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WHIPLASH!

A Seismic Shift in Workplace Laws

2017 Employment Law Conference

March 10, 2017

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WELCOME

2017
Employment
Law Conference

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A Wave or a Whimper?

Federal Agency and Legislative Developments in President Trump's First 50 Days

2017 Employment Law Conference

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Federal Developments in President Trump's First 50 Days

The Trump Administration's Immigration Actions

- Protecting U.S. workers
- National security emphasis
- Inconsistent messaging on high-skilled workers and unexpected actions
- Expanded immigration enforcement
- "Legalization" program for undocumented?

The First 50 Days

- Executive orders
  - Border Security and Immigration Enforcement Improvements (01/25/2017) (building "the wall")
  - Protecting the Nation from Foreign Terrorist Entry into the United States, Executive Order 13679 (V. 1 dated 01/27/2017, and V. 2 dated 03/06/2017)
- Uncertainty over DACA policy
- Increased immigration enforcement raids
- Suspension of premium processing for H-1Bs effective 04/03/2017

Impact of the First 50 Days

- International travel remains uncertain for many employees; Impact not limited to affected countries
- U.S. CBP increasing searches of devices and personal effects of employees
- Employers advising employees to defer nonessential international travel
- Nervousness in hospitality, agriculture, and healthcare industries about expanding enforcement and visa bans

EO 13769 (the "Visa Ban")

- Version 2 applies to 6 countries (Yemen, Somalia, Sudan, Iran, Libya, and Syria); excludes Iraq
- 90-day suspension of visas and U.S. entry; covers individuals:
  - Outside the U.S. on 03/06/17; AND
  - Lacking a valid U.S. visa on that date; AND
  - Lacking a valid U.S. visa at 5:00 pm EST on 01/27/17
- Case-by-case waivers available to individuals temporarily outside the U.S. who were previously admitted to the U.S. or established significant contacts here
- Exempts:
  - Legal Permanent Residents
  - Dual nationals if travel occurs on a non-designated passport
  - A foreign national with a valid travel document other than a visa

H-1B Premium Processing Suspension

- DHS suspends H-1B premium processing effective 4/3/17, for up to 6 months
- Impacts all H-1B lottery cases
- Significant impact includes:
  - Impact on work authorization eligibility
  - Impact on international travel
  - Impact on approvability in some cases

So, What's Next? What We *Know*:

- Continuing emphasis on immigration enforcement
- Continuing volatility and uncertainty in immigration policy and enforcement
- DACA uncertainty

So, What's Next? What We *Think*:

- Leaked draft Executive Order on business immigration
  - Increased scrutiny of all visa categories and reinterpretation of guidelines. (DOJ/DHS/DOL)
  - Reversal of Obama executive order on STEM OPT?
  - Protective posturing by the DOL
- Increases to H-1B prevailing wages
- Business immigration reform:
  - Congressional proposals to reform H-1B visas and to limit family immigration
  - Emphasis on skills-based immigration

Increased Workplace Enforcement and E-Verify Requirements

- Expansion of Workplace Enforcement (I-9) audits
- A return to workplace raids? Chilling effect on immigrant labor
- Mandatory E-Verify or strong incentives to enroll?
  - Illinois does not currently require E-Verify enrollment

Workplace Enforcement: Protecting U.S. Workers

- EEOC to establish new standards for interpreting Title VII where U.S. workers lose their jobs? (Disney case)
- Department of Justice Civil Rights Division to become more active on interpreting "non-discrimination" guidelines?

Legislation/Treaty Renegotiation

- NAFTA renegotiation – TN visa impact?
- H-1B visa program changes:
  - Limits on applications per sponsor
  - Greater preference for smaller employers
  - Greater preference for higher wage positions
  - Requirement to recruit a U.S. worker first
  - More protections for U.S. workers
- Shared interests on H-1B visas across political parties?

How Should You Respond to Volatility?

- Find a trusted source of information and analysis in a fluid environment
- Act quickly - identify who and what might be impacted at your organization by EOs
  - Proactive communication can soothe concerns
  - Partner with your legal counsel
- Provide the right resources to affected individuals and operations

How Should You Prepare for the Coming Changes?

- Be proactive:
  - When was your last I-9 audit?
  - Do you understand E-Verify?
  - Do you need to provide legal resources to your workforce?
- Review your internal policies and legal guidance:
  - Employees coming forward with new information: are you liable for prior employment?
  - Affirmative duty to report somebody who is unauthorized?
  - Is chatter about status “knowing employment of unauthorized workers”?
  - How should you talk to employees?
  - How can you correct any deficiencies?

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ACA and Retirement Plans

Federal Developments in President Trump's First 50 Days

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Potential Changes to the ACA

- Significant changes to the Affordable Care Act are likely under Trump administration and Republican-controlled Congress
  - Regulatory/sub-regulatory changes
    - January 20, 2017 Executive Order
  - Repeal and replace effort
    - Slim Republican majority in Senate limits extent of possible changes

ACA Replacement Proposal

Republican Draft Replacement Proposal

- “American Health Care Act” proposed on March 6, 2017
- Proposal is controversial and will almost certainly be modified
- Hard to find agreement among Republicans and unlikely to win support of Democrats

ACA Replacement Proposal

- Eliminates individual and employer mandate penalties, as of January 1, 2016
- Delays implementation of Cadillac tax until January 1, 2025
- Preserves ACA employer reporting requirements
  - New employer reporting details still unclear
- Changes W-2 health coverage reporting

ACA Replacement Proposal

- Eliminates $2,500 cap on health flexible spending accounts (FSAs) starting in 2018
- Substantial increase in Health Savings Account (HSA) limits starting in 2018
  - Increased to $6,550 for individuals and $13,100 for families (currently $3,400 for individuals and $6,750 for families)
  - Liberalizes other HSA rules starting in 2018
    - Catch-up contributions
    - Use of HSA funds for medical expenses incurred 60 days before establishment of HSA account

ACA Replacement Proposal

- Eliminates ACA income-based subsidies and provides flat tax credits based on age
  - Tax credits phase out at certain income levels
- Includes continuous coverage requirement in lieu of individual mandate
  - 63 day gap over prior 12 months = 30% surcharge/penalty
- Eliminates many other ACA-related tax provisions effective January 2018

ACA Replacement Proposal

- Keeps the following elements of the ACA:
  - Insurers must cover pre-existing conditions
  - Coverage requirement for adult children up to age 26
  - Cap on total out of pocket expenses
  - Ban on lifetime and annual limits
  - Preventive care requirements
  - Section 1557 (nondiscrimination rules, particularly for transgender-related treatment)

Potential Retirement Plan Changes

- Trump administration has promised comprehensive tax reform and several other significant spending priorities including increases in infrastructure and defense spending
- The retirement plan system provides several possible revenue sources to pay for tax reform and other spending:
  - Freeze or reduction of 401(k) and 403(b) contribution limits
    - Decreases both corporate and individual tax deductions
  - Relax the funding rules for single-employer pension plans
    - Decreases annual corporate pension contributions, which decreases corporate tax deductions
  - Increase PBGC premiums for pension plans
    - This tactic been used in recent years and has led to heightened efforts by plan sponsors to de-risk or terminate pension plans

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Federal Developments in President Trump's First 50 Days

Union Statistics*

- Calendar Year 2016
  - Union membership down to 6.7% (private sector)
  - Union RC elections down 17%
  - Union RC win rate 71%
    - In units of 1-10, 83% win rate
  - Most active Unions
    - Teamsters
    - SEIU
    - Combined for roughly 1/3rd of all elections

- * Labor Relations Institute, Inc. 2016 NLRB Elections Review

NLRB Statistics

- Fiscal 2016 (ending 9/30/16)
  - 21,326 unfair labor practice charges filed
    - Increase of 1127 from FY 2105
    - Roughly 2/3 without merit
    - 93% of merit cases settled
    - 89% GC win rate in NLRB and ALJ decisions
      - "in whole or in part"

Key NLRB Vacancies

- Current Board
  - Acting Chairman Phil Miscimarra (R); term expires 12/16/17
  - Mark Pearce (D); term expires 8/27/18
  - Lauren McFerren (D); term expires 12/16/19
- Two vacant Board seats
  - When filled, will have 3 Republican and 2 Democrat appointees
- General Counsel’s term expires November 2017

Ripe for Reversal…

- *Lutheran Heritage*
  - Test used to evaluate handbook policies
  - Often produces head scratching results
  - Miscimarra's dissent in *Beaumont Hospital* makes the argument for a balancing test

Ripe for Reversal…

- *Browning-Ferris/Miller & Anderson*
  - “Joint employer” cases
- *Specialty Healthcare*
  - Paved the way for micro-units
  - Courts of appeal have endorsed NLRB decision
- Protected concerted activity cases

Ripe for Reversal…

- *D.R. Horton, Inc./Murphy Oil USA, Inc.*
  - Class action waivers
  - Supreme Court will hear three cases next term
    - Circuit split (7th and 9th upheld NLRB view; 5th went the other way)

Ripe for Reversal…

- *Pacific Lutheran*
  - – Adjunct faculty at private, religious colleges and universities can unionize
  - – Test: show faculty performing specific role in creating and maintaining a religious environment
- *Columbia College*
  - – Graduate assistants may be employees
  - – Test is compensation for services provided

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DEPT OF LABOR

Federal Developments in President Trump's First 50 Days

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Secretary of Labor

- First nominee – Andrew Puzder – withdrew from consideration on February 15, 2017
- Puzder, the CEO of CKE Restaurants (operates Carl's Jr. and Hardee's) opposed higher wages, voiced harsh anti-regulatory positions, and hired an undocumented worker
- On February 16, 2017, President Trump nominates Alex Acosta – deemed a less controversial choice

Who is Alex Acosta?

- Would be first Hispanic member of Trump's cabinet
- Considered a well rounded nominee with both public and private sector experience
- Notable jobs:
  - NLRB Board Member
  - Head of the U.S. Dept. of Justice's Civil Rights Division
  - U.S. Attorney for Southern District of Florida
  - Dean of the Florida International University School of Law (currently)

Alex Acosta – A Smoother Confirmation?

- Generally positive reaction toward his nomination from both management and union representatives
- His views on labor issues are not yet known but early indication is that he is pro-free-market, pro-free-enterprise
- Has been known to be a champion of diversity
- Insiders believe he will take both employers' and employees' points of view into account – but policy still driven by the White House

What Can We Expect from the DOL?

- Obama Administration: Rift was between the Executive Branch/DOL and the courts
- Trump Administration: Rift likely to be between worker-focused policies of the Obama Administration and the pro-business, anti-regulation Trump Administration
- DOL will likely dial back some of Obama's wage focused initiatives – such as the Overtime Exemption Rule and Joint Employer Administrator's Interpretation

Status of the Final Overtime Rule?

- On December 1, 2016, minimum salary level was to increase from $455/week to $913/week ($47,476 per year), with automatic salary level increases every 3 years
- Texas district court issued nationwide injunction in November 2016
- Injunctive order currently on appeal to the 5th Circuit
- Briefing schedule extended to allow the new administration to consider its position in the matter – it is presumed the DOL will take a different approach under new leadership
- But the underlying case continues in district court where: (1) AFL-CIO has sought to intervene as co-Defendant to defend the new rule; and (2) Plaintiff's motion for summary judgment has been briefed

Status of the Final Overtime Rule?

- So what does this all mean?
  - If AFL-CIO is allowed to intervene, DOL can't just lay down its sword or settle the case
  - If Plaintiff wins at the district level, the case ends and the rule is invalidated
- So no final nail in the coffin just yet

The New Rule Had Limited Application

Keep in Mind What Did **Not** Change:

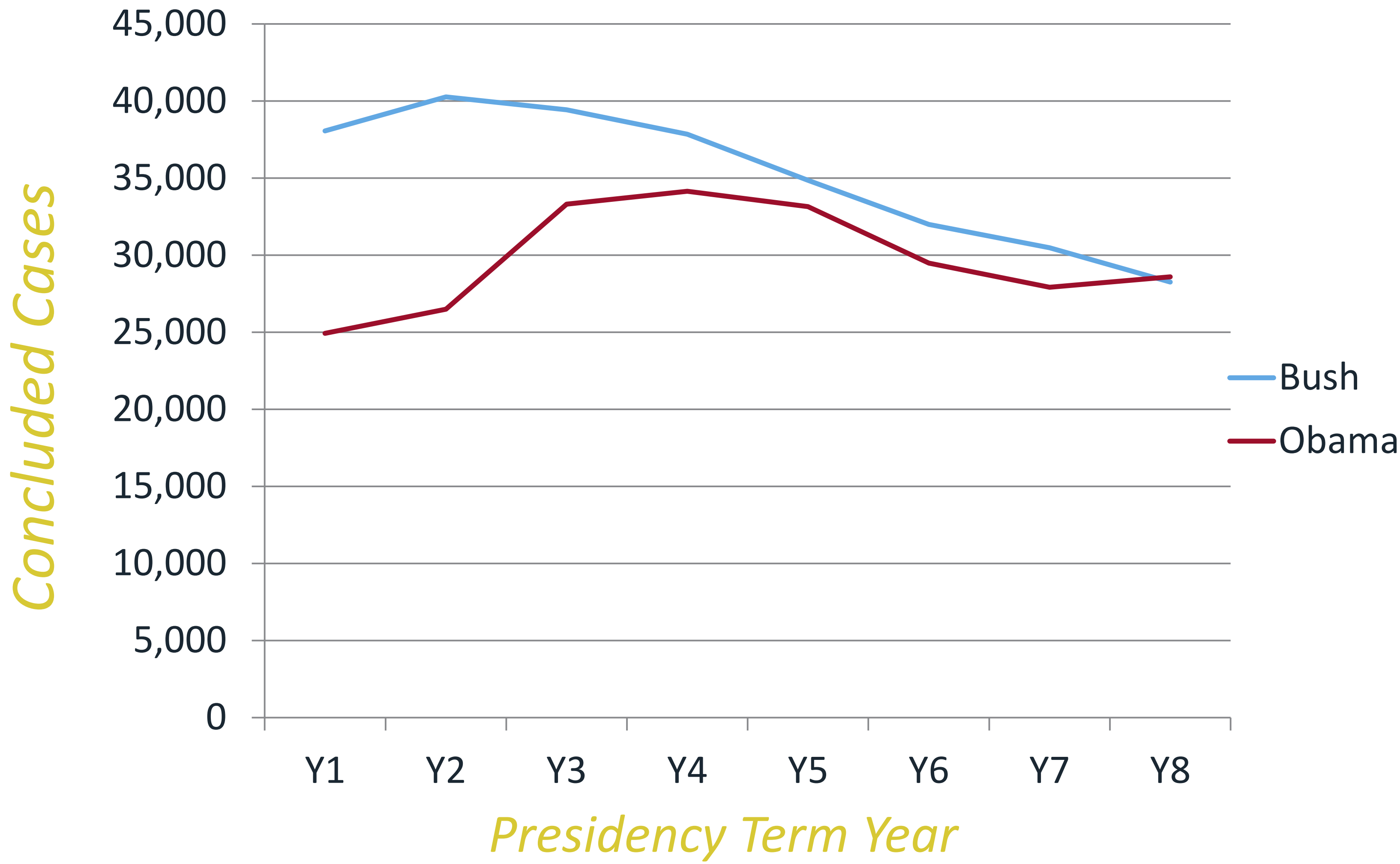
- Job duties test
- Salary basis test

Most claims related to misclassification are based on the failure to meet the job duties test – and we expect that to continue

