

Labor & Employment Law Resources and Experience

Together, members of Steptoe's Labor & Employment (L&E) Law team bring over 200 years of experience to bear on workforce strategic planning, talent management, compliance, counseling, investigation, training, litigation, and labor relations needs. Steptoe L&E team members have argued and won before the US Supreme Court, served as the Management Chair of the American Bar Association's only substantive labor law committee (The Committee on the Development of the Labor Law), edit the nation's only comprehensive treatise on labor law, and function as national coordinating counsel for the L&E needs of some of the world's largest employers.

Steptoe L&E lawyers represent clients large and small in a broad array of industries, representing employers before state and federal regulatory agencies and courts across the United States. The Steptoe team provides outstanding, responsive service at a competitive price for every workforce-related legal need. Contact Steptoe L&E team leader, Steve Wheelless, at 602-257-5234 or swheelless@step toe.com to learn more about the Steptoe team members or for more information on how Steptoe can serve your labor & employment law needs.



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Strategic Planning

Mergers & Acquisitions

Businesses considering the purchase of or merger with, another business must investigate and identify workforce liability risks and evaluate cultural “fit” issues. Doing so requires an in-depth, onsite assessment of not only obvious ongoing litigation exposure or labor commitments (i.e., union relationships and collective bargaining agreements), but also employee engagement metrics (e.g., retention rates, sick days, workers’ comp claims, attendance-related discipline, management evaluations) and a comprehensive legal compliance audit of HR, Labor, and wage-and-hour policies, procedures, and programs. Without the proper L&E-focused due diligence, an interested business cannot adequately assess the value proposition of a potential deal. For example:

- In one recent instance, Steptoe conducted the L&E due diligence on a potential acquisition of a “dark” facility for an international retailer. The retailer ultimately did not make the acquisition based on legal risks identified by Steptoe because of a union representation relationship with a predecessor employer, even though the target had been dark for over 18 months.
- In another instance, Steptoe uncovered a failure of proper payroll record keeping at the target employer, which the interested business required the target to cure before the deal proceeded so as to avoid wage-and-hour class action risks going forward.
- In yet another instance, an acquiring employer wanted to purchase a unionized going concern, but did not want to take the union relationship with the acquisition. Steptoe helped the acquiring business navigate the complex web of applicable regulatory standards to achieve that objective.

Workforce Culture

Every business must decide what type of workplace culture it wants to create and maintain. Depending on business objectives and the operational environment, a business may need a highly structured, hierarchal chain of command. In contrast, another business may best achieve its goals through collaboration and transparency. Yet another business may find that its existing workplace environment does not produce the desired results and want to change course. Steptoe’s L&E team works with business executives to determine the optimal workplace culture and then designs employee engagement, communication, and work rule policies, procedures, and programs that provide the enterprise-level infrastructure to create and maintain the target objectives while complying with all state and federal workforce regulations and laws. For example:

- Steptoe helped an international manufacturer with a highly-centralized facility management model transition to a flatter, more distributed authority structure that significantly increased team-based collaboration and decision-making transparency while improving employee morale and reducing turnover. Significantly, Steptoe helped the employer make that transition without affecting the supervisory or exempt/non-exempt status of the workforce, which avoided legal liability associated with unintended changes in legal status.
- Steptoe helped a major health care system develop, communicate, teach, implement, and enforce work-rule changes that the business needed to increase productivity without creating disparate treatment issues that could create long term EEO litigation exposure.

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Dispute Resolution

Step toe regularly drafts system-wide employment dispute resolution procedures, including binding arbitration agreements. We counsel employers on dispute resolution procedures in specific regulatory contexts such as the Franken Amendments to the 2010-11 Defense Appropriations Bill or collective bargaining. For example:

- Step toe helped a major national auto servicing business with over 2,000 employees develop and implement a peer review dispute resolution policy that effectively eliminated workforce-related regulatory charges and court lawsuits over the course of two years.
- In another instance, Step toe helped a large hospital create a dispute resolution system for its 1,000+ nurses, nurse assistants, and nursing aids that avoided the “bilateral dealing” proscriptions of § 8(a)(2) of the National Labor Relations Act

Talent Management: Employment Contracts/Restrictive Covenants/Separation

Even before the employment relationship begins, Step toe routinely assists clients in acquiring talent - ranging from individual executives to large numbers of personnel – with legal advice designed to avoid disputes with former employers and to protect the clients’ long-term interests. We draft, audit, and help clients enforce executive employment agreements as well as stand-alone intellectual property, confidentiality, and restrictive covenant agreements. We have obtained numerous TROs and injunctions against current or former employees (and their new employers) to keep them from misappropriating confidential information or competing unfairly. We also defend our clients from “offensive” lawsuits by former executives or other employees alleging breach of contract and related tort claims arising from employment contract disputes.

