

POLICY MATTERS

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Hy-Brand Decision Overturned; Obama-Era Joint Employer Standard Reinstated. Earlier this week, the NLRB [vacated its December decision](#) that overturned the Obama-era joint employment standard, a reversal set in motion by [conflict of interest questions surrounding Board member Bill Emanuel](#). A [report from the inspector general](#) stated that Emanuel had a conflict of interest because of his former employer's involvement in *Browning-Ferris*, the 2015 decision that was reversed by the NLRB's action in December. See [Seyfarth's Employer Labor Relations blog](#) for more information on the Board's action for more information. OMB Director Mulvaney commented that the *Browning-Ferris* joint employer agreement would kill the franchise industry and that he would take a serious look at [H.R. 3441](#), the joint employer bill which passed the House.

Union Dues at SCOTUS. On Monday, February 26, the Supreme Court heard oral arguments in [Janus v. AFSCME](#) concerning the constitutionality of public sector "fair share" fees. The Court will now have to consider whether [Abood v. Detroit Board of Education](#) should be overruled and public sector "agency shop" arrangements invalidated under the First Amendment so as to prevent public-sector unions from collecting mandatory fees from non-members. [The future ruling will likely impact millions of workers in the 22 states that do not have "right-to-work" laws.](#)

Seyfarth's [Randy Johnson](#) was recently interviewed by [Bloomberg Law](#) regarding the far reaching implications of the case, stating "[o]n the surface, people say, 'It's a public sector issue. Who cares?' [But] whether it's money from the public sector or the private sector, it's money that goes into political war chests that are often used on Capitol Hill to oppose candidates or policy initiatives that the business community supports." Needless to say, this case could have a [BIG impact on the coffers of organized labor](#). Stay tuned for the high court's ruling in June.

Senate Hearing on NLRB Nominee Ring Earlier Today. The Senate HELP committee held a [confirmation hearing for NLRB nominee John Ring](#) this morning. During the hearing, Senator Patty Murray (D-WA) questioned Ring on the recent conflict of interest issues that have plagued current Board member Bill Emmanuel following his participation in the Hy-Brand decision. Ring stated unequivocally that he would recuse himself from any such cases that conflicted with the work of his previous employer, Morgan Lewis. Ring also commented that Board General Counsel Peter Robb's plan to [restructure the agency's field office system](#) would require action from the board. The committee has scheduled a [confirmation vote on Ring for March 7](#).

Second Circuit Holds That Title VII Bars Sexual Orientation Discrimination. In a rare "en banc" hearing (a hearing which is held before all the judges of a court), the 2nd Circuit voted 10 - 3 on Tuesday to hold that discrimination on the basis of sexual orientation is prohibited by Title VII ([Zarda v Altitude Express decision](#)). The 2nd Circuit joins the 7th Circuit in finding Title VII coverage. The 11th Circuit held that it was bound by previous circuit precedent and found no coverage. This decision upholds the [position taken by the EEOC](#) which argues that Title VII did cover sexual orientation, which ran counter to the position taken by the Department of Justice. (Note: it's very rare to see the Justice Department and EEOC on opposite sides in the same case.) With the split in the circuits, it should be assumed that this issue will find its way to the Supreme Court. See [Scott Rabe](#) and [Sam Schwartz-Fenwick's post on the decision](#) for more information.

Department of Justice Takes on Sexual Harassment in the Workplace. The Department of Justice announced that it is [launching a second initiative to combat sexual harassment](#), this time in public employment. The Department has authority to bring Title VII actions against public employers. The Department's announcement accompanied the [filing of charges against the Houston Fire Department](#) for failing to address sexual harassment directed at two female firefighters. Seyfarth's [Larry Lorber](#), a former director of the OFCCP, noted that the Department of Justice initiative follows the action of the House of Representatives in passing [H.R. 4924](#), which strengthened the rules and penalties regarding sexual harassment in the Congress. "These actions by the Department of Justice and the House of Representatives show that the impetus behind the #MeToo movement is rapidly gaining traction throughout the federal government," said Lorber. "We expect additional action by the other federal agencies and state and local agencies addressing this issue."

Gig Economy Round-Up. Following [testimony](#) from [Camille Olson](#) on behalf of the U.S. Chamber of Commerce at a Senate HELP Committee hearing on "[the Gig Economy and the Future of Retirement Savings](#)," Seyfarth recently submitted [answers to two follow-up questions](#) on the same issue. Senator Tim Scott (R-SC) reached out to help find solutions on how "gig" workers can be better educated on the retirement vehicle options already available to them and how the government can encourage (and not get in the way of) further market innovations in this space.

Seyfarth's [Rich Lapp](#) took part in a meeting on the gig economy last week at the U.S. Chamber with Secretary Acosta. As previously reported, the Secretary prefers the term "entrepreneurial economy" because it more aptly captures the parts of the new economy that he thinks are great—the opening of new markets and opportunities for both workers and consumers. Acosta discussed barriers to the growth of the gig economy and encouraged the private sector to come up with innovative solutions to address them.

Seyfarth continues to be an active partner on the gig economy with the Chamber to help address these critical issues moving forward.

Pay Equity Across the Pond. The United Kingdom is moving ahead with its [pay equity initiative](#). By no later than April 5, private employers with at least 250 employees in England, Scotland and Wales must report and publically publish their pay gap data identifying where there is a gender based pay gap in different job categories. The publication must also indicate what steps the employers are taking to address any pay gap revealed.

ICYMI: Seyfarth Webinar: *Washington 2018 Labor and Employment Outlook: What Does Year Two of the Trump Administration Mean for You?* Earlier this week, members of Seyfarth's Government Relations and Policy Practice Group gathered to discuss the labor and employment agenda on Capitol Hill and within the Administration. Experts provided updates on the current legislative gridlock, recent activities within the departments and agencies, and developments in the "gig" economy.

UP NEXT: March 6 Hearing on DOL's Proposed Budget. Secretary Acosta will [testify next week](#) before the Labor HHS Subcommittee of the House Committee on Appropriations to review the DOL's proposed budget for FY19. The hearing could shed some significant light on the priorities of the department and its agencies in the upcoming year.

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