DOL Enforcement Actions

- Data from 2001-16 indicates similar number of enforcement actions with no drastic decrease at the federal level
- We will be watching Trump's enforcement activity to see if consistent with recent administrations or a new low

DOL Enforcement Actions



Expect Increased FLSA Filings

- Even if the DOL does not engage in as much enforcement, we expect the Plaintiff's bar to fill that void
- Focus will continue to be on worker classification – exempt/non-exempt, contractor and joint employer
- Additional considerations: increased wages at the state and local level, worker awareness of rights, and increased filing in state courts (including Illinois)

Joint Employer Relationship

- July 15, 2015: W&H Division issues Administrator's Interpretation on Joint Employment
  - Horizontal and Vertical Joint Employment
- Relies on "economic realities" test
- But takes an aggressive view of cases and made clear the DOL was cracking down on contractor classifications
- Emphasizes an expansive application of "employee" – asserting that most workers are employees under the FLSA

Looking Forward…

- Employers were bracing for more DOL scrutiny of their contractor relationships…but now??
- Few courts have addressed this since the A-I was issued but no real impact thus far – continue to refer to economic realities
- Employers will likely continue to face evolving FLSA issues as the workforce evolves and changes:
  - Gig economy
  - Alternative work schedules
  - Technology
- Is the FLSA outdated??

Wage & Hour Insights

Wage & Hour Insights

Guidance & Solutions for Employers

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Trump Names New Nominee for Secretary of Labor

By Staci Ketay Rotman on February 16, 2017
Posted in Trump Administration

Yesterday, President Trump's then nominee for Secretary of Labor, Andy Puzder, withdrew his nomination ahead of his confirmation hearing given the increasing opposition to his nomination by both parties. Less than 24 hours later, President Trump announced Alexander Acosta as his new choice for Secretary of Labor. Mr. Acosta is currently the dean of Florida International University College of Law but has experience in both the public and private sector. Some of Mr. Acosta's prior positions include being appointed by President George W. Bush to serve as a member of the National Labor Relations Board, his appointment to the role of Assistant Attorney General for the Civil Rights Division of the Department of Justice, and a high profile role as U.S. Attorney for the Southern District of Florida. If confirmed, Mr. Acosta will be the first Hispanic member of President Trump's cabinet.

It's too early to tell what type of agenda we could see from the DOL if Mr. Acosta is confirmed but he likely will be a little more worker-friendly than Mr. Puzder. We will continue to update you as more information becomes available regarding Mr. Acosta.

Trump leaves DOL OT rules on life support - For Now

By Bill Pokorny on January 27, 2017
Posted in *New Exemption Rules, Trump Administration

President Trump has had a busy week since his inauguration: ordering construction of a wall, starting to unwind the ACA, arguing with the media about how many people attended his inauguration – the list goes on. One thing that he has not yet gotten to is the U.S. DOL's stalled overtime exemption rules. Right now the rules remain in limbo, temporarily suspended by order of a U.S. District Court in Texas. That

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EEO/EEOC & DOJ

Federal Developments in President Trump's First 50 Days

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EEOC

- Victoria Lipnic – Acting Chair
  - Appointed in 2010 by President Obama
- Indicated no major changes
  - Strategic pursuit of systemic cases in light of limited resources
  - Foster employment opportunities and job growth
- Pay Data Reporting Requirements on EEO-1

EEOC Strategic Enforcement Plan

- Approved October 2016
  - Covers FY 2017-2021
- Listed Priorities:
  - Barriers in recruitment and hiring
  - Systemic harassment
  - Equal pay
  - Protecting vulnerable workers, including immigrant and migrant workers

EEOC SEP Priorities

- Barriers to the Legal System
  - Settlement agreements that prohibit filing charges
  - Overly broad waivers
  - Significant retaliatory practices
- Emerging and Developing Issues
  - Discrimination against persons who are Muslims or Sikh or of Arab, Middle Eastern or South Asian descent
  - Qualification standards and inflexible leave policies under the ADA

Sexual Orientation/Transgender

WHAT IS SEX???

Sexual Orientation/Transgender

- Title VII of the Civil Rights Act of 1964
  - Prohibits discrimination against employees on the basis of race, color, national origin, religion and “sex”
  - “Sex” includes discrimination based on gender stereotypes
    - *Price Waterhouse v. Hopkins* (Supreme Court 1989)

Sexual Orientation/Transgender

- *Hammer v. St. Vincent Hosp.* and *Spearman v. Ford Motor Co.* (7th Cir. 2000)
  - Harassment based on sexual orientation is not an unlawful employment practice under Title VII
- *Ulane v. E. Airlines, Inc.* (7th Cir. 1984)
  - Sex ≠ sexual identity or sexual orientation

Sexual Orientation/Transgender

- *Hively v. Ivy Tech Community College* (7th Cir. 2016)
  - Initially held Title VII does not prohibit sexual orientation discrimination but strongly criticized current state of the law
  - Noted distinction between sex stereotyping and LGBT discrimination makes no sense
  - Entire Seventh Circuit vacated decision and will re-decide

Trump Administration Positions

- Federal contractors
  - WH stated would leave in place Executive Order that prohibits discrimination against LGBT employees
- Transgender student rights
  - Obama administration guidance interpreted Title IX, the law that prohibits sex discrimination in education, to include transgender students
  - February 23, 2017: DOE and DOJ revoked guidance, said access should be decided at state and local level

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KEEPING IT LOCAL

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State and Municipal Developments

Today's Agenda

- Developments in Local/State Laws
- The Backlash: Preemption Laws
- Chicago & Cook County Paid Sick Leave Ordinances: A Case Study
- What Can Employers Expect in the Near Future?
- Considerations for Policy Drafting

Current Trends

- Federal gridlock
- State and local "activism"
- Federal executive orders vs. state/local laws
- Tension between state and local leaders

Paid Sick Leave

- Where we are seeing paid sick leave laws:
  - 7 states & D.C.
    - In 2016, Arizona, Vermont, and Washington state all enacted paid sick leave laws
  - 30 localities/counties
    - 7 in California
    - 12 in New Jersey
    - 2 in Illinois

Other Types of Leave

- In addition to paid sick leave laws…
  - Family Leave
    - 5 states offer paid family leave (California, New Jersey, New York, Rhode Island, and Washington)
    - Bills regarding paid family leave predicted to be introduced in 20 additional states, including Illinois
    - San Francisco – first city to offer paid parental leave
    - 12 states offer unpaid leave
    - Illinois Employee Sick Leave Act
  - School Visitation Leave
    - 10 states and D.C.
    - Ranges from a simple anti-discrimination statute (Nevada) to 40 hours of leave per year (California)
  - Military/Family Military Leave
  - Leave for Victims of Domestic Violence & Sexual Abuse

Equal Pay Laws

- Most states have them and they track federal Equal Pay Act
- But . . . some differences:
  - MA: Prohibits employers from asking about an applicant's salary history during interviews (OK after offer with compensation made)
  - MD: Equal pay law includes prohibition on wage discrimination based on gender identity
  - Geographic reach varies

Pregnancy Accommodation

- Nearly 31,000 charges of pregnancy discrimination were filed with the EEOC and state agencies between October 2010 and September 2015
- 18 states, DC, and four cities have pregnancy accommodation laws
  - Coverage, posting and accommodation requirements, and remedies vary

Source: Nat'l Partnership for Women and Families

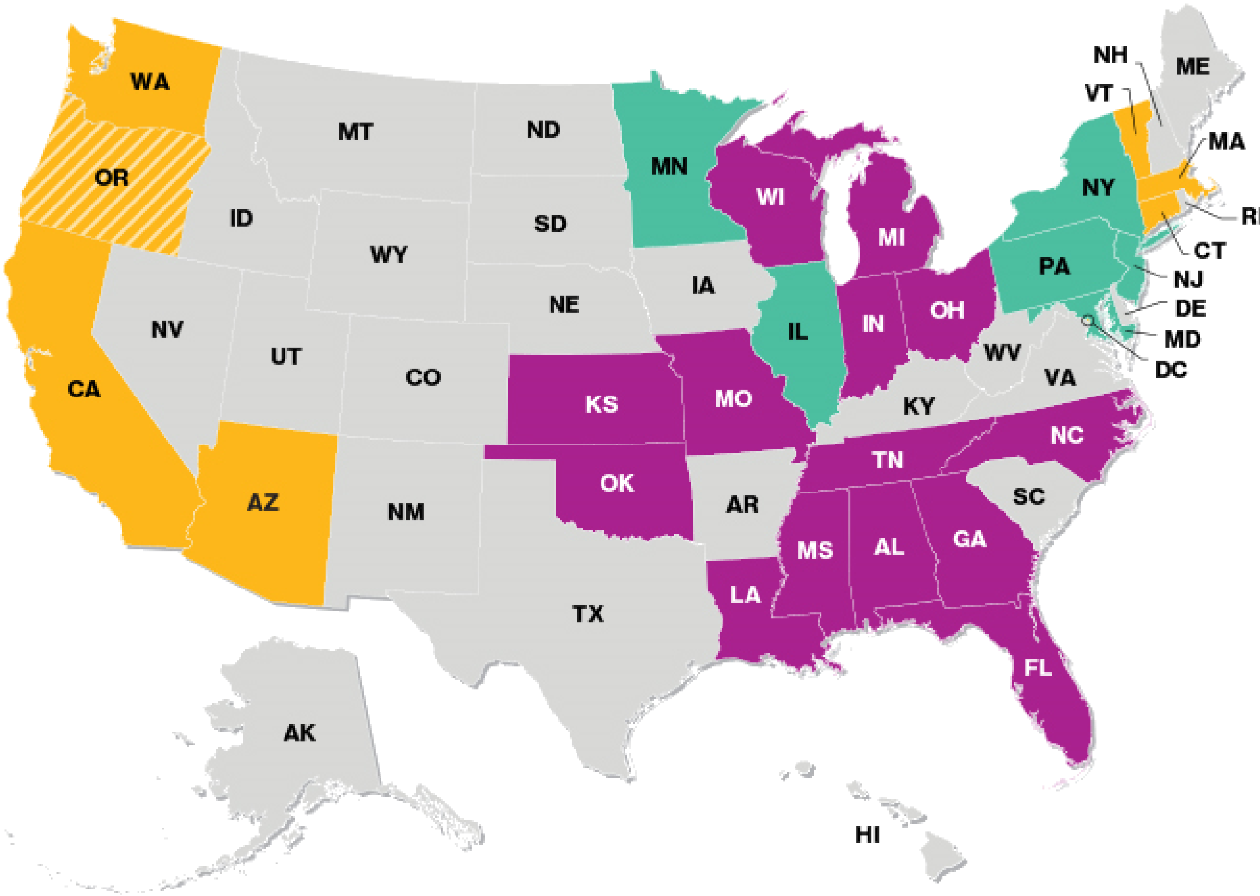
Other Topics Addressed at the State or Local Level

- Minimum Wage
- Restrictive Covenant Agreements
- Right-to-Work Laws
  – 28 states have right-to-work laws on the books
- Ban-the-Box Initiatives
  – Could affect your nationwide application forms
- Credit and Background Checks
- Anti-Discrimination Laws
  – Protected categories expanded in some states

The Backlash: Preemption

- Preemption laws provide that a locality may not pass a law more generous than that existing at the federal or state level
- Although some states have had preemption laws for a long time, most were passed in the last 4 years
  - 15 states prohibit localities from adopting paid sick leave mandates
  - 23 states prohibit localities from adopting higher minimum wage than state/federal level

Preemption Laws



- States mandating paid sick leave (and the District of Columbia)
- States mandating paid sick leave and prohibiting local jurisdictions from legislating paid sick leave
- States with one or more localities (but not the state itself) that mandate paid sick leave
- States prohibiting local jurisdictions from legislating paid sick leave

States/localities mandating paid sick leave

Arizona*	Oregon
California	Vermont
Connecticut	Washington
Massachusetts	Washington, DC
Berkeley, CA	San Diego, CA
Emeryville, CA	San Francisco, CA
Los Angeles, CA	Santa Monica, CA
Oakland, CA	
Chicago, IL	Cook County, IL
Montgomery County, MD	
Minneapolis, MN	St. Paul, MN
Bloomfield, NJ	Newark, NJ
East Orange, NJ	New Brunswick, NJ
Elizabeth, NJ	Passaic, NJ
Irvington, NJ	Paterson, NJ
Jersey City, NJ	Plainfield, NJ
Montclair, NJ	Trenton, NJ
Morristown, NJ	
New York City, NY	
Portland, OR	
Philadelphia, PA	Pittsburgh, PA (on hold)
Seattle, WA	Tacoma, WA
Spokane, WA	

*An earlier law – now facing a court challenge – prohibits local government from mandating paid sick leave.

