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Dangerous Curves: Navigating New Employment Law Issues

Summary/Description:
Dangerous Curves may have been the concern in years past as employers tried to educate employees on harassment in the workplace. Now with all the changed landscape and protected classes, there are new elements to consider. We will discuss some of the more recent allegations of sexual harassment and recent court cases, discuss the fast-developing arena of marijuana in the workplace, accessibility of technology and websites for disabled individuals and changes to Wage & Hour. Other trends will be discussed including, the implications of the upcoming Supreme Court case on class action waivers, ADA demand letters and the changing definition of retaliation. The session will cover recent developments and what lies on the horizon for the EPL market in legal battles, coverage availability and emerging issues.

Presenters:
Regan E. Katz, Wortham Insurance & Risk Management
Carrie Kurzon, Hartford Financial Products
Nichole Thompson, Travelers Insurance
Tracy Wolf, Lewis Brisbois

Target Audience:
Insurance professionals
Legal professionals

Risk Managers, Claims Professionals, and attorneys providing employment consulting and defense.

Course Length: 60 Minutes

The Current Environment & What is on the Horizon:

I. The Current Environment (5 mins)
   i. **EEOC issues "Fact Sheet on Bathroom Access Rights for Transgender Employees under Title VII"**: The Commission's statement reaffirms their

interpretation that Title VII protects against employment discrimination on the basis of gender identity and outlines 2015 holding in *Lusardi v. Department of the Army*[1] that transgender employees must be provided equal access to common bathroom corresponding to the employee's gender identity, allowing the transgender employee access to a single-user bathroom is insufficient, and that access cannot be conditioned on the employee undergoing or providing proof of any surgical or other medical procedure.

ii. **Department of Labor issues a final rule updating interpretation sex discrimination for federal contractors**: the regulation prohibits discrimination in application for contracts, as well as in the terms and conditions in employment for contractors and subcontractors, on the basis of sex, which the rule expressly defines to include gender identity and transgender status.

iii. **Department of Justice seeks injunction of North Carolina House Bill 2:** Agency claimed that implementation of legislation regulating the use of public bathrooms and changing areas based on the gender an individual was assigned at birth was unlawful sex discrimination as it would prohibit transgender individuals from using facilities consistent with their gender identity. A preliminary injunction was granted solely as to enforcement in the State's university system. The plaintiffs have appealed to the Circuit Court for expansion of the injunction while both sides have sought to stay any decision on the merits of the case until after the Supreme Court rules on *G.G. ex rel. Grimm v. Gloucester County School Board*.

II. Wage & Hour Discussion (10 mins)
   a. Environment- legally, politically
      i. Litigation: Darden, Chipotle, Ruby Tuesday
      ii. While Wage and Hour claims touch all industries, Services and Retail & Wholesale dominate the landscape:
         1. 30% - Services
         2. 23% - Retail & Wholesale
         3. 13% - Transportation & Real Estate
         4. 9% - Mining and Construction
         5. 9% - Manufacturing

         Top 10 states for Wage and Hour include: California, Florida, Mississippi, Louisiana, West Virginia, Texas, Nevada, New York, Arkansas, Hawaii
      iii. One hundred and ninety-five wage and hour class actions were allowed to proceed in 2016, compared to 175 certifications in 2015. Wage and hour cases were certified at a higher rate than any other employment class action type in 2016.
         1. Although the number of wage and hour cases filed in 2016 decreased for the first time in more than a decade, the value of the top ten wage

[1] EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015)

and hour lawsuits increased significantly, to $695.5 million—nearly quadrupling in value compared to 2014.

2. The top two wage and hour settlements of 2016—both involving FedEx—were valued at $240 million and $226 million. Both cases settled claims that FedEx employees had been misclassified as independent contractors.
3. Wage and hour litigation is expected to continue its overall growth in 2017 and beyond based on new federal overtime regulations, local minimum wage laws, independent contractor misclassification lawsuits, and increased public awareness of employees' rights.

iv. Retail/Restaurant/Hospitality Examples

1. FedEx

b. Overtime Rules

$240,000,000: Settlement **FedEx Ground Package System Inc.** June 2016	The settlement resolved class actions by roughly 12,000 delivery drivers in 20 states who alleged they were misclassified as independent contractors, and that the company improperly deducted business expenses from their pay.
$226,500,000: Settlement **FedEx Ground Package System Inc.** June 2015	A class of 2,016 drivers filed suit alleging that FedEx Ground misclassified the drivers as independent contractors. The average payout per class member was expected to be more than $100,000.
$60,800,000: Verdict **Wal-Mart Stores Inc.** November 2016 Federal Court: CA	A certified class of 839 truckers alleged they were not paid for work-related on-duty tasks, such as pre-and post-trip inspections. They also alleged they were not given rest breaks required by law or paid properly for time spent on federally mandated 10-hour layover breaks, during which they had to stay
$41,000,000: Settlement **RS Legacy Corp. (RadioShack)** August 2016 Federal Courts: NY and OH	The liquidating trustee overseeing the bankruptcy estate of the electronics retailer agreed to settle a pair of class action suits relating to miscalculation of overtime for more than 7,500 store managers.