- In one recent case, the Step toe team dealt with claims by a departed CEO for over \$2 million in allegedly unpaid bonuses and benefits under the executive’s employment contract. After drafting and providing the former CEO with a draft court Complaint for a declaratory judgment and attorneys’ fees, the CEO withdrew his demands.
- In another case, a CTO left a company and took significant intellectual property with her for the stated purpose of opening a competing business. The Step toe team obtained a TRO within 24 hours and the CTO subsequently stipulated to a permanent injunction.
- Similarly, Step toe obtained dismissal of a False Claims Act claim and won summary judgment on retaliation claims for a multi-national defense contractor in a suit brought by a former IT executive who stole gigabytes of highly sensitive trade secrets.
- Likewise, Step toe obtained injunctive and financial relief for a multi-national contractor against a group of engineers who stole trade secrets and engaged in unfair competition after they left the company.

In contrast, when an employer needs to right-size the workforce, Step toe guides employers through the layoff/RIF process to minimize disparate impact EEO exposure, as well as to ensure compliance with federal WARN Act and state analog requirements. For example:

- Step toe won a jury verdict in a major WARN Act lawsuit brought against an employer in Arkansas with hundreds of thousands of dollars at stake.

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- Another employer needed to downsize thousands of employees nationwide, and Steptoe developed, taught, and oversaw the comparator matrix evaluations and disparate impact analysis, resulting in a right-sized workforce with no discrimination charges or claims.

Compliance Audits/Employee Handbooks

Myriad state and federal statutes and regulations mandate a multitude of different workforce rights and employer obligations. Many of those statutes and regulations require employers to communicate the pertinent rights and obligations to employees. Others provide an employer “safe harbor” if the employer provides certain types of notice. And, of course, many employers feel compelled to communicate work rules and expectations to employees in an “Employee Handbook.” Anytime an employer communicates to its employees about legal rights and obligations, it creates regulatory and litigation exposure if it does so improperly or inadequately. Steptoe conducts compliance audits to ensure that an employer’s written policies, training materials, and payroll practices serve the intended purpose rather than creating legal liability and/or confusion in the workforce; particularly as to job classification, meal/rest break, and overtime practices, which provide fertile ground for wage-and-hour class actions.

- In a recent representation, after notice of a pending DOL audit, Steptoe conducted an internal compliance audit for a client and determined that a particular facility automatically deducted a 30 minute unpaid meal period each day from employees’ recorded hours worked; a practice that would result in automatic liability under DOL rules. Based on Steptoe’s recommendations, the employer fixed the problem from both a payroll perspective as well as manager training, and passed the DOL audit without any adverse findings.
- In another instance, an employee filed an unfair labor practice with the National Labor Relations Board challenging numerous provisions of the Employee Handbook. Steptoe audited the Handbook, identified the problematic provisions and those that passed legal muster, and negotiated an immediate settlement with a non-admissions clause for the employer.
- In yet another compliance audit, Steptoe identified numerous “exempt” employee misclassification issues and helped the employer correct the misclassifications and develop a communication strategy to maintain productivity and morale through the transition.

Counseling

Every day, human resources professionals grapple with workforce issues that – by definition – can create legal liability. Should the employer discipline or discharge a non-productive employee, aged 62, who has a long history of age-related complaints? Does another employee qualify for Uniformed Services Employment and Reemployment Rights Act (USERRA) leave? If an employee needs to extend FMLA leave past the statutory allotment, what should the employer do? Does the ADA apply? How should an employer respond to a new mandatory paid sick leave law?

Questions like these – and many, many more – face HR professionals on a routine basis. Steptoe provides 24/7/365 telephone or in-person counseling support to help HR staff develop a plan of action that maximizes operational objectives while minimizing legal and practical risks. For example:

- Over the last five years, Steptoe provided regular HR counseling support to an employer dealing with discipline and retraining for a chronically unhappy and disruptive employee. The employee repeatedly filed grievances under an applicable collective bargaining agreement, and in each instance, the union either refused to take the grievance to arbitration or the Company won the

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arbitration (with the union paying the employer's attorneys' fees) because Steptoe helped orchestrate every step in the disciplinary and retraining process to ensure those decisions would withstand litigation scrutiny.

- In another case, Steptoe guided an employer through the difficult process of separating a seriously ill employee who could not get to work on a regular basis despite the employer's generous leave policies and despite demands for unreasonable ADA accommodations.

