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Contents

Polsinelli PC has a labor and employment department with extensive experience in providing employers with cost-efficient advice and aggressive defenses on employment and labor law matters. The firm has represented Fortune 500 corporations and privately owned entrepreneurial firms in conducting internal investigations, resolving executive and employee disputes, handling terminations and successfully defending class, collective and individual legal claims. Polsinelli has more than 825 attorneys in 21 offices, spanning from New York to Los Angeles.

Authors

Connie N. Bertram is a shareholder at Polsinelli. She focuses her practice on whistle-blowers, trade secrets, government contractors and employee mobility counseling and litigation. She frequently conducts confidential internal investigations involving executive-level employees, including alleged fraud, theft or misuse of company data, trade secrets, sexual harassment and code of conduct violations. Connie is a member of the American and District of Columbia Bar Associations, United Way's Women's Leadership Council and the task force rewriting the DC Superior Court Jury Instructions. Connie regularly speaks at programs, seminars and conferences on items including steps employers should take to address the #metoo movement, sexual harassment and whistle-blower policies and investigations, and forensic data in litigation.

Jack Blum is an attorney in Polsinelli's Washington, DC office. Jack has experience across the labor and employment law spectrum. He defends employers from class, collective, and single-plaintiff discrimination and wage and hour claims, conducts internal investigations (including sexual harassment allegations in the #metoo era), advises government contractors regarding employment compliance issues, defends OFCCP audits and counsels clients on risky, high-stake employment decisions. Jack enforces employers' rights under noncompetition, nonsolicitation, and confidentiality agreements and helps employers redress data breaches and the theft of trade secrets by employees. He has extensive experience advising clients on independent contractor classifications.

Samuel T. Long is an attorney in Polsinelli's Washington, DC office. Sam represents corporate clients and individuals in a variety of industry sectors in all aspects of labor and employment law, including representation before administrative agencies and litigation in state and federal court. He provides valuable legal counsel for sensitive workplace issues and has successfully defended clients against claims of discrimination, retaliation, and wrongful termination under state and federal statutes, including Title VII, FMLA, FLSA, ADA, and ADEA. Sam represents corporate management in labor disputes, including collective bargaining, arbitrations and litigation before the National Labor Relations Board.

1. Current Socio-Economic, Political and Legal Climate; Context Matters

1.1 "Gig" Economy and Other Technological Advances

Despite the patchwork of new laws – at the federal, state and local level – companies that are compliance-orientated and can navigate conflicting legal obligations should consider entering or expanding their presence in the USA. At the federal level, the political climate generally favors employers. Although fraud-based whistleblower and retaliation laws have been enforced robustly by federal and state regulators and individual employees, most of the federal employment agencies have focused on transparency, compliance and co-operation.

State and local legislatures and regulators have stepped into the breach, seeking legislative reforms to address pressing issues, such as the 'Me Too' movement and pay equity. However, a nimble, global player can relatively easily navigate the federal, state and local legislative landscape to take advantage of the US market and workforce.

Although it provides greater employee protections than federal law, the District of Columbia is not on the cutting edge of employment law reforms or enforcement. The District's Council and elected offices are dominated by Democrats (who comprise over 75% of registered voters) but is not particularly active in the employment field. The current Mayor is regarded as being relatively pro-business.

As one example of this trend, District business advocacy groups in 2018 succeeded in convincing the District's Council and Mayor to reverse the results of a voter referendum to eliminate the tip credit that won the support of over 55% of voters earlier in the year. In another recent failure to enact progressive employment law priorities, the Council voted to table a 'fair scheduling' bill in 2016 which has not regained momentum.

If an employer seeks a highly educated workforce with an international focus, the District of has a bounty of qualified (and potentially over-qualified) employees. According to the US Census Bureau, as of 2017 approximately 57% of the District's residents over the age of 25 had a bachelor's degree or higher level of educational attainment. Given its status as the seat of the federal government, many District employees bring experience as former federal executive agency employees or congressional staffers. Employees in this jurisdiction tend to be highly intelligent and rights-oriented, which may provide a recipe for future claims or litigation. If managers are well-trained and sensitive to the perception (and reality) of implicit bias, they can mitigate this risk and develop a highly-skilled and effective employee base in the District.

