber of Commerce of the United States v. Becerra*, was filed in the Eastern District of California; the case is No. 2:19-cv-02456-KJM-DB.

**Minneapolis $15 minimum-wage ordinance upheld by Minnesota Supreme Court**

Because employers will comply with the Minnesota Fair Labor Standards Act (MFLSA) when they comply with Minneapolis’ minimum-wage ordinance, the Minnesota Supreme Court affirmed lower court rulings rejecting a legal challenge to the recently enacted local measure. The MFLSA established a minimum-wage floor for employers, but leaves room for municipalities to regulate above that floor. The state legislation provides that employers “must” pay “at least” the minimum hourly rate required by statute. The use of the phrase “at least” clearly contemplated the possibility of higher hourly rates. Moreover, the state legislature provided no indication that it intended to occupy the field of minimum-wage rates. Therefore, the MFLSA did not preempt the municipal ordinance. Finally, the fact that the ordinance defined employer size based on the number of people an entity employs did not mean it was in conflict with the plain language of the MFLSA, which defines employer size based on the entity’s revenue ([Graco, Inc. v. City of Minneapolis](https://www法学案例库.com), January 22, 2020, Gildea, L.).

**Federal law doesn’t preempt NJ medical marijuana law, so employer must reimburse injured construction worker’s prescription**

In a case of first impression, a federal district court in New Jersey affirmed a workers’ compensation judge’s order for a construction company to reimburse a former employee for his use of medical marijuana prescribed for chronic pain following a disabling work-related accident in 2001, followed by two surgeries that did not relieve his pain, and opioid prescriptions that left him chemically dependent. The former employee was able to stop taking opioids after being prescribed medical marijuana and continues to treat his pain with the prescribed two ounces of medical marijuana per month for which he pays $616 a month out-of-pocket. The court ruled the federal Controlled Substances Act (CSA) did not preempt the New Jersey Compassionate Use Medical Marijuana Act because there was no conflict, as it is possible to comply with both laws. The employer’s reimbursement of a registered patient’s use of medical marijuana does not require the employer to commit offenses prohibited by the CSA ([Hager v. M&K Construction](https://www法学案例库.com), January 13, 2020, Currier, H.).

**MAJOR SETTLEMENTS**

**Facebook settles biometric lawsuit for $550 million**

In a non-employment case with potential ramifications for employment law, Facebook, Inc., has agreed to settle Illinois Biometric Information Privacy Act (BIPA) claims for a record $550 million, which, if approved, will be the largest ever recovery in a privacy case. The settlement, referenced in Facebook’s [annual report filing](https://www.facebook.com), comes one week after the Supreme Court declined to disturb a Ninth Circuit [ruling](https://www.facebook.com) on the issue of standing for the plaintiffs. The settlement agreement, which is subject to approval by the court, is yet another record-breaking deal.
Facebook has entered into based on its treatment of consumers’ privacy. The case is Patel v. Facebook, Inc., No. 3:15-cv-03747-JD.

The potentially huge class action on behalf of millions of Facebook users was seeking tens of billions of dollars in statutory damages for the alleged violation of the BIPA based on Facebook’s use of facial-recognition software to help users "tag" people in photographs. Facebook provided users with notice and the opportunity to opt-out of this feature, but did not provide the required notice or seek the proper kind of consent under the BIPA, the suit alleged. Illinois is the only state that passed a biometric privacy statute that allows consumers to bring claims for damages.

On January 21, the Supreme Court declined to take up Facebook’s appeal of the Ninth Circuit’s ruling, paving the way for the class action to move forward. Following renewed arbitration, the parties reached the settlement announced in January. The court will have to approve the agreement before the proposed $550 million cash fund will be available to Illinois residents for whom Facebook created and stored a face template after June 7, 2011.

**Aramark $21M bonus plan settlement gets preliminary approval**

Uniform company Aramark Corp. will pay up to $21 million to resolve common-law and statutory claims that it refused to pay bonuses due to managerial employees under their standard bonus plan. The class action suit, a consolidation of two separate actions, involves some 4,500 managers, and three subclasses under Illinois, North Carolina, and South Carolina law, which were certified for settlement purposes. A federal court granted preliminary approval to the settlement, which will award class members an average individual payout of $3,243 (and as much as $71,945). Class counsel will move for $5.25 million in fees, or 25 percent of the maximum settlement amount. Aramark "vigorously denies" any wrongdoing (Lacher v. Aramark Corp., January 23, 2020, Padova, J. Jr.).

A class action on behalf of more than 80 current and former students and teaching and research assistants alleged a specific department’s faculty had a virtual "predator’s club"

**Preliminary nod given to Dartmouth students’ $14M sexual harassment settlement under Title IX and state law**

A federal court has preliminarily approved a $14 million settlement to resolve allegations that three tenured Dartmouth College faculty engaged in pervasive sexual harassment, creating a sexually hostile education environment, in violation of Title IX and New Hampshire law. A class action brought by nine students on behalf of more than 80 current and former students and teaching and research assistants, alleged the Department of Psychological and Brain Sciences faculty had a virtual "predator’s club" in which they "leered at, groped, sexted, intoxicated, and
even raped female students" for well over a decade. The plaintiffs asserted that female students’ academic success was tied to their willingness to tolerate unwanted sexual attention, including "unwanted touching and sexual contact," and that one professor publicly ranked which female students he would "bang" based on a "Papi" scale. According to the plaintiffs’ complaint, the professors’ misconduct was well known to college administration since at least 2002. Following a university investigation, all three faculty resigned or retired. In settling the case, the parties announced what they called "a historic partnership seeking to enact meaningful change" at the college. In addition to monetary damages for the class members, the deal provides significant programmatic relief, including $1 million from the college over the next 10 years "to assist in hiring diverse faculty with expertise in gender and racial discrimination and violence," among other initiatives (Rapuano v. Dartmouth College, January 29, 2020, McCafferty, L.).

Final OK given to $35M settlement of Wells Fargo workers’ overtime claims

A class of nonexempt Wells Fargo bank employees will share in a $35 million settlement after a federal court in New Jersey gave final approval to the parties’ deal to resolve their collective and class action overtime claims. In addition to the FLSA collective action, the court certified seven state-specific subclasses of bank tellers alleging that the banking giant also violated state wage laws in Connecticut, Minnesota, Nevada, New Jersey, New York, North Carolina, AND Pennsylvania. The court granted final approval to the $35 million settlement in which Wells Fargo denied having violated state or federal law (Merino v. Wells Fargo & Co., January 15, 2020, Salas, E.).