



THE MONITOR

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Ripple Effect: How the SEC is Trying to Regulate Cryptocurrencies, DeFi, and NFTs

Many people are still trying to understand how cryptocurrency works. To add another layer of confusion, people debate whether and how current laws and regulatory structures are equipped to address the legal issues that have arisen in this space. This confusion could be a reason that the cryptocurrency market is so volatile. With market volatility, many entrepreneurs have seen opportunity and forged ahead with mining new cryptocurrencies and minting non-fungible tokens (“NFTs”). The U.S. Securities and Exchange Commission (“SEC”) has pressed its case for bringing the industry under its oversight, with SEC Chairman Gary Gensler stating “very many [cryptocurrencies] are” securities and cryptocurrency

exchanges should register with the SEC as securities trading platforms. (1) So far, there has been a focus on the Howey Test to define securities, but the SEC also points to other definitions of securities in the 1933 Securities Act to bring cryptocurrencies under its ambit.

The SEC’s position on cryptocurrencies is being played out right now and will likely provide more clarity when it comes to civil litigation in the digital asset space. As one example, the SEC is currently suing Ripple, the company behind the XRP cryptocurrency, alleging that Ripple was conducting an unending initial coin offering (“ICO”) and flouting the Howey Test. The SEC argues that XRP is a security that should have been registered with

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the SEC and that Ripple's insiders (who also held a significant percentage of XRP) created an information vacuum with total unilateral control about what information should be disclosed about Ripple and XRP.(2) Unlike Bitcoin and Ethereum, which the SEC says are not securities, XRP allegedly exists wholly as a speculative asset, not a currency, and that it was marketed and sold as such. (3) Ripple responds that "XRP is a fully functional ecosystem and real use case as a bridge currency that does not rely on Ripple's efforts for its functionality or price."(4) It is interesting to note that the SEC's action against Ripple was done in the waning days of now former Chairman Jay Clayton's tenure, with Ripple's CEO stating "Clayton did this with one foot out the door. Rather shamefully, he has decided to sue Ripple, and leave the legal work to the next chair."(5) Empower Oversight, a non-governmental organization recently accused the SEC of bias against Ripple. The bias action against the SEC helped shape the present outlook from investors - that the Company will prevail against the SEC.(6) Although the outcome is far from certain, there will be a ripple effect that will give more clarity as to how cryptocurrencies may fall under SEC regulation, if at all.

The SEC is also facing significant pushback on other fronts. Stemming from the creation of decentralized cryptocurrencies or decentralized finance ("DeFi"), buyers, sellers, lenders, and borrowers can now interact peer to peer or with strictly software-based middlemen. They have avoided the need to utilize a company or financial institu-



tion to facilitate the transaction.(7) In other words, they have the ability to mint digital assets and transact business without involving regulated intermediaries because the existing framework of regulations does not appear to address these types of assets or transactions. The SEC has taken the position that individuals who mint non-fungible tokens, or NFTs, are doing the same thing as issuing securities. Recently, Terraform Labs ("TFL") -- a DeFi company led by a South Korean national residing in Singapore -- was served with an SEC complaint alleging that it had issued and sold unregistered securities.(8) Despite significant jurisdictional issues at play, these recent events provide a glimpse at how the SEC intends to regulate DeFi.(9) However, many argue that the SEC has not adequately explained how creating software enabling others to mint NFTs is the same as selling and issuing securities.

The outcomes for Ripple and TFL

are unknown at this time, but the SEC has taken aggressive steps to declare that cryptocurrencies and DeFi companies are actually issuing securities subject to regulation under the federal securities laws. On one hand, the SEC could prevail and bring cryptocurrencies and DeFi under its regulation -- causing enforcement problems due to decentralization. On the other hand, the SEC's gambit could implode, leaving this new asset class largely unregulated. Either way, many argue that the existing regulatory structure does not sufficiently address how, or even if, this new asset class should be regulated.

(1) Rakesh Sharma, How SEC Regs Will Change Cryptocurrency Markets, Investopedia, updated Nov. 7, 2021, <https://www.investopedia.com/news/how-sec-regs-will-change-cryptocurrency-markets/> (list visited Dec. 21, 2021).