1.2 "Me Too" and Other Movements

The District of Columbia has a number of laws that provide protections beyond those imposed by the federal law. The DCHRA prohibits harassment against a broad range of protected categories beyond gender, including marital status, matriculation, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, personal appearance, sexual orientation, gender identify or expression, family responsibilities, and credit information. It also has a broad prohibition against retaliation for complaining about conduct, such as sexual harassment, that violates the DCHRA.

However, the District of Columbia has not been on the legislative forefront of the 'Me Too' movement. In a 2018 bill that restored the tip credit, the District imposed requirements for employers who use the tip credit to provide sexual harassment training to tipped employees upon hiring and to managers and owners on a biannual basis.

Beyond that limited training requirement, however, the District has not adopted the types of progressive state and local laws designed to protect the victims of sexual harassment, such as laws lowering the standard for proving sexual harassment or prohibiting or restricting the use of confidentiality and non-disclosure agreements and prohibiting the arbitration of sexual harassment claims.

1.3 Decline in Union Membership

The District's economy is primarily service and knowledge based and lacks any substantial presence of manufacturing or industrial workplaces that are traditionally unionized. As of 2018, only 9.9% of the District's workforce was composed of union members, a rate that is lower than the national average.

1.4 National Labor Relations Board

Private sector union-employer and union-member relationships in the District are generally governed by the National Labor Relations Act and the decisions of the National Labor Relations Board, rather than local law.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

The District does not have a well-developed body of law regarding the classification of workers as employees or independent contractors. Although many state and local governments have aggressively pursued employee misclassification issues in recent years, the District generally has not joined that trend.

Courts in the District generally look to common law standards in ascertaining the existence of an employment rela-

tionship. This analysis is highly fact specific and looks to the individual's selection and engagement by the putative employer, the payment of wages, the putative employer's exercise of control over the putative employee and whether the services performed are part of the putative employer's regular business. While no factor is controlling, the control factor has been described by the DC Court of Appeals as decisive.

The District's unemployment insurance statute specifically adopts the common law standards in defining 'employee'. For purposes of workers' compensation, the District's Department of Employment Services uses a 'relative nature of work' test which focuses on whether the putative employee is hired to do work in which the putative employer specializes. There are two branches to this analysis.

First, one must examine the putative employee's work and consider the degree of skill involved, the degree to which it is a separate calling or business and the extent to which the putative employee's business can be expected to carry its own accident burden.

Second, one looks to the putative employer's business and considers the extent to which the putative employee's work is a regular part of the putative employer's regular work, whether the putative employee's work for the putative employer is continuous or intermittent and whether the duration of the services is sufficient to amount to the hiring of continuous services. Again, this is a fact-specific inquiry.

For purposes of wage and hour law, the existence of an employment relationship under the District's local statute is construed consistent with the federal FLSA under an 'economic realities' test. The court considers the totality of the circumstances of the relationship, including the putative employer's power to hire and fire, supervise and control work schedules or conditions of employment, determine the rate and method of pay and maintain employment records. As is also the case under the FLSA, the District's wage law classifies employees as being exempt or non-exempt. Employees may be classified as exempt executive, administrative, professional, or outside sales employees. Courts evaluating exemption claims under the District's local wage law also follow the FLSA's standards and case law.

Courts in the District utilize two separate tests in evaluating claims that an employee is employed by two nominally separate employers under a joint employment relationship. While the tests are framed separately, the central question under either is whether the purported joint employer exercised control over the worker's performance and the terms and conditions of his or her employment, and the outcome of any particular case will therefore be the same under either test in many instances.

District law places limitations on the ability of employers to employ minors in most occupations. Minors under 14 years of age generally may not be employed in the District. Minors between 14 and 17 are limited in the number of days and hours they may work as well as their ability to work early in the morning or late into the night. Minors may not be employed or permitted to work in dangerous workplaces.

2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity

Employment relationships that lack a specific term of duration are presumed to be terminable at will by either party at any time, provided the termination is not prohibited by statute or contract.

The presumption of at will employment can be rebutted by evidence that the parties intended the employment to be for a fixed period or subject to specific preconditions before termination. The District's courts require a clearly expressed statement of the parties' intention to depart from the presumption of at will employment. Courts have often considered whether such a statement can be found in employee handbooks.

District courts have found progressive discipline and other handbook provisions sufficient to overcome the presumption of at will employment where the policy in question contains clear assurances that the employer is limiting its power to terminate the relationship and does not reserve the employer's right to terminate or to dispense with the procedures set forth in the handbook.

