# Labor & Employment Law Update

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## In This Issue



VedderPrice

# Class Is in Session: Supreme Court to Decide Future of Class Waiver Arbitration Clauses

From *Fortune 500s* to regional warehouses, employers have long relied on arbitration clauses that prohibit class or collective action employment claims ("class claims") in order to minimize legal costs and financial exposure. However, the National Labor Relations Board (NLRB) and a patchwork of court decisions have put those clauses under increasing scrutiny, and in 2017 the Supreme Court will finally decide if such agreements are enforceable. Needless to say, the decision will be crucial for the business community.

For over 20 years, the use of arbitration agreements prohibiting class claims by employees has been on the rise, and for good reason. Faced with potentially costly internal investigations, the prospect of adverse publicity, and the possibility of expensive class litigation and settlements, companies have had strong incentives to consider implementing such waivers in the employment setting. Arbitration clauses that prohibit class claims may offer a safeguard from steady streams of settlement demands, often devoid of any substantive merit but which are nevertheless very costly to defend.

At the heart of the debate is whether class action waivers in arbitration agreements violate Sections 7 and 8 of the National Labor Relations Act (NLRA)

Meanwhile, the NLRB, state courts and federal appellate courts have opined on whether such agreements are legally enforceable, prompting many employers to wonder whether they may end up defending claims in court they previously thought would head to an arbitral forum. At the heart of the debate is whether class action waivers in arbitration agreements violate Sections 7 and 8 of the National Labor Relations Act (NLRA), which dictate that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of guaranteed rights, including the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

This sets up a potential conflict between the NLRA, which the NLRB says protects the filing of class or collective actions in court by employees as a form of "concerted activity," and the Federal Arbitration Act (FAA), which safeguards and encourages arbitrations as a mechanism to resolve disputes in a faster and less costly manner.

## Differing Views in the Courts

In 2011, the Supreme Court offered tacit approval of class action waivers in the context of a mandatory consumer arbitration agreement in *AT&T Mobility LLC v.*

*Concepcion*, 563 U.S. 333 (2011). There, the Court found that a California Supreme Court decision that declared such clauses as unconscionable conflicted with the FAA. Writing for a 5-4 majority, Justice Scalia wrote that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration" under the FAA. In balancing state law and the FAA, the Court gave the FAA the inside track.

Sony, Netflix, eBay, PayPal and StubHub are among the companies that reportedly implemented employment-related arbitration provisions, including class waivers, after the *AT&T* decision.

A number of decisions have since bolstered the *AT&T* decision. In *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013), the Supreme Court held that mandatory class action waivers are enforceable and do not deny a plaintiff any substantive right simply because individual claims are more costly for employees to pursue. More recently, in *DIRECTV, Inc. v. Imburgia*, the Court found that class action waivers contained in mandatory arbitration agreements are enforceable under the FAA and cannot be struck down on state law grounds. No. 14-462, 577 U.S. ___, (2015).

Backed by *AT&T* and subsequent decisions, many employers across the country have created or altered employment arbitration policies modeled on the arbitration/class waiver clauses approved by the Supreme Court. Sony, Netflix, eBay, PayPal and StubHub are among the companies that reportedly implemented employment-related arbitration provisions, including class waivers, after the *AT&T* decision.

The NLRB, meanwhile, has taken the stance that class action waivers violate Sections 7 and 8 of the NLRA, beginning with its seminal 2012 decision in *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184. In *D.R. Horton*, the Board advanced the nuanced argument (which was eventually adopted by the Seventh Circuit) that there is no clash between the NLRA and the FAA, deciding that proceeding collectively in furtherance of employees' wage claims was a substantive right (as opposed to a merely procedural right) that could not be waived in an arbitration agreement. The Board also ruled that since the FAA's savings clause permits the enforcement of only legal arbitration contracts, the employer's unlawful arbitration agreement and class waiver could not be enforceable. The NLRB reached the same conclusion in 2014 in *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, finding again that the right to file or participate in collective proceedings could not be waived.

The NLRB has had mixed results, however, when seeking appellate court approval of the *D.R. Horton* and *Murphy Oil* decisions. The Second, Fifth and Eighth Circuits have rejected the Board's reasoning and currently allow class action waivers in mandatory arbitration agreements. The Ninth Circuit and, recently, the Seventh Circuit have concurred with the Board's position that class action waivers in mandatory arbitration agreements are unenforceable. Of note, the Ninth Circuit has held in two other decisions that a class action waiver is enforceable where the

employee can "opt-out." The NLRB has nevertheless concluded that such "opt-out" agreements still violate the NLRA.