Investigations

Sooner or later, every employer must determine "what happened," "who did what," and "who knew what and when did they know it" when a workforce problem arises. Steptoe conducts internal investigations into alleged wrongdoing in the executive suite, the boardroom, or the shop floor. Additionally, Steptoe helps guide employers on how and when to cloak such investigations with the attorney-client privilege and what they can and should do with the investigation results from a risk management and legal compliance perspective.

- In one recent situation, the Audit Committee of the Board of Directors of a major health care institution retained Steptoe to investigate numerous complaints of sexual harassment by executive level employees against a CEO and Board member. Steptoe conducted a comprehensive investigation that ultimately led to a multi-layered resolution involving major personnel changes, the creation of training and additional reporting programs, and no legal claims.
- In another case, the Audit Committee of a major national employer retained Steptoe to conduct an internal investigation and advise the Board of Directors on a Sarbanes-Oxley whistleblower complaint.
- In yet another situation, Steptoe investigated claims of intellectual property theft and self-dealing, and made recommendations that led to the recovery of key trade secrets and new restrictive covenants that prevented further loss.

Training

Steptoe excels at direct-employee/manager workshop-based training as well as providing train-the-trainer programs. For example, Steptoe delivers:

- State-specific harassment prevention training; *e.g.*, CA AB 1825
- New-employee orientation training focusing on workplace rights and obligations, union-free culture (or an introduction to the Collective Bargaining Agreement in a unionized setting), and no-harassment/retaliation policies and reporting procedures (to ensure "safe harbor" for the employer)
- New-supervisor/introduction to leadership workshops
- Continuing education/legal update training for experienced supervisors
- Union-free supervisor workshops
- Supervisor training for unionized employers
- New issue specific training; *e.g.*, AZ Prop 206 (mandatory paid sick leave)

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Regulatory Audits

The Department of Labor and the Office of Federal Contract Compliance Programs conduct both “random” as well as “employee-complaint” audits. The first step to successfully defending such audits is performing regular internal audits to ensure regulatory compliance. The second step to addressing such audits is to work with experienced counsel to navigate the regulatory audit process with a sophisticated knowledge of what the law requires and what it does not. Steptoe regularly helps employers conduct preventative internal audits as well as defend government audits. Steptoe also conducts in depth OFCCP audits for government contractors. For example:

- A national employer retained Steptoe to respond to an aggressive audit by the DOL’s Wage-and-Hour Division where the DOL asserted – based on internal complaints – that the employer improperly classified employees as independent contractors. Steptoe quickly evaluated the operational reality in light of the controlling law and worked with the DOL investigators to conduct two manager interviews, which then led to the conclusion of the audit with a favorable finding.
- In another situation, Steptoe worked with the DOL’s Office of Labor Management Standards to successfully resolve a complaint about the Company’s LM-10 reporting obligations arising from the retention of certain labor relations consultants.
- And in another situation, Steptoe defended a defense contractor in an OFCCP compliance review and audit where Steptoe helped the employer restructure its applicant/recruiting practices and applicant tracking system to ensure compliance with requirements of Executive Order 11246 and related OFCCP regulations and then conducted annual statistical analyses of employee compensation for compliance audits.

Wage-and-Hour Class Action Litigation

Plaintiffs’ lawyers file more wage-and-hour class action litigation than perhaps any other form of employment-law litigation. Their liability theories always rest on some claim of underpayment multiplied by scores, hundreds, or thousands of “class members” over several years, generally equaling millions of dollars of potential risk. When faced with such claims, an employer must give serious and substantial attention to defending the claims at every step of the litigation process, including early settlement options, given the significant downside risk. Steptoe regularly and successfully represents employers in wage-and-hour class action litigation, including:

- *Osuna v. Wal-Mart Stores, Inc.*, 214 Ariz. 286 (Ct. App. 2007) (affirming denial of class certification and dismissing wage-and-hour class claims by putative class of 50,000 current and former employees)
- *Carrillo v. Schneider Logistics, Inc., et al.*, CV 11-08557 CAS (DTBx) (C.D. CA 2011) (case settled on favorable terms after MSJ in wage and hour class action alleging vicarious liability based on joint employer doctrine)
- *Taylor v. Delta-Sonic Car Wash Systems, Inc.*, 6:14-cv-06698-MAT-JWF (WDNY 2016) (case pending settlement on favorable terms after Plaintiff declined to respond to MSJ in wage-and-hour class action involving state reimbursement and payroll notice claims)

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Regulatory Agency and Court Litigation

The Steptoe L&E team has litigated and won thousands of labor & employment issues for employers across the country before state and federal regulatory boards and commissions as well as scores of cases before state and federal trial and appellate courts, including a Section 186 “thing of value” RICO case, *Qui Tam* actions, and the seminal *Bill Johnsons* case before the United States Supreme Court.