By contrast, District courts do not recognize claims for breach of the implied covenant of good faith and fair dealing in the at will employment context.

The District recognizes a narrow exception to the at will employment rule for terminations that violate public policy. To fit within the exception, an employee must identify a clear public policy declared in a statute, regulation, or constitutional provision and show that there is a close fit between the policy and the conduct underlying the termination. District courts have not recognized the applicability of this claim to adverse employment actions short of termination.

A number of District statutes provide protections from termination and other adverse employment actions for employees who exercise their statutory-protected rights. These include: the DC Human Rights Act, DC Family and Medical Leave Act, DC Accrued Sick and Safe Leave Act, DC's workers' compensation law, DC's wage transparency law, the DC Universal Paid Leave Act, the DC Occupational Safety and Health Act, the DC Building Service Employees Minimum Work Week Act, the DC minimum wage law, the DC Protecting Pregnant Workers Fairness Act, the DC Wage

Theft Prevention Act, and the Unemployed Anti-Discrimination Act.

Certain employees in the food service, janitorial, building maintenance, health care, and security services industries receive job displacement protections under District law that limit the application of the at will employment rule to such employees. If the employer loses a contract under which such employees are employed, but within 30 days receives a similar contract at another establishment in the District, it must retain at least 50% of the employees who worked under the former contract. A new contractor must retain incumbent employees who had been employed for eight months or longer on the contract for an additional 90 days and then offer such employees continued employment if their performance is satisfactory during the 90 day trial period.

2.3 Immigration and Related Foreign Workers

Immigration is generally governed by federal, rather than District, law. National origin is a protected class under the DC Human Rights Act, in addition to the federal Title VII.

2.4 Collective Bargaining Relationship or Union Organizational Campaign

There is no information relevant to this section.

3. Interviewing Process

3.1 Legal and Practical Constraints

The District of Columbia has adopted a Pay Transparency Act that prohibits employers in the District from requiring that employees refrain from disclosing or discussing their own wages or the wages of other employees. The District, however, has not adopted the types of protections adopted by other states and localities, such as salary history laws, that prohibit employers from asking applicants about their current compensation or compensation history.

The District has enacted several provisions designed to protect applicants from hiring decisions that may have a disparate impact on protected categories. The Fair Criminal Record Screening Act prohibits employers from asking applicants about their criminal history on their initial job application, subject to limited exceptions, until after they have made a conditional job offer. Additionally, employers may not ask, at any point in the hiring process, about arrests that are not pending or that did not result in a conviction. After an employer has extended a conditional offer, it may not withdraw it or take adverse action against an applicant or employee based on his or her criminal record except for a legitimate business reason. The District's Office of Human Rights has issued a guidance regarding the factors employers legitimately may consider in making an adverse hiring decision based on an applicant's criminal history.

The Fair Credit in Employment Amendment Act, on the other hand, restricts employers' ability to ask job applicants about their credit history or to refuse to hire an applicant based on that information. Employers also may not include on their job postings any preferences or limitations on applicants' credit history. Under the District's Human Rights Act, 'credit information of any individual' is a protected class on which discrimination is prohibited.

Under the Pre-Employment Marijuana Testing Act, an employer, other than the US government or its agencies, may only test a prospective employee for marijuana use after a conditional offer of employment has been made. This law, however, does not exempt employees from compliance with employer workplace drug policies, require an employer to accommodate an employee's right to use, consume, possess, transfer or display marijuana in the workplace, or prevent an employer from denying employment based on tests conducted after a conditional offer.

The District provides protection for job applicants who are currently unemployed and prohibits employers from failing to consider or refusing to hire applicants due to their status as unemployed. In addition, employers are prohibited from stating in job advertisements or announcements that unemployed applicants will not be considered. However, an employer may state in a job announcement that it will only consider applicants who are currently employed by the employer and may also examine the reasons for an individual's unemployment in making a decision whether to hire the individual.

Employers in the District are prohibited from administering lie detector tests or accepting or using the results of lie detector tests in the application, interview, and hiring process.

Employers considering hiring employees in the District of Columbia should be mindful of the fact that, where there is overlap between federal and local law, the least restrictive (most applicant/employee friendly) law will be applied.

4. Terms of the Relationship

4.1 Restrictive Covenants

Unlike many other states, the District of Columbia does not have a well-developed body of law regarding the enforcement of restrictive covenants. The courts will generally enforce restrictive covenants if it:

- is no broader in scope and duration than reasonably necessary to protect the employer's legitimate business interests;
- does not impose an undue hardship on the employee or violate public interests; and
- is supported by consideration.