States with bans against local paid sick leave laws

Alabama	Missouri
Florida	N. Carolina
Georgia	Ohio
Indiana	Oklahoma
Kansas	Oregon
Louisiana	Tennessee
Michigan	Wisconsin
Mississippi	

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Source: Willis Towers Watson

Jury is Still Out on Preemption Laws

- *Lewis et al. v. Bentley et al*. (S.D. Alabama) – arising out of Birmingham's minimum wage increase – appeal pending
- *United Food & Commercial Workers et al. v. Arizona (AZ state court)* – arising out of municipalities' desire to enact paid leave – pending
- *Protect Fayetteville et al. v. City of Fayetteville et al*. – AR Supreme Court declared unlawful a city ordinance banning discrimination based on sexual orientation or gender identity

Chicago & Cook County Paid Sick Leave Ordinances: A Case Study

- Effective July 1, 2017
- Applies to all employers with at least one employee working in either the City or County
  - Obligation may be waived in collective bargaining agreement
- Five municipalities have opted out of Cook County's Ordinance

Chicago & Cook County Paid Sick Leave Ordinances: A Case Study

- Entitled to 40 hours of paid sick leave per year
  - Accrued at a rate of 1 hour per every 40 hours worked
  - 20 hours can be carried over per year
    - If FMLA eligible, 40 hours can be carried over
- More generous in terms of reasons for leave than FMLA, e.g., preventative care
- Expansive definition of “family member”

Definition of a Family Member

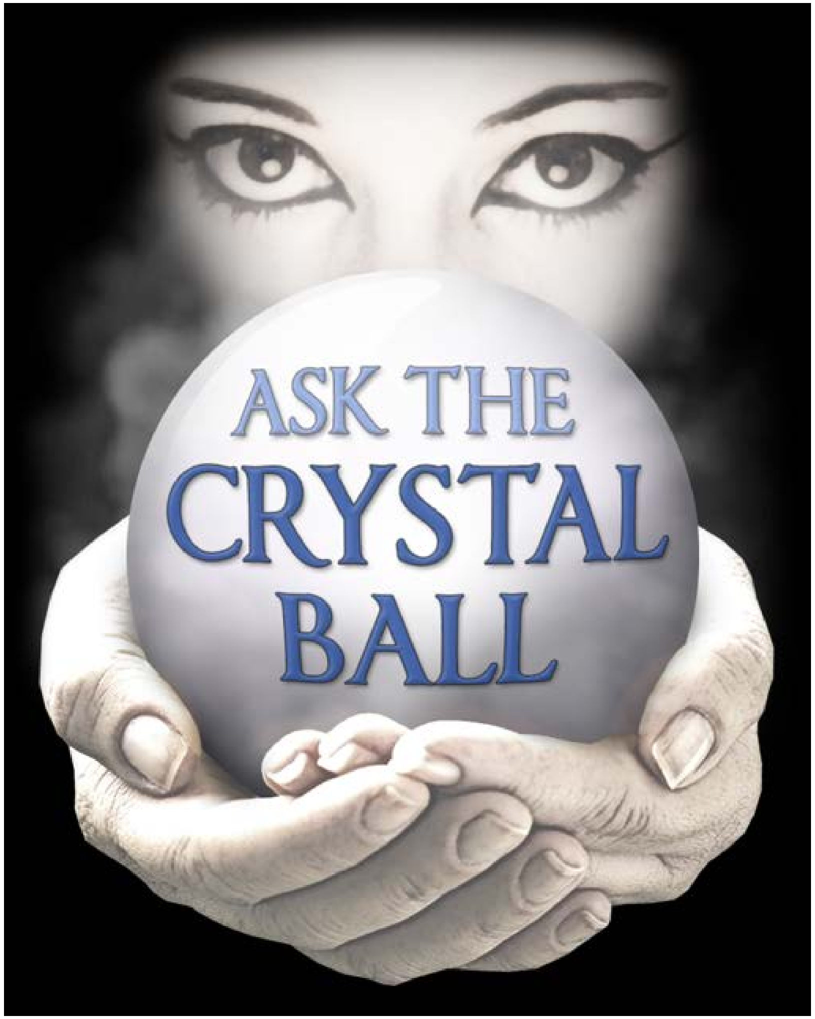
FMLA

- Child
- Spouse
- Parent
- Covered servicemember

Chicago/Cook County

- Child, legal guardian, ward
- Spouse
- Domestic partner
- Parent
- Spouse or domestic partner's parent
- Sibling
- Grandparent
- Grandchild
- Any other person related by blood or close association equivalent to a family member

What's Next?



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Geography is Destiny?

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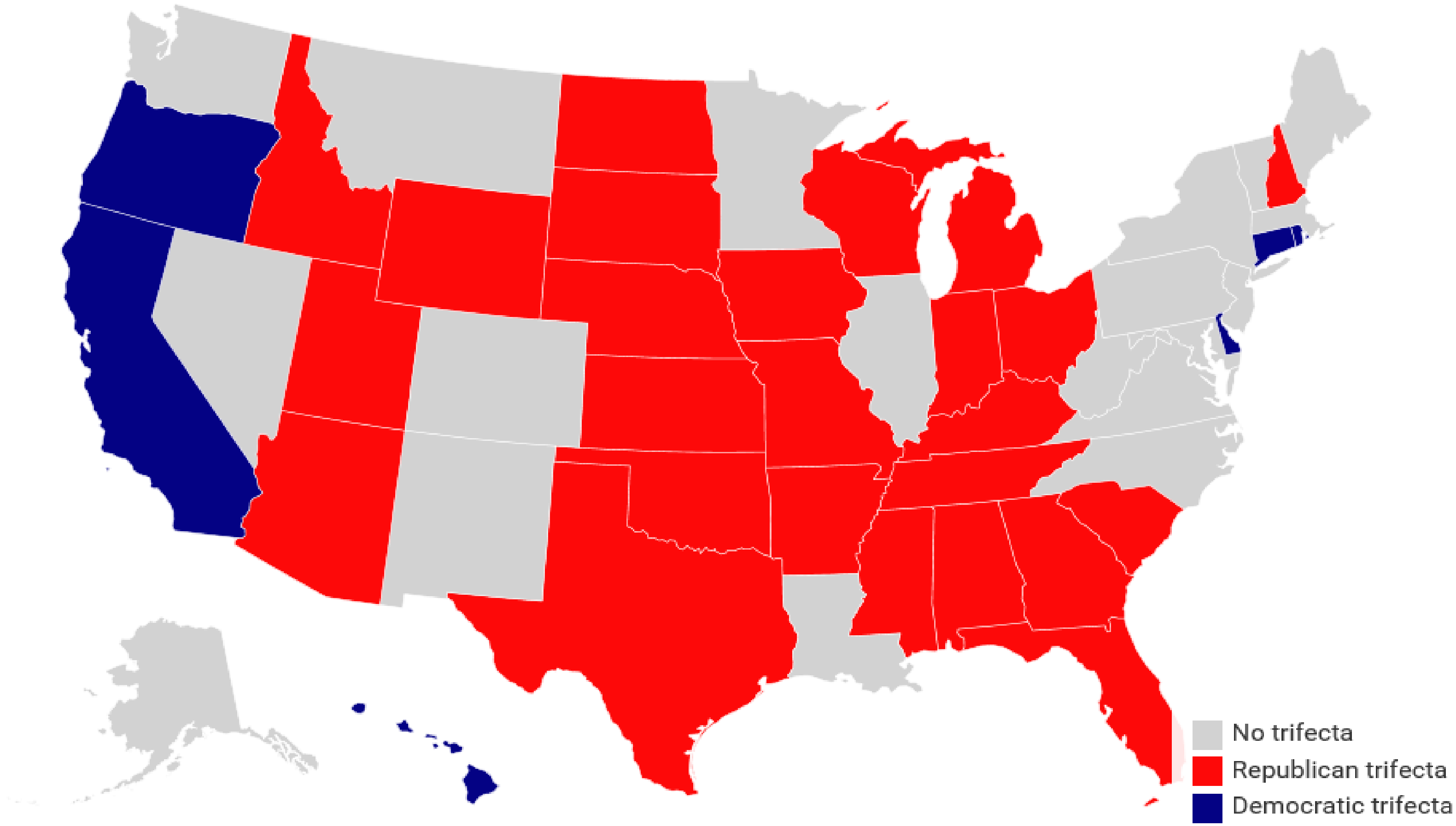

Trifectas: states where one political party holds the governorship, a majority in the state senate, and a majority in the state house.

Source: Ballotpedia

What Should We Expect?

- More preemption laws in “red” states
- More state/local jurisdictions adopting laws expanding employee entitlements
- Federal action on paid leave?
  - Trump is supportive
  - FAMILY Act (H.R. 947; S. 337)
  - EO 13706 still requires 7 days of paid sick leave for federal contractors
- *Bottom line: Remain vigilant in locations where you have operations or employees!*

What to Do?

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Should You Adopt a Uniform Policy?

One-Size Fits All Policies

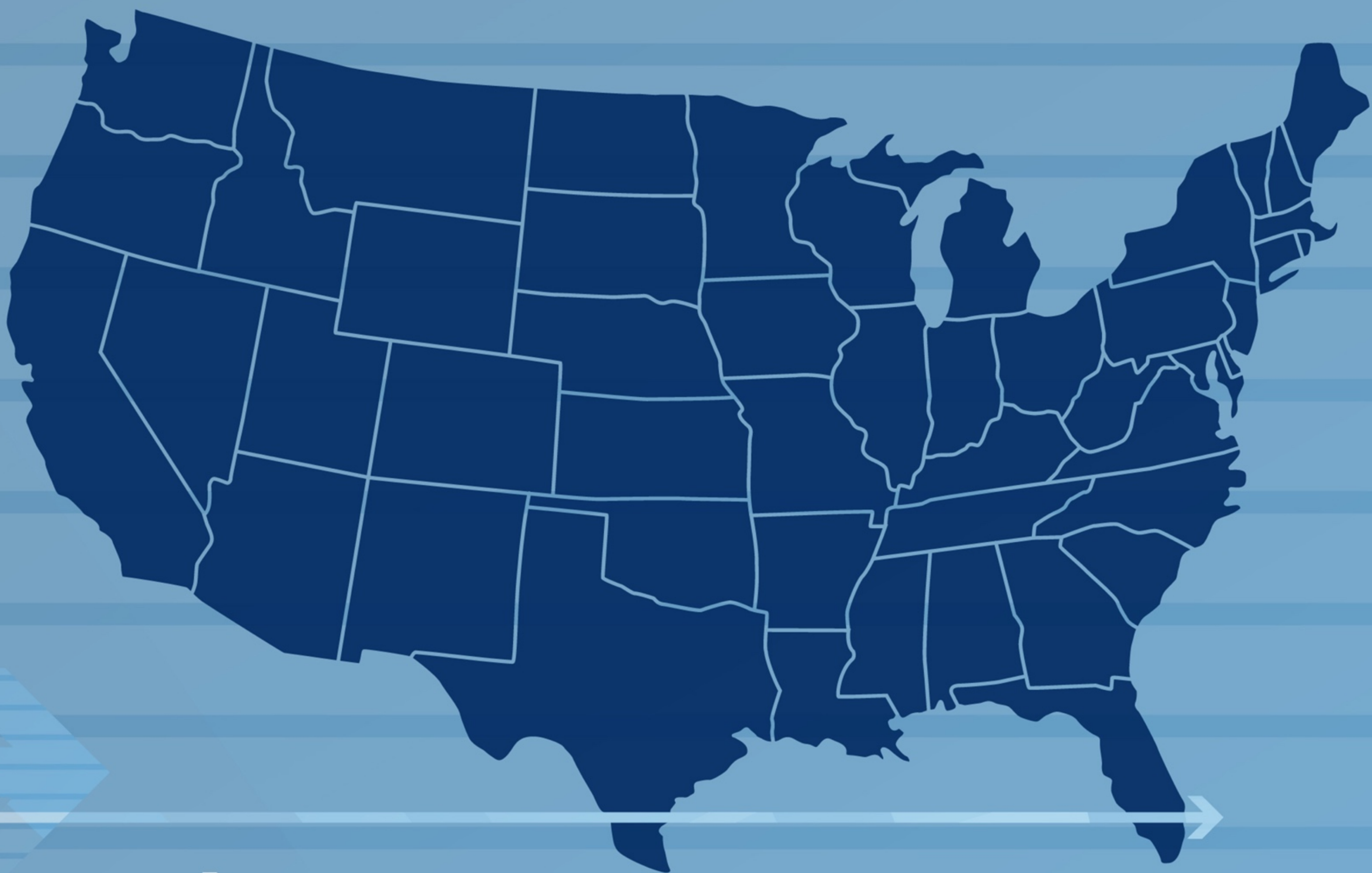
- Provide the most generous benefit to all employees regardless of location
- Easier to implement and comply with
- More costly: or is it?
- May boost employee morale

State-Specific Policies

- Provide the required benefit of the state or locality
- May be more economical
- Compliance becomes more difficult
- Consideration for employees who travel from state-to-state

Consider consulting with your labor and employment counsel!

LEAVE LAW INSIGHTS



Assessment, analysis and business implications of the most recent state, city and county updates on employee leave laws throughout the United States.

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MARCH 2017

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INTRODUCING

LEAVE LAW INSIGHTS

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Welcome to the first issue of Leave Law Insights!

Over the past several years as leave of absence legislation has become increasingly complex, employers have asked whether we could provide a product that keeps them up to date on all the changes in state and local leave of absence laws.

Clearly, there is a need to stay up to date on these changes in employee leave law, since various forms are pending in legislatures in nearly every state. On a moment's notice, cities and county governments also are passing local leave laws, which only further complicate an employer's compliance efforts.

We have heard you loud and clear! Beginning with this issue, we are providing regular updates on any *leave of absence* legislation that has been signed into law. Our analysis will cover paid and unpaid leave laws at the state, city and county level.