In the L&E context, most “discrimination” or “retaliation” cases start with a “Charge” filed with the pertinent regulatory agency; e.g., the DOL, EEOC, OSHA, NLRB, or their state counterparts. Such charges cover claims involving ADA, FMLA, ADEA, OWBPA, Title VII, USERRA, Whistleblower, and NLRB matters. Steptoe “wins” the vast majority of charges – getting them dismissed, withdrawn, or favorably settled – by devoting substantial effort up front to a comprehensive investigation and analysis, which allows the Steptoe team to best influence the regulatory agency or charging party towards an early resolution. If necessary, Steptoe regularly wins cases at trial and in the appellate courts. Steptoe has spent decades litigating employment-law cases in both state and federal court.

Representative cases include:

- *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (affirming an employer’s right to sue union supporters for defamation during an organizing campaign)
- *Hardwick v. Complete Skycap Services, Inc.*, 247 F. App’x. 42 (9th Cir. 2007) (affirming grant of summary judgment on claim of discharge in retaliation for complaints made regarding compensation and overtime and claim of violating minimum wage provision)
- *Tempesta v. Motorola, Inc.*, 21 F. App’x. 700 (9th Cir. 2001) (affirming summary judgment on race claims challenging the employer’s system-wide RIF policy)
- *Steckl v. Motorola, Inc.* 703 F.2d 392 (9th Cir. 1983) (affirming grant of summary judgment on claim of age discrimination)
- *Marceau v. IBEW*, 618 F. Supp. 2d 1127 (D. Ariz. 2009) (defeating union’s motions to dismiss and summary judgment denied on client’s RICO claims against union officers attempting to extort “sweetheart” deals)
- *UFCW v. Walmart*, 2016 Ark. 397 (Ark. 2016); *UFCW v. Walmart*, 228 Md. App. 203 (MD. CT. SPEC. APP. 2016) (Slip op.); *Walmart v. UFCW*, 208 Cal. Rptr. 3d 542 (Cal. Ct. App. 2016), review denied Jan. 25, 2017 (CA); *Walmart v. UFCW*, 382 P.3d 1249, (Colo. App. 2016), cert. denied, 2016 WL 5723926 (Colo. 2016); *UFCW v. Walmart*, 2016 WL 6277370 (Tex. App. 2016); *UFCW v. Walmart*, 192 So.3d 585 (Fla. Dist. Ct. App. 2016), review denied, 2016 WL 5900156 (Fla. 2016) (statewide injunctions against trespass by Union and its allies; defeating Union’s motions to dismiss based on preemption, SLAPP, and anti-injunction act grounds)
- *U.S. ex rel. Cafasso v. General Dynamics C4 Systems, Inc.*, 2011 WL 2489817 (D. Ariz. 2011) (client’s counterclaim for attorney’s fees granted)
- *Hunley v. Orbital Sciences Corp.*, 2007 WL 977384 (D. Ariz. 2011) (client’s motion to dismiss granted on claims of placing employee in false light, and falsifying documents)
- *Slater & Associates Insurance, Inc.* 2007 WL 3026944 (D. Ariz. 2007) (client’s motion for TRO granted on claim of misappropriation of client’s confidential business information)

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- *Smith v. American Express Travel Related Services Co.*, 179 Ariz. 131 (1994) (client's motion for summary judgment granted on claim by employee for assault and battery, intentional infliction of emotional distress, breach of contract, and breach of implied covenant of good faith and fair dealing)
- *First National Bank of Arizona v. Carruth*, 116 Ariz. 482 (1977) (vacating denial of client's motion for change of venue in an employment discrimination case)

Immigration

Many employers face complex immigration issues for key executives, managers, and high-value technical and skilled workers. Steptoe advises employers on strategies for working within applicable immigration laws to develop the workforce they need while complying with all applicable laws and regulations. Steptoe's immigration lawyers regularly help multi-national employers obtain necessary visas, work permits, and related documents for international employees at all levels. If government investigators do make inquiries, we represent employers in responding to government audits, subpoenas for Form I-9s and other employment records, and related litigation.

Lawyers in Steptoe's Immigration practice focus on three areas: compliance with homeland security rules, regulations, and mandated procedures; temporary and permanent immigration to the United States; and employment-related compliance issues.