District of Columbia courts recently recognized that restrictive covenants may be reformed through 'blue penciling', when necessary, to make reasonable modifications.

Restrictive covenants purporting to restrict the ability of broadcasting industry employees to obtain similar employment within the industry are unenforceable.

4.2 Privacy Issues

The District of Columbia has adopted a Uniform Trade Secrets Act that is largely identical to the Uniform Trade Secrets Act. Like the UTSA, the DCUTSA prohibits the misappropriation of trade secrets and provides remedies for violations of the law, including injunctive relief, money damages and attorneys' fees.

Employers in the District are prohibited from administering lie detector tests to employees. With the exception of the above-described restriction on pre-employment marijuana testing (see **3.1 Legal and Practical Constraints**), no District statute prohibits or regulates the ability of employers to test employees for illegal drug usage. Such tests are specifically carved out of the DCHRA's prohibition of 'genetic tests'.

Although the District has decriminalized medicinal marijuana, the District's federal district court has ruled that the Medical Marijuana Treatment Act does not provide any implied cause of action for employees allegedly terminated for medicinal marijuana usage.

4.3 Discrimination, Harassment and Retaliation Issues

As noted in **1.2 "Me Too" and Other Movements**, the DCHRA protects a number of protected categories applicants and employees who are not protected by federal law. In addition, the DCHRA provides employees and former employees with the option of litigating their claims before an administrative forum. Although the resolution of claims administratively can be a lengthy process, the damages awarded can be more substantial than claims asserted in state or federal courts in the District.

The District of Columbia has also adopted The Protecting Pregnant Workers Fairness Act, which requires employers to provide reasonable workplace accommodations to employees whose ability to perform their jobs is impacted by pregnancy, childbirth or related medical conditions, breastfeeding, etc. For instance, employers may be required to provide more frequent or longer breaks, provide time off, provide a temporary transfer or relocate an employee's work area.

The District of Columbia provides a highly educated and diverse work population. It is critical for companies establishing operations in the jurisdiction to train its managers to be sensitive to implicit biases that may be experienced (or perceived to be experienced) by workers in the District. With their education level, the impact of the unionized federal workforce and a sympathetic jury pool, employees in the District may be more inclined to file charges or lawsuits against their employers, particularly if they perceive they are being treated differently because of their race or nationality.

4.4 Workplace Safety

The District of Columbia workers' compensation laws are administered by the Department of Employment Services. The laws cover all employees employed in the District. Employees of uninsured subcontractors may assert claims against the general contractor. Psychological injuries are generally compensable if the injury resulted from a specific, identifiable source in the conditions of his or her employment, even if the employee had a pre-existing condition.

With the exception of intentional acts and harassment, workers' compensation is generally the exclusive remedy available to employees for workplace injuries. Every employer in the District is required to secure coverage under the workers' compensation act, either through insurance or by qualifying as a self-insurer.

District employers are required to furnish a reasonably safe place of employment, furnish and use safety devices and safeguards, and adopt and use practices, means, methods, operations, and processes that are adequate to render the employment reasonably safe. The District has a statute analogous to the federal Occupational Safety and Health Act, and also maintains a local Occupational Safety and Health Commission that investigates workplace accidents.

The District prohibits smoking in workplaces (except in designated and property ventilated areas) and prohibits the use of hand-held devices while driving.

4.5 Compensation and Benefits

On July 1, 2019, the District's minimum wage increased to USD14.00 an hour, substantially higher than the federal minimum wage. Annual adjustments will increase the minimum wage to USD15.00 per hour by July 1, 2020. After the minimum wage reaches USD15.00 per hour, the minimum wage will be adjusted by the rate of inflation. If the federal minimum wage is increased to this level, as some have advocated, District law provides that the local minimum wage will be USD1.00 higher than that required by the FLSA. There are separate minimum wages for certain categories of employees, such as tipped employees. In 2018, District voters passed a referendum (with over 55% in favor) to repeal the tipped minimum wage, but the District's Council subsequently reinstated the tip credit. It is possible that the proponents of the ballot referendum may renew their efforts in future elections.

The District of Columbia follows the federal standards for overtime pay (ie, time-and-one-half for all hours worked

during a working week over 40). Premium pay, such as weekend and holiday pay, is counted towards overtime. As noted above, District courts typically follow federal FLSA precedent in evaluating exemption claims.