This inaugural issue covers laws and ordinances signed into law since August 2016 – just so you're up to speed on what's happened over the past several months!

We hope you find Leave Law Insights useful, timely and an easy way to navigate the complexities of leave laws. If you have suggestions for how we can improve it, please reach out anytime at jsn@franczek.com.

Sincerely,

Jeff Nowak

TABLE OF CONTENTS

STATE

CITY

ARIZONA PAID SICK LEAVE LAW

Summary: Effective July 1, 2017, Arizona employees will be entitled to accrue 1 hour of paid sick leave for every 30 hours worked, up to a maximum of 24 hours (small employers) or 40 hours (all other employers). The law provides the employer two options for dealing with accrued but unused paid sick time at the end of the year: (1) the employer may allow employees to carry over up to 40 hours of paid sick leave; or (2) the employer can allow an employee to cash out their accrued but unused sick time.

Unionized employers may waive the requirements of this law if clearly and unambiguously waived in the CBA. Otherwise, the leave is available to all eligible employees and can be used for the employees' own injuries or illnesses, the injuries or illnesses of their family members, or for safe time purposes.

Employers Covered

All employers within in the State of Arizona, including local governments. However, State workers are not subject to this law.

Employees Eligible

All employees employed in the State of Arizona with the exception of State workers. Individuals employed by a parent or sibling, or persons performing babysitting duties are not considered employees for purposes of the law.

Amount of Leave

Eligible employees are entitled to accrue 1 hour of paid sick leave for every 30 hours worked. For employers with 14 or fewer employees, employees are entitled to accrue up to 24 hours of leave per year. For all other employees, eligible employees are entitled to accrue up to 48 hours of paid sick leave per year.

Type of Leave

Arizona paid sick leave may be used for the following purposes:

- The employee's own mental or physical injury, illness, or health condition, medical diagnosis, care, or treatment;
- The mental or physical injury, illness, or health condition, medical diagnosis, care, or treatment of the employee's family member;
- For safe time purposes (where an employee or employee's family member is the victim of domestic violence, sexual violence, abuse, or stalking); or
- When the employee's place of business is closed due to a public health emergency, or the employee needs to care for a child whose school or place of care is closed due to a public health emergency.

Definition of Family Members

A family member is a:

- Child (including biological, adopted, or foster children, along with stepchildren, legal wards, children of a domestic partner, or an individual for whom the employee stands in loco parentis)
- Parent
- Parents of a spouse or a registered domestic partner
- Spouse
- Registered domestic partner
- Grandparents
- Grandchildren
- Siblings
- Siblings of a spouse or registered domestic partner
- Any other individual related by blood affinity whose close association with the employee is the equivalent of a family relationship.

Probationary Period & Carryover

Eligible employees begin accruing paid sick leave at the commencement of employment. However, an employer may delay the employee's use of such leave until 90 days after the employee's employment begins.

Eligible employees are allowed to carry over one year's worth of accrued leave into the next accrual year. An employer, however, may choose to pay out an employee's accrued but unused paid sick leave at the end of the accrual year if the employer provides the full amount of leave at the beginning of the next year.

Relatedly, an employer is not required by the law to pay out any accrued but unused paid sick leave to an employee at the end of his or her employment. If, however, an employee is rehired within 9 months, the employee is entitled to the reinstatement of all of his or her unused paid sick leave, unless the employer allowed the employee to cash out such leave.

Reinstatement Rights

The employer may not discriminate or retaliate against an employee for exercising his or her rights under the law. Additionally, absences due to this leave cannot count against the employee for purposes of discipline.

Employers who violate the statute may be subject to fines up to $1000 for each violation.

Employee Notice Requirements

Where an employee's leave is foreseeable, the employee must make a "good faith effort" to provide advanced notice and schedule their absences. If, however, the leave is unforeseeable, the employer may require an employee to provide notice in accordance with its policy if such policy is in writing and disseminated to employees prior to the need for leave. An employer can request, when possible, that the employee provide an expected duration of the leave.

Employer Notice Requirements

Employers must provide notice of employee rights in a conspicuous place at any workplace or jobsite. The notices must be posted in English, Spanish, and any other language that the Industrial Commission of Arizona requires.

Medical Certification May be Required by Employer to Support Need for Leave

An employer may request reasonable documentation to verify the need for the employee's leave when an employee is absent for three or more days. Reasonable documentation is defined as documentation signed by a health care professional indicating that the earned paid sick time is necessary.

Alternate forms of verification are provided in the case of domestic violence, sexual violence, abuse, etc. In those cases, the following will constitute verification:

- A police report
- A protective order
- A signed statement from the employee or other relevant individual indicating that the employee was a victim of such violence.

Effective Date

July 1, 2017

Access the Statute

http://apps.azsos.gov/election/2016/general/ballotmeasuretext/I-24-2016.pdf

Arizona Paid Sick Leave Law (continued)

Key Takeaways:

- An employee cannot be required to find a replacement when he or she uses paid sick leave;
- Paid sick leave can be used in the smallest increment allowed by the employer's payroll system;
- The Ordinance's requirements can be waived through a valid collective bargaining agreement if the waiver is clear and unambiguous;
- If an employer provides PTO or paid vacation days that can be used for the purposes enumerated under this Ordinance and meets the requirements for paid sick leave accrual, the employer is not required to provided additional paid sick leave. Additionally, an employer may allow an employee to cash out his or her unused leave at the end of the year if the employer then frontloads the employee's leave the following year; and
- Records of employee hours worked and paid sick leave earned must be kept for 4 years. For exempt employees, the days worked must be recorded, but a record of the hours is not required.

CHICAGO PAID SICK LEAVE ORDINANCE

Summary: Effective July 1, 2017, employers that employ at least one part-time or full-time employee within the city limits, and who maintain a business within city limits or are subject to the city's licensing requirements must allow employees to accrue 1 hour of paid sick leave for every 40 hours worked, up to a maximum of 40 hours per year. An employer, however, can choose to provide more paid sick leave, but it not required to do so under the Ordinance.

The Ordinance provides only one exemption: construction industry employees who are covered by a collective bargaining agreement are exempted from the Ordinance. The leave can be used to care for the employee's own illness or injury, the illness or injury of the employee's family member, or to address issues as a result of the employee or his or her minor child being a victim of domestic violence. Although the general effective date is July 1, 2017, the Ordinance does not take effect for unionized employers until the expiration of the collective bargaining agreement.

Employers Covered

All employers with at least one full-time or part-time employee who works within the City and who maintain a business within the City limits or who are subject to the City's licensing requirements.

Employees Eligible

Employees who work at least 80 hours for any employer within any 120-day period. Construction-industry employees covered by a CBA are exempted from the Ordinance's entitlement to paid sick leave.

Amount of Leave

Eligible employees are entitled to up to 40 hours of paid sick leave to be accrued at a rate of 1 hour for every 40 hours worked.

Health Care Provider

Health Care Provider means: any person licensed to provide medical or emergency services, including, but not limited to, doctors, nurses, and emergency room personnel.

Type of Leave

Paid sick leave may be used for the following purposes:

- For illness or injury of the employee or the employee's family member, including receiving medical care, treatment, diagnosis, or preventive medical care;
- Where the employee or the employee's family member is a victim of domestic violence or a sex offense; or
- When the employee's place of business is closed due to a public health emergency, or the employee needs to care for a child whose school or place of care is closed due to a public health emergency.

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Definition of Family Members

A Family Member is an employee's child, legal guardian or ward, spouse under the laws of any state, domestic partner, parent (including a biological, foster, adoptive, stepparent, or person who stood in loco parentis for the employee), spouse or domestic partner's parent, sibling, grandparent, grandchild, or any other individual related by blood or whose close association with the employee is the equivalent of a family relationship.

The Ordinance further defines child of the employee: a biological, adopted, or foster child, stepchild, or a child to whom the employee stands *in loco parentis*.

Probationary Period & Carryover

Eligible employees begin accruing paid sick leave on the first calendar after the commencement of employment, or July 1, 2017, whichever is later. However, an employer may delay the employee's use of such leave until 180 days after the employee's employment begins.

Eligible employees are allowed to carry over half of their accrued leave into the next accrual year, up to 20 hours per year. Employees who are also covered by the FMLA are entitled to carry over an additional 40 hours of paid sick leave for FMLA purposes.

Relatedly, an employer is not required by the Ordinance to pay out any accrued but unused paid sick leave to an employee at the end of his or her employment unless an applicable collective bargaining agreement or policy provides otherwise.

Reinstatement Rights

The Ordinance provides that absences taken pursuant to the Ordinance may not be counted under an employer's absence control policy as an absence that triggers discipline, discharge, demotion, or any other adverse action against the employee. Moreover, the employer may not discriminate or retaliate against an employee for exercising his or her rights under the Ordinance.

Key Takeaways:

- An employee cannot be required to find a replacement when he or she uses paid sick leave;
- An employer cannot require an employee to take leave in increments larger than 4 hours per day;
- The Ordinance's requirements can be waived through a bona fide collective bargaining agreement if the waiver is clear and unambiguous; and

Employee Notice Requirements

Where an employee's leave is foreseeable, the employer may require an employee to provide at least 7 days' notice before the leave is taken. If such notice is not possible, the employee must provide notice as soon as is practicable. An employer may not deny or delay the grant of leave because the employee has not provided certification of the need for leave.

Employer Notice Requirements

Employers must provide notice of their rights in two forms:

- A notice posted in a conspicuous place at each facility located within the city; and
- A notice to employees with their first paycheck.

Medical Certification May be Required by Employer to Support Need for Leave

If an employee is absent for 3 or more consecutive days, the employer may require certification of
the reason provided for the need to take leave. Employers may not, however, insist that the certification specify the nature of the medical issue necessitating the need for leave, except as required by law.

Special Rules for the Construction Industry

The provision of paid sick leave is not applicable to employees in the construction industry covered by a bona fide collective bargaining agreement.

Civil liability

Employers who violate the ordinance may be subject to a civil suit by employees and the employees may be entitled to recover damages equal to three times the full amount of sick leave denied or lost due to the violation, plus interest and attorney's fees.

Effective Date

July 1, 2017

Access the Statute

http://www.fmlainsights.com/wp-content/uploads/sites/311/2016/06/Chicago-Paid-Sick-Leave-Ordinance.pdf

LEAVE LAW INSIGHTS

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Jeff serves as co-chair of Franczek Radelet's Labor and Employment Practice. Jeff is widely recognized as one of the nation's foremost FMLA and ADA experts, regularly counseling clients on compliance with FMLA and ADA regulations, conducting FMLA/ADA audits and training, and successfully litigating FMLA and ADA lawsuits.

Jeff is the author of the firm's highly regarded *FMLA Insights* blog, which has been selected for six consecutive years by the *ABA Journal* as one of the top 100 legal blogs (2011-2016) and this past year to the blogger Hall of Fame.

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ADA Accommodations

Test Your Knowledge!

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Working from Home as a Reasonable Accommodation

Walter: Stress, Anxiety

- Walter: Procurement analyst
- Dealing with stress, anxiety
  - Exacerbated during busy work periods, end of fiscal year and calendar year
  - Hand tremors, heart palpitations, cold sweats, lacks any concentration on work
- During flare ups, he has asked to work from home (twice per week, but entire week recommended by physician)

Poll

- If you were inclined to deny teleworking to Walter, how is it best explained to him?
  1. "We have a strict policy against teleworking that we have applied consistently because we believe all work should be performed in-house."
  2. "If we agreed to teleworking for you, we would need to extend it to others…"
  3. "Many of your critical job duties require you to be on-site. [Insert duties]. Therefore, we cannot grant your request."

EEOC Position

- What if Employee Requests Telework as a Reasonable Accommodation?
- EEOC position:
  – An employer may need to permit more frequent telework than is otherwise allowed under its regular telework policy
  – Fact-specific determination based on particulars of position and workplace
  – Telework need not be granted if not feasible or poses an undue hardship

Teleworking Factors to Consider

- Ability to supervise the employee equally
- Whether face-to-face interaction and coordination of work with other employees is necessary
- Whether any duties require use of certain equipment that cannot be replicated at home
- Whether in-person interaction with outside colleagues, clients, or customers is necessary
- Whether the position requires the employee to have immediate access to documents or other information located only in the workplace

Dealing with Performance Issues

- Teleworking employees can be held to same performance and production standards as working on-site
- Managers can require daily accomplishment reports or use other management methods with respect to all employees
- Teleworking Agreement is advisable
- EEOC Guidance: www.eeoc.gov/facts/telework.html

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EMPLOYMENT AGREEMENTS 2.0

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What You Need to Know Now

Agenda

- What is an employment agreement?
- Agreements that alter "at-will" employment
- Current developments impacting employment agreements

What is an Employment Agreement?

Every Employment Relationship Has an Agreement

WRONG:

He doesn't have an employment agreement, he's "at will."

RIGHT:

Her employment agreement is "at will."

What is an Employment Agreement?

- Agreement where one person is providing labor for another
- Can take many forms – “at will” vs. specific length of time or restrictions on termination
- May be verbal or in writing
- May be comprehensive or may just cover a specific aspect of the employment relationship
- May impose obligations on the employer or employee

Who Can Enter Into An Agreement?

- Any manager who is reasonably perceived by employees as having authority to do so
- So, you should adopt written agreements, policies and handbook provisions restricting authority to bind the employer and enter into an agreement

Key for Employers

- Know when you are entering into an employment agreement
- Make sure there is a mutual understanding of the terms of that agreement

Agreements: “At Will” = Altered

- Duration
  - Sometimes want “guaranteed” length of service
  - Helps secure “key personnel”
- Only alter “at will” with careful thought and for good reason
  - Offer letter?
  - Annual appointment letter?

