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CUT AND PASTE POST SEPTEMBER, 2018

LOOKING BACK, LOOKING FORWARD

U. S. Supreme Court Report

This is a good time to get caught up on things that have happened over the summer, and things that are likely to happen in the future. To begin, here is a review of cases that the U.S. Supreme Court decided in 2018 that had employment implications:

- *Encino Motorcars, LLC v. Navarro*: *Encino* shifted the burden of proof in Fair Labor Standards Act (FLSA) overtime exemption cases to the plaintiff, meaning that if employees cannot prove they were misclassified, they will not be entitled to overtime pay.
- *Epic Systems Corp. v. Lewis*: *Epic* held that employers may enforce class action waivers in arbitration agreements rather than being obligated to allow employees to unite in a class action suit.
- *Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission*: *Masterpiece* argued the key civil rights issues of discrimination versus freedom of religion. Although both sides declared a win, the court simply decided that the law is the law and employers cannot deny equal access to goods and services but also religion remains a highly-protected civil right.
- *Janus v. American Federation of State, County, and Municipal Employees*: *Janus* ruled that public sector employees are not required to pay fees to a union they choose not to join, even if they receive the benefits of the union’s negotiations.

It’s also interesting to know what cases the Court declined to hear. These included cases involving tip pooling, Americans with Disabilities leave, age and sexual discrimination, and compensation during rest breaks.

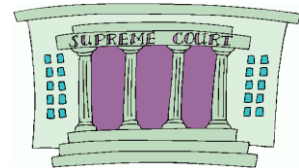
What to Watch for in 2019:

- In general, the Court’s decisions in 2018 tended to favor employers. Assuming Brett Kavanaugh is confirmed to replace Justice Kennedy, the Court will likely continue on the conservative trend.
- The EEOC speculates that cases potentially on the docket for next season could be related to age discrimination, equal pay, sexual orientation, and gender identity. These would appeal the following circuit court decisions:
 - *Rizo v. Yovino*: The Ninth Circuit Court of Appeals held that under the federal Equal Pay Act an employer cannot justify a wage differential between male and female employees by relying on prior salary.

Inside
• U. S. Supreme Court Report
• Preview of Upcoming Montana Legislative Session
• New FMLA Forms
• National Labor Relations Board Issues Memorandum
• New Federal Guidance

- [*EEOC v. R.G. & G.R. Harris Funeral Homes*](#): The Sixth Circuit Court of Appeals ruled that employers may not discriminate against employees because of failure to conform to sex stereotypes, transgender, or transitioning status.
- [*Kleber v. CareFusion Corporation*](#): The Seventh Circuit Court of Appeals found that an outside job applicant can assert a disparate impact claim under the federal Age Discrimination in Employment Act.
- *Zarda v. Altitude Express, Inc.*: The Second Circuit Court of Appeals ruled that Title VII protects employees from discrimination based on sexual orientation. For some reason, this case is not yet available on the net, but here's [a link to a related article](#).

Other cases which may be heard include whether the Federal Arbitration Act applies to independent contractors, whether the Age Discrimination in Employment Act applies to small public employers, and whether a payment an employee receives for time lost from work is subject to employment taxes.



Preview of Upcoming Montana Legislative Session

It's early in the process yet, but here is some information on bills that have been requested that may affect HR. More information will be coming as the bill requests become drafts.

Bill Draft No. (LC No.)	Request Date	Requestor	Status	Status Date	Short Title
LC0005	07/20/2018	Sue Malek (D) SD 46	(C) Draft Request Received	07/20/2018	Generally revise family leave laws
LC0006	07/23/2018	Steve Fitzpatrick (R) SD 10	(C) Draft Request Received	07/23/2018	Generally revise laws related to firefighters
LC0009	07/23/2018	Steve Fitzpatrick (R) SD 10	(C) Draft Request Received	07/23/2018	Generally revise laws related to medical exams
LC0067	07/29/2018	Jim Keane (D) HD 73	(C) Draft Request Received	07/29/2018	Prohibit PowerPoint usage. (This is funny! Legislators hate it presenters read to them from a PowerPoint!)
LC0071	07/29/2018	Jim Keane (D) HD 73	(C) Draft Request Received	07/29/2018	Generally revise state fund laws
LC0098	08/06/2018	Moffie Funk (D) HD 82	(C) Draft Request Received	08/06/2018	Generally revise labor laws
LC0126	07/31/2018	Local Government Interim Committee	(C) Draft Request Received	07/31/2018	Require workers' comp for all volunteer firefighters
LC0191	08/20/2018	Andrea Olsen (D) HD 100	(C) Draft Request Received	08/20/2018	Revoke tax reductions for corporations that reduce employee benefits