(2) Paul Vigna, SEC Sues Ripple

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Over XRP Cryptocurrency, The Wall Street Journal, December 22, 2020, <https://www.wsj.com/articles/ripple-to-face-sec-suit-over-xrp-cryptocurrency-11608598800> (last visited Dec. 21, 2021).

(3) *Id.*

(4) Rakesh Sharma, Crypto Company Ripple Faces SEC Lawsuit, Investopedia, <https://www.investopedia.com/crypto-company-ripple-faces-sec-lawsuit-5093444> (last visited Dec. 21, 2021).

(5) *Id.*

(6) Ekta Mourya, Ripple Long-Term Investors Bet on XRP, Expect Bias Lawsuit Against SEC to Succeed, FXStreet, <https://www.fxstreet.com/cryptocurrencies/news/ripple-long-term-investors-bet-on-xrp-expect-bias-lawsuit-against-sec-to-succeed-202112210859>, Dec. 12, 2021 (last visited Dec. 21, 2021).

(7) Rakesh Sharma, Decentralized Finance (DeFi) Definition, Investopedia, <https://www.investopedia.com/decentralized-finance-defi-5113835>, updated Dec. 20, 2021 (last visited Dec. 20, 2021).

(8) Sam Reynolds, Terraform Labs Hits Back at SEC: 'No Jurisdiction Over Do Kwon,' Blockworks, Dec. 20, 2021, <https://blockworks.co/terraform-labs-hits-back-at-sec-no-jurisdiction-over-do-kwon>, (last visited Dec. 21, 2021).

(9) *See id.*



High Interest Rates and Evolving Products Call for a Review of Your Annuities

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This article was inspired by a recent experience with a new client who is over 70 and is already retired. EsqWealth helped him increase his guaranteed lifetime monthly payments by thousands of dollars by exchanging an outdated annuity into a much more beneficial annuity at no cost to the client. The added income and the new strategy will help him keep up with, if not exceed, the pace of inflation.

As interest rates surge to their highest levels in decades, the time is ripe for individuals to reevaluate their financial strategies and explore the potential of annuities in their comprehensive financial plans. At a recent conference on annuities, I was reminded of the significant role these financial instruments can play, especially for those with older annuities. An enticing offer of a five-year fixed annuity with a guaranteed interest rate of 6.15% made waves, underscoring the changing landscape. Of course, that rate may not be

around for long. Additionally, the emergence of fixed index annuities with uncapped strategies add to the allure of these investments.

The Benefits of Annuities in Your Portfolio:

At EsqWealth, we emphasize the importance of having a comprehensive financial plan that covers all aspects of your financial life. While annuities may not fit in every client's plan, for some (including myself) annuities can provide a powerful financial tool as one of the many asset buckets in a well-diversified portfolio. They offer a range of benefits that can help secure your financial future. First and foremost, annuities provide tax-deferred growth. As your investment grows within the annuity, you won't be subject to annual capital gains taxes, allowing your money to compound more rapidly. Additionally, they also offer the benefit of deferred taxes. Thus, you only pay taxes on your gains when you withdraw the funds, po-

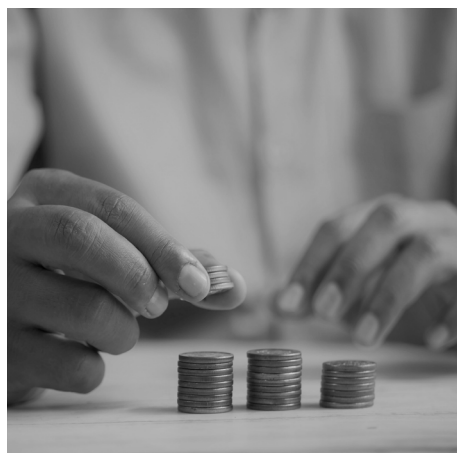
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tentially reducing your overall tax burden.

One of the most compelling advantages of annuities is that many are guaranteed not to lose money. Unlike many other assets in your retirement portfolio, which are susceptible to market risks and volatility, annuities provide a safe haven for a portion of your assets. With annuities, your principal is secure, and they may allow you to trigger income for the rest of your life. This security becomes especially important as you transition from wealth accumulation to retirement income distribution. In addition, one of the often-overlooked advantages of annuities is the guarantee that every year, your gains are locked in, and you can never lose them. Let's say you start with a million dollars, and after one year, you have \$100,000 in gains. These gains are not subject to market fluctuations. They're securely locked in, providing you with a stable foundation for your financial future.