Non-exempt employees must be paid at least twice during each calendar month. Exempt administrative, executive, and professional employees may be paid once per month. Upon an involuntary termination, the employer must pay all wages earned by the next working day following the termination. If an employee quits or resigns voluntarily, he or she must be paid by the earlier of the next regular pay day or seven days after the resignation date.

If an employer fails to make payment within the applicable timeframe following termination, it will be liable to the employee for a penalty in the amount of the lesser of 10% of the unpaid amount per day or three times the unpaid amount. General contractors are jointly and severally liable for payment of a subcontractor's employees and clients of a temporary staffing firm are jointly and severally liable for payment of the staffing firm's employees.

The District of Columbia provides leave protections to employees beyond those afforded by federal law. The District of Columbia Family and Medical Leave Act (FMLA) requires employers to provide up to 16 working weeks of unpaid leave during any 24-month period for the birth or placement of a child, to care for a family member with a serious health condition, or for treatment for the employee's own serious health condition. The District's FMLA also provides relaxed eligibility requirements as compared to federal law as employees need only work 1,000 hours during the 12 month period prior to the leave request. In addition, the District's FMLA dispenses with the federal FMLA's size requirement for employers.

The District's Accrued Sick and Safe Leave Act (ASSLA) requires employers to provide paid sick and safe leave for leave for medical conditions (and associated treatment) of the employee or his or her family members, and reasons related to the stalking, domestic violence or sexual abuse of the employee or his or her family member. The amount of leave that must be provided depends on the size of the employer.

Beginning on July 1, 2020, employees in the District will be permitted to take paid leave under the District's Universal Paid Leave Act. This act imposes a 0.62% payroll tax on employers in order to fund generous paid family, medical, and parental leave entitlements for employees. Employees may take up to six weeks of paid family leave, two weeks of paid medical leave, and eight weeks of paid parental leave during any 52 week period.

The District government pays the employee up to USD1,000 per week out of a fund from the payroll tax proceeds. Although employers are not directly involved in administering or paying for the leave, they are prohibited from interfering with, restraining, or denying the exercise of employees' leave rights.

Employers in the District of Columbia also must provide the following forms of leave: parental leave, leave for jury duty, leave to serve as a witness, leave to attend school functions and leave on Emancipation Day.

As certain of these protections and requirements conflict with federal law and the laws of other states and localities, it is important for employers that are moving into the jurisdiction to retain counsel or an HR professional who is aware of the nuances of the law.

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

As noted in **2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity**, most private employees in the District of Columbia are employees 'at will'. Consequently, employers can generally terminate employees at any time and for any reason (other than a reason that violates the law). If an employee and employer enter into a valid and binding employment contract, the employer's right to terminate the employee and the consequences of the termination may be defined by contract. District of Columbia courts have held that, in certain circumstances, a contract for employment may be founded on a verbal commitment or may be implied in law.

Employment contracts, particularly for executives, often include provisions that identify the circumstances when an employee may be terminated or the benefits they receive when they are terminated without cause or in connection with a change in control. These terms are typically defined within the contract and, if clear, will tend to be upheld by courts in the District of Columbia. Generally, courts will construe contracts in favor of employees, who often do not have the same bargaining power as the employer. However, particularly in situations where the employee engages in intentional misconduct, courts have been willing to enforce termination for cause provisions.

District of Columbia law addresses the timing of payment upon termination. Employees who are terminated must be paid on the next working day, other than Saturdays, Sundays and legal holidays. If the employee resigns or quits, he or she must be paid within the earlier of seven days or the next regularly scheduled payday.

The District has its own healthcare continuation law that applies to employers with less than 20 employees. The law generally provides for the continuation coverage for up to three months for employees and their dependents. Employers must notify former employees of their continuation rights within 15 days of the termination of coverage.

6. Employment Disputes: Claims; Dispute Resolution Forums; Relief

6.1 Contractual Claims

As noted above (see **5.1 Addressing Issues of Possible Termination of the Relationship**), courts in the District of Columbia tend to construe employment contracts in favour of employees, unless the employer can show that the employee engaged in intentional misconduct. Before taking the position that an employee engaged in conduct rising to the level of 'cause' for termination, an employer must carefully test the language of the contract and the evidence supporting the termination. However, courts in the District of Columbia strictly enforce contract formation laws, including consideration and execution obligations.