Litigation, therefore, continues at the state and federal levels with various wrinkles, and over a dozen cases on this issue are pending at the NLRB. This growing circuit split and lack of clarity regarding the enforceability of class waivers has provided a clear path to the Supreme Court.

## Where to from Here?

Employers should, therefore, keep a watchful eye on the cases before the Supreme Court.

The Supreme Court has received four petitions for *certiorari* to address these issues. The petitions have been brought from both sides of the circuit split, including one petition from employees, two from employers, and one from the NLRB itself. *See NLRB v. Murphy Oil*, No. 16-307 (petition filed Sept. 9, 2016 by Solicitor General on behalf of NLRB); *Epic Sys. Corp. v. Lewis*, No. 16-285 (petition filed Sept. 2, 2016 by employer); *Ernst & Young U.S. LLP v. Morris*, No. 16-300 (petition filed Sept. 8, 2016 by employer); *Patterson v. Raymours Furniture Co.*, No. 16-388 (petition filed Sept. 22, 2016 by the employees).

On January 13, 2017, the Court consolidated several of these cases and collectively granted *certiorari* to *Murphy Oil, Ernst & Young* and *Epic Systems*. The briefing schedule will likely be extended, based on the number of amicus briefs expected to be filed.

With the issue now on the Supreme Court docket, it appears that the question may be resolved once and for all. However, the Court still stands at eight justices since the passing of Justice Scalia, with the eight justices on record as an even 4-4 split in *AT&T.* With President Trump's nomination of Circuit Court Judge Gorsuch to the Supreme Court there is speculation that Gorsuch will break the 4-4 tie in favor of class action waivers. Moreover, the new administration will have the opportunity to appoint members to fill three vacancies at the NLRB in the coming year, which will presumably lead to the Board changing its position on the matter altogether.

Employers should, therefore, keep a watchful eye on the cases before the Supreme Court. Depending on how the Court rules, employers should be prepared to strike their class waivers entirely from their arbitration agreements or resume using them across-the-board, including in those jurisdictions where the circuit courts currently disallow waivers of class actions.

If you have any questions regarding the topics discussed in this article, contact **J. Kevin Hennessy**, **Joseph K. Mulherin**, **Heather M. Sager**, **Elliot G. Cole**, or any Vedder Price attorney with whom you have worked.


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# Upset about FLSA Retaliation? There's a Remedy for That.

As if employers were not already sufficiently concerned about potential back pay exposure posed by wage and hour lawsuits, a relatively recent appellate court decision now puts emotional distress damages in play when employees bring claims for emotional distress damages in cases involving claims of retaliation. Specifically, the Fifth Circuit held late last year that emotional distress damages are available under the anti-retaliation provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3), exposing employers to heightened penalties for retaliating against employees who bring FLSA claims.

In *Pineda v. JTCH Apartments, L.L.C.*, 843 F.3d 1062 (5th Cir. 2016), Santiago Pineda sought overtime compensation from his employer, JTCH. The parties had an arrangement whereby Pineda performed maintenance work in exchange for discounted rent from JTCH. Three days after Pineda served JTCH with summons, he and his wife received a notice to vacate their apartment for nonpayment of rent. The amount of JTCH's demand was equal to the rent reductions Pineda and his wife had received during his employment. Pineda then amended his complaint to bring an FLSA retaliation claim.

The ruling is significant for employers because it adds another costly component to wage and hour cases, which are already expensive to litigate given their size and remedial scheme.

Prior to trial, Pineda sought a jury instruction for emotional distress damages on his retaliation claim, but the court denied his request. At trial, the jury found for Pineda on both his overtime and retaliation claims and awarded him approximately $5,200 in damages. The court subsequently awarded liquidated damages and attorney's fees to Pineda before both sides appealed.

Addressing Pineda's retaliation claim, the Fifth Circuit reversed and remanded, holding that emotional distress damages are available under the FLSA, and that a jury instruction was warranted in Pineda's case. In reaching its decision, the Court focused on the 1977 amendment to the FLSA, which provided a private cause of action to enforce the FLSA's anti-retaliation provision, and allowed for the recovery of not just wages and liquidated damages, which are available for minimum wage and overtime violations, but also for "such legal or equitable relief as may be appropriate." 29 U.S.C. § 216(b). In analyzing the amendment's "expansive" remedial language, the Fifth Circuit held that it "should be read to include the compensation for emotional distress," which is "typically available for intentional torts like retaliatory discharge." *Id.* at 1064. Moreover, reasoned the Court, a heightened remedy for retaliation laims is consistent with the heightened level of culpability associated with such claims as "an employer can inadvertently pay less

than the law requires" but "it cannot unintentionally retaliate against an employee who complains about it."