A new and increasingly important part of our immigration practice consists of helping clients comply with the numerous immigration statutes and regulations that fall under the jurisdiction of the Department of Homeland Security (DHS), the Department of Labor, the Department of Justice, and the Department of State. Specifically, our lawyers represent clients with respect to matters including the following:

- Cross-border movement of executives, managers, and technical personnel, aided by our broad international experience in many countries and our longstanding experience with foreign and domestic legal systems
- Representation of special immigrants such as investors, treaty traders, religious workers, aliens of extraordinary ability, and outstanding researchers
- Counseling with respect to deemed export matters and changes in enforcement measures and the law brought about since the terrorist attacks
- Audits for compliance with Department of Labor, US Citizenship and Immigration Services (the former Immigration and Naturalization Service, and Immigration Reform and Control Act requirements such as Form I-9 Employment Eligibility Verification
- Applications for work authorization, nonimmigrant visas, permanent residency, naturalization, political asylum, and foreign adoptions
- Litigation before immigration judges, the Board of Immigration Appeals, and federal courts
- Legislative representation before the US Congress on amendments to immigration laws

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Immigration Law Advisory

The *Immigration Law Advisory* summarizes legal developments of interest to our clients and friends of the firm. It is published on a periodic basis as developments warrant. The practice covers the following:

- Department of Homeland Security
- Temporary/Nonimmigrant Visas
- Immigrant Visas/Permanent Residence
- Consular Processing
- Border-Crossing Issues
- Employers
- Citizenship & Naturalization
- Pro Bono Immigration
- Appeals

Department of Homeland Security

The practice of immigration law has changed fundamentally since the September 11, 2001, terrorist attacks. The most notable change came about with the passing of the Homeland Security Act of 2002, which dissolved the Immigration and Naturalization Service and created the Department of Homeland Security (DHS).

A proposed benefit of the DHS was increased border security as a result of the consolidation of those agencies previously responsible for this function. Beginning on March 1, 2003, the DHS assumed the functions of the INS in such a way that three different agencies housed within the DHS (US Citizenship and Immigration Services, Immigration and Customs Enforcement, and Custom and Border Protection) were tasked with the responsibilities and duties that had previously been performed solely by the INS. The change has resulted in the promulgation of a significant number of compliance regulations, not to mention an increased backlog due to the restructuring, as well as staffing and budget limitations.

Our lawyers are sensitive to this constantly changing climate, and are equipped to meet the needs of our clients, both corporate and individual, who must interact with the DHS.

Temporary/Nonimmigrant Visas

Step toe lawyers have successfully handled a variety of cases involving individuals seeking visitor visas (B2), as well as cases involving any one of the numerous business-related visas available for companies seeking to employ foreign nationals for their US operations:

- B1 (visitor for business)
- E (treaty trader/investor)
- F (student)

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- H (temporary worker)
- I (journalist)
- J (exchange visitor)
- L (intra-company transferee)
- O (outstanding researcher)
- P (athletes and performers)
- R (religious)
- TN (NAFTA visa applications for Canadians and Mexicans)

Our clients include domestic and international companies across many industries. We also assist clients who must enter temporarily for urgent humanitarian reasons, or significant public benefit, and those eligible to enter the United States on visa waiver. Our practice also serves clients who must change or amend their status to reflect changes in their employment.

Immigrant Visas/Permanent Residence

We present individual and corporate clients who sponsor foreign nationals for immigrant visas via employment-based or family-based petitions by

- Providing seamless transitions for those clients who are present in the United States in a nonimmigrant status at the time they are sponsored for immigrant visas
- Filing and renewing applications for travel documents and employment authorization (EAD) concurrently with their adjustment of status applications
- Advising lawful permanent residents of the procedures required to preserve residence during extended absences from the United States
- Ensuring the continued compliance of our permanent-resident clients who are subject to conditional residence restrictions

Our lawyers diligently notify clients of case developments to ensure that clients' post-filing requirements, including the scheduling and attending of fingerprint and biometrics appointments are satisfied. Our lawyers also offer pre-interview counseling for marriage-based immigrant petitions.

The retrogression of available visa numbers has adversely affected many individuals seeking permanent residence in the United States. Our lawyers counsel affected clients, and, where applicable, offer alternative and effective methods for maintaining legal status in the United States in light of this development.

Step toe lawyers are knowledgeable about the complex recruitment and filing procedures required by the recently implemented PERM Labor Certification system. The PERM system requires a higher level of involvement by employers in demonstrating that no US workers are available to fill their permanent job openings. We assist our clients to meet the PERM requirements and to file solid and well-supported applications.

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Diversity Visa Lottery. We notify clients eligible for this provision that is made available annually to certain foreign nationals seeking permanent residence in the United States, and skillfully guide them through the application process.