Agreements: “At Will” = Altered

- Examples:
  - Key personnel (executives, leaders, cyclical job duties)
    - Job protection
    - Compensation terms complex (bonus, deferred comp)
  - Collective Bargaining Agreements
  - Tenure or other academic appointments
  - Temporary or short-term appointments
  - “On the bubble” of Independent Contractor status
    - Duration of term can help clarify

Agreements: “At Will” = Altered

- Handbooks
  - “Not a contract”
  - Still relevant
    - Clearly explain “at will” expectation
    - Avoid excessive termination process
      - Note: public sector rights may affect this
    - Expressly reserve right to revise – unilaterally
  - Practice what the Handbook preaches

Common/Key Provisions

- Applicable to all employee agreements
  - "At Will"
  - Employment of set duration
- General terms to include in all written agreements
  - Termination – grounds, process, remedy?
  - Only some terms (role, not duties)
  - Flexibility
  - Consistency – with other employment agreements (unless deliberate reason for variance)

Common/Key Provisions

- Key terms:
  - Compensation provisions
  - IP, Confidentiality, Business Protection
  - Dispute Resolution
  - Technical Provisions

Compensation Provisions

- Salary
  - Annual consideration for change
  - No automatic increase
- Bonuses
  - Discretionary? Governed by "plan" documents?
  - Tax deferred?

Compensation Provisions

- Commissions
  - Think “guarantee,” “right,” and “loss of control”
  - Only create deliberately and carefully – everyone understand terms
  - “Procuring Cause” rule
    - Equitable doctrine – post-termination right to pay if everything necessary for sale accomplished before termination
    - You can and <u>SHOULD</u> “contract” around this

Commissions – Clarify Terms

- What need to do to "earn"?
  - As precise as possible
  - "sign SOW with contact assigned . . ."
  - Only initial "order"? Follow-up customer agreements?
- When "earned"?
  - Revenue received v. contract signed
  - "Fluid" profit margin?
- When paid?
  - State statute – once per month
- Post-termination payments?
  - "Revenue must be received while employed"
  - "Cannot earn commissions post-termination"
- Revisions – require agreement or unilateral?

Current Developments Impacting Employment Agreements

Agency Encroachments on Confidentiality Agreements Under Obama

Agency Encroachment

- SEC: Targeted provisions that deter securities fraud whistleblowing
- EEOC: Targeted agreements and provisions that discourage or prohibit individuals from exercising rights to complain about employee discrimination
- NLRB: Targeted provisions that could be construed as prohibiting communication between employees on terms and conditions of employment

Enter the DTSA

Defend Trade Secrets Act of 2016

- Enacted May 2016, applies to agreements entered into or updated after that date
- Codifies trade secrets protections at the federal level for the first time
- Creates a private cause of action whereby trade secret owners may have their case heard in federal court

DTSA vs. UTSA

- Whistleblower protections
- Authorizes punitive damages and attorneys’ fees in certain cases, as long as notice of whistleblower language is given

DTSA: Whistleblower Protections

- Immunity for disclosing a trade secret:
  - In confidence to a federal, state, or local government official or to an attorney for the purpose of reporting or investigating a suspected violation of law; or
  - In a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal

DTSA: Notice Requirements

- Employer must provide notice of the immunities for whistleblowers in any agreement with an employee that governs the use of a trade secret or other confidential information
- Employer may also provide notice by cross-referencing a policy provided to employee
- Consequence of non-compliance: Employer may not recover punitive damages or attorney's fees

DTSA – Whistleblower Protection Language

- "I understand that an individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that: (a) is made (i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (b) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

- "I further understand that an individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual: (a) files any document containing the trade secret under seal; and (b) does not disclose the trade secret, except pursuant to court order."

Consideration for Restrictive Covenants – How Much is Enough?

- *Fifield v. Premier Dealer Servs. Inc.*, 2013 Il. App (1st) 120327 (2013)
  – Court ruled that where there is no additional, independent consideration to support a valid, non-compete or non-solicitation, two or more years of continued employment is required to constitute adequate additional consideration
- *Prairie Rheumatology Assoc., S.C. v. Francis*, 2014 Il App (3d) 140338 (2014)
  – Court applied the *Fifield* two-year and additional, independent consideration rules
  – Rejected employer's argument that further consideration was provided in the form of marketing and a promise to consider the doctor for partnership after 18 months

Restrictions on Restrictive Covenants

Illinois Freedom to Work Act

- Agreements entered into after January 1, 2017 fall under the Act's purview
- The Act expressly prohibits private sector employees from entering into a "covenant not to compete with any low-wage employee of the employer."

Illinois Freedom to Work Act

- "Low wage employee" is defined as an employee who earns less than equal to:
  - The hourly rate equal to the minimum wage required by the applicable federal, state, or local minimum wage law; or
  - $13.00 per hour

whichever is greater

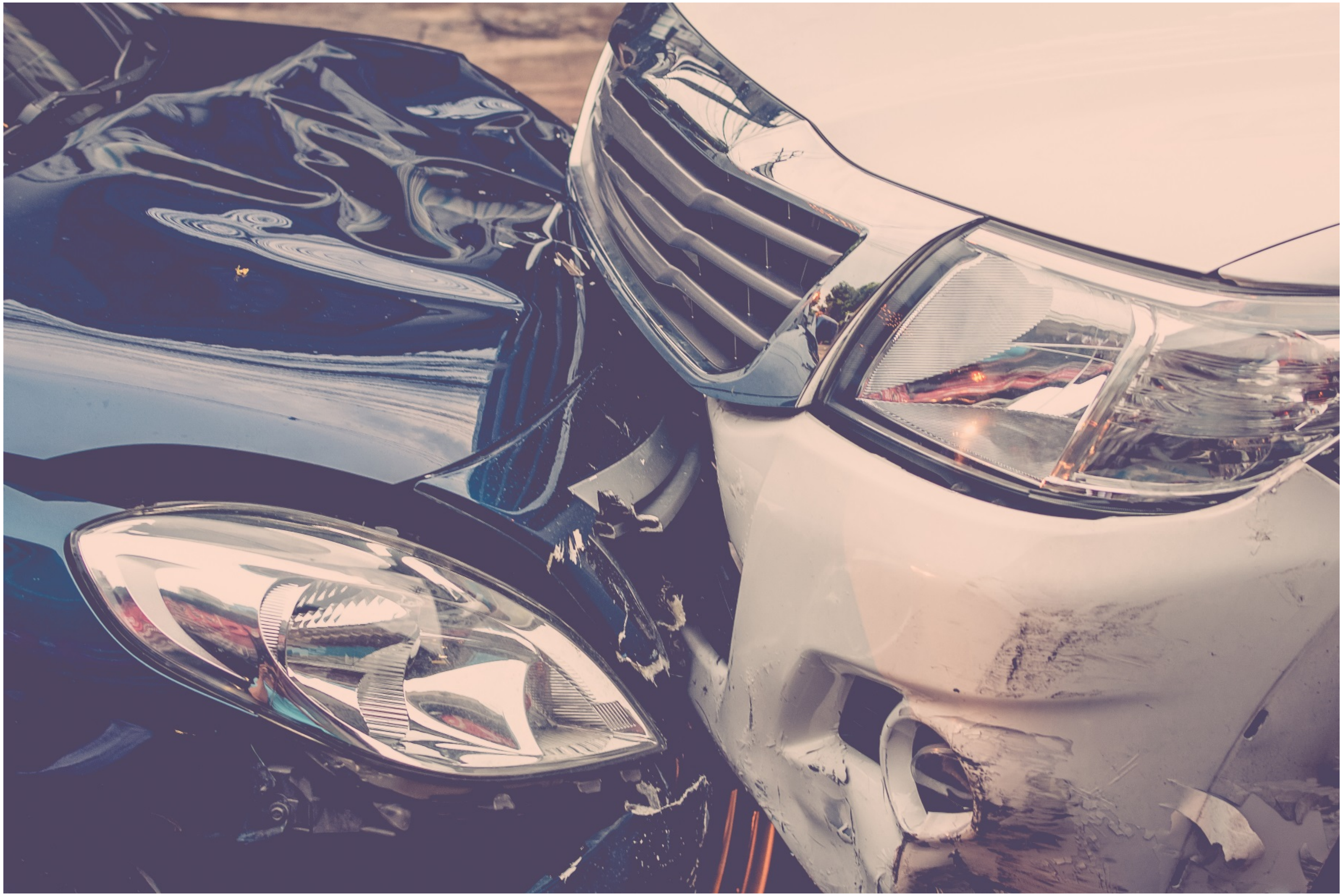
Arbitration Provisions

- Provision requiring that any dispute be resolved in private arbitration rather than in court
- Often specifically waives right to file or participate in class action claims

Class Action Waivers in Arbitration Agreements

- *D.R. Horton*: NLRB held that class waivers violate Section 7 of the National Labor Relations Act which protects "concerted" activity
- Federal Arbitration Act: Expresses strong policy preference for arbitration. Supreme Court has upheld class waivers in non-employment contexts

Collision Course!



Supreme Court

- The Court has agreed to hear 3 consolidated cases raising this issue:
  - *National Labor Relations Board v. Murphy Oil USA* (5th Circuit)
  - *Epic Systems Corp. v. Lewis* (7th Circuit)
  - *Ernst & Young LLP v. Morris* (9th Circuit)
- But has deferred argument until October 2017 term.

Current Circuit Split

- Class Action Waivers Unlawful:
  - 7th Circuit – Illinois, Wisconsin, Indiana
  - 9th Circuit – California, Arizona, Nevada, Oregon, Idaho, Montana, Washington
- Class Action Waivers Lawful:
  - 2nd Circuit – New York, Vermont, Connecticut, New Jersey, New Hampshire
  - 5th Circuit – Texas, Louisiana, Mississippi
  - 8th Circuit – North Dakota, South Dakota, Minnesota, Iowa, Missouri, Arkansas, Nebraska

Class Action Waivers

- If issue is resolved in employer’s favor, strong incentive to adopt arbitration agreements, particularly where class litigation is a risk.
- Does delay mean that Court is waiting for 5th vote to uphold waivers?

What Should Employers Do Now?

- Review/audit employment agreements and policies
- Ensure new confidentiality agreements incorporate DTSA language
- Review non-compete agreements for adequate consideration and enforceability
- Consider class waiver/arbitration agreements

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Modifying Work Schedules and Rescinding Discipline

Ursula and Her Urges

- Ursula is a customer service representative – she responds to customer calls and customer complaints submitted online
- Supervisor complains that she is missing periods of time at work, affecting work cycle
- Video of Ursula shows her leaving her work station regularly throughout day, often 15-20 minutes at a time
- Misuse of time = written warning
- At disciplinary meeting, Ursula requests that:
  - Discipline be rescinded because of health condition
  - She be allowed to take breaks as needed because she is dealing with an uncontrollable bladder issue
  - She be allowed an extended work day to work a full shift

Poll

- Do We Have to Rescind Ursula’s Discipline?

Yes

No

Honestly, I don’t know, and please don’t ask me!

Unlimited Breaks/Extended Day

- Doctor's Note: Ursula has urge incontinence, requires "breaks as needed" because of condition
- Does this provide us the information we need?
  - Documentation sufficient to determine disability and why accommodation is necessary. Sufficient if:
    1. Describes nature, severity, and duration of impairment, the activity the impairment limits, and the extent of limitation
    2. Substantiates why the requested reasonable accommodation is needed

Unlimited Breaks/Extended Day

- Let's assume Ursula provides sufficient documentation. Required to accommodate?
- Unpredictable, flexible schedule that would permit employee to leave work whenever she has a medical episode is unreasonable
  – Production requirements
  – Customer requests must be handled in timely manner
  – Other employees picking up slack
- But what about working an extra hour without supervision? Do we have to accommodate?

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SOCIAL MEDIA

Encouraging an Entrepreneurial Spirit While Staying Compliant

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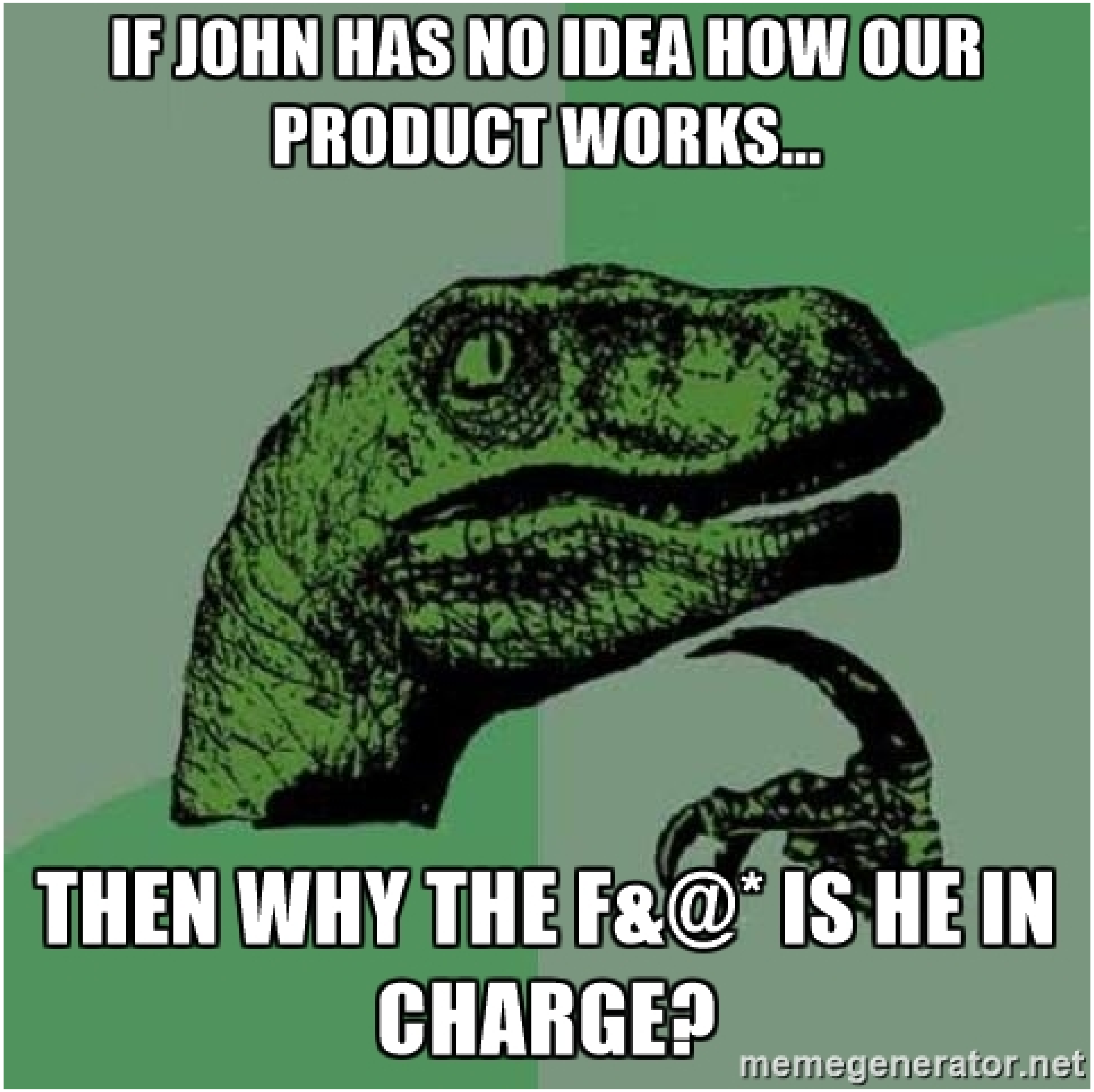

IF JOHN HAS NO IDEA HOW OUR PRODUCT WORKS...
THEN WHY THE F&@* IS HE IN CHARGE?
memegenerator.net

Right to Privacy in the Workplace Act

Employer cannot:

- “Request, require, or coerce”
- Employee or applicant
- To provide username, password, other login info
- To “personal online account”

Or otherwise demand access to such an account

820 ILCS 55/10(b)(1)

"Personal Online Account"

"Personal Online Account" means an online account that is used by a person primarily for personal purposes. "Personal online account" does not include an account created, maintained, used, or accessed by a person for a business purpose of the person's employer or prospective employer.