In so holding, the Fifth Circuit acknowledged prior precedent, which held that the remedial provisions of the FLSA and the Age Discrimination in Employment Act (ADEA) should be interpreted consistently (because the ADEA expressly incorporates the FLSA's remedies), and that emotional distress damages are not available under the ADEA. *See Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977). The Court, however, concluded that *Dean* was not controlling because it was decided prior to the 1977 amendment, and, unlike the ADEA, the FLSA follows the path of tort law by authorizing employees to file suit directly in court instead of first requiring the exhaustion of administrative remedies. *Pineda*, 843 F.3d at 1066. As such, according to the Court, there is little concern that awarding emotional distress damages under the FLSA would disrupt the dispute resolution procedure followed by the ADEA, as discussed in *Dean*.

Finally, in reviewing the factual record, the Court held that Pineda was entitled to a jury instruction on emotional distress damages for his retaliation claim because he "testified to experiencing marital discord, sleepless nights, and anxiety about where his family would live after JTCH made what the jury found to be a retaliatory demand for back rent." According to the Court, this testimony was sufficient to enable the jury to find that Pineda suffered compensable emotional distress.

The Fifth Circuit joins the Sixth and Seventh Circuits in expressly holding that emotional distress damages are available for FLSA retaliation claims. *See Moore v. Freeman*, 355 F.3d 558 (6th Cir. 2004); *Travis v. Gary Community Mental Health Center, Inc.*, 921 F.2d 108 (7th Cir. 1990). The ruling is significant for employers because it adds another costly component to wage and hour cases, which are already expensive to litigate given their size and remedial scheme. It also introduces additional facts that must be established during discovery, including the plaintiff's mental and emotional health and any medical treatment related thereto. Finally, with the number of retaliation claims on the rise generally, this latest ruling may encourage the plaintiff's bar to pursue FLSA retaliation claims with increased rigor. To that end, employers would be well-advised to ensure that steps are taken to avoid conduct that could be perceived as discouraging employees from engaging in activities—such as seeking wages they believe they are owed—protected by the FLSA.

If you have questions regarding the issues discussed in this article, please contact **Michelle T. Olson**, **Blythe E. Lovinger** or any Vedder Price attorney with whom you have worked.


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# California Corner: Let There Be Rest: California Supreme Court Rejects "On-Duty" or "On-Call" Rest Periods

Over the past several years there has been a good deal of attention paid to meal and rest break obligations under California law. Just when employers thought it was safe to exhale (perhaps during a rest break?), the California Supreme Court's opinion in *Augustus v. ABM Security Services, Inc.*, No. S224853 (Dec. 22, 2016), appears to have imposed a heightened standard for employer compliance in "single operator" workplace environments. Following *Augustus*, employers that require employees to remain on-call during rest breaks (even if they are not interrupted or called back to work) will be deemed as not having afforded those employees a valid break.

## The Decision

In light of the significant impact of the decision, employers should carefully examine their rest period policies and "on-call" practices related to paid or unpaid break time.

The *Augustus* plaintiffs filed a putative class action against ABM on behalf of the Company's security guards, claiming that ABM failed to properly provide rest breaks. Plaintiffs argued that ABM policy required security guards to keep pagers and radios on during rest breaks, respond when necessary (such as escorting tenants to parking lots, notifying building managers of mechanical issues and responding to emergency circumstances), and to remain vigilant. The trial court granted plaintiffs' motion for summary judgment on the underlying issue as well as on damages, awarding approximately $90 million in statutory damages, penalties and interest. After the Court of Appeal reversed, the California Supreme Court granted review to consider the Court of Appeal's decision.

The ABM security guards were governed by IWC Wage Order 4 (which regulates wages, hours and working conditions for professional, technical, clerical, mechanical and similar occupations). This Wage Order applies to a great many categories of employees, so the *Augustus* decision reaches far beyond the security industry. In evaluating the plaintiffs' claims in the context of California Labor Code Section 226.7 (which establishes the meal and rest break rules), the Supreme Court considered two issues: (1) whether California law requires employers to proactively authorize off-duty rest periods; and (2) whether requiring employees to remain on-call satisfies an employer's rest break obligation. As to the first question, the Court held that employers must "permit and authorize" employees to take off-duty rest periods, meaning employees must be relieved of their job duties and the employer must relinquish control over the way employees spend their time during

rest breaks. As to the second issue, the Court held that on-call rest periods do not relieve an employee of job-related duties or employer control. Accordingly, the Supreme Court reversed the decision of the Court of Appeal and agreed with the guards that requiring them to "remain vigilant" did not empower them to take a true rest break.