Consular Processing

The US Department of State requires most travelers to obtain visa stamps from a US embassy or consulate abroad, or comply with other regulations prior to requesting entry to the United States. We are adept at researching and communicating current and consulate-specific procedures for visa processing at US embassies and consulates abroad. We also help clients schedule visa interviews.

Border-Crossing Issues

We understand the effects of increased reliance by the government on databases to identify and track the movement of visitors entering and exiting the United States. We respond to this concern by vigilantly monitoring client travel, to ensure that we efficiently and accurately redress difficulties caused by erroneous data, and by ensuring that traveling clients are prepared with supporting documentation and equipped to justify their presence in the United States to the satisfaction of a US Customs and Border Protection inspector.

Employers

We assist our corporate clients to comply with labor and employment laws with regard to their foreign workers, most notably by meeting the requirements of the Employment Eligibility Verification Form I-9, which is used to establish employees' identities and to confirm their eligibility to work in the United States.

Compliance also includes creating and maintaining public access files for H-1B employees, as well as filing labor condition applications with the Department of Labor to ensure that the hiring of a foreign worker will not adversely affect a US worker. We also counsel our corporate clients whose staffing projections are impeded by the H-1B cap.

Citizenship & Naturalization

We counsel clients on US naturalization application procedures, citizenship verification procedures for those individuals born in the United States as well as individuals born outside of the United States to US citizen parents (citizenship by descent), and the procedures for and effects of renunciation of US citizenship. We also ensure that clients adhere to the relevant residence requirements for naturalization.

Pro Bono Immigration

We have extensive experience in the pro bono representation of clients seeking political asylum or refuge in the United States because of past persecution, or fear of future persecution in their home countries on account of religion, gender, political opinion, sexual orientation, and/or social affiliations.

We also research the eligibility of the immediate relatives of our asylee and refugee clients for derivative immigration benefits.

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Appeals

We help clients successfully challenge decisions of the Departments of Labor, Homeland Security, and State. This work has included the following:

- Informal appeals and reconsiderations of consular officer visa denials
- US border exclusion cases
- Deportation proceedings
- Advisory opinions from the State Department Visa Office
- Regulatory interpretations
- Administrative appeals and proceedings before the Labor Department and DHS
- Litigation before federal district courts

Noteworthy

Chambers USA, Labor & Employment (Arizona), 2007-2016

Employment-Related Class Action Litigation

Steptoe offers clients one of the premier employment-related class action defense practices in the United States. Our team of experienced litigators and appellate lawyers regularly and successfully represents employers at every phase of the class action litigation process, in both trial and appellate courts, in jurisdictions across the country.

We have successfully obtained dismissals of class action complaints, defeated class certification, obtained Rule 23(f) appeals of class certification decisions, excluded plaintiffs' expert witnesses, won summary judgment motions, prevailed at trial or on appeal, and obtained settlements that effectuate the maximum possible scope and binding effect of the settlement so that they are highly favorable to clients. We often serve as national coordinating counsel for large companies facing serial class action litigation, whether filed across the country or consolidated as multidistrict litigation.

We understand the rapidly changing legal standards for class certification and have been at the forefront of legal developments that have convinced courts to exclude unreliable scientific evidence at the class certification stage – decisions that we have often leveraged into denials of class certification.

Moreover, practical business judgment and creativity complement our trial-ready approach. Our team collaborates with clients to develop “outside the box” solutions that are consistent with business goals, promote early case resolution, and protect important company brands.

Wage-and-Hour Class Actions

Steptoe's Labor & Employment team has substantial experience defending complex wage-hour cases under the Fair Labor Standards Act (FLSA), California law, New York law, and other state laws. For example, we defended a logistics company in the Central District of California against allegations the company violated California's nuanced rules on piece-rate pay, meal- and rest-breaks, and reporting time pay. In another case in the Western District of New York, we litigated the FLSA's and New York state's stringent notice and paystub requirements for employers who take a tip credit.

Our litigators understand the nuances of successfully responding to agency investigations that often lead to class actions. We represented a national fuel distributor and convenience store chain in response to a DOL investigation and two subsequent putative FLSA class/collective actions in the Middle District of Florida based on allegations that the employer improperly adjusted employee time and required employees to clock out for meal periods of less than 30 minutes. After investigating the allegations, Steptoe worked with the DOL to successfully conclude its investigation with no adverse findings and persuaded plaintiffs' counsel to withdraw the class/collective actions to avoid substantive and attorneys' fees counterclaims.