Unlocking the Power of Annuities: A Real-Life Example

To shed light on the benefits and intricacies of annuities, consider a recent client encounter at EsqWealth. This individual held two annuities, each with unique terms that had a profound impact on the client's financial future. The first annuity was renewed in the most recent year with an annual point-to-point cap of 2.5% and a 7% annual point-to-point spread (meaning the first 7% does not get counted). These numbers significantly hindered any gains in the portfolio and the client was unaware of them.



Presumably in 2016, when the annuity started, the details were more favorable. However, for 2023 the 7% spread was added to the contract terms and the client was not informed or was not aware of its impact. Thus, if the index on which the underlying principle's growth was tied was up 20%, the client's return would first be reduced by 7% and then his total upside was capped by 2.5%. The terms of this annuity were so unfavorable that over the past seven years he held it, he only averaged a shockingly low 3.11% average return on the principal. Thus, while it may have been guaranteed to not go down in value, the minimal gains did not even keep up with inflation. This missed opportunity was particularly painful when you consider that in years when the market was up, an uncapped strategy might have delivered over 20% in gains.

Here, we see how understanding the terms and costs of your annuity is essential.

Rethinking Your Annuity Strategy

In light of the ever-changing financial landscape and the promising opportunities in the annuity market, it's essential for individuals

to reevaluate their annuity policies. For those with annuities that are three or more years old, a 1035 exchange might be a wise move, especially given the rising interest rates and new offerings in the market.

Moreover, the availability of fixed index annuities with uncapped rates opens up new possibilities for wealth accumulation. These products offer a chance to participate more fully in the market's growth without the constraints of annual caps and excessive spreads.

Conclusion

While annuities may not be for everyone, they can be a valuable addition to your financial plan, providing security and growth potential. At EsqWealth, we're here to guide you through the complexities of the financial markets and various options (including the annuity landscape) to help you make informed decisions that align with your financial goals and aspirations. Don't miss out on opportunities like the one our client encountered—take charge of your financial future today.

The information above is not intended to and should not be construed as specific advice or recommendations for any individual. The opinions voiced are for general information only and are not intended to provide, and should not be relied on for tax, legal, or accounting advice. To discuss specific recommendations for any unique situation, please feel free to contact us.



California Jury Delivers \$41.5 Million Verdict for Whistleblower Retaliation

On December 11, 2023, a California jury in *Gatchalian v. Kaiser Foundation Hospitals*—a whistleblower retaliation case—delivered a \$41.5 million verdict in favor of the plaintiff, comprising \$2.5 million in past and future lost earnings, \$9 million in emotional distress damages, and \$30 million in punitive damages. The plaintiff, a charge nurse for Kaiser Permanente Hospital with a 30-year tenure at the company, alleged she was fired in retaliation for reporting concerns over patient health and safety.

Gatchalian had worked for 13 years as a charge nurse in the NICU, during which time she alleged she made repeated reports concerning patient and staff health and safety, including, inter alia, that (1) a supervisor failed to report that a patient’s father brought a knife into the NICU, or take any action whatsoever; (2) two nurses did not know which type of catheter to use on a baby in critical condition and neglected to seek her help; (3) a nurse neglected to feed a baby; and (4) that a staff member had disclosed

protected health information to a putative father whose paternity had not yet been confirmed. Gatchalian alleged that the foregoing reports precipitated swift retaliation by her supervisors, and both supervisors and colleagues began refusing to cooperate with her or to provide her with information that was necessary and attendant to her job duties as a charge nurse. Ultimately, Gatchalian was fired for purportedly allowing her bare feet to touch an isolette during a break.

The jury rejected Kaiser’s proffered business reason for Gatchalian’s termination, finding instead that it was motivated by Gatchalian’s whistleblowing. The result is yet another cautionary message to employers that proffered business reasons for terminating an employee will yield to a jury’s finding of subterfuge where the evidence supports a discriminatory or illegal motive.