## How Will This Decision Impact Your Business?

The Supreme Court's ruling is significant for at least three reasons. First, it limits employer flexibility in administering rest periods. *Augustus* likely invalidates many company policies that require employees to maintain possession of company radios or cell phones during rest breaks or to respond to phone calls or e-mails during that time. Second, the number of rest break lawsuits, including class actions, will likely increase. Third, based on the Court's rationale, employees will likely cite the opinion to show a likelihood of success at litigation if they can demonstrate the employer requires them to potentially respond to work-related issues during a rest break. Given the language in *Augustus*, this will be the case even if employees do not actually perform any work-related duties during the majority of their breaks.

## How Can You Manage the Risk and Alleviate the Burden?

Despite imposing stringent requirements, the Court offered three ways to alleviate the burdens of relieving employees of all duties, including on-call duties, as follows:

1. Provide employees with another rest break to replace an interrupted break;
2. Pay the one-hour premium payment required for a noncompliant rest break;
3. Request from the Division of Labor Standards Enforcement that it be exempt from the obligation to provide duty-free rest breaks.

It is worth noting, however, that while the Court offered these alternatives, the opinion also warned that replacing rest breaks and/or paying the penalty should be exceptions rather than a rule, hinting that a suit for failure to comply with the statutory obligations still might lie even where the employer had mitigated all damages by providing new breaks or paying the applicable premiums.

In light of the significant impact of the decision, employers should carefully examine their rest period policies and "on-call" practices related to paid or unpaid break time. Even if a policy is facially compliant with California law, actual practices for administering rest breaks can lead to liability if the employee is not truly afforded the opportunity to be relieved of all work-related obligations.

If you have questions regarding the issues raised in this article, please contact **Brittany A. Sachs** or any Vedder Price attorney with whom you have worked.


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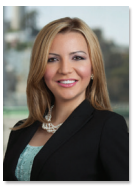

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# New Immigration Regulations Provide Relief to Employers Seeking Green Cards for their Employees

On January 17, 2017, a new Department of Homeland Security rule took effect. "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers" is intended to benefit U.S. employers and affected workers by streamlining sponsorship processes and increasing job "portability" for workers. The new rule affects foreign national workers who are waiting in line to receive their lawful permanent resident ("green card") status and impacts certain employees with temporary status, including H-1B, TN and E visa holders.

An H-1B visa is a temporary nonimmigrant visa that allows the worker to hold a specific job with a specific employer.

## Background

Unless an employee is eligible for green card status in another category (*e.g.*, multinational manager/executive) the employment-based green card process generally follows three steps: (1) an employer conducts recruitment to test the U.S. labor market for the position that is being offered to the foreign national and files the results ("Labor Certification") with the U.S. Department of Labor; (2) if no U.S. worker is qualified, willing or available to fill the position, the employer files an Immigrant Visa ("IV") Petition with the U.S. Citizenship and Immigration Services to reserve the foreign national a spot in line for a green card (the "Priority Date," established by the date of filing with the Department of Labor); and (3) when the foreign national's spot in line comes up, he or she applies for lawful permanent residence. The worker's spot in line is determined by his or her country of nationality and the type of job to be filled. If the position requires an advanced degree, the foreign national is given employment-based second preference standing ("EB-2"); if the position requires a bachelor's degree or entails other skilled labor, the position is given employment-based third preference ("EB-3"). First preference ("EB-1") positions are reserved for multinational managerial executives, outstanding professors and researchers, or individuals considered to have extraordinary ability in their field. EB-1 positions do not require a test of the U.S. labor market.

For individuals from certain countries, particularly China and India, the wait can be very long (several years) before they are eligible to apply for lawful permanent residence. This new rule aims to alleviate some of the pressures created by these long waits by making it easier for individuals in the EB-1, EB-2 and EB-3 lines to change jobs.