We also have a proven track record of defeating class certification. For example, we successfully defeated class certification in a wage-hour class action against one of the world's largest employers by arguing that common issues did not predominate over individual issues in the class, convincing the trial court and appellate court that the plaintiffs' proposed army of experts could not overcome the individualized issues in claims for off-the-clock work, meal- and rest-break violations, and overtime violations by a putative class of 50,000 current and former employees.

We also understand that the cost of litigating wage-hour class actions often means that an early settlement is the best option. We have particular experience developing strategies to exert maximum

Employment-Related Class Action Litigation

pressure on the proposed class representatives and/or co-defendants to accept settlement early in the case on terms favorable to our clients. In one case, we leveraged an ongoing business relationship with a co-defendant (and alleged joint employer) to obtain a favorable settlement. In another case, we defended a car-wash chain against a proposed class of more than 10,000 employees across three states alleging FLSA and state law tip credit notice and paystub violations. After filing a motion for summary judgment, the plaintiffs requested to mediate instead of responding to the motion, and we obtained settlement at a small fraction of the potential liability.

Discrimination Class Actions

We also regularly represent clients against allegations of classwide discrimination on the basis of sex, age, national origin, and other protected classes both at the EEOC investigation phase and at trial. For example, our attorneys obtained decertification of a class after convincing a federal district court that plaintiffs' discriminatory working conditions claim lacked commonality. In another case, we defended a chain of grocery stores against claims that its healthcare coverage discriminated against women. We also successfully defended a client against harassing administrative subpoenas as part of the EEOC's efforts to pursue a nationwide national origin discrimination class.

Labor Relations

The Steptoe L&E group also offers one of the nation's most robust labor relations practices. We represent employers who have union-represented employees in collective bargaining and support all their contract interpretation, grievance investigation, and arbitration needs. We also provide comprehensive counseling, training, campaign, and litigation support to employers who do not have union-represented employees and prefer to maintain that status. We have managed, consulted on, and won scores of union organizing campaigns, and we have successfully defended numerous employers across the country against thousands of Unfair Labor Practice allegations at the investigation stage, at trial, and on appeal. State legislators have called on the Steptoe team to help draft labor law legislation affecting union organizing and collective bargaining issues.

Union-Free: An Enterprise-Level Solution

Unions fundamentally change the workplace culture, creating an institutional and legal obstacle to dealing directly with employees on terms and conditions of employment, creating a pervasive-us-versus-them mindset. Unions dramatically increase overhead costs, lead to "power sharing" struggles with the union, and most often lead to a decrease in efficiency and productivity. Except in certain legacy-union industries, unions generally do not target employers. Instead, disgruntled employees seek out union representation to "get back at" unpopular managers or to "get a voice" in the workplace. Once a disgruntled employee contacts a union and organizing begins, the union and the pertinent regulatory agency (the National Labor Relations Board) take over and a legal process begins that the employer cannot control. Consequently, employers who build their business model on the ability to adapt quickly and nimbly to changing market forces with an emphasis on direct relationships with the workforce, must devote sufficient resources to creating a union-free culture on a 24/7/365 basis; particularly in light of the current NLRB rules that allow organizing in department-level units and lead to most union elections occurring within 24 days of a union petition for election.

Step toe serves as national coordinating labor counsel for several international employers – employing over two million employees – who base their business models on a union-free workforce. Steptoe works closely with scores of employers to build an enterprise-level framework to maximize positive employee engagement, which minimizes union-organizing risks.

Union Organizing Campaigns/Decertification Campaigns

When a union files a petition with the National Labor Relations Board for a representation election, an employer must respond within hours to meet the highly-accelerated election campaign schedule set by NLRB (assuming the employer intends to resist the organizing effort). The campaign proceeds on two fronts: (1) winning (back) the hearts and minds of the electorate (the employees); and (2) expanding the electoral pool to enfranchise more voters while attempting to gain more time to educate the voters. Under current NLRB rules, the first contested issue (the size and composition of the electorate) occurs on the 8th day after the petition with the hearts-and-minds vote only two weeks later in most cases. Both efforts involve an exceptionally heavy, 24/7 "lift," and require significant expertise in an otherwise unique area of law-meets-politics.

Employees may also decide to decertify an existing union. The applicable rules severely constrain the employer's participation in such campaigns, but the employer does have a statutory right to express its views. Steptoe guides employers through decertification campaigns to maximize the potential for campaign success while minimizing labor risk.

Step toe delivers best-in-class support for both the labor litigation and campaign manager efforts.

