

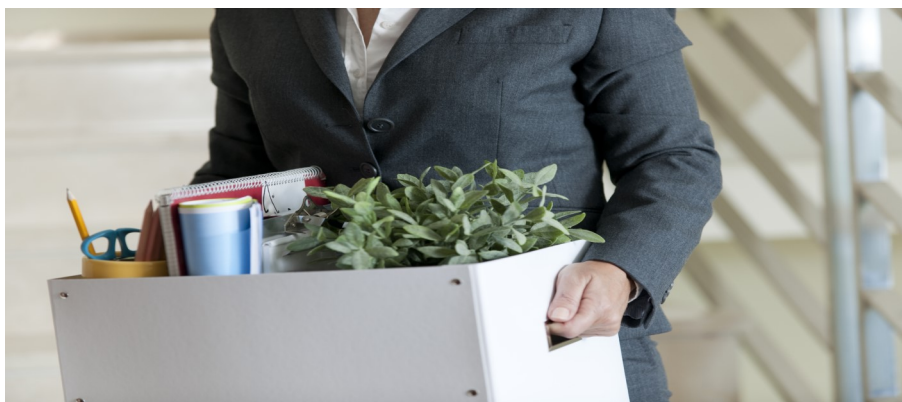
# Human Resources WEEKLY DIGEST

January 15, 2020

## No Retaliation Where Documentation Supports Job Elimination and Termination for Performance

"In a case that reiterates the importance of documentation, an employer avoided liability for an employee's retaliation claim under the False Claims Act where it was able to demonstrate the legitimacy of its decision to eliminate her position and that she had performance issues that pre-dated her whistleblower complaint. In *Musser v. Paul Quinn College*, the plaintiff alleged that she had been terminated in retaliation for making a whistleblower complaint about fraud under the False Claims Act. The U.S. Court of Appeals for the Fifth Circuit, however, found that the employer had offered a legitimate non-retaliatory reason for the termination – a departmental reorganization that resulted in the elimination of her position and her poor performance." [Full Article](#)

*Shawe Rosenthal*



## EEOC Rescinds Policy Statement Disfavoring Arbitration Agreements

"As part of its efforts to rescind outdated guidance on a rolling basis, the EEOC recently dispensed with a 22-year-old policy statement that disfavored mandatory arbitration agreements between employers and employees. The EEOC previously took the position that mandatory arbitration agreements undermine the enforcement of federal anti-discrimination laws. The 1997 policy statement concluded that arbitration agreements permit employers to 'exempt themselves from federal enforcement of civil rights laws' and 'deprive civil rights claimants of the choice to vindicate their statutory rights in the courts.' The EEOC cited public policy concerns such as a lack of public accountability, limited opportunity for judicial review, and structural biases in the arbitral forum." [Full Article](#)

*Littler Mendelson*

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#### State and International Compliance

## NLRB Concludes Pending Workplace Investigations May Be Kept Confidential

“As many employers know, confidentiality can be essential to performing workplace investigations. Last month, in Apogee Retail, LLC, a 3-1 decision, the NLRB agreed. Applying the test for facially neutral rules established in *The Boeing Company*, 365 N.L.R.B. No. 154 (2017) (discussed here), the NLRB held that workplace rules that require employees to keep pending workplace investigations confidential while the investigation is open are generally legal. The decision arose after a thrift store retailer, Apogee Retail, prohibited its employees from discussing investigations in its Code of Business Conduct and Ethics and in its Loss Prevention Policy.” [Full Article](#)

Vorys



## Sitting On The Job: When Sitting Is Requested As An ADA Accommodation

“The retail setting is a particularly difficult one in which to make accommodations. This is because retail employees engage in a host of different duties that require all manner of physical activities. Those who are restricted from climbing may not be able to stock high shelves. And those restricted from bending and stooping may not be able to stock low shelves. Meanwhile, workers who can only lift with one arm may have difficulty checking out items at the cash register.” [Full Article](#)