If you believe you have been illegally victimized by your employer or another person in the workplace, please contact us for a free consultation and case evaluation. You may telephone us at (619) 230-0063 or e-mail us at contactus@johnsonfistel.com



Upcoming Lead Plaintiff Deadlines

Johnson Fistel is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed on this page are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a “lead plaintiff” under the Private Securities Litigation Reform Act of 1995.

Company	Deadline
Microvast Holdings, Inc.	2024-02-05
Eagle Pharmaceuticals, Inc.	2024-02-09
Golden Heaven Group Holdings Ltd.	2024-02-20
Maison Solutions Inc.	2024-03-04
Dada Nexus	2024-03-11
BioNTech SE	2024-03-12



Johnson Fistel Helps Secure Important Corporate Governance Reforms at Resideo Technologies, Inc.

In re Resideo Technologies, Inc. Derivative Litigation, Case No. 0:21-cv-01965-WMW-ECW (D. Minn.): On November 7, 2023, Judge Wilhelmina M. Wright granted final approval of a stockholder derivative settlement, which resolved the stockholder lawsuit pending in the United States District Court for the District of Minnesota.

The actions, brought on behalf of nominal defendant Resideo Technologies, Inc. (“Resideo” or the “Company”) and against certain current and former directors and officers of the Company for breaches of fiduciary duties and other violations of Delaware and federal law. Specifically, Plaintiffs alleged that these directors and officers: (i) caused the Company to enter into certain agreements with its former parent company, Honeywell Inter-

national, Inc., which were unfavorable to Resideo; and (ii) made false and misleading statements to the investing public regarding the implementation of two of Resideo’s business initiatives, Project GRIP and Project STORM, thereby breaching their fiduciary duties owed to the Company.

The settlement reached by the parties, and approved by the Court, requires corporate governance reforms to be implemented for a period of five years and, as the Defendants and Resideo acknowledged, the settlement “confer[s] substantial benefits upon Resideo and its current stockholders.” These benefits include Resideo’s implementation of important corporate governance reforms, including: (i) the allocation of at least \$300,000 annually toward continuous improvement of the

Company’s governance oversight, risk management and supply chain; (ii) amendments to the Audit Committee Charter and Nominating and Governance Committee Charter including amendments requiring that the Audit Committee oversee certain enterprise risk management matters, and requiring the Nominating and Governance Committee to oversee additional environmental, social and governance programs and the impact of the Company’s supply chain processes related to such; (iii) separation of Resideo’s Chief Executive Officer and the Board’s Chairperson position; (iv) amendments to Resideo’s Disclosure Committee Charter to assist the Company both in meeting its disclosure obligations in a timely manner, and in supporting the Audit Committee in the discharge of its obligations in connection with certification of its quarterly and annual filings with the Securities and Exchange Commission; (v) more stringent Board independence requirements; (vi) enhancements to director and employee training and continuing education; (vii) enhancements to Resideo’s confidential whistleblower program; and (viii) requiring that management provide Resideo’s Board with a strategic update on an annual basis.

Attorneys Frank J. Johnson, Brett M. Middleton, and Jonathan M. Scott led the prosecution of the litigation for Johnson Fistel and helped achieve this superb result on behalf of Plaintiffs and Resideo.



Johnson Fistel Helps Secure Important Corporate Governance Reforms at Zuora, Inc.

In re Zuora, Inc. Derivative Litigation, Case No. 3:19-cv-05701-SI (N.D. Cal.): On September 18, 2023, Judge Susan Illston granted final approval of a shareholder derivative settlement which resolved shareholder lawsuits pending in the United States District Court for the Northern District of California, United States District Court for the District of Delaware, and in the Delaware Court of Chancery.

The actions, brought on behalf of nominal defendant Zuora, Inc. (“Zuora” or the “Company”) and against certain current and former directors and officers of the Company for breaches of fiduciary duties and other violations of Delaware and federal law. Specifically, Plaintiffs alleged that these directors and officers: (i) caused the Company to make false and misleading statements to the investing public regarding the integration of its two primary software products, “Billing” and “RevPro”; and (ii) engaged in insider sales of the Company’s stock

while the Company’s stock price was allegedly artificially inflated, thereby breaching their fiduciary duties owed to Zuora.