$19,100,000: Settlement **TGI Friday's and Carlson Restaurants, Inc.** September 2017	A putative class action involving 28,800 tipped workers in nine states alleged violations of multiple state and federal wage statutes. The workers alleged the owners took a "tip credit" from their paychecks, paid them a reduced minimum wage, failed to pay them all owed overtime and uniform-related expenses, misappropriated tips, and took unlawful deductions for customer walkouts.
$15,000,000: Settlement **RCI Entertainment & Peregrine** March 2015	A class of 2,000 former exotic dancers brought action against their employer, Rick's Cabaret, a subsidiary of the named companies, alleging they were misclassified as independent contractors and not paid minimum wages. In November 2014, the judge awarded the dancers nearly $11 million. The company settled ahead of an April 2015 trial over further amounts the dancers sought.
$15,000,000: Settlement Verizon California, Inc. October 2014 State Court: CA	A class of approximately 6,800 employees filed suit alleging the company issued roughly 223,000 inaccurate wage statements that excluded crucial information that made it impossible for employees to determine whether or not they had been properly paid.
$12,000,000: Settlement Victoria's Secret Stores LLC June 2017 Federal Court: CA	A class of approximately 40,000 employees alleged the company did not properly pay them for shifts in which they had to call work two hours before a scheduled time to find out whether they would be needed that day. They also alleged that the company owed its workers unpaid wages for scheduling shifts that resulted in them being sent home after they showed up. Since the suit's filing, many retailers including Victoria's Secret have changed policies that require workers to block off time for a shift they may not even work. UPDATE: Settlement preliminarily approved in August 2017
$10,000,000: Settlement Dick's Sporting Goods, Inc. December 2015 Federal Court: MA	A collective action and a proposed class action of 2,200 assistant store managers alleged that they were misclassified as exempt from overtime, regularly required to work more than 40 hours per week, and that the work they performed included no actual managerial responsibilities.
$9,500,000: Settlement Lowe's Home Centers, Inc. August 2014 Federal Court: FL	A suit commenced in August 2012 on behalf of a class of human resource managers, alleging the company misclassified them as exempt from overtime pay requirements, although their duties included menial tasks such as operating cash registers, cleaning bathrooms, greeting customers and sweeping floors. In April 2014, a Florida federal judge dismissed the ERISA components of the case, finding that the company's failure to compensate the employees for overtime was an employment decision, not an ERISA plan decision.

$9,250,000: Settlement **Alorica, Inc.** May 2016 Federal Court: CA	1,175 San Diego-area pharmacists claimed they were forced to remain on call in the pharmacy during their breaks and pressured to work overtime without pay.
$9,000,000: Settlement **Costco Wholesale Corp** June 2017 Federal Court:CA	Approximately 83,000 current and former nonexempt employees who worked at T.J. Maxx, Marshalls or HomeGoods retail stores alleged the company failed to pay overtime and minimum wage and failed to provide meal and rest breaks.

c. Change is on the Horizon

III. State Judicial Activism (10 mins)

The Takeaway—continued uncertainty in this arena. Increased state activism which will lead to inconsistent rules and regulations and additional confusion for large companies.

a. Medical Marijuana
   i. *Noffsinger v. SSC Niantic Operating,* No. 3:16-CV-01938(JAM), 2017 WL 3401260 (D. Conn. Aug. 8, 2017)
   ii. *Callaghan v. Darlington Fabrics*, No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017)
   iii. *Barbuto v. Advantage Sales & Marketing,* 477 Mass. 456, 78 N.E.3d 37 (2017),

b. **Position of the Trump Administration on Medical Marijuana:** Jeff Sessions, Attorney General under the Trump administration, has said he will enforce federal laws that prohibit all use of marijuana, despite legalization by a number of states for medical or recreational use. Currently, 28 states have legalized medical marijuana use and eight states have passed laws legalizing recreational marijuana. Federal law, however, still classifies marijuana as a Schedule I illegal substance, along with heroin, LSD and ecstasy. Sessions has also indicated, however, that the DOJ does not have the resources to enforce federal prohibition across the country.