# Time to File H-1B Petitions!

Many employers utilize the H-1B (Specialty Occupation) visa category to hire foreign nationals for professional positions requiring a university degree or its equivalent (e.g., engineers, physicians, computer systems professionals, etc.). As many of you know, the number of these visas is limited to 85,000 per fiscal year, with minor exceptions. The first date to file H-1B petitions for Fiscal Year 2018 is April 1, 2017. Because demand exceeds supply for H-1B visa numbers, a lottery is held to select the 85,000 petitions that will be adjudicated. Only cases received the first few days of April are included in the lottery. The process requires that certain documents be certified by the U.S. Department of Labor prior to filing the H-1B petition, so the earlier the process is begun the better. In order to ensure that your organization's petitions can be filed on April 1, employers should begin the process **NOW!**

Many of the individuals waiting for green cards are currently present in the United States pursuant to H-1B visas. An H-1B visa is a temporary nonimmigrant visa that allows the worker to hold a specific job with a specific employer. The job must be a "specialty occupation"; that is, it must require at least a bachelor's degree in a specific field of study. There are a limited number of H-1B visas available each year, and there are many times more applied for than are issued; demand far exceeds supply. However, there are exemptions from the quota for certain educational and nonprofit entities. Further, H-1B visas are valid for only two three-year increments (six years in total) before the employee must leave the United States. This time limit is often insufficient given the long wait times for green cards. The new rule builds upon previous regulations to provide relief in these instances.

## Summary of Major Provisions and Impacts

The new rule makes numerous procedural and substantive changes to the federal regulations. A full copy of the rule can be found at 81 Fed. Reg. 223 82398 (Nov. 18, 2016). Following are the most important changes that affect the employers of EB-1, EB-2, EB-3 and certain other nonimmigrant temporary visa workers.

- Workers who are currently in line for an EB-1, EB-2 or EB-3 green card are allowed to retain their Priority Date if they file for a subsequent EB-1, EB-2 or EB-3 petition with a different employer. Thus, the applicants will not lose their place in line if they switch to another qualifying job.

- Workers with employment-based IV petitions that have been approved for more than 180 days (without obtaining a green card) will no longer have their petitions revoked based only on withdrawal by the petitioner. Previously, an employer that went out of business or terminated an employee for whom it had obtained an employment-based IV petition would file a revocation of that petition, resulting in the employee losing his or her place in the green card line. With this new rule, workers will be able to retain their place in line if and when a new employer files an employment-based IV petition.

- Rules were codified regarding potential extensions beyond the usual six-year limit for H-1B visa holders with approved or in-process IV petitions that are waiting in a long line for their green cards. Thus, workers with approved EB-1, EB-2 or EB-3 petitions may be able to receive extensions in three-year increments, while individuals for whom a Labor Certification or IV petition has merely been filed and pending for 365 days may receive H-1B extensions in

one-year increments. The employer requesting the extension need not be the same employer as the filer of the IV petition.

- Individuals who hold E, H-1B, H-1B1, L-1, O-1 or TN visas will receive a 60-day grace period if their employment ends is ended during the validity period of their status. These workers will now have 60 days to leave the United States or obtain another valid status following the end of their employment, during which they will not accrue unlawful presence.

- For H-1B professions that require a worker to have a state or local license to engage in the occupation, the H-1B visa may be granted for up to one year if the appropriate licensing authority will not grant a license due solely to the employee's lack of a valid Social Security number or employment authorization. Thus, these H-1B visa holders may be granted status and be allowed to work for the employer while waiting to obtain the required license.

- The new rule authorizes automatic extension of a worker's Employment Authorization Document (EAD) for up to 180 days upon filing of an extension application prior to the expiration of the current EAD. The extension must be based on the existing authorization category and cannot require adjudication of another application. Eligible categories include individuals with pending Adjustment of Status (I-485) applications, refugees, asylees, Temporary Protected Status recipients, and individuals with pending I-485 applications. Ineligible categories include H-4 and L-2 beneficiaries.

- The definitions of "institution of higher education" and "related or affiliated nonprofit entity" are codified and clarified to provide better guidance to entities that could qualify for the H-1B quota exemptions.

Thus, the new regulations allow mobility in the labor market for those seeking green cards or currently in the green card process and provide relief to those hindered by the time pressures of long waits. Employees can more freely move between employers, so employers can recruit and retain employees more easily under the new rules.

If you have any questions about these new regulations or any other business immigration or compliance issue, please contact **Gabrielle M. Buckley**, **Ryan M. Helgeson** or any Vedder Price attorney with whom you have worked.


