

## Looking Back to Look Forward: Healthcare Developments in Labor and Employment Law

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Wednesday, February 6, 2019

The year 2018 was a busy one for healthcare employers. Below are some of the key developments from 2018 and issues that employers should be on the lookout for in 2019.

### Pay Equity

Pay disparity between male and female physicians continued to be a serious and worrisome issue in 2018. Multiple studies show that female doctors are paid less than male doctors, and litigation over the issue is becoming more prevalent. For example, in October 2018, the U.S. District Court for the Eastern District of Texas, in [Equal Employment Opportunity Commission v. Denton County](#), awarded Martha Storrie, a female physician, \$115,000 in damages because Denton County Public Health paid a male physician a starting annual salary that was \$34,000 higher than hers to perform the same duties.

Pay disparity issues will continue to loom large for healthcare employers in 2019. The Supreme Court of the United States may consider hearing *Yovino v. Rizo*, a case in which [the U.S. Court of Appeals for the Ninth Circuit ruled that an employer may not use an individual's prior salary to explain a pay disparity](#). Before *Yovino*, an employer could justify the difference in pay between male and female workers by pointing to prior job salaries, which would be considered a factor other than sex.

## Misclassification Guidance

In July 2018, the Department of Labor (DOL) issued a [Field Assistance Bulletin](#) to provide guidance in determining whether home care, nurse, or caregiver registries are considered employers under the Fair Labor Standards Act (FLSA). In its bulletin, the DOL writes that registries, which are entities that match people who need caregiving services with providers, are typically not employers, but provides factors to help determine the existence of an employment relationship under the FLSA. Some of the factors that could suggest an employer-employee relationship include whether the registry determines the rate to be paid to the caregiver, exercises control over the caregiver's schedule, and receives continuous payments for caregiver services.

## Proposed Change to Joint-Employer Standard

In September 2018, the National Labor Relations Board [published a notice of proposed rulemaking](#) in the *Federal Register* regarding its joint-employer standard. According to the proposed rule, an employer would be a joint employer only if it possesses and exercises substantial, direct, and immediate control over the essential terms and conditions of employment and that control is not limited and routine. The proposed standard means that indirect influence and contractual reservations of authority are no longer sufficient to demonstrate a joint-employer relationship. The period to receive comments was extended to the end of January, and we expect the Board to issue a final rule sometime this year.

## #MeToo in Medicine

The [#MeToo](#) movement continues to make headlines across almost all industries, and [healthcare is no exception](#). In fact, a study in the *Journal of the American Medical Association* found that 30 percent of women in academic medical settings experience some form of harassment.

In response to the [#MeToo](#) movement, in 2018, several states and municipalities passed laws implementing programs to prevent harassment. For instance, starting this April, [New York City employers](#) that have at least 15 employees must conduct annual anti-sexual harassment training for all employees. Likewise, this year, [California employers](#) with more than five employees must provide mandatory sexual harassment prevention training to meet a January 1, 2020 deadline.

## Leave and Accommodations Issues

Several states and municipalities have had paid leave programs on their books for years, and new paid leave laws are continually being added to the list. For example, this past year, the [New Jersey Earned Sick Leave Law](#) went into effect in October

2018. [Michigan's Paid Medical Leave Act](#), which will go into effect late March 2019, will require employers to pay certain employees earned medical leave time. Employers, therefore, may want to stay abreast of developments and make sure that they are compliant with both state and municipal leave laws.

Further, accommodations issues continue to be a recurring problem for healthcare employers, and the Equal Employment Opportunity Commission (EEOC) in 2018 brought suit against several healthcare employers for accommodations-related issues. For instance, the EEOC brought suit against Nix Hospital System, LLC d/b/a Nix Healthcare System Services, alleging that the healthcare system refused to accommodate an employee's pregnancy-related medical restriction and placed her on leave instead. Likewise, Family HealthCare Network, a California-based healthcare network, settled an EEOC suit for \$1.75 million alleging that the network's leave policies denied accommodations to its disabled and/or pregnant employees.

## **Arbitration Agreements**

In 2018, the Supreme Court resolved the circuit split on the enforceability of class action waivers in arbitration agreements. In [Epic Systems Corporation v. Lewis](#), the Supreme Court ruled that employers may include class action waivers in their arbitration agreements, finding that the National Labor Relations Act does not preclude the use of arbitration and does not address class or collective action procedures.

Another important decision regarding arbitration will be coming down from the Supreme Court this year. In *Lamps Plus Inc. v. Varela*, the Supreme Court will rule on how explicit an arbitration agreement must be in order for the parties to proceed with class arbitration. Given the decision in *Epic Systems* and the upcoming decision in *Lamps Plus*, all healthcare employers may want to take the time this year to review their employment agreements and consider their positions on using arbitration provisions that include class waivers.

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**Source URL:** <https://www.natlawreview.com/article/looking-back-to-look-forward-healthcare-developments-labor-and-employment-law>