New FMLA Forms

The Federal Office of Management and Budget has approved the new FMLA forms, which will be valid through 2021. Here are links to the current forms:

- [WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition](#) (PDF)
- [WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition](#) (PDF)
- [WH-381 Notice of Eligibility and Rights & Responsibilities](#) (PDF)
- [WH-382 Designation Notice](#) (PDF)
- [WH-384 Certification of Qualifying Exigency For Military Family Leave](#) (PDF)
- [WH-385 Certification for Serious Injury or Illness of Covered Servicemember -- for Military Family Leave](#) (PDF)
- [WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave](#) (PDF)

National Labor Relations Board Issues Memorandum

According to an article from ThinkHR, Peter Robb, General Counsel for the National Labor Relations Board (NLRB), issued a [memorandum](#) on June 6th that provides new guidance regarding the legality of personnel policies under the National Labor Relations Act (NLRA).

The memorandum lists: 1) policies which are presumed to be *legal*; 2) policies which are presumed to be *illegal*, and 3) policies which require a *case by case review*. These 3 categories are briefly described below.

1. Policies which are presumed to be Legal:

- Civility rules.
- No photography, no recording.
- Bans on insubordination, non-cooperation, adversely affecting operations. (If the "insubordination" is engaging in protected concerted activity, then the *application* of the rule would violate the NLRA.)
- Bans on disruptive behavior. There may, however, be instances when some of this activity is associated with a strike or walkout and may be protected. And you can't ban strikes or walkouts.
- Policies Protecting confidential and proprietary information, and customer information. This includes prohibitions from releasing confidential employee information obtained from the unauthorized access/use of that, and removing records from the employer's premises.
- Bans on defamation or misrepresentation.
- Bans on unauthorized use of company logo or intellectual property.
- Policies requiring authorization to speak for the employer.
- Bans on disloyalty, nepotism, or self-enrichment.

During the Obama Administration, the NLRB took the position that these policies were always unlawful because they might have a "chilling effect" on employees' exercise of their rights to engage in "protected concerted activity" under Section 7 of the NLRA. The policies listed above are now presumed to be legal as long as they that don't restrict these rights.

2. Policies which are presumed to be Illegal:

- Prohibiting employees from discussing or disclosing information about wages, benefits, or other conditions of employment.
- Prohibiting employees from joining outside organizations or voting on matters concerning the employer.

3. Policies which will be subject to a case-by-case assessment:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union.
- Broad or vague employer confidentiality rules that don't focus on confidential and proprietary, or customer, information and that don't specifically restrict protected activity;
- Rules prohibiting disparagement of the employer, as opposed to disparagement of employees.
- Rules restricting use of the employer's name, rather than just its logo or trademarks.
- Rules that prohibit employees from speaking to the media or third parties at all (as opposed to communications to third parties where the employee purports to represent the employer).
- Bans of off-duty conduct that might harm the employer.
- Rules against making false or inaccurate statements.

New Federal Guidance

OSHA Temporary Bulletins

The Occupational Safety and Health Administration (OSHA) has released new temporary worker bulletins relating to respiratory protection, noise exposure, and hearing conservation:



- [Temporary Worker Initiative Bulletin No. 8 – Respiratory Protection](#)
- [Temporary Worker Initiative Bulletin No. 9 – Noise Exposure and Hearing Conservation](#)

OFCCP Notice to Federal Contractors

On August 24, 2018, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) [released](#) three directives, including new procedures for reviewing contractor compensation practices, a program to verify that contractors are in compliance with federal affirmative action program requirements, and an initiative establishing a recognition program for contractors with high-quality and high-performing compliance programs and initiatives.

Professional Pointer: These directives are designed to insure contractor compliance with federal rules. Federal contractors should take a deep dive into this information.