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# Immigration Reminders/Updates

## New Form I-9 Went Into Effect on January 22, 2017

This is a reminder that U.S. Citizenship and Immigration Services (USCIS) released an updated version of Form I-9, Employment Eligibility Verification. The new Form I-9, dated 11/14/2016, became mandatory on January 22, 2017, replacing the version dated March 8, 2013. As you know, pursuant to federal immigration law, employers must maintain a properly completed Form I-9 for all employees hired in the U.S. after November 6, 1986. Employers may access the new Form and its Instructions at: https://www.uscis.gov/sites/default/files/files/form/i-9.pdf. The most important change to the Form is that it can now be completed electronically, which may decrease errors. However, if you use the electronic Form I-9 on the government website, you must still print it out and have it signed by both the employee and employer. The Manual for Employers (M-274) is in the process of being updated, but there are still no changes regarding I-9 Forms for remote workers.

## Immigration-Related Executive Orders

On January 27, 2017, President Donald Trump issued an Executive Order that created substantial changes to the United States' long-standing refugee policy and other certain immigration benefits. It would also suspend the admission of individuals "from" the following countries: Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen for 120 days. A subsequent communication from the Department of Homeland Security clarified that people who hold lawful permanent resident ("green card") status will be readmitted to the U.S. even if they are from one of the seven countries. That means that if you employ someone in temporary status (e.g., H-1B, L-1, E-1/E/2, TN or O-1) and they are from the listed countries, they would have trouble reentering the U.S. if they were out of the country for business, vacation, family matters and the like.

Several federal courts have issued rulings to stay the terms of the Executive Order that would have barred the entry of foreign nationals from these countries even with a valid visa or status as a lawful permanent resident. After a district court judge in the Western District of Washington issued a stay, putting a temporary hold on enforcement of this ban, the Court of Appeals for the 9th Circuit upheld the stay, so this Executive Order is not being enforced as of this writing.

We advise clients that have employees who are nationals of the seven affected countries who are on temporary visas to avoid traveling internationally if possible, as another Executive Order may be issued while they are abroad. However, lawful permanent residents from the affected countries should be able to travel abroad and safely return to the United States. They should expect that it may take longer to clear Customs/Immigration when returning to the United States. We will keep you updated with immigration law changes that affect you and your employees.

# A View From Across the Pond: The Gig Economy and Its Implications for UK Employment Law

If you use a smart phone, you've most likely contributed to the paradigm shift that is taking place as the modern workplace transforms to accommodate the preferences of consumers and those who provide service to them. Whether you prefer Gig Economy, Sharing Economy, Freelance Economy, On-Demand Economy, Networked Economy, Collaborative Economy, Platform Economy or Peer Economy, there is no shortage of terms used to describe the brave new working world in which many employers now find themselves. With traditional roles and responsibilities blurred, the law struggles to keep up as individuals look to earn a living without tying themselves to a specific employer, and businesses look to capitalize on the ever-growing desires of consumers to get what they want, when they want it, simply by tapping a few buttons on their smart phones.

One key question raised by these new atypical working arrangements is whether the way in which a person's entitlement to employment rights is determined by their status (employee, worker or self-employed) is fit for purpose in the Gig Economy.

Such businesses increasingly rely on technology platforms and algorithms to link people to services, and revolve around self-employed people doing "gigs." A "gig" is a short-term, casual piece of work or stint, and is often sought through mobile apps on an "on demand" basis. Consumers can get gig workers to drive them to work, assemble their flat pack furniture, walk their dog, sort out their clutter, deliver their takeaway, produce corporate presentations, write articles and blogs, translate documents, do copywriting…. The list is ever expanding.

The accompanying rise in self-employment is a striking trend, in both the US and the UK, and one that is likely to continue. In the UK, self-employment is at a record level 15% of the workforce. To many of these individuals, the traditional concepts of permanent employment and career progression are completely alien. Instead, these "solopreneurs" are moving towards working from anywhere and portfolio careers.

The Gig Economy offers pros and cons to those working in it. Is it a question of choice or necessity? Security or excitement? Freedom and flexibility or uncertainty and insecurity? Independence or risk? Solopreneurism or self-exploitation? Freedom to create work or a license to exploit?

Certainly, the Gig Economy and its implications for employment law and protections are currently hot topics in the UK.

One key question raised by these new atypical working arrangements is whether the way in which a person's entitlement to employment rights is determined by their

status (employee, worker or self-employed) is fit for purpose in the Gig Economy. Or is it, as some argue, a technicality being exploited to deprive a large group of low-paid individuals of basic statutory rights?

In several closely watched cases, the parties have grappled with such issues, including matters involving Uber and a number of courier companies, with more expected during the course of this year. So far, the Employment Tribunal has found in favor of the individuals, scrutinizing these relationships and stepping in to dismiss claims by the businesses that individuals are self-employed independent contractors and conferring legal rights on them as workers. For some, these cases have served to show that our employment law needs overhauling if it is to remain relevant and workable in the new reality of the Gig Economy.