820 ILCS 55/10(b)(6)(B)

“Personal Online Account”

- Networking (*e.g.*, Facebook)
- Publishing (Blogs, YouTube, Podcasts)
- Email (Gmail, Yahoo, AOL, Comcast)
- File storage / sharing (Dropbox, Google Drive, OneDrive)
- Web applications (Office 365, Google apps)
- Mobile apps (Snapchat, WhatsApp)

Right to Privacy in the Workplace Act

Don't:

- Ask for employee's username / password for a personal account
- Make employee access a personal online account in your presence
- Use login info from work computer to access the online account

Why Can’t We Be Friends?

It shall be unlawful for any employer or prospective employer to …

(C) require or coerce an employee or applicant to invite the employer to join a group affiliated with any personal online account of the employee or applicant;

(D) require or coerce an employee or applicant to join an online account established by the employer or add the employer or an employment agency to the employee’s or applicant’s list of contacts that enable the contacts to access the employee or applicant’s personal online account.

820 ILCS 55/10(b)(1)(C)

Employer's Electronic Equipment

- Can still have policies governing use of Employer equipment for Internet, social networking sites, email
- Monitor use of Employer equipment

Provided that employee login credentials aren't used to gain access to employee online accounts

820 ILCS 55/10(b)(2)

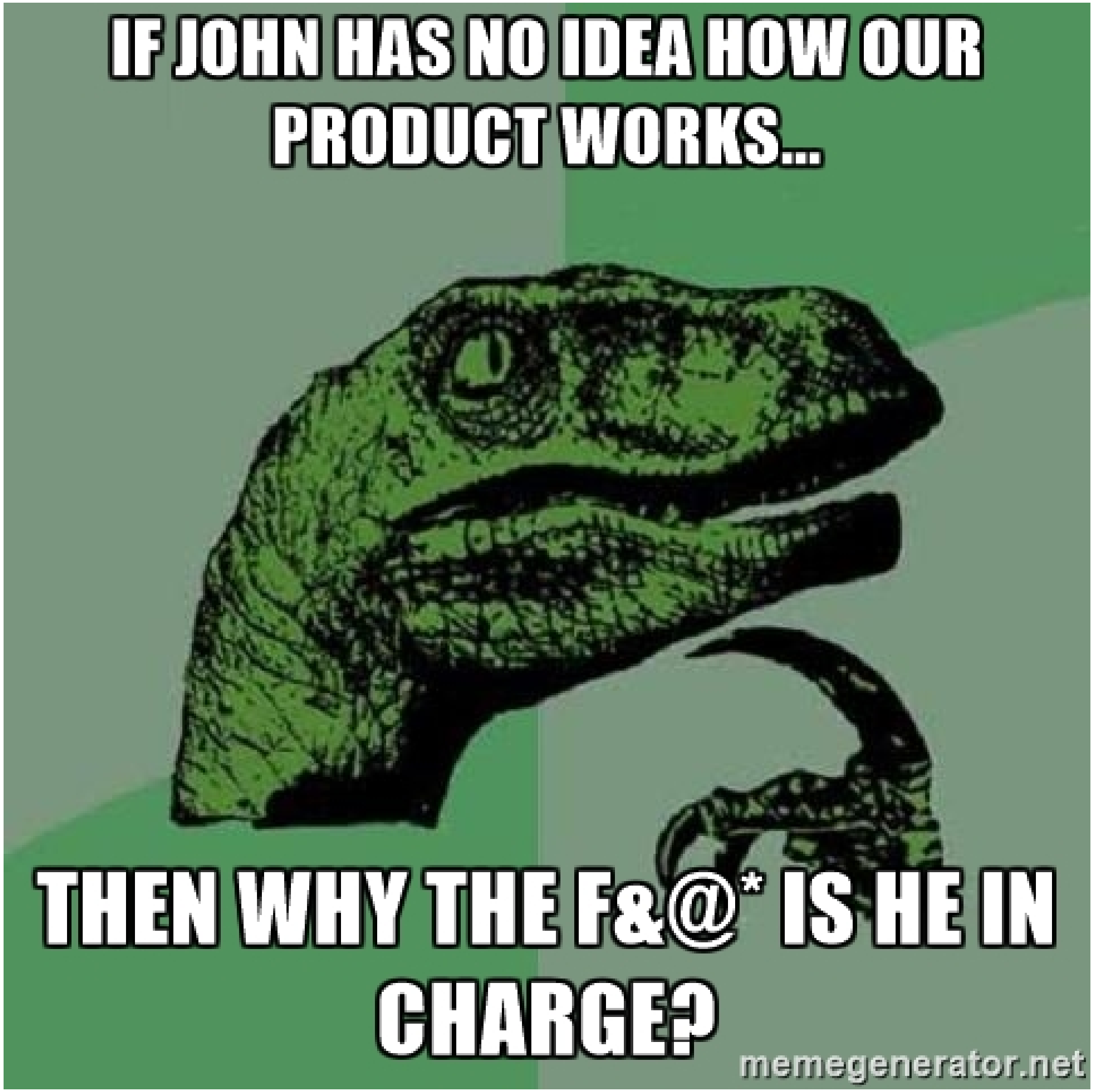
Investigations

Employer MAY:

- Request or require employee or applicant to share
- Specific content
- That has been reported to the employer
- Without requiring password or authentication giving employer access to online account

Investigations Limited To:

- Ensuring legal compliance
- Investigating unauthorized transfer of proprietary or confidential info to employee’s personal account
- Investigating allegations of legal / regulatory / work-related misconduct
- Prohibiting use for business purposes
- Prohibiting use during business hours, while on employer property, or using employer devices or network resources


IF JOHN HAS NO IDEA HOW OUR PRODUCT WORKS...
THEN WHY THE F&@* IS HE IN CHARGE?
memegenerator.net

There Are Other Paths to Enlightenment…

- Start with public information
- Talk to co-workers first
- Look at Internet logs / cache files on work computers
  – Activity with similar time stamps?
  – Cached web files
- Don't destroy evidence
  – If in doubt – bring in the pros!

Use Strong Policies, Agreements

Topics to address:

- Privacy expectations (none)
- Personal accounts for business
- Accessing personal accounts via employer equipment / networks
- Social media guidelines – Personal and business
- Personal devices – BYOD
- Return of Company data
- Data security practices
- NDA / Non-compete / Non-solicitation

National Labor Relations Act

The NLRA applies to your workplace -

Union or not!

Surviving the NLRA

National Labor Relations Act

- An employer cannot promulgate a rule that a reasonable employee would construe as prohibiting protected concerted activity for the mutual aid or protection of employees.
- Social media policies that deter employees from speaking out about workplace conditions or other issues in the workplace do not comply with Section 7 of the National Labor Relations Act.

Is This Policy Legal?

Is This Okay?

- “If you aren’t careful and don’t use your head, *your online activity can … spread* incomplete, *confidential*, or inaccurate *information*”

NO!

- Policy found to be overly broad and unlawful.
- The term “confidential” was not defined. Employees reasonably could understand the prohibition to cover matters protected by Section 7, such as employees’ compensation and benefits.

Is This Okay?

- "*You may not make disparaging, false, misleading, harassing, or discriminatory statements* about or relating to Company, our employees, suppliers, customers, competition, or investors."

NO!

- Prohibition on “false” statements overbroad and unlawful – under Board law false statements are protected unless they are maliciously false, i.e., knowing or recklessly false.
- Equated “disparaging” statements with those that are derogatory and found that employees have a protected right to make derogatory statements about the terms and conditions of employment.

Chipotle Services LLC, 364 NLRB No. 72 (August 18, 2016)

**Recreation - not an actual Tweet or Twitter handle*

Chipotle Services LLC, 364 NLRB No. 72 (August 18, 2016)

**Recreation - not an actual Tweet or Twitter handle*

Chipotle Services LLC, 364 NLRB No. 72 (August 18, 2016)

**Recreation - not an actual Tweet or Twitter handle*

Is This Okay?

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of Employer. Also, keep in mind that you are more likely to resolve work–related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Is This Okay? – Yes!

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of Employer. Also, keep in mind that you are more likely to resolve work–related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Is This Okay?

Carefully read these guidelines, the Statement of Ethics Policy, the Information Policy, and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Is This Okay? – Yes!

Carefully read these guidelines, the Statement of Ethics Policy, the Information Policy, and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Is This Okay?

Maintain the confidentiality of Employer trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures, or other internal business-related confidential communications.

Is This Okay? - Yes

Maintain the confidentiality of Employer trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures, or other internal business-related confidential communications.

What's The Difference?

Not lawful

- Ambiguous, undefined terms
- Reasonable employee could read them to bar Section 7 activity

Lawful

- Ambiguous terms defined
- Prohibit plainly improper conduct
- Provide examples that are clearly unprotected by Sec. 7

Walmart's Revised Social Media Policy

Disclaimer or Savings Clause

"This policy will not be interpreted or applied in a way that would interfere with the rights of employees to self organize, form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities."

Social Media Policy

Updated: May 4, 2012

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolved work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trades secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.

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WHIPLASH!

A Seismic Shift in Workplace Laws

2017 Employment Law Conference

March 10, 2017

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2017 EMPLOYMENT LAW CONFERENCE
Franczek Radelet Alert Highlights

January 2016 – January 2017

NAVIGATING CHANGE ALERTS

Recent changes in the administration have the potential to alter considerably the current legal and regulatory environment for employers. Our Navigating Change alerts provide timely and credible information on legal and policy developments that may impact your organization. Many sources speculate and opine on every development of the new administration; you will not find that here. Our goal is to focus on the truly important developments that employers need to know, and what they need to do to prepare for change. Each update will tell you:

> *What we know – The concrete facts on developments of importance to employers*
>
> *What we believe – Informed predictions as to what may happen under the Trump administration*
>
> *What we don't know – We will explain what issues are still in play*
>
> *What it means – The key takeaways on what to do now to prepare for change*

TRADITIONAL LABOR ALERTS

This represents a sample of Franczek Radelet alerts over the past year. All alerts are available at http://www.franczek.com/frontcenter.html

EMPLOYMENT ALERTS

IMMIGRATION ALERTS

EMPLOYEE BENEFIT ALERTS

NAVIGATING CHANGE ALERTS

What Will Happen at the Supreme Court?

February 2, 2017

What We Know

Yesterday President Trump nominated Judge Neil Gorsuch to fill the vacancy created by the death of Justice Antonin Scalia in February 2016. Gorsuch has top-flight academic credentials, and has been a judge on the 10th Circuit Court of Appeals since 2006.

Should Gorsuch be confirmed, he would likely be a reliably conservative vote, thus returning the Court to the composition that existed before Scalia's death of four justices who are traditionally viewed as liberal (Breyer, Ginsburg, Kagan, and Sotomayor), four justices who are traditionally viewed as conservative (Alito, Roberts, Thomas, and Gorsuch), and one "swing" justice (Kennedy). At 49, Gorsuch would be the youngest justice on the Court, and would potentially serve for decades.

Even before the presidential election this Supreme Court term (which runs from October 2016 through June 2017) was not shaping up to be a particularly remarkable one for labor and employment cases. However, there are a few employment-related cases where a Justice Gorsuch could tip the balance.

For example, last month the Court agreed to hear three cases (which will be consolidated) on the legality of requiring employees to execute arbitration agreements that not only require employees to pursue disputes through arbitration – rather than through a court – but also waive their right to participate in class or collective actions. The courts of appeal are divided on the issue. The Seventh Circuit, which covers Illinois, Indiana, and Wisconsin, sided with the NLRB and the Obama administration in holding that such agreements are unenforceable because they infringe on employees' ability to engage in protected concerted activity under the National Labor Relations Act. In recent years the Court has re-affirmed the longstanding federal policy favoring the arbitration of private contractual disputes. We therefore expect the Court to continue that trend and reverse the Seventh Circuit's opinion.

Also, in late October, the Court agreed to hear *Gloucester County School Board v. G.G.*, a case involving whether Title IX of the Civil Rights Act prohibits schools from discriminating against students based on transgender status. While not directly applicable to employers, the Court's ruling will likely impact whether federal law prohibits workplace discrimination against transgender individuals because the relevant provisions of Title IX and Title VII (which prohibits employment discrimination) are usually interpreted identically by the courts.