The settlement reached by the parties, and approved by the Court, requires corporate governance reforms to be implemented for a period of four years and, as Judge Illston noted, “provides a beneficial result for Zuora and appears to be the product of serious, informed, non-collusive negotiations overseen by an experienced mediator.” The independent non-defendant members of Zuora’s Board acknowledged that the settlement “confer substantial benefits upon Zuora and its current stockholders.” These benefits include Zuora’s implementation of important corporate governance reforms, including: (i) the creation of a Chief Compliance Officer position; (ii) amendments to its Disclosure Committee Charter to assist the Company both in meeting its disclosure obligations in a timely manner, and in supporting the Au-

dit Committee in the discharge of its obligations in connection with certification of its quarterly and annual filings with the Securities and Exchange Commission; (iii) enhancement to Zuora’s Audit Committee governance; (iv) the creation of a Chief Technology Officer position; (v) more stringent Board independence requirements; (vi) enhancements to director training and continuing education; (vii) enhancements to Zuora’s confidential whistleblower program; and (viii) requiring that management provide Zuora’s Board with a strategic update on an annual basis.

Attorneys Frank J. Johnson, Brett M. Middleton, and Jonathan M. Scott led the prosecution of the litigation for Johnson Fistel and helped achieve this superb result on behalf of plaintiffs and Zuora.



Investment Opportunities in a Declining Rate Environment: Four Asset Classes to Consider

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To combat inflation, the Federal Reserve increased interest rates by 5.25 percentage points since March 2022. The recent hints from the Fed about potential rate cuts in 2024 suggest a significant shift in interest rate expectations. As the Fed forecasts a possible reduction of three-quarter points to around 4.6 percent by year-end 2024, the landscape for investments is evolving. Anticipating this change from rising to decreasing interest rates for the first time in a long time, I'm personally evaluating optimal strategies to deploy some cash-equivalent positions.

While there is no surefire way to time investments for when interest rates begin to decline, there are a few options that can lower your risk and position your portfolio for future benefits in the coming months and years should interest rates fall. Here are four asset classes that tend to perform well in falling interest

rate environments:

Bonds and Treasuries

These assets often excel in declining rate scenarios due to their fixed interest rates. As interest rates drop, bond prices rise, offering opportunities for potential gains. For instance, if you purchase a 30-year Treasury bond yielding 4% and rates fall to 3%, the market typically values your higher-yielding bond at a premium. Thus, you may want to just ride out the duration of your bond and earn above-market income or sell your bond, recognize your capital gains, and invest your cash elsewhere.

Real Estate

Lower borrowing costs generally stimulate demand in real estate markets. Reduced mortgage rates enhance affordability, potentially

leading to increased property values and market activity, benefiting residential, commercial properties, REITs, and real estate funds. However, economic factors like supply constraints, regional affordability issues, and speculative behaviors might counterbalance the effect of falling rates on home prices.

Preferred Stocks

With fixed dividends, preferred stocks offer stability. They are a type of hybrid investment that function as a stock and, similar to a bond, pay a fixed dividend. Preferred stockholders have preference over common stockholders if a company is unable to pay its dividends, and preferred stock returns are often higher than those of regular stock. In falling rate environments, the appeal of consistent income typically results in higher demand for preferred stocks and when demand is higher, prices typically increase.

Growth & Technology Stocks

Certain sectors, like technology, often thrive with reduced borrowing costs. Growth stocks within these sectors may experience amplified growth potential and higher valuations. Lower rates can lead to increased spending and borrowing, positively impacting these stocks. In addition, in discounted cash flow valuation models, lower interest rates have an adverse effect on the present value of future profits. The predicted future profits of growth stocks are usually substantially higher than the current profits resulting in a higher present value when interest rates or discount rates are lower.

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Risk Considerations and Diversification Strategies

While these asset classes historically perform well in falling interest rate scenarios, it's vital to consider associated risks. Recognizing and managing risks associated with falling interest rates involves a comprehensive understanding of various risk factors and employing diversified strategies tailored to an investor's specific financial situation and goals. Economic conditions, geopolitical events, or unexpected market fluctuations can also influence asset prices.

Diversifying across asset classes such as equities, fixed income, real estate, and alternatives helps spread your risk. A mix of assets with varying correlations to interest rate changes can also help mitigate the impact of rate movements on the overall portfolio. You may also want to diversify within each asset class. For example, within real estate, diversification might include different property types or geographic locations to spread risk further. Within fixed income, diversification by bond quality (government, corporate, high-yield) and maturity (short, intermediate, long-term) would help further manage interest rate risk.