Focused on these questions, the UK Government recently launched several inquiries to consider how employment practices need to change in order to keep pace with modern business models. The implications for employee rights and responsibilities and employer freedoms will form a large part of these reviews. We await the Government's findings later this year, together with more interesting cases on worker status. Watch this space!

If you have questions regarding the issues in this article, please contact **Jonathan Maude**, **Esther Langdon** or any Vedder Price attorney with whom you have worked.


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## Washington, DC Council Passes Expansive Paid Sick and Family Leave Bill

On December 20, 2016, the DC City Council voted in favor of the Universal Paid Leave Amendment Act ("Paid Leave Act"), a bill granting generous family and medical leave benefits to employees working in the District. If enacted, the bill would be one of the most generous paid family and medical leave programs in the country. Mayor Bowser declined to veto the bill. Congress therefore has 30 legislative days to review the bill before it becomes a law. Rhode Island, New Jersey, California and New York also have adopted paid family and medical leave legislation.

Under the Paid Leave Act, private employers will be required to provide the following categories of paid leave:

- eight weeks of paid time off to new parents,
- six weeks of paid time off to employees caring for sick relatives, and
- two weeks of paid time off for an employee's personal medical leave.

Leave will be funded through a 0.62 percent payroll tax on all private DC employers, regardless of size. Employers who already offer paid leave programs are not exempt from the tax. The payroll tax proceeds will be deposited into a fund run by the District government, which will administer the benefit payments.

To read the above article in full, please go to the Vedder Price website at http://www.vedderprice.com/vedder-thinking/publications/2016/12/dc-city-council-passes.

For additional information or clarification, please contact **Amy L. Bess** (202-312-3361), **Sadina Montani** (202-312-3363), **Margaret G. Inomata** (202-312-3374) or any Vedder Price attorney with whom you have worked.

# Recent Accomplishments

On February 9, 2017, **Ed Jepson** and **Elizabeth Hall** successfully defended The University of Chicago Medical Center against claims of national origin discrimination and retaliation pending since 2012 that were brought by a former surgical resident, winning a favorable jury verdict in federal court on all counts.

**Tom Wilde** won a contract interpretation labor arbitration for a national manufacturing company. The Union had challenged the Company's work assignment practices, but the arbitrator agreed with the Company's arguments and denied the grievance.

# Recent Publications and Presentations

**Sadina Montani** co-hosted a Workforce Management Lecture Series seminar titled, "Managing Pregnancy Issues: Parental Leave, Accommodations and Discrimination Issues," on February 1, 2017 with Tony Hines, an Employee Benefits Specialist with Northwestern Mutual. The seminar addressed issues associated with managing employees' pregnancies, childbirth and adoption, including parental leave, the need to accommodate pregnant employees under state and federal law, managing employee benefits and preventing pregnancy-related discrimination in the workplace.

**J. Kevin Hennessy** made a presentation entitled "Class Action Waivers in Arbitration Agreements: Are They Enforceable?" and presented a paper on the same topic to the ABA Midwinter Meeting of Alternative Dispute Resolution in Labor and Employment Law Committee on January 28, 2017. The paper is titled "The Continuing Debate Over Class Action Waiver Provisions in Employment Arbitration Agreements."

**Margo Wolf O'Donnell** and **Blythe E. Lovinger** presented a CLE program to a client's law department on "Implicit Bias in the Employment Life Cycle: Best Practices and Practical Tips for Recruiting, Hiring, Reviewing and Terminating Employees in a Diverse Workplace" on February 6, 2017. Ms. Wolf O'Donnell and Ms. Lovinger reviewed recent guidance and legal developments and offered practical tips on how to best handle real-life employment situations while fostering diversity and inclusion. Associates **Kimberly R. Greer** and **Margaret G. Inomata** assisted in preparing the presentation.

**Sadina Montani** presented the first webinar in the six-part American Bar Association Mediation Webinar Series "Mediator Selection: A Look Behind the Scenes" on January 17, 2017. Ms. Montani and fellow panelists discussed the real thought process behind choosing a mediator and candidly discussed what factors prompt them to opt for one mediator over others in varying mediation scenarios.

**Margo Wolf O'Donnell** and **Jeanah Park** were panelists at the 2017 Federal Bar Association's Fourth Annual Employment Law Seminar. Ms. O'Donnell's panel focused on the major changes in employment law in 2016 and predictions for 2017. She and her fellow panelists discussed the most impactful case law developments, the most significant legislation and regulations and what the new U.S. administration can and cannot do. Ms. Park moderated the session "Employment Litigation Nuts and Bolts Revisited," which discussed initial settlement demands and new discovery issues in employment litigation and settlement conferences, among other topics.