c. Employers in Connecticut and elsewhere may want to review their drug policies in light of this decision and to address the quickly-changing landscape of medical marijuana in the workplace—especially relating to pre-employment drug testing. *Noffsinger* takes aim at blanket policies by employers that deny or terminate employment for a positive drug test for marijuana. This case may be of particular interest to employers in other states with laws that, similar to Connecticut, contain express anti-discrimination protections for medical marijuana users, namely Arizona, Delaware, Illinois, Maine, Nevada, New York, Minnesota, and Rhode Island.

d. Connecticut law allows the use of marijuana by qualified patients for medicinal purposes and expressly prohibits employers from taking adverse employment actions because of an individual's status as a qualified medical marijuana user. Federal law classifies marijuana as an illegal controlled substance and categorically prohibits the use of marijuana for any purpose. For employers in Connecticut with pre-hire drug testing requirements and policies on illegal drug use, this conflict has led to a cloudy

haze as to what actions may be taken if a registered medical marijuana user fails an employment-related drug test.

e. In the first case to squarely address this conundrum in Connecticut, *Noffsinger v. SSC Niantic Operating Company, LLC*, No. 3:16-cv-01938 (August 8, 2017), a federal district court judge found that there is no conflict between federal and Connecticut marijuana regulation and held that federal law does not preempt Connecticut law. Accordingly, a cause of action may be maintained under Connecticut's medical marijuana law for firing or refusing to hire a user of medical marijuana, even where the individual has failed a drug test.

f. The Trend of State-By-State Legalization Continues

   i. Beginning with California in 1996, states bean to legalize marijuana for medical as well as recreation uses. By the end of 2017, at least 28 states will have legalized medical marijuana and eight states – Alaska, Colorado, Oregon, Washington, California, Nevada, Massachusetts and Maine – as well as the District of Columbia, will allow for recreational marijuana usage. In November 2016, Pennsylvania, Ohio, North Dakota, Florida and Arkansas voted to legalize medical marijuana. Massachusetts, Maine, Nevada and California voted to legalize recreational marijuana. Each state has taken its own approach to regulating the issue of marijuana in the workplace and the substance remains criminalized under federal law.

   ii. The position of the federal government remains an open question. In October 2009, the Department of Justice issued the "Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana," commonly referred to as the "Ogden Memo," stating the agency's intention to deprioritize drug prosecutions against individuals who were "in clear and unambiguous" compliance with their state's medical marijuana laws. In May 2011, letters were sent to states that legalized marijuana, threatening to prosecute those who implemented cultivation and distribution programs. In April 2016, however, the DEA announced in a letter to lawmakers that it planned to decide in the next several months whether to change the federal status of marijuana from its current classification as a Schedule I drug, though it has announced its decision will likely be delayed until 2017. Whether the new Attorney General and the DOJ will chose to resume individual prosecutions is unclear.

g. Survey of State-Specific Issues:

1. **Anti-Discrimination** – Some states have included specific anti-discrimination provisions in their respective medical marijuana laws, which generally involve: (1) protections based upon cardholder status alone (e.g., CT, IL, ME, RI and PA) and (2) dual protection for card holder status and a failed drug screen (e.g., AZ, DE and MN). Most states with anti-discrimination provisions include a caveat if complying with the state law would violate federal law or cause any employer to loss federal funding.

2. **Reasonable Accommodations –** Both Nevada's and New York's statutes include provisions that require employers, in certain instances, to provide a reasonable accommodation to employees covered by the

Acts. Rhode Island's law explicitly states that nothing in the statute should be construed to require that an "employer accommodate the medical use of marijuana in any workplace."

3. **Drug Screening Tests –** In Arizona, Connecticut, Delaware and Minnesota employers cannot take action based solely on a failed drug test in non-safety sensitive positions, particularly if employee holds valid medical marijuana card. However, California, Missouri, Oregon and Washington all allow employers to implement zero tolerance policies regardless of legality of marijuana use under state law.

4. **Use can be prohibited during working hours and for specific purposes** – No state laws currently require employers to permit drug use in the workplace or to tolerate employees who report to work under the influence. Employers may discipline, including up to termination, on-duty intoxication and do not have to provide reasonable accommodation to allow for on-duty use. Many states also prohibit using medical marijuana on a school bus, on the grounds of a school, in a correctional facility, or in any motor vehicle. Profession-specific restrictions are also common, especially if the use could possibly result in injury to others. For example, Arizona, Delaware, Maine, and Rhode Island prohibit any person from using medical marijuana if the undertaking of any task under the influence would constitute negligence or professional malpractice. Maine also includes the prohibition if the undertaking of any task under the influence would violate any "professional standard."

h. Americans with Disability Act (ADA) Cases

i. Background on Web Accessibility under the ADA.