Gloucester County will likely not be heard until late March at the earliest, making it likely that Gorsuch will hear the case if he is confirmed. Although his record on LGBTQ rights is sparse, in a 2009 case Gorsuch voted to affirm summary judgment in favor of a transgender woman's employer that refused to allow the woman to use the women's restroom for "safety reasons" until she could prove completion of sex reassignment surgery.

What We Believe

Because the Court only decides cases brought before it – and only hears between 100-150 of more than 7,000 cases it is asked to hear each year – it is impossible to predict what issues the Court might decide during the Trump administration. Further, legal challenges typically take several years to wend their way to the Court. If, for example, the Trump administrations does away with the Affordable Care Act or significantly modifies it, and those changes result in a lawsuit, a decision by the Court could take years, if the Court opts to hear the case at all. However, the Court has moved incrementally to the right on a few issues in recent years, and if Gorsuch is confirmed this trend will probably continue.

One issue on which Gorsuch has been vocal is the long-standing practice of courts to defer to a government agency's own legal interpretation of a statute. Last year he wrote a lengthy concurring opinion in which he railed against this principle, commonly known as *Chevron* deference. If the

Court puts an end to *Chevron* deference, as Gorsuch advocates, it could hamper the ability of agencies such as the EEOC, NLRB, and DOL to prevail in cases involving statutory interpretation of the laws those agencies enforce.

What We Don't Know
We don't how quickly the Senate will act on Gorsuch's nomination. Until the Senate last year refused to consider President Obama's nominee, Merrick Garland, the Senate had never taken more than 125 days to vote on a nominee and took on average 25 days. Therefore, it is possible that if he is confirmed, Gorsuch will consider cases heard during the current term.

We also don't know how many justices Trump will appoint. Given the advanced age of several of the justices, it is entirely possible that Trump will nominate more than one justice. It seems likely that any additional vacancies that are filled during Trump's presidency will bolster the Court's conservative wing.

What this Means for Employers
A more conservative Court may generally be a positive for business, but it does not guarantee employer-friendly decisions, especially in the area of individual employee rights. Even Justice Scalia, the "intellectual anchor" of originalism, sometimes went against the conservative grain and sided against employers. Further, the Court will never hear the vast majority of cases affecting employers, since those cases are decided at a lower level. Therefore, employers should not expect significant changes in their obligation to maintain a work place free from discrimination and harassment.

What Will Happen at the NLRB?

January 24, 2017

What We Know
Historically, the NLRB has been strongly influenced by changes in the White House. Republican-leaning Boards sweep aside decisions issued by Democrat-leaning Boards, just as the Obama Board overturned decisions issued by prior Republican Boards. Currently, the Board consists of two Democrats and one Republican who were all appointed by the Obama administration. There are also two vacancies on the Board.

The new administration will be able to fill the two vacant positions immediately with supporters of its agenda. Additionally, the administration will be able to appoint a new General Counsel in October 2017 when the current General Counsel's appointment expires. The General Counsel plays a critical role as the NLRB's chief prosecutor and as the supervisor of the NLRB's regional offices. In December 2017, the new administration will fill a third spot on the Board when the current Republican Board member's term expires. The terms of the two current Democrat members expire in 2018 and 2019, leaving two additional vacancies for the Trump administration to fill.

What We Believe
We predict the new NLRB will reverse many of its controversial decisions issued during the Obama administration. For example, we believe several key decisions are ripe for reversal including *Pacific Lutheran*, *Columbia University*, *Browning-Ferris*, *Specialty Healthcare*, and *Total Security Management*.

In *Pacific Lutheran*, the NLRB ruled that adjunct faculty at private, religious colleges and universities could unionize unless the employer was able to demonstrate that it held out the particular faculty as performing a specific role in creating and maintaining the school's religious educational environment. We also anticipate that the Board will reverse its decision in *Columbia University*, a decision in which the Board overturned 40+ years of nearly uninterrupted precedent when it ruled that graduate student teaching assistants were employees as defined by the National Labor Relations Act. We also anticipate that a newly-constituted NLRB will reverse *Browning-Ferris* which greatly expanded the definition of "joint employer" so that more companies could be brought to the bargaining table and held liable for labor law violations of their subcontractors and franchisees. Likewise, we anticipate the new NLRB will ditch its controversial *Specialty Healthcare* decision. There, the NLRB broke with historical precedent by certifying a micro-unit of certified nursing assistants ("CNA") instead of a "wall to wall" unit of all employees that shared the same community of interests as the CNAs. *Total Security Management* looks to be another candidate for reversal. In *Total Security Management*, the NLRB held that employers negotiating a first contract must provide notice and an opportunity to bargain to the union before imposing discretionary discipline. Finally, the Obama NLRB significantly expanded the concept of protected concerted activity and thereby granted employees nearly boundless protections under federal labor law. We expect a Trump NLRB to pare back the NLRB's rulings in this area.

While President Trump will be able to immediately fill two NLRB vacancies and swing the NLRB to a 3-2 Republican majority, we expect the reversal of many of these Obama-Board decisions to take some time. The NLRB will likely wait for a case that has ideal facts and it will take some time as those cases wind their way to the NLRB from regional offices and administrative law judge decisions. It may be late 2017, at the earliest, before we see the impact of President Trump's appointments.

In addition to overturning several controversial decisions, we also expect that the NLRB will walk back several of its rules that have been criticized for being pro-labor and anti-employer, including most prominently the quickie union election rule that, among other changes, significantly shortened the time period between when a union files for an election and the election itself. The Board may also walk back its rule that allows electronic signatures to support a showing of interest in representation petitions.

What We Don't Know

We don't yet know how aggressively the Trump administration and the Republican-controlled House and Senate will handle the NLRB or how aggressive the new NLRB will be in promoting the Republican pro-business agenda.

What this Means for Employers

Employers can reasonably expect that the Trump NLRB will follow a pro-business agenda designed to allow employers greater latitude to manage the workplace, although it may be mid-to-late 2017 before employers see any change in NLRB decisions or rules.

President Trump's appointments to the NLRB will likely have little immediate effect on the day-to-day operations of the NLRB's regional offices. However, a potentially more significant appointment looms when current NLRB General Counsel Richard Griffin's term expires in November 2017. At that time, President Trump will have the opportunity to nominate a new General Counsel who will have an opportunity to re-make the NLRB's prosecutorial agenda and guide the NLRB's regional offices.

What Will Happen at the EEOC?

January 23, 2017

What We Know

Historically the EEOC has been less influenced by administration changes than other agencies such as the DOL and NLRB. EEOC field offices are staffed by long term career employees who are committed to the mission of the EEOC and who have a large degree of influence on what cases are pursued and how aggressively. EEOC's ability to pursue its agenda is largely controlled by the level of funding Congress provides. The budgetary sequester has already squeezed EEOC funding, and a Republican Congress and Trump administration are not likely to prioritize the EEOC. Local EEOC offices will continue to focus on systemic cases in order conserve resources.

The EEOC recently issued its Strategic Enforcement Plan (the "SEP") for fiscal years 2016-2021. Among the priorities identified in the SEP, are "protecting vulnerable workers" including immigrant and migrant workers; and "backlash" discrimination against individuals who are Muslim, Sikh or of Arab, Middle Eastern or South Asian Defense. Gender pay disparity and "issues related to complex employment relationship in the 21st century workplace," such as the role of staffing agencies, temporary workers, independent contractor relationships, and the "on demand" economy are also listed as areas of focus.

On the regulation front, in 2016 the EEOC issued new EEO-1 reporting requirements which are slated to go into effect in January 2018. The current EEO-1 report requires private sector employers with more than 100 employees to provide workforce profiles sorted by race, ethnicity, gender and job category. In addition to the data already required, the new rules would require reporting of employees' total hours worked and W-2 earnings. The purported intent of the new regulation is to provide the EEOC with information that could be used to identify gender based pay disparities.

Although not connected to the new administration, the Chicago District Office announced on January 11, 2017 that Greg Gochanour, a long time trial attorney in the office has been appointed regional attorney. He succeeds John Hendrickson, who was known by employers throughout the Midwest and nationwide, as an outspoken and aggressive advocate for employees. It remains to be seen if this change of leadership has any impact on employers within the Chicago District, which covers Illinois, Wisconsin, Minnesota, Iowa, and North and South Dakota.

What We Believe
We predict the EEO-1 regulations will be repealed before they become effective. This is exactly the sort of regulation that we would expect to be subject to increased scrutiny under a regulation-averse Trump administration. The 2018 start date should provide ample time for the rule to be withdrawn, revised, or overturned by the Republican Congress.

We also anticipate that the EEOC will de-emphasize efforts to expand Title VII to cover sexual orientation and gender identity discrimination, but this probably will not make any difference in the future development of the law. Right now, the Obama EEOC appears to be winning the battle in the courts, and this issue will continue to be litigated, with or without the Trump EEOC. This issue is inevitably bound for the Supreme Court, where the ultimate outcome may depend on how many Justices have been appointed by Trump by the time a case arrives. Congressional action on this issue is highly unlikely. In the meantime, multi-state employers will be subject to increasingly divergent state and local requirements when it comes to LGBTQ protections.

Because the SEP is merely "aspirational" and is not legally binding, its continued relevance is uncertain. In the short term, employers can look to the SEP as a broadly accurate statement of the priorities of EEOC field office staff. Over the longer term, Trump's campaign rhetoric suggests that protecting immigrant workers and preventing "backlash" discrimination might not be top priorities of a Trump EEOC.

One possible area of increased EEO priority that is consistent both with the current SEP priority of the "21st Century Workplace" and Trump's focus on protecting American jobs is the use of Title VII to protect against jobs lost due to foreign outsourcing. We would not be surprised if the Trump EEOC actively pursues novel claims similar to the recently filed private class action alleging that Disney discriminated against U.S. workers based on age and national origin by outsourcing jobs to foreign workers.

What We Don't Know
Is the racially charged and divisive rhetoric that characterized the presidential race a sign that the EEOC's role could fundamentally change under the Trump administration, or will EEOC be left to pursue its traditional anti-discrimination agenda (albeit with reduced financial resources) as has been the case under previous Republican presidents?

What this Means for Employers
Change will be marginal at best. Employers can hope for some relief from the burdensome EEO-1 requirements. The risk of being subjected to systemic EEOC litigation might lessen as EEOC funding is further reduced. Ultimately, however, the private plaintiffs' bar remains active and employers who do not have robust and effective anti-discrimination and anti-harassment policies and practices will remain at significant risk of litigation. It also remains to be seen whether the highly polarized and divisive rhetoric that characterized much of the presidential campaign will manifest itself in the workplace and further increase employer risks.

What will Happen at the DOL Wage and Hour Division?

January 19, 2017

What We Know
President Trump has selected Andy Puzder to serve as his Secretary of Labor. Mr. Puzder is CEO of CKE Restaurants, which owns the Hardee's and Carl's Jr. Restaurant chains. Mr. Puzder has been a vocal critic both of the Department of Labor's proposed overtime exemption rule and of proposals

to significantly increase the federal minimum wage. His confirmation hearing currently is scheduled for February 2, 2017.

The aforementioned overtime exemption rule would raise the minimum salary threshold for the executive, administrative and professional exemptions from $455 per week ($23,660 annualized) to $913 per week ($47,476 annualized). This rule was to take effect on December 1, 2016, but a federal district court in Texas issued an injunction temporarily blocking the rule on November 22. This ruling has been appealed and briefing on the appeal is set to conclude by January 31, 2017. This leaves open the question of whether President Trump will direct the DOL to drop its defense of the new rule once he takes office. To hedge against that possibility, on December 9, 2016, the AFL-CIO filed a petition to intervene in the lawsuit so that it can defend the rule even if the DOL bows out at the new President's direction.

What We Believe
It is highly likely that a Puzder-led Trump DOL will seek to undo Obama-era regulations, executive orders and initiatives that impose obligations on businesses, including the now enjoined overtime exemption rules.

While we don't yet know the precise cause of death, it seems safe to say at this point that the new overtime exemption rule in its current form is likely to be killed before it ever takes effect. While the Trump administration cannot wipe away the new rule with the stroke of a pen as it can an executive order, withdrawing the DOL's defense of the pending litigation in Texas may have the same practical effect, particularly if the court denies the AFL-CIO's petition to intervene in defense of the rule. The Republican-led Congress could also block the rule.

What We Don't Know
President Trump is nothing if not unpredictable. While his nominee for Secretary of Labor certainly seems to signal a more business-friendly, laissez-faire direction for the Department of Labor, Trump campaigned on a populist message that may not align perfectly with business interests. It is at least conceivable, for example, that the Trump administration and Puzder-led DOL could pursue some modest increase in the minimum wage or in the minimum salary level for exempt employees in order to demonstrate their concern for working Americans. Some Congressional Republicans have also signaled a willingness to consider more moderate increases in the minimum salary threshold for exempt employees. We do not know, however, whether such legislation would muster the support in Congress and the new administration necessary to become law.

What this Means for Employers
In general, it seems highly likely that we will see a more employer-friendly DOL over the next several years. However, major changes may take time to materialize, and at this point we cannot say exactly what will change or how. For the time being, employers should not make any changes in anticipation of rules being rescinded or enforcement actions being curtailed. To the contrary, the shift in direction at the federal level is likely to accelerate the growth in state and local workplace regulations. The resulting patchwork of regulations may leave some employers longing for the days when state and local governments were willing to leave such regulation to the feds.

What Will Happen to the Affordable Care Act?

January 18, 2017

What We Know
Employers and plan sponsors need to start preparing for significant changes to the Affordable Care Act under the new administration. Both President-elect Trump and the new Republican-controlled Congress have vowed to "repeal and replace" the ACA as one of their first official acts. But this task is already proving to be easier said than done. In the short term, we are more likely to see a targeted repeal of certain key ACA provisions, followed by legislation or rulemaking that seeks to replace those aspects of the ACA that generated significant federal revenue or were intended to make the delivery of health care more efficient.