**Sadina Montani** and fellow panelists discussed the factors involved in mediation for employment cases at the Women's Bar Association's "Let's Make a Deal: Employment Mediations" seminar. This seminar was presented by the Employment Law Forum on January 31, 2017. The panel included discussion regarding the decision to go to mediation, selecting a mediator and the strategies for a successful mediation, among many other mediation-based topics.

**Jonathan Maude** and **Esther Langdon** co-authored an article titled "Employment Alert: Bike Courier is a 'Worker' Says Employment Tribunal" published on January 12, 2017. This article focuses on the United Kingdom's Employment Tribunal's decision to consider employees in atypical work arrangements, such as bike couriers or Uber drivers, as "workers" of such businesses. Mr. Maude and Ms. Langdon point out in their article that the Government has launched an inquiry into the Future World of Work and Rights of Workers and many suggest that a new category of "worker" is needed.

**Amy L. Bess**, **Sadina Montani** and **Margaret G. Inomata** jointly authored an article titled "Washington, DC City Council Passes Expansive Paid Sick and Family Leave Bill" published on December 27, 2016. This article focuses on the DC City Council vote in favor of the Universal Paid Leave Amendment Act, granting generous family and medical leave benefits to employees working in the District. In the article, Ms. Bess, Ms. Montani and Ms. Inomata provide an in-depth explanation of the Paid Leave Act and its requirements for private employers.

**Gabrielle M. Buckley** and **Jonathan Maude** presented a Lorman webinar, "International Employment Assignments: Understanding the Compliance Risks," on December 9, 2016. This webinar helped attorneys and HR professionals gain an understanding of the issues involved in successfully transferring employees to different countries. Among other topics, Ms. Buckley and Mr. Maude discussed the many common themes related to international assignments, terms to include in the assignment agreements, compliance issues, immigration concerns and the laws that apply no matter where the employees are located.

**Gabrielle M. Buckley**, **Sara B. DeBlaze** and **Ryan M. Helgeson** jointly authored an article titled "Vedder Price Business Immigration Update" published on December 27, 2016. This article focuses on 2016 and 2017 legislative updates concerning business immigration, such as the new Form N-400, Form I-9, changes in U.S. government filing fees and other fee increases, and immigration changes under the new administration.

**Kevin P. Connelly** spoke on the topic "Disputes" at the West Government Contracts Year-in-Review Conference that was held February 14–17 in Washington, DC. The conference brought together leading professionals for high-level, expert briefings on the past year's legal developments affecting government contracts. Vedder Price was also a proud sponsor of this year's conference.

## Arrivals and Departures

**Daniel B. Lange** joined the firm in February 2017 as a Shareholder in the Executive Compensation & Employee Benefits group in Chicago. Daniel represents public and private commercial companies, investment funds, ESOP trustees and employees in structuring and implementing executive compensation packages, as well as broad-based equity and incentive compensation arrangements and identifying the related compliance and reporting requirements. He also counsels buyers, sellers, management and lenders on the employment and related tax issues that arise in corporate transactions, such as restructurings, mergers and acquisitions, and transactions involving company stock held by ESOPs.

Previously practicing with Katten Muchin Rosenman and with Dentons, Daniel is a Washington University School of Law graduate and obtained his BA from The Jewish Theological Seminary in New York City.

**Charles B. Wolf** recently retired from the firm after 41 years with the Labor and Employment group in the Chicago office. Chuck focused his practice on labor, employment and employee benefits law and litigation, representing employers and multiemployer funds. He was lead counsel in several well-known employee benefits cases and has handled the labor and benefits aspects of numerous mergers and acquisitions. His clients were engaged in many industries, including transportation, chemicals, food, pharmaceuticals, cosmetics, foundry, construction and heavy equipment manufacturing.

Chuck is co-author of a leading treatise, “ERISA Claims & Litigation,” and is a Senior Editor of the BNA publication *Employee Benefits Law*, created by the ABA Labor Section, Employee Benefits Committee. He was inducted as a Fellow in the American College of Employee Benefits Counsel and continues to serve on its Board of Governors, and will continue to teach Employee Benefits Law at the University of Chicago Law School.

Formerly serving as a member of the firm’s Executive Committee and leader of the firm’s Labor, Employment and Employee Benefits area, Chuck made significant contributions to the firm.

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