Under the ADA, most businesses that provide goods or services to the public are required to be as accessible to persons with disabilities as they are to those without. Historically, Title III has been applied to require businesses to provide equal access to stores, restaurants, and other physical spaces. As our society has increasingly moved into the virtual world for just about every task in our daily lives, there has been a growing debate about whether the ADA also applies to our virtual stores, supermarkets, libraries, movies theaters, and other online businesses and websites. Enacted in 1990, the ADA was not drafted with the Internet in mind, and Congress has not amended the ADA to modernize it in that respect. However, a trend of private lawsuits and enforcement actions by the DOJ has developed in recent years claiming that websites, apps and other technology (*e.g.*, touchscreen appliances, smartphones, ATMs, etc.) fail to accommodate individual users with disabilities.

ii. Recent Developments.

1. March 2017, a District Court for the Central District of California granted another motion to dismiss a Title III web-accessibility case. The plaintiff in Robles v. Dominos Pizza LLC, CV 16-6599 (C.D. CA Mar. 20, 2017) claimed that Domino's Pizza's website was not compatible with his

"screen-reading software program," and, as a result, he was unable to use the website to have a pizza delivered to his home. For purposes of deciding the motion, the Court conceded that Title III may be applicable to websites operated by places of public accommodation. The Court then engaged in an analysis of the government's historical approach to regulating the "accessibility" of websites. The Court focused particularly on a Department of Justice "Advance Notice of Proposed Rulemaking" issued in 2010, in which the DOJ announced it was considering whether to promulgate proposed regulations for web-accessibility. The court lamented that nearly seven years had passed since the DOJ's first announcement – in which time the DOJ had rescinded and re-noticed its intent to one day draft regulations – and there was still no clarity for the public as to whether and to what extent private, commercial websites were subject to Title III. The court found that applying the so-called "Web Content Accessibility Guidelines 2.0," ("WCAG 2.0 Recommendations") promulgated by the "Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C)," a private advocacy group, to determine whether Domino's website was subject to legal liability would be a violation of the defendant's due process rights. The Court then invoked the judicial doctrine of "primary jurisdiction" – which holds that where a given issue is committed to the regulatory expertise of an agency, a court should decline to interfere with that agency's authority – and dismissed the lawsuit. Id. at *25 ("Regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III. Moreover, the Court finds the issue of web accessibility obligations to require both expertise and uniformity in administration, as demonstrated by the DOJ's multi-year campaign to issue a final rule on this subject.").

2. In Gil v. Winn Dixie Stores, Inc., No. 16-23020-Civ, 2017 U.S. Dist. LEXIS 90204 (S.D. Fla. June 12, 2017) the District Court for the Southern District of Florida (the same jurisdiction as the Bang & Olufsen case) found a sufficient nexus existed between the physical Winn Dixie grocery store locations and the Winn Dixie website, which contained a "store locator" and offered web-only coupons, for Title III's requirement of full and equal access applied to the website. The Court determined that the website was not accessible to blind users, in violation of the ADA. In fashioning remedial relief, the Court ordered Winn Dixie to conform its website to the WCAG 2.0 standards. While other courts had endorsed settlement agreements or consent decrees adopting WCAG 2.0, this marked the first time a court affirmatively decided that WCAG 2.0 was an appropriate measure of "accessibility" for websites under the ADA.

iii. Andrews v. Blick Art Materials, No. 17-cv-767, 2017 U.S. Dist. LEXIS 138880 (E.D.N.Y. August 1, 2017). The Court specifically found that there is a "substantive right to obtain access to [defendant's] website to make purchases, learn about products, and enjoy the other goods, services, accommodations, and privileges the defendant's website provides to the general public," regardless of the website's nexus to a physical location. The Court found it was fully competent to analyze the text of the ADA and its regulations to determine whether and to what extent the defendant needed to comply with Title III. The Court also found that there was nothing unconstitutional about ordering a defendant to make "reasonable modifications" and that the determination of what is reasonable is a fact-specific inquiry to be resolved at summary judgment or trial. The decision does not reference WCAG 2.0 by name, although the parties cited it in the pleadings and papers.