Labor Relations

For example, Steptoe:

- On 12-hours' notice, arrived on site and served as campaign manager and labor litigators in a recent organizing campaign in the food service industry that caught the employer completely off guard. The Steptoe team created and coordinated the delivery of all campaign materials, expanded the union's petitioned-for unit by nearly 40%, and gained three weeks of additional time to campaign. The employer won the election.
- Conducted the representation hearing on day eight of a union organizing campaign in the trucking industry, which included presenting novel legal theories that the Regional Director took under advisement, which ultimately gained two weeks of additional time to campaign. The employer won the election.
- Served as campaign manager and labor litigators for a union organizing campaign in the aviation industry in the first campaign conducted under the NLRB's expedited election rules. Steptoe successfully expanded the petitioned-for-unit by 35% by persuading the Regional Director to add certain temp-to-hire employees. As a result, the union withdrew its petition the day before the scheduled election.

Business Planning and Union Issues

Steptoe regularly counsels and guides businesses through the intricacies of organizational growth and restructuring involving unionized facilities. For example, the Steptoe team:

- Counseled a major hotel chain on labor issues related to closing of unionized hotel and resort facility
- Helped a seven-state regional restaurant-chain owner reorganize the business in the face of ongoing union recognition demands
- Developed a strategy for a non-union employer to penetrate a heavily-unionized market segment
- Assisted a national employer with organizational structure planning for new retail format stores to minimize labor relations issues
- Created attorney-client privileged employee hot-line reporting systems for labor relations activity
- Provided strategy and labor law guidance to an international employer desiring to pursue anti-trust, labor law, and unfair competition claims against unions, competitors, city officials, and lobbying firm engaged in coordinated efforts regarding zoning, permitting, and legislation intended to block the client's expansion and growth
- Guided non-union companies through the legal issues arising out of the acquisition of unionized companies
- Advised an international employer on labor relations compliance issues associated with taking American Reinvestment and Recovery Act funds
- Counseled employers involved in picketing, handbilling, bannering, strike, strike-planning, property-access, law enforcement coordination, reserved-gate, customer boycott, tortious interference with contract, breach of contract, and defamation issues related to union organizing, area-standards messaging, and work stoppages
- Negotiated neutrality and "stand-still" agreements with labor organizations

Labor Relations

- Provided legal analysis and advice on federal labor law preemption of various local and state regulations and legislation
- Advised federal contractors on compliance with labor-related executive orders
- Created a “double-breasted” business operation to help a unionized national trucking company lower its cost structure for competitive bid purposes with a non-union, parallel operation.

Labor Law Litigation

Steptoe has litigated over 2,000 unfair labor practice allegations and worked with every Region of the NLRB in the United States. We win the vast majority of those ULP allegations by getting them dismissed or withdrawn during the investigation and position statement phase of the regulatory process. However, some cases do not get resolved or settled, and Steptoe offers unparalleled trial experience, with scores of trials over many decades, along with numerous appearances before the federal courts of appeal and a seminal win before the United States Supreme Court in the Bill Johnson’s case. Representative NLRB cases include:

- *Wal-Mart Stores, Inc.*, 2016 WL 4191886 (2016) (obtained dismissal of nationwide complaint targeting all non-union employees in America on jurisdictional grounds)
- *Flagstaff Medical Center v. NLRB*, 715 F.3d 928 (D.C. Cir. 2013) (reversing NLRB on CEO statements to employees and employee discharge)
- *National Basketball Association*, 2-CA-40518 (2011) (surface bargaining claims settled)
- *Flagstaff Medical Center*, 357 NLRB No. 65 (2011) (rejecting joint employer, subcontracting, and discrimination claims filed during multi-year corporate campaign)
- *Wal-Mart Stores, Inc.*, 351 NLRB No. 103 (2008), and *Wal-Mart Stores, Inc.*, 339 NLRB No. 153 (2003) (establishing an employer’s right to lawfully place visiting, high-ranking managers in a facility experiencing organizing without creating an inherent and unlawful solicitation of grievances)
- *UFCW, Int’l. v. NLRB*, 519 F.3d 490 (D.C. Cir. 2008) (affirming that petitioned-for unit was inappropriate after unilateral changes in employee job duties)
- *Sam’s Club*, 349 NLRB 1007 (2007) (upholding disciplinary decisions, dress code rules, and campaign messages)
- *Wal-Mart Stores, Inc.*, 349 NLRB No. 102 (2007) (establishing an employer’s right to impose time, place, and manner property access rules for leased exterior property)

Unionized Employers

Steptoe actively represent numerous unionized employers in collective bargaining negotiations for initial and renewal contracts, manages contract interpretation issues, handles grievance processing, and conducts Collective Bargaining Agreement arbitrations. In addition, we regularly help employers develop strike contingency plans, temporary hiring policies, and picketing responses in the event of work stoppages or demonstrations associated with collective action.