Conclusion:

In the evolving landscape of interest rates, exploring diverse investment options presents potential opportunities. Understanding the nuanced dynamics driving each asset class in declining rate environments and effectively managing associated risks are vital aspects of strategic investing.



While experienced investors may navigate these shifts independently, seeking advice from a financial advisor is a recommended avenue for gaining professional insights and perspective. EsqWealth offers tailored strategies and informed perspectives, benefitting not only those seeking additional guidance due to limited expertise but also individuals desiring a comprehensive evaluation or lacking the time to dedicate to extensive research.

Consulting with a financial advisor allows investors to tap into their expertise and gain a broader understanding of market nuances, potentially enhancing their investment decisions. While not imperative for all investors, seeking advice from a financial advisor remains a prudent choice for those looking to further

refine their investment strategies and gain professional insights into navigating the evolving interest rate environment.

The information above is not intended to and should not be construed as specific advice or recommendations for any individual. The opinions voiced are for general information only and are not intended to provide, and should not be relied on for tax, legal, or accounting advice. To discuss specific recommendations for any unique situation, please feel free to contact us.

Recent Accomplishments



Zornberg v. NAPCO Security Technologies, Inc., et al., Case No.: 23-cv-6465 (BMC) (E.D.N.Y.): On November 13, 2023, The Hon. Brian M. Cogan appointed Johnson Fistel's client as lead plaintiff and the firm as co-lead counsel pursuant to the Private Securities Litigation Reform Act of 1995 in this securities fraud class action brought on behalf of all persons and entities that purchased or otherwise acquired publicly traded NAPCO Security Technologies, Inc. ("NAPCO" or the "Company") securities between November 7, 2022 and August 18, 2023, inclusive (the "Class Period"). NAPCO, which is headquartered in Amityville, New York, engages in the development, manufacture, and distribution of security products. Through this action, lead plaintiff, Johnson Fistel, and its co-counsel

seek to recover damages caused by defendants' violations of the federal securities laws and to pursue remedies under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, against the Company and certain of its top officials. The action focuses on allegations that throughout the Class Period, defendants made false and/or misleading statements and/or concealed that: (i) NAPCO failed to address any material weaknesses with internal controls regarding cost of goods sold ("COGS") and inventory; (ii) the Company downplayed the severity of material weaknesses regarding its internal controls; (iii) NAPCO's unaudited financial statements from September 30, 2022 to the present included "certain errors," such as overstating inventory and understat-

ing net COGS, resulting in overstated gross profit, operating income, and net income for each period; and (iv) as a result, the Company would need to restate its previously filed unaudited financial statements for certain periods. On August 18, 2023, NAPCO announced it would restate its unaudited financial statements from September 30, 2022 to the present. Specifically, the Company disclosed that its "inventories were overstated and COGS was understated, resulting in overstated gross profit, operating income and net income for each period." On this news, the price of NAPCO stock fell more than 45%, causing substantial damage to investors.

Portfolio Monitor

Johnson Fistel recognizes that there are inherent risks when investing in the stock market. But the risks that an investor assumes do not, and should not, include the risk that the company or its officers and directors will make false and misleading statements to artificially inflate the company's stock price or sell their own stock based on insider information.

Our Portfolio Monitor is designed to alert institutional and individual investors when one of their investments may be affected by securities fraud, corporate waste, or other wrongdoing. Our Portfolio Monitor is available to both U.S. and foreign investors. There are no minimum portfolio requirements or costs to participate.



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Employment and Labor Litigation

The attorneys at Johnson Fistel have obtained successful and efficient results for both employers and employees in litigating employment disputes, negotiating separations and severances, and evaluating employment policies, practices, and contracts.

Johnson Fistel can help employers and employees with the following issues:

- Minimum Wage & Overtime Pay
- Misclassifications (Employee/Independent Contractor)
- Discrimination, Harassment, & Retaliation
- Employment Contracts, Severance & Separations, & Restrictive Covenants.

Whether you're an employee or an employer, please contact us today to determine whether we may be able to assist you.

Please visit our website for FAQs about employment law: <https://www.johnsonfistel.com/faq/>





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