6.2 Discrimination, Harassment and Retaliation Claims

Although the District of Columbia has recognized contract claims based on employee handbooks and policy statements, employees in the District of Columbia tend to rely on the wealth of employment discrimination and retaliation claims available in the District. As noted above (see **1.2 "Me Too" and Other Movements**), the District recognizes a long list of protected classes of employees in addition to those protected under Title VII and other federal law.

For many of these protected classes, the District lacks a robust body of case law defining the employer's obligations. In addition, its leave laws and applicant protection laws are generally more generous than federal law. Many claimants will forego their federal claims to pursue claims in state court in the District of Columbia, where they may be able to avoid administrative agency exhaustion requirements, are less likely to face motions for summary judgment and may enjoy more sympathetic judges and juries.

6.3 Wage and Hour Claims

The District's Wage Theft Prevention Act provides employees with a strong weapon to bring wage claims. The act has employee-friendly provisions about the time for payment of wages upon termination, the obligation to pay wages conceded to be due notwithstanding the existence of a dispute, and the recovery of penalties and reasonable attorney's fees for a successful plaintiff.

Employees can obtain these remedies not only in situations where the employer fails or refuses to pay the wages due, but also where the employee does not receive minimum wages or overtime. Unlike many states, these remedies are available even to FLSA exempt employees, which can lead to large damage and treble damage awards in favor of higher-level employees or executives who are not paid substantial bonuses or commissions. In addition, the existence of a bona fide dispute regarding the employee's entitlement to the wages does not preclude an award of treble damages or attorney's fees as it does in some other jurisdictions.

6.4 Whistle-blower/Retaliation Claims

The District does not have a generally applicable whistleblower protection statute. In some instances, employees may have a viable common law wrongful termination in violation of public policy claim, (see **5.1 Addressing Issues of Possible Termination of the Relationship** for further information), where the employee is terminated for his or her refusal to commit an illegal act, giving testimony in an official proceeding, or other public policy-related conduct.

However, the District's federal and local courts are typically reluctant to expand the wrongful termination tort beyond existing precedent. The District provides statutory protection through its Whistleblower Protection Act and local False Claims Act to employees of District government contractors who report fraud or other misconduct by local government contractors.

6.5 Dispute Resolution Forums

There is no information relevant to this section.

6.6 Class or Collective Actions

Generally, class certification requirements in the District are identical to those under Fed. R. Civ. Proc. 23. Superior Court Rule 23 permits class certification where:

- the class is so numerous that joinder of all members is impracticable;
- there are questions of law or fact common to the class;
- the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- the representative parties will fairly and adequately protect the interests of the class.

In addition, the putative class representatives must satisfy the requirements of SCR 23(b) that:

- prosecuting separate actions by or against individual class members would create a risk of:
  - (a) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
  - (b) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to

the individual adjudications or would substantially impair or impede their ability to protect their interests;
- the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
- the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Under the Wage Theft Prevention Act, employees can maintain a variety of joint actions on behalf of themselves and those similarly situated. In addition to an individual action, the employee's options include:

- joint actions by one or more aggrieved persons;
- a collective action pursuant to FLSA procedures;
- a class action; or
- an action by a labor union on behalf of its members.

Employees are considered 'similarly situated' where they were employed by the same employer at some point during the limitations period, allege violations that raise similar questions as to liability, and seek similar forms of relief.

Polsinelli PC

1401 Eye ("I") Street, N.W., Suite 800
Washington,
District of Columbia 20005
USA

Tel: 202 777 8921
Email: cbertram@polsinelli.com
Web: www.polsinelli.com

6.7 Possible Relief

The District's Wage Theft Prevention Act provides robust remedies for employees who are not paid all wages they are due. The statute of limitations for nonpayment of wages is three years, an increase from the two years permitted by the FLSA in the absence of a willful violation. Employees can recover the amount of wages unlawfully withheld, plus liquidated damages equal to three times the unpaid amount and reasonable attorney's fees. Notably, unlike many state statutes, liquidated damages and attorney's fees are recoverable even where there is a bona fide dispute as to the employer's obligation to pay the wages in question.

The DC Human Rights Act permits the recovery of front and back pay, compensatory damages, and punitive damages, and lacks the damage caps that Title VII provides for certain types of damages.

7. Extraterritorial Application of Law

DCHRA and many other District employment statutes do not have extraterritorial application. They only permit relief for discriminatory actions occurring in the District.