i. Ban the Box (Banning Salary Inquiries)
    i. The Salary Ban--
        1. Governor of CA just signed law last week (effective 1/1/18) banning salary history inquiries. This is another example of CA tackling pay equity through local legislation. This is also an area where a national company could be inadvertently violating state law if they have one application that is used nationwide which asks about prior salary.
        2. Other states/cities that have already enacted restrictions or bans on employers asking about salary history: Delaware, Massachusetts, New York, Puerto Rico, and Oregon. Cities-New York City, Philadelphia, and San Francisco.
    ii. Criminal history—
        1. "ban the box"- Legislation enacted at state and local levels
        2. States: Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Washington D.C., Connecticut, Vermont
        3. Localities: Austin, Baltimore, Buffalo, Chicago, Columbia, MD, Montgomery County, MD, Newark, NYC, Philadelphia, Portland, Prince George's County, MD, Rochester, San Francisco, Seattle, Los Angeles, Cook County, IL
        4. Each law has its own requirements. Focal point is WHEN an inquiry into criminal history can be made … after initial interview, after conditional offer, after written conditional offer? General gist is to postpone the inquiry until later in the hiring process.
        5. Challenge for employers. May require compliance with multiple local requirements. Even sophisticated employers can get snagged.

j. Equal Pay

On August 29th, 2017, the Office of Management and Budget (OMB) informed the Equal Employment Opportunity Commission (EEOC), that it is initiating a review and immediate stay of the effectiveness of **the pay data collection aspects** of the EEO-1 form that was revised on September 29, 2016, in accordance with its authority under the Paperwork Reduction Act (PRA).

    i. The revised form **would have** required employers and federal contractors with 100 or more employees to begin submitting summary pay data based

on W-2 wage information for the 2017 calendar year on March 31, 2018. It created new requirements to submit summary compensation data categorized by gender, race and ethnicity, including a requirement to report hours worked by employees in 10 job categories divided by 12 pay bands per category. The 12 pay bands ranged from the lowest band of $19,239 and under, to the highest band of $208,000 and over. Sex, race and ethnicity counts were to be included for each pay band, along with the aggregate hours worked by all employees accounted for in each pay band.

ii. This detailed compensation data collection purported to be a way for the Equal Employment Opportunity Commission (EEOC) to combat pay discrimination on the theory that the information would enable the EEOC to identify employers who might be discriminating against minorities and/or females. The EEOC planned to publish aggregated EEO-1 data and industry reports on a periodic basis, with the idea that such reports might provide useful comparative data for private employers and federal contractors, as well as small employers who would be able to use the data to conduct voluntary self-assessments of their pay practices, remedy pay disparities and comply with state and federal equal pay laws.

1. **<u>This could mean that employers won the battle but lost the war—</u>** could lead to state judicial activism. Localized pay data laws would be a huge headache for multi-state employers, businesses would have to comply with a variety of standards across different states or cities.
2. We may see states and localities stepping into the breach that the federal government has created- salary ban in CA, MA and cities including Philadelphia and NYC.
3. Efforts in general to strengthen state and local pay discrimination laws. I predict in these next few years we will also see more effort to increase pay transparency.

IV. Sexual Harassment in the Workplace (25 mins)

a. The Headlines!

i. Harvey Weinstein/Roy Price (Amazon exec)/Roger Ailes/L.A. Reid/Mike Cagney (SoFi CEO)/Uber (Travis Kalanick)/Many in the VC space as well--- these headlines have brought the issue of workplace sexual harassment and discrimination to the forefront. ALL IN THE PAST THREE MONTHS!!

1. This is not a Hollywood issue nor a Silicon Valley issue nor a hedge fund issue—this happens in every industry.
2. The same power dynamics that cause bad actors in the Hollywood scene also apply across the board in all classes of business.
3. There will always be the rogue bad actor but lately there are more examples of institutional permissive abuse, with lack of proper oversight and accountability.

ii. Now that the conversation has started, we have seen uptick in sexual harassment claims.

1. Other Examples- Restaurant/Retail/Hospitality
2. Gucci- even designers
3. Kay Jewelers (incuding Jared)- harassment, unequal pay
4. Amazon- exec on leave
5. John Besh / Besh Restaurant Group
6. Plaza Hotel- you knew we would bring up Harvey Weinstein

7. Todd English

iii. What can we do?
    1. Companies must demonstrate its high expectations of a respectful workplace by not just conducting regular training with all members of management and staff, but keep those expectations in the forefront by making meaningful and regular efforts to reinforce expectations.
    2. Even with the highest of internal controls, we expect companies to face increased claims now that the conversation is taking place and women feel more supported to bring said claims.
    3. Also important to highlight that the frequency of claims come more from the friendship or relationship gone bad rather than what we see in the headlines.