First, there are not enough votes in the senate to repeal the ACA in full. As a result, Congress must rely on the reconciliation process, which allows changes to the law only to the extent that the changes impact the federal budget. Through this process, Congress could eliminate the ACA's employer mandate ("employer shared responsibility" rules), individual mandate ("individual shared responsibility" rules), Medicaid expansion, the "Cadillac Tax," and other taxes and penalties that are part of the ACA.

Other ACA provisions, such as the requirement to offer coverage to adult children up to age 26 and the requirement that insurers offer coverage on the individual market without regard to pre-existing health conditions, cannot be repealed using this process. In any event, these provisions are broadly popular among most voters, and President-elect Trump has said that he supports them along with other insurance market reforms.

Second, the ACA is now deeply integrated into all facets of the U.S. health care system, including insurance markets, health care providers, individual consumers of health care, Medicaid and Medicare. Even a partial repeal would impact approximately 20 million people who have received coverage on the individual market through an ACA exchange or through Medicaid expansion. So any full or partial repeal must have a delayed effective date or be followed by other legislation that addresses the significant affordability and access problems that exist in the U.S. health care system (which the ACA tried to fix).

What We Believe May Happen in the Short Term

We anticipate that Congress will pass (and President-elect Trump will sign) legislation that repeals many of the budgetary components of the ACA with a delayed effective date. As of this writing, both houses of Congress have voted to set the reconciliation process in motion. This legislation will likely resemble a bill that Congress finalized in early 2016 which was ultimately vetoed by President Obama. That bill did not include any replacement for the ACA, as promised by congressional Republicans and President-elect Trump, but it did delay the effective date of certain repeal components for two years. The two-year delay was intended to allow Republicans to develop an ACA replacement, while minimizing the impact to health insurers, health care providers, and individuals. In the meantime, those ACA requirements that most directly impact employers and plan sponsors (such as the employer mandate, annual reporting, and the Cadillac Tax) will remain in effect.

What We Don't Yet Know

Republican leaders have not yet developed a replacement for the ACA and have not yet agreed on all of the details of a repeal bill. A complete strategy for replacing the ACA (i.e. legislation that addresses the underlying health care problems that the ACA was meant to fix) may not be put in place this year. In terms of related health care initiatives, both Paul Ryan (the current speaker of the House) and President-elect Trump have stated that they would like to expand consumer driven health care initiatives and vehicles such as health savings accounts, and that they would like to make Medicaid a block grant program.

There is also speculation that Tom Price, Trump's candidate for the Secretary of Health and Human Services ("HHS"), will attempt to scale back elements of the ACA through the regulatory process. Much of the ACA has been implemented through HHS rulemaking, and many predict that Price will try to eliminate or modify certain insurance coverage requirements (such as the requirement to cover contraceptives without cost sharing) that have effectively been developed through regulations. But the rulemaking process takes time, so whether these items remain a priority after Congress passes repeal legislation is not clear.

Further, the new administration has not yet proposed candidates for some of the key regulatory positions that oversee ACA rulemaking and enforcement, including the Department of Labor's Assistant Secretary of the Employee Benefits Security Administration ("EBSA") and the Department of Treasury's Deputy Assistant Secretary (Tax Policy) for Retirement and Health Policy. Like Tom Price, the individuals who are selected for these positions will have considerable influence over the path that the ACA will take.

What This Means for Employers

Until President-elect Trump is sworn in and the scope of any repeal legislation is finalized, employers should assume that the Affordable Care Act will remain in place in the near term. For example, it is important that large employers and plan sponsors continue to comply with the ACA's annual information reporting requirements for calendar year 2016.

That said, the potential repeal of the employer mandate and the Cadillac Tax, along with other potential changes that may be accomplished through the regulatory and enforcement processes, will have a particularly significant impact on employers and plan sponsors in the short term. Below are just some of the things that will plan sponsors will need to consider.

Repeal of Employer Mandate
If the employer mandate is repealed, employers and plan sponsors will have an opportunity to revert to their pre-ACA health plan eligibility rules, as health plan eligibility will no longer need to be tied specifically to how many hours an employee works. Those who sponsor self-insured plans will still need to comply with the tax code's nondiscrimination rules (which have been in place for many years, prior to the ACA) when structuring their plans' eligibility criteria. In any event, the tax code's nondiscrimination rules allow far more flexibility than the ACA's employer mandate rules. Although the ACA included a similar nondiscrimination provision for fully-insured plans, this provision will not go into effect until the IRS writes regulations, which we do not expect will happen quickly (or at all) under the Trump administration, potentially giving fully-insured plan sponsors complete freedom when structuring their plans' eligibility rules. Finally, ACA information reporting to the IRS may eventually not be required, although it could be replaced with some other type of health coverage reporting.

Cadillac Tax Repeal
If the Cadillac Tax is repealed, plan sponsors will once again have the freedom to design health plans that provide generous benefits on a tax-free basis. Keep in mind, however, that the Trump administration's tax reform efforts could ultimately limit the tax-free treatment of employer-sponsored health coverage.

Other Potential Change
Aside from repealing the employer mandate and the Cadillac Tax, the Trump administration could make significant changes to the ACA by simply declining to enforce certain ACA provisions or modifying regulations that were issued by the Obama administration, such as:

- The ACA's ban on stand-alone health reimbursement arrangements, which, if not enforced or modified through rulemaking, would once again allow employers to pay for employee health expenses or non-employer sponsored health insurance coverage on a tax-free basis.
- Regulations under Section 1557 of the ACA that require certain plans to cover transgender-related health services, which, if withdrawn or modified through rulemaking, would once again allow affected plans to categorically exclude coverage for transgender-related health services. Keep in mind that these types of exclusions may be susceptible to challenge under Title VII or similar state laws.
- Preventive care guidelines, particularly those that require plans to cover birth control, which, if modified, could allow plans to either exclude coverage for birth control or cover birth control under the plan's normal cost-sharing structure.
- The ban on "mini-med" or "skinny" health plans, which, if not enforced or modified through rulemaking, would once again allow employers to offer this type of health insurance. Before the ACA, employers with large low-wage workforces commonly offered this type of coverage.

We will continue to keep you up to date on ACA developments as they occur. In the meantime, please let us know if you have any questions or feedback.

Does Paid Leave Become Reality in a Trump Administration? And Who is His Likely Choice to Head the Department of Labor?
November 17, 2016

Every other employment attorney has been offering their opinion on how the election of Donald Trump will impact employment law. So, I'd feel left out of this riveting discussion if I *didn't* offer my two cents about how a Trump presidency might impact by far the most exciting area of employment law — employee medical leave, of course!

How likely is employee paid leave to become reality in a Trump administration? In short, don't bank on it.

Trump's Position on Employee Paid Leave
On the campaign trail, Mr. Trump did not offer a detailed position on federally-mandated paid leave for employees, though it certainly is notable that he was the first Republican presidential nominee to propose paid maternity leave for employees across the country. Under his proposal as highlighted on his campaign website, Mr. Trump would provide six weeks of paid maternity leave to new moms, and he would pay for it by funds recovered in fighting unemployment compensation fraud. Mr. Trump would not offer any paid leave to a father after the birth of a child, nor any paid time off (for either) for the adoption of a child.

If Mr. Trump carries through on his campaign promise and continues to endorse such a proposal, which has been pushed publicly by his daughter, Ivanka Trump, it faces a rocky road in a Republican-controlled Congress. It's hardly clear whether the Republican Congressional leadership would advance any of Mr. Trump's priorities, but if the past is any indication, the GOP Congressional leadership has long been opposed to paid leave. There is little chance this position will change with Mr. Trump taking office. Shout out to SHRM for providing a thorough analysis on this topic, too.

Who Will Become the New Secretary of the U.S. Department of Labor (aka the new "Head FMLA Nerd")?

Speculation has been swirling that current EEOC Commissioner Victoria Lipnic, who holds one of the two Republican spots on the Commission, is the leading candidate to become Secretary of Labor. If her name rings a bell, Ms. Lipnic was the leading author of the changes to the (more employer-friendly) 2009 FMLA regulations. From 2002 to 2009, she served as an assistant secretary of labor for employment standards, a role which allowed her to oversee the Wage and Hour Division, including FMLA enforcement. Since 2010, she has served as an EEOC Commissioner, delicately advocating that the agency take a more moderate position on some of its most publicized priorities.

During her time as an EEOC Commissioner, she has become known for working collaboratively with her Democratic counterparts. Notably, however, she criticized the EEOC's decision to issue the 2015 Pregnancy Discrimination Guidance, arguing that it was issued without public comment and review and that it was published prematurely given that the Supreme Court was taking pregnancy and accommodations issues up at the time in *Young v. UPS.* She also has expressed concern for the gap in pay for men and women, but also opposed the EEOC's push to try and fix it, again voting against a proposal that would require certain employers to disclose their pay data to the government.

Personally, I have found Commissioner Lipnic to be delightful and down-to-earth, not to mention realistic and thoughtful about the burdensome nature of government regulations on employers. Her appointment would be a benefit to the employer community. As a related aside, I also can say "I knew her back when . . ." when she and I co-presented about pregnancy accommodations at a DMEC conference last year.

What Employers Can Expect from the Trump Administration: Immigration

November 16, 2016

This alert provides greater detail on the immigration policies that Candidate Trump supported and the changes that he is likely to enact or advocate for as President. President-elect Trump has already announced plans for the first **100** and **200** days of his presidency and released an immigration plan. The changes that the new administration seeks to enact can be broadly categorized according to how they could be accomplished: through legislative, regulatory, or executive action, which will impact the likelihood and pace of change.

Repealing DACA
Among the first steps that President Trump could take is eliminating the DACA (Deferred Action for Childhood Arrivals) program that President Barack Obama created through executive order in 2012. This program has provided work authorization to approximately 750,000 individuals who entered the United States as youths and met certain public safety and national security requirements. DACA was

unaffected by the lawsuit over President Obama's expansion of these programs in 2015 and 2016. As a presidential candidate, Trump stated that he would eliminate the DACA program, but it is unclear whether he would actually fulfill this promise or enact a more limited restriction on the DACA program. Because this program was enacted through executive order, President Trump will be able to eliminate or change it through executive order and that is likely to be one of the first actions he will take. The elimination of this program could impact the ability of employers to employ individuals with DACA-based work authorization.

Notwithstanding the possibility of change to this program, it is critical that employers avoid making any adverse employment decisions about an employee or prospective hire based only upon the potential elimination of the DACA program. Under current federal law, such actions could be considered unlawful and could expose the employer to legal liability.

E-Verify
During his campaign, Trump emphasized mandatory E-Verify as a solution to the problem of illegal immigration and employment of unauthorized workers by U.S. employers. E-Verify is currently a voluntary program and prior legislative attempts to make it mandatory have been unsuccessful. President Trump would need to work with Congress to enact mandatory E-Verify.

Workplace Enforcement and Raids
Candidate Trump promised an increased emphasis on workplace enforcement and I-9 audits, as well as a likely return to the practice of detaining unauthorized workers caught in raids. Under the Obama administration, workplace enforcement, due to limited resources, focused on "critical infrastructure" and ended the practice of detaining alleged unauthorized workers unless those individuals had a criminal record or were otherwise a removal priority. Employers should prepare for increased workplace enforcement under the Trump administration and the possibility of "SWAT-style" raids. Such changes would reflect new administrative policy and would not require legislative action.

TN Visa
The TN visa category was established under NAFTA and permits certain Canadian and Mexican professionals to live and work in the United States on a temporary basis. Candidate Trump was fiercely critical of NAFTA and his 200 day plan calls for significant changes to the treaty. These changes could result in U.S. withdrawal from the treaty and renegotiation of bilateral treaties with Canada and Mexico, which could have a significant impact on the TN visa category.

Business Visa Changes
Many changes to the H-1B visa program would require legislation. For example, the annual cap of 85,000 H-1B visas (including 20,000 visas for U.S. advanced or Master's Degree holders) is fixed in the Immigration and Nationality Act, as is the process for obtaining an H-1B visa. However, changes to the prevailing wage guidelines that control the wages paid to visa holders could be enacted through Department of Labor regulation. As a candidate, Trump promised to increase prevailing wages.

Additionally, over the last 2 years, the Obama administration enacted modest and limited reforms to business immigration. These reforms have included changes to the Visa Bulletin, employment authorization for certain H-4s, the new 2-year STEM OPT program, and a proposed parole program for start-up entrepreneurs. While Candidate Trump did not focus on these changes, some of his associates have been vocal critics of these reforms and their future is therefore uncertain. Because many of these changes were enacted through agency rulemaking, changes would take some time due to the notice and comment requirements associated with enacting new federal regulations.

Extreme Vetting of Certain Immigrants
Candidate Trump initially stated that he would block Muslims from entering the United States. His position later evolved to "extreme vetting" of immigrants from certain countries. Such vetting could be implemented in a variety of different ways, including but not limited to registration requirements (similar to the NSEERS program that the George W. Bush administration adopted) and increased background checks. These changes could be enacted through a combination of regulatory and legislative changes.

Border Security and Undocumented Immigrants
Candidate Trump focused his most extreme rhetoric on undocumented immigrants and border security, promising to build a wall on the border with Mexico and to "make" Mexico pay for it. In the 100-day action plan he released after his election titled "Contract with the American Voter," President-elect Trump promises to enact punitive measures such as defunding sanctuary cities and discontinuing visa issuance in response to countries' refusal to accept U.S. deportees. The plan also includes the "End Illegal Immigration Act," which includes funding and plans for construction of the border wall; creation of mandatory federal prison sentences for those who unlawfully re-enter the U.S. after deportation, felony convictions, or multiple misdemeanor convictions; and increased penalties for visa overstays. The stated intention of the Act is to protect job opportunities for U.S. workers. Although information is limited at this time, Trump's transition team has announced the detention and deportation of unlawfully present individuals with criminal convictions as an immediate priority.

What to Expect Next
The President's ability to impact immigration policy will be more quickly and sharply felt where he can use executive authority, including changes in personnel and the policies of immigration agencies, prioritization of enforcement efforts, and use of executive actions. He will likewise have the ability to deny immigration benefits not codified in laws. Regulatory changes will take more time. And legislation will be required to change treaