

2020 LABOR & EMPLOYMENT LAW DEVELOPMENTS

Amy Beckstead
Beckstead Terry PLLC

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- Financial/KPI Tracking
- Proven Transition Plan
- Customized Solutions
- Transition and Onboarding
- Continuous Improvement

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Amy Beckstead is a partner at Beckstead Terry PLLC. In her practice, Amy assists employers in complying with the multitude of federal and state employment laws and is licensed in both Texas and California. She has guided employers through complicated employment matters, including reclassification of exempt employees to nonexempt positions, Department of Labor investigations and audits, and EEOC on-site investigations. Amy also is a litigator, defending employers in wage and hour class actions, wrongful termination, employment discrimination, retaliation, harassment and other employment-related lawsuits and arbitrations. Prior to forming her own law firm, Amy's past professional experience includes an equity partnership at DLA Piper, one of the world's largest law firms.

Education:

J.D. University of Kansas (graduated at top of the class of 2001), Order of the Coif

Bar Admissions and Affiliations:

State Bar of Texas

State Bar of California

Volunteer Attorney, U.S. Agency for International Development, Kosovo & Bangladesh

Founder, Mother Attorney Mentoring Association Austin

Agenda



- Department of Labor Update, including new FLSA regulations and opinion letters
- NLRB Update
- EEO-1 & W-4 Update
- Status of Paid Sick Leave Laws in Texas and Nationwide
- New Texas Statutes & Regulations for 2020
- “Me Too” Movement Year Three
 - Required Training and Policies and Best Practices
 - Restrictions on Confidentiality in Settlements
- “Ban-the-Box” Law Update
- ADA/FMLA Update
- Multi-State IP/Non-Compete Update, including Texas
- Arbitration Update



U.S. Department Of Labor Update

New Federal Overtime Rules Effective 1/1/20



- Since 2004, salary basis had been \$455/week (\$23,660/year)
- Obama era regulatory changes that substantially increased salary basis test to \$913/week enjoined in 2016 by U.S. District Court Judge in Texas
- On September 24, 2019, the DOL issued new final regulations, increasing salary basis test to \$684/week (\$35,568/year)
- “Highly compensated employee” increase to \$107,432/year (from \$100,000)
- No change in duties test

New Federal Overtime Rules Effective 1/1/20



- Employers allowed to use nondiscretionary bonus and incentive payments (including commissions) to satisfy up to 10% of the standard salary level (\$32,011.20 base salary + \$3,556.80 in nondiscretionary bonuses and incentive payments)
- “Catch up” payment -- if an employee does not earn enough in nondiscretionary bonuses and incentive payments (including commissions) in a 52 week period to retain his/her exempt status, employer may provide a “catch up” payment of up to 10% of the standard salary level at the end of the 52 week period.

New Federal Overtime Rules Effective 1/1/20



- Unlike Obama-era rules, no automatic adjustments to salary threshold
- DOL indicated a willingness to update regulations “more regularly” but will not require it, so that the Department has “flexibility” in making future updates.
- DOL: Estimated 1.3 million workers will now become eligible for overtime
- Irony: decision that enjoined 2016 rules held DOL didn’t have regulatory power to set salary basis test.

New Exclusions from “Regular Rate” Effective 1/15/20



Regular Rate = Basis for Overtime Premium Payment

Under revised regulations, these amounts are now confirmed to be excluded from the “regular rate” calculation:

- **the cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;**
- **payments for unused paid leave, including paid sick leave or paid time off;**
- **reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred “solely” for the employer’s benefit;**
- **the cost of office coffee and snacks to employees as gifts;**

New Exclusions from “Regular Rate” Effective 1/15/20



Regular Rate = Basis for Overtime Premium Payment.

Under revised regulations, these amounts are now confirmed to be excluded from the “regular rate” calculation:

- **reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se “reasonable payments”;**
- **certain sign-on bonuses and certain longevity bonuses;**
- **contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense; and**
- **payments of certain penalties required under state and local scheduling laws (such as legally mandated “reporting,” “call-back,” “closing-then-opening,” and “schedule change” pay.**

New DOL Joint Employer Rules Effective 3/16/2020



- **Adopts “Four Factor Balancing Test”** , examining whether the putative joint employer: (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, but the mere maintenance by one company of employment records of another will not, itself, establish joint-employer status.**
- **To be a joint employer, the second employer must *actually* exercise—directly or indirectly—one or more of the four control factors.**
- **Clarifies that use of franchise model does not mean that a franchisor is more likely to be the joint employer of its franchisee’s employees.**
- **Also clarifies that if a contracting business requires certain terms and conditions relating to the employees of another company (such as requiring that a subcontractor company institute sexual harassment policies) does not increase the likelihood of the contracting company being deemed a joint employer.**

Latest DOL Opinion Letters



A number of new opinion letters issued in 2019 and 2020 including:

- 1/7/20 opinion letter regarding receipt of additional compensation by employee for additional projects not violating salary basis test
- 4/29/19 opinion letter for “gig” economy company – held service providers were independent contractors (but don’t do that in California!)
- 3/14/19 opinion letter pertaining to employer-sponsored community service
- 7/1/19 opinion letter pertaining to paralegals meeting the highly compensated employee exemption
- 7/1/19 opinion letter pertaining to rounding time

State Trend: Minimum Wage Increases



- On January 1, 2020, 20 states increased their minimum wage (some slight, some more extensively)
- 26 other cities and counties increased minimum wage on January 1, 2020 as well
- States are legislating where federal government is unwilling or unable to move, especially with respect to minimum wage



As reported on last year, an employer rule will only violate the NLRA if it would be reasonably interpreted to interfere with workers' NLRA rights considering the balance between (A) the nature and extent of the rule's potential impact on protected rights and (B) the employer's legitimate justifications for the rule.

NLRB Update: But Still Beware of These Policies



- Blanket rules prohibiting employees from making disparaging or negative remarks about the company
- Blanket rules prohibiting employees from criticizing the employer
- Blanket rules prohibiting employees from making false or inaccurate statements
- Blanket rules providing that wages, benefits, or working conditions are confidential or preventing employees from discussing them
- Blanket rules prohibiting employees from joining outside organizations.

Reminder: Section 7 rights apply to non-managerial employees only.

NLRB Update: Notable 2019 Decisions



- *Apogee Retail LLC* – investigative confidentiality rules are lawful so long as they only apply for the duration of the investigation. So, no case-by-case inquiry/determination necessary to determine whether confidentiality can be required in a specific investigation, overturning *Estrella Medical Center* decision.
- *Caesar's Entertainment* – employees do not have a statutory right to use employer IT resources unless the employer's e-mail system furnishes the only reasonable means for employees to communicate with one another, overturning *Purple Communications, Inc.*
- *Wal-Mart Stores* – rule limiting employee's right to wear logos or graphics no larger than size of name badge upheld

Stay Tuned: NLRB to soon issue final rules governing joint employment



- September 2018, NLRB proposed regulation that would clarify separate employers only considered “joint employers” if two employers actually exercise substantial direct and immediate control over the employees’ essential terms and conditions of employment
- Anticipate that final rules should largely track DOL’s final rules
- **Still important to make sure whenever utilizing a staffing company that you contract with established and reputable companies**

EEO-1: What a Mess



- **EEO-1 requirement applies to companies with 100+ employees**
- **Obama era regulations requiring companies to provide extensive compensation data by job category, race, sex, and ethnicity. EEOC originally held it would not require, but a federal judge overruled the EEOC in a lawsuit filed by the National Women's Law Center.**
- **Court ordered EEOC to continue to obtain "Component 2" pay data for 2017 and 2018. Employers that haven't yet complied may submit required information on or before January 31, 2020.**
- **2019 and beyond: EEOC seeking to only obtain Component 1 data (Component 2 data would no longer be required)**



- All employees hired 1/1/2020 and after must use new W-4
- For employees hired before 2020, new W4 does not need to be completed **UNLESS** employee wants to make changes in tax withholding
- Big change: no longer any allowances. Based on answers to questions, employer will determine appropriate deductions
 - *Employees may provide information about multiple jobs or spouse works, claim dependents, and other adjustments.*

Paid Sick Leave Laws: Coming to a Texas City Near You?



Austin's Paid Sick Leave Law: Still Enjoined



San Antonio's Paid Sick Leave: Temporarily Enjoined Nov. 2019



Dallas's Paid Sick Leave: Pending Litigation



Paid Sick Leave Laws: A Nationwide Trend



- **Arizona**
- **California + Several Cities Have Additional Requirements (Berkeley, Emeryville, Long Beach, Los Angeles, Oakland, San Diego, San Francisco, & Santa Monica)**
- **Chicago & Cook County, Illinois (not statewide)**
- **Connecticut**
- **Maryland + Montgomery County**
- **Maine (Effective 1/2/21)**
- **Massachusetts**
- **Michigan**
- **Duluth, St. Paul and Minneapolis, Minnesota (not statewide)**

Paid Sick Leave Laws: A Nationwide Trend



- Nevada (Effective 1/1/20)
- New Jersey (earlier local laws now preempted)
- Bernalillo County, New Mexico (not statewide)
- New York City + Westchester County, NY
- Oregon
- Philadelphia and Pittsburgh, Pennsylvania (not statewide) (Pittsburgh effective 3/15/20)
- Rhode Island
- Vermont
- Washington + City of SeaTac, Seattle, Spokane, & Tacoma
- Washington D.C.

Paid Sick Leave Laws: Accrual vs. Front-Loaded



Most paid sick leave laws allow employers a choice between accrual-based policies and front-loaded policies

- California explicitly allows for unlimited PTO
- Other states haven't explicitly adopted unlimited PTO, but have language that provides "more generous" policies comply

Accrual Pros/Cons:

- Pro: Only accrue based on hours worked
- Con: Can be more administratively burdensome
- Con: Usually has a roll-over requirement

Front-Loaded Pros/Cons:

- Pro: May be easier to administer
- Pro: Usually no roll-over requirement
- Con: All hours front-loaded at beginning of year



Have separate policy for full-time and part-time employees

- **Full-time: tailor existing policies so that they comply with law**
- **Part-time: create new policy that complies with law**

For part-time employees, consider taking highest accrual, highest carry-over, etc. and creating a policy for part-time employees that works for all locations

- **Must decide between accrual vs. front-loaded**

Paid Sick Leave Laws: Tips



Make sure existing policies for full-time employees comply

- **Review policies in handbooks and edit accordingly**
- **Watch carry-over and accruals**
 - *Use-it-or-lose-it policies may not comply with law, even if amount far exceeds annual requirement*
- **Doctor's note at 3 day mark?**
 - *Check handbooks to see when note required*

Most require notices and some require handbook language: read the statutes and design your policies and handbooks accordingly



TWC rule on “Gig Workers”

Under new rule, “marketplace contractors” who provide services for third parties through a “marketplace platform” are not employees for purposes of unemployment provided these conditions are met:

- No specific hours; compensation based on per job basis
- Contractors can work for other platforms & businesses
- Contractor free to decide where/when they work and when contractor accesses platform
- Contractor supplies tools to perform work & pays expenses
- Platform doesn’t require contractor to follow specified instructions to perform services
- Platform doesn’t require contractor to attend mandatory meetings or training

New Texas Statutes & Regulations



Payroll cards now expressly authorized by Texas Labor Code

- **Must be linked to federally insured financial institution**
- **Uses electronic funds to deposit in payroll card account**
- **For current employees, must provide 60 days notice of intent to pay via payroll card account (new hires = first day of employment)**
- **Must notify employee re: adoption of payroll card plan**
- **Provide list of all fees & form for those that opt out**

Right to breastfeed or express breast milk

- **Mother is entitled to breastfeed or express breast milk in any location in which the mother's presence is otherwise ok**

Enhanced jury service protection

- **Employer may not discharge, threaten to discharge, intimidate, or coerce any permanent employee because of current or anticipated jury service**

#MeToo Movement Year Three



Increasingly visible in media and popular culture because of the #MeToo movement



Alyssa Milano

@Alyssa_Milano

Follow

If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."

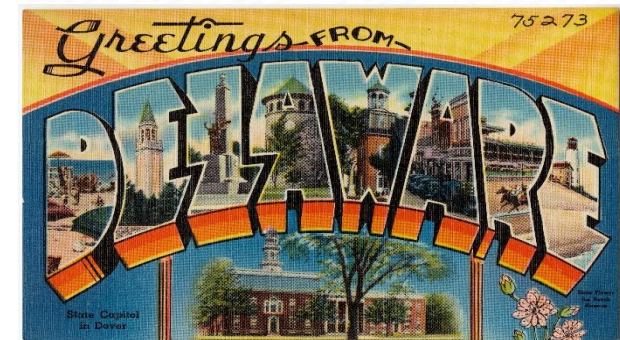
4:21 PM - 15 Oct 2017

Hallmarks of Effective Anti-Harassment Policy



Reminder: some states have special requirements/language that must be included in policies

- New York
- California
- Delaware
- Maine
- Massachusetts
- Vermont

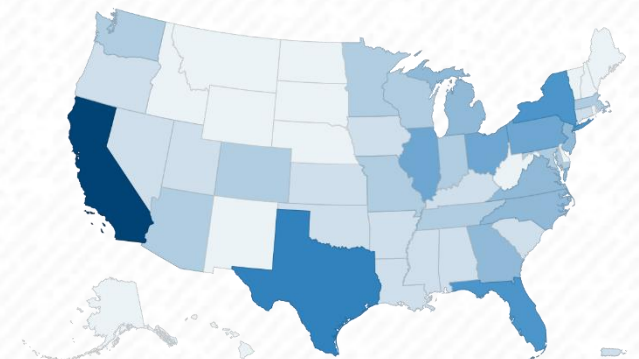


Make Sure Training Complies with State Law



Some states have specific training requirements:

- **California**
 - *Current law = 2 hour training for supervisors, every 2 years; very specific curriculum*
 - *By 1/1/20 = all employees; non-managers must receive 1 hour of training*
- **Delaware (all employees every 2 years)**
- **New York and New York City (all employees annually)**
- **Connecticut (2 hrs of training for supervisors)**
- **Maine (all employees within 1 year of start date)**
- **Illinois (all employees once per year)**





BRACE YOURSELVES



MORE CHANGE IS COMING

quickmeme.com

Confidentiality & Harassment Settlements



- **Tax law change: Section 13307 of the federal Tax Cuts and Job Acts of 2017 provides that no tax deduction is allowed for any settlement related to sex harassment if settlement includes a confidentiality provision**
- **States have passed various laws restricting disclosures pertaining to harassment and discrimination**
 - *Arizona*
 - *California*
 - *Illinois*
 - *Maryland*
 - *New Jersey*
 - *New York*
 - *Oregon*
 - *Vermont*
 - *Virginia*
 - *Washington*
 - *More to come*



Ensure Compliance with State Laws in Separation Agreements



If settling a sex harassment or discrimination claim, carefully review and comply with applicable state law.

- *Example: In New York, employee must agree to non-disclosure, be given 21 days to consider whether to include (non-waivable) & 7 day revocation period.*

TIP: Consider including language in standard release agreements, if appropriate.

“Employee hereby acknowledges and agrees that as of the Separation Date, Employee has not made, and does not have, any harassment, discrimination, or retaliation claims, or any claims for which the factual foundation involves harassment, discrimination, or retaliation against Company or any of the Released Parties.”

“Ban the Box”: State Trend



- “Ban the Box” = laws restricting employers from inquiring about an applicant’s criminal background at various stages of the hiring process
- Laws typically require no inquiry be made on employment application about criminal history – that inquiry may only be made after extending conditional offer of employment
- Such laws often also require employers to make decisions based on a particularized review and require certain notices to employees be provided, in addition to any federal FCRA notice

“Ban the Box”: State Trend



- States with various “Ban-the-Box” laws include: California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, and Washington
- Cities and counties with “Ban-the-Box” laws include: DC, Baltimore, MD, Montgomery County, MD, Prince George County, MD, Columbia, MO, Kansas City, MO, Buffalo, NY, NYC, Rochester, NY, Westchester County, NY, Philadelphia, PA, and Austin, TX
- More are added every year

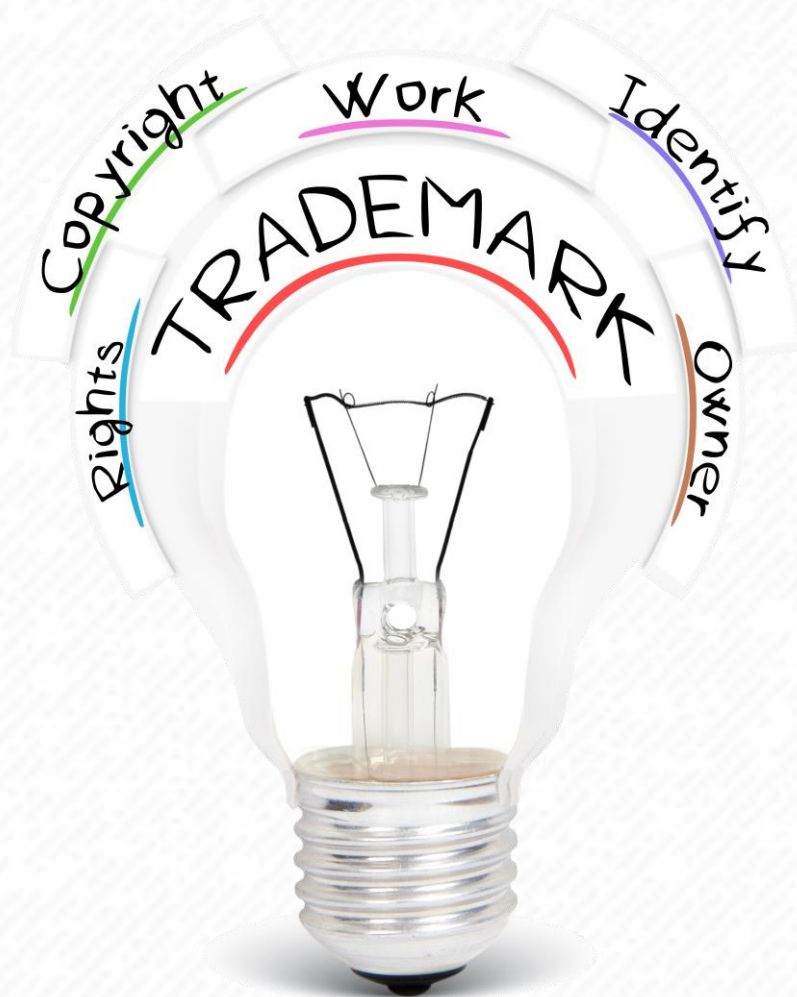
TIP: Train hiring managers about these laws and ensure compliance in employment applications.



- 2019 DOL Opinion letter – employees cannot decline FMLA leave or force employers to classify FMLA qualifying leave as another form of leave
- Indefinite/long-term leaves of absence = undue hardship?
- Reminder: “regarded as” disabled can be basis for disability discrimination. In *Shell v. Burlington Northern Santa Fe Railroad Company*, court held that employer could regard an employee as disabled based on perceived health complications associated with obesity

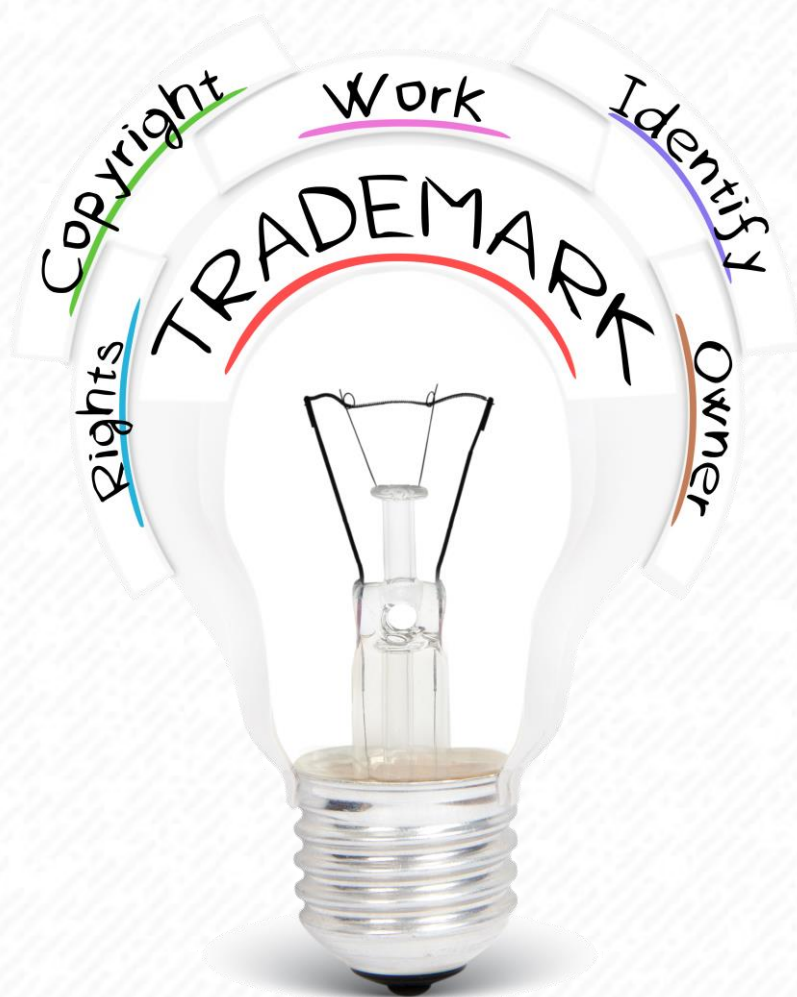
Takeaways: continue to assess accommodation requests on a case-by-case basis.

Multi-State Update on Employee IP and Non-Compete Matters



- **Reminder: states with invention assignment notice requirements include California, Delaware, Illinois, Kansas, Minnesota, North Carolina, Utah, and Washington.**
- **Is reference to Defend Trade Secrets Act notice included in proprietary rights agreement?**
 - *If not, lose ability to pursue punitive damages and attorneys' fees under federal DTSA*

Multi-State Update on Employee IP and Non-Compete Matters



Significant non-compete and non-solicitation law changes:

- **Illinois (2016)** – no non-compete permitted with “low wage earners” (less than \$13/hr)
- **Nevada (2017)**
 - *Former employee allowed to continue servicing client if employee didn't solicit client and client wishes to follow employee*
 - *If terminated due to RIF or restructuring, non-compete only enforceable during severance period*
- **California (2018) non-competes are void and unenforceable, but now employee non-solicitation agreements viewed as void, too**
- **Massachusetts (2018)**
 - *Must pay employee for non-compete period*
 - *Can't exceed 12 months, can't be with non-exempt ee*

Multi-State Update on Employee IP and Non-Compete Matters



Significant non-compete and non-solicitation law changes:

- New Hampshire (2019) – no non-compete with person that earns less than 200% of federal minimum wage rate
- Maine (2019) – no non-compete with person that earns less than 400% of the federal poverty level (“FPL”)
- Maryland (2019) – no non-compete with employee that earns less than \$15/hr or \$31,200 annually
- Rhode Island (2020) – Unenforceable against any non-exempt employee or someone making less than 250% of the FPL
- Washington (2020) – non-compete unenforceable against person that makes less than \$100,000/year; may not exceed 18 months duration
- Oregon (2020) – must provide employees with signed, written copy of non-compete agreement’s terms within 30 days after termination of employment

And What About Texas?



- **General rule: narrowly-tailored non-compete and non-solicitation provisions are enforceable in Texas if supported by adequate consideration.**
- **Don't be greedy: if provision must be modified/narrowed, company loses the right to pursue damages against employee related to breach**

Arbitration Agreements and Class Action Waivers



- **Pros and Cons of arbitration agreements**
 - *Pro: typically decreases settlement value of potential claim – no risk of runaway jury*
 - *Con: employer pays cost, limited appellate review*
- **U.S. Supreme Court held in *Epic Systems* that employers may utilize class action waivers in arbitration agreements**
 - *This is a powerful tool to help ward against the risk of class actions*
 - *State laws against arbitration agreements being struck down by courts*



Protests Against Arbitration Provisions?



BUSINESS
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Google is ditching its mandatory-arbitration policy after mass protest

Nick Bastone Feb 22, 2019, 12:39 AM



Troy Wolverton/Business Insider



The Washington Post

Democracy Dies in Darkness

On Leadership | Analysis

Google and Facebook ended forced arbitration for sexual harassment claims. Why more companies could follow.

By Jena McGregor

November 12, 2018 at 4:42 PM





Questions?

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