Fisher Phillips

## No Magic Words Needed in Employee Requests for Leave That Might Be Protected By FMLA

“A terminated employee may proceed with his Family Medical Leave Act (FMLA) retaliation claim even though he never specifically requested leave under that statute, a Maine federal court has ruled. *Waterman v. Paul G. White Interior Solutions*, No. 2:19-cv-00032-JDL (D. Me. Nov. 5, 2019). The employee worked as a floor finisher and installer for a flooring company. His father had been diagnosed with several serious health conditions. On April 8, 2018, the employee’s stepmother told him that his father’s doctor advised that his father would “mostly likely die” if he did not immediately return to the doctor for tests and treatment. The employee had shared his father’s worsening condition with his supervisor and two coworkers. However, he did not know that his father was near to death until the conversation with his stepmother.” [Full Article](#)

Jackson Lewis PC



## Can an Employer Implement a Nicotine-Free Hiring Policy? — It Depends on State Law (US)

“Nicotine products are highly addictive and have been linked to a variety of serious health issues, including lung cancer and other respiratory illnesses. In addition to the numerous health risks associated with nicotine use, there is also a causal connection between employee nicotine use and lower productivity in the workplace, as well as higher healthcare costs for employers. In response to these issues, and in an effort to promote and empower a healthy workforce, more employers are enacting health-conscious workplace policies and anti-smoking/vaping initiatives.” [Full Article](#)

Squire Patton Boggs

*This Weekly Digest is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice.*

*Readers should contact legal counsel for legal advice.*

## STATE & INTERNATIONAL COMPLIANCE

### NEW YORK



#### New York State to Eliminate Tip Credit for All But Hospitality Industry Workers

"In New York, 2020 will be the last year employers who employ tipped employees in car washes, nail salons, and parking garages, among other establishments, will be permitted to pay such employees a rate below the minimum wage and take a "credit" for tips received by such employees to satisfy the state minimum wage requirements, according to an Order issued on December 31, 2019, by the Commissioner of the New York State Department of Labor (NYSDOL)." [Full Article](#)

*Jackson Lewis*

### ILLINOIS



#### Illinois Responds to the #MeToo Movement with New Sexual Harassment Legislation

"In the wake of the #MeToo Movement, the Illinois legislature and Governor J.B. Pritzker have enacted new legislation to prevent sexual harassment and unlawful discrimination in the workplace. The legislation changes existing laws and enacts ones, imposing additional requirements and limitations for employers. The legislation took effect on January 1, 2020." [Full Article](#)

*Krieg Devault*

### CALIFORNIA



#### On the Offensive in 2020: California Employers Fight Back Against Laws Restricting Use of Independent Contractors and Arbitration Agreements

"With the New Year comes a slew of newly enacted laws, many of which have serious implications for employers in California. Two of the most contentious new laws are California Assembly Bills 5 and 51 (AB 5 and AB 51 respectively). However, businesses most affected by these new laws are fighting back, and are finding support and success in doing so, signaling that hope is not lost." [Full Article](#)

*Gordon & Rees*

### VIRGINIA

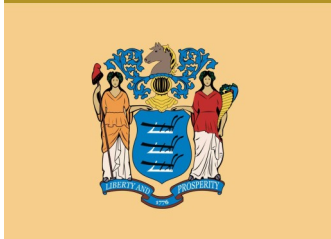


#### How Might Virginia's New Legislative Trifecta Affect Employers in the Commonwealth in 2020?

"In the November 2019 election Virginia gained a Democratic "trifecta"—both legislative chambers and the governorship are now controlled by one political party. It has been over two decades since Democratic lawmakers constituted the majority in the Commonwealth. What will this mean for Virginia employers during the coming year? One means of tea leaf reading is taking a look at what happened in the six states that similarly gained Democratic trifectas following the 2018 midterm elections (Colorado, Illinois, Maine, Nevada, New Mexico, and New York). Collectively, these states enacted over 100 new generally applicable labor and employment laws in 2019 ." [Full Article](#)

*Littler Mendelson*

### NEW JERSEY



#### New Jersey Employers: Make Sure Your Workplace Notices and Employee Posters Are Up to Date

"The year 2019 saw significant changes to New Jersey's employment law landscape, including amendments to the Family Leave Act ("NJFLA"), the Family Leave Insurance law ("NJFLIL"), the Security and Financial Empowerment ("SAFE") Act, the Law Against Discrimination ("NJLAD"), wage laws, and more. Many of these new laws have resulted in changes to employer notice and posting requirements and many of the official posters have been updated. We therefore recommend that New Jersey employers take a moment to ensure that their workplace posters and employee notices comply with these new changes." [Full Article](#)

*Epstein Becker Green*