b. Case Law
    i. In Texas, the *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017) is getting a lot of attention. A Texas district court held the exclusive statutory remedy for sexual assault claims was the Texas Commission on Human Rights Act (akin to Title VII/sexual harassment). After the appeals court affirmed this decision, the Texas Supreme Court reversed the appeals court and found the plaintiff was not attempting to prove a hostile work environment, but a sexual assault, and when the gravamen of the claim is sexual assault the TCHRA is not the exclusive remedy.
    ii. EEOC subpoena issue addressed in *McLane Co., Inc. v. E.E.O.C.*, 137 S.Ct. 1159, 197 L.Ed.2d 500 (2017). The Supreme Court found that an abuse of discretion standard applies because: (1) a long-standing precedent of applying abuse of discretion for enforcement of EEOC subpoenas exists; (2) the district courts are better positioned to answer the issue in question; and (3) enforcement of EEOC subpoenas are case specific and require broad standards based on an analysis of the materials sought and the nature, purpose, and scope of the request.
    iii. *Berghorn v. Tex. Workforce Comm'n*, 2017 U.S. Dist. LEXIS 188702 (N.D. Tex. 2017) A Texas District Court held that Title VII protection did not extend to a plaintiff's claim of sexual orientation discrimination. The Court reasoned that it is bound by U.S. Supreme Court and Fifth Circuit authority, and the Seventh Circuit's recent ground breaking decision construing Title VII as granted protection on the basis of sexual orientation discrimination (*See Hively v. Ivy Tech Cmty. Coll. Of Ind.*, 853 F,3d 339, 340-41 (7th Cir. 2017)) is not binding precedent. In fact, at present, the Seventh Circuit is the only circuit to hold this view. The Court further held that plaintiff's claim for gender stereotyping was recognized as a type of discrimination covered by Title VII, and gave plaintiff leave to amend his pleadings to allege a gender stereotyping claim.

    iv. *Lee v. Mission Chevrolet Ltd*, 207 U.S. Dist. LEXIS 174858 (W.D. Tex. 2017) In the absence of Fifth Circuit case authority, a district court in the Western District of Texas looked to Fourth, Eleventh, and DC Circuit case law when determining whether a discrete harassing act inside of a limitation period related back to harassing acts outside of a harassment period under a continuing

violation/hostile work environment theory. Specially an employee worked for the employer for a period of time, left for a period of several month, then returned and alleged she was subjected to harassment during her first period of employment and subsequently forced to resign during her second period of employment for resisting sexual harassment. The Court held that a non-time-barred discrete act may constitute an act contributing to a hostile work environment claim and therefore may properly be the basis for applying the continuing violation doctrine.

v. *Chin v. Crete Carrier Corp*, 2017 U.S. Dist. LEXIS 126606 (N.D. Tex. 2017) The case involves a newly employed male truck driver, plaintiff, who was assigned to be trained by another male employee. During the training, plaintiff rode in a truck with the other employee and stayed at the same hotels. During the course of the training, the employee exposed himself to plaintiff while urinating in a jug within the confines of the truck cab, allegedly made homosexual advances, and offered to participate in a sexual threesome with employee's girlfriend and plaintiff. After the employee's girlfriend appeared at a truck stop to "surprise" plaintiff at breakfast, the employee, not plaintiff, called the employer and informed the employer that it would not work out. The employee subsequently kicked plaintiff out of his truck, and videotaped him with his phone walking with luggage down the side of a busy street. The employee resigned from the company before the company could take any action against him. The court found that while a reasonable jury may be able to find that the employee was attracted to plaintiff and interested in participating in homosexual and/or bisexual conduct with him, the acts occurred over a few short days (6 days) and were not severe or pervasive enough to alter a term, condition, or privilege of plaintiff's employment.

c. Underwriting Concerns
d. Industry Concerns

V. What Lies Ahead (10 mins)

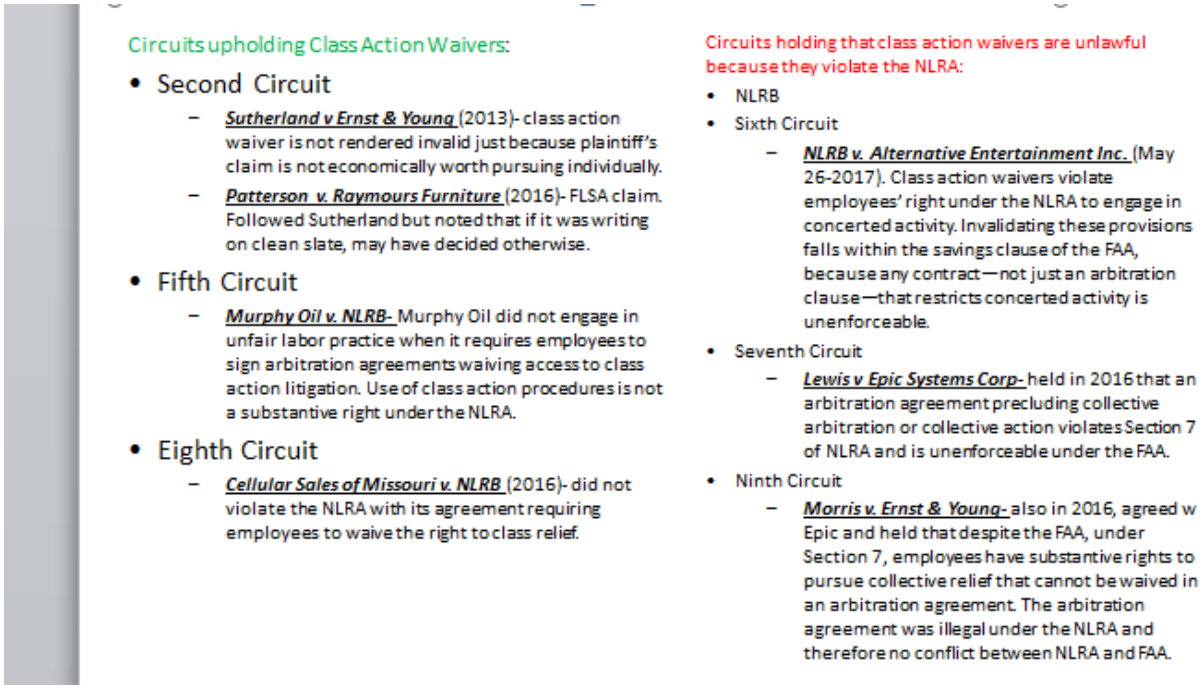
a. Pending Supreme Court Decisions

The U.S. Supreme Court has agreed to decide whether class action waivers in employment arbitration agreements violate the National Labor Relations Act ("NLRA").

b. Background

i. Arbitration agreements that require employees to pursue claims in arbitration, rather than in court, have long been enforced pursuant to the Federal Arbitration Act ("FAA"). Due to a series of Supreme Court decisions, employers increasingly have included class and collective action waivers in such agreements. However, the National Labor Relations Board ("NLRB") has taken the position that employers violate the NLRA when they make such waivers in arbitration agreements a condition of employment.

c. Class action waiver:



d. ***Sutherland and Patterson***- The Second Circuit in Patterson, had to determine whether an Employee Arbitration Program's prohibition of class or collective claims illegally restricted an employee's substantive rights under the NLRA. *Second Circuit* found it was bound by precedent in *Sutherland* which "decline[d] to follow the [NLRB's] decision" in *D.R. Horton* "that a waiver of the right to pursue a FLSA claim collectively in any forum violates the [NLRA].

Fifth Circuit *(parts of Louisiana, Mississippi and Texas)*

e. ***Murphy Oil-*** operates more than 1000 gas stations in 21 states. The court found that neither of the two exceptions to the general requirement that arbitration agreements be enforced were applicable:
   i. the arbitration agreement waiving class action remedies did not violate the NLRA and therefore the savings clause exception did not apply
   ii. because the FAA's mandate favoring arbitration agreements had not been overridden by a contrary congressional command from the NLRA, the arbitration agreement must be enforced according to its terms.
   iii. Held arbitration agreements must be enforced per their terms under the FAA because of the conflict between the FAA and NLRA, the Court had to determine whether the NLRA, a later-enacted statute, contained a contrary congressional command to the FAA's mandate that arbitration agreements should be enforced according to their terms. And since the NLRA lacked a contrary congressional command, class action waivers have to be enforced under the FAA.

Eighth Circuit- has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

f. ***Cellular Sales of Missouri-***The Eighth Circuit held that Cellular Sales did not violate Section 8(a)(1) of the NLRA by requiring its employees to enter into an arbitration agreement waiving class or collective actions in all forums.

Seventh Circuit *(Illinois, Indiana and Wisconsin)*

g. ***Lewis v Epic-*** W&H collective action alleging it misclassified certain employees as exempt in violation of FLSA. Epic required employees to agree to bring any wage-and-hour claims against the company only through individual arbitration and the agreement did not permit collective arbitration or collective action in any other forum.

i. Court essentially said that an employment contract that is "illegal" under the NLRA because it bars class procedures cannot be validated by the FAA's pro-enforcement policy. That conclusion, the first to agree with D.R. Horton, put the Seventh Circuit squarely at odds with the federal circuits that had previously held or indicated that the FAA's policy of favoring arbitration overrides any concerted activity rights employees have to class or collective remedies. **Private action by an employee rather than an unfair labor practice proceeding. However, the NLRB participated as an amicus and argued that the waiver was unlawful and unenforceable. *Ninth Circuit*** *(Alaska, AZ, CA, Hawaii, Idaho, Montana, Nevada, Oregon and part of Washington)*

h. ***Morris v Ernst & Young-*** Casting the right to proceed collectively as substantive rather than procedural, the Ninth Circuit immunized the NLRA's class litigation rights from the FAA: "The FAA does not mandate the enforcement of contract terms that waive substantive federal rights. Thus, when an arbitration contract professes the waiver of a substantive federal right, the FAA's saving clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield." **Private FLSA dispute. NLRB also amicus**

i. In July 2017, United States District Courts in the Southern and Eastern Districts of New York issued the first decisions in the Second Circuit addressing motions to dismiss based on the Dominos arguments. In Markett v. Five Guys, No. 17-cv-788(KBF), 2017 U.S. Dist. LEXIS 115212, (S.D.N.Y. July 21, 2017), Judge Katherine Forrest denied a motion to dismiss made by the defendant, an owner of a popular fast food chain, who is being sued over its online ordering service hosted on its website. Judge Forrest specifically held "the text and purposes of the ADA, as well as the breadth of federal appellate decisions, suggest that defendant's website is covered under the ADA, either as its own place of public accommodation or as a result of its close relationship as a service of defendant's restaurants, which indisputably are public accommodations under the statute." Id. at *5. Judge Forrest summarily rejected the defendant's "primary jurisdiction" and due process arguments and implicitly endorsed WCAG 2.0 as a possible means by which equal access to the website could be ensured.

Thereafter, Judge Jack Weinstein in the Eastern District of New York issued a sweeping, 37-page decision rejecting nearly every argument a "web-accessibility" defendant has made to date. See Andrews v. Blick Art Materials, No. 17-cv-767, 2017 U.S. Dist. LEXIS 138880 (E.D.N.Y. August 1, 2017). The Court specifically found that there is a "substantive right to obtain access to [defendant's] website to make purchases, learn about products, and enjoy the other goods, services, accommodations, and privileges the defendant's website provides to the general public," regardless of the website's nexus to a physical location. The Court found it was fully competent to analyze the text of the ADA and its regulations to determine whether and to what extent the defendant needed to comply with Title III. The Court also found that there was nothing unconstitutional about ordering a defendant to make "reasonable modifications" and that the determination of what is reasonable is a fact-specific inquiry to be resolved at summary judgment or trial. The decision does not reference WCAG 2.0 by name, although the parties cited it in the pleadings and papers.

However, Judge Weinstein said he was "sympathetic" to the defendant's argument that resolution of the case involved highly technical matters. To resolve this issue, Judge Weinstein has scheduled a "Science Day" in mid-October on which the parties will present expert testimony regarding the feasibility and cost of website design and assistive technologies.

Whether early evidentiary hearings will become a trend remains to be seen. We continue to monitor both the judicial and regulatory arenas to stay apprised of developments in the law.

j. Potential Impacts on Coverage

k. Potential Impacts on Market

l. Other Concerns / Outlying Influences

   i. The panel will also devote time to discussion of changes to the EPL landscape that may occur with the new makeup of the Supreme Court and the National Labor Relations Board, the individuals chosen to run federal agencies and the enforcement priorities of those agencies are all likely to impact many EPL areas including, the EEOC's adherence to its Strategic Enforcement Plan for 2017-2021 – which identified as top priorities: protecting immigrant and migrant workers in the developing "share economy," addressing discrimination against persons who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, and equal pay issues – legal recognition of transgender rights and the viability of gender identity discrimination claims under federal law, the federal government's response to state-based decriminalization of marijuana, accessibility issues related to websites and new technologies and joint employment liability issues. Notably, as discussed above, the status of various rulemakings is now in question, as is the outcome of various employment cases selected for Supreme Court review.

REQUIRMENTS:

- Do not include "Introduction, Questions & Answers/Summary/Wrap-up" section in the total of the time increments
- 1 ½ pages minimum – 2 pages maximum in length
- Acronyms need to be spelled out
- WORD format (do not submit as a PDF)
- If case law/citations are included:
  - Include a description of the case law/citation
  - Include a Florida, California, and Texas case law/citation
- Main headings/subheadings are to be statements – not questions. If questions used - must provide the answer(s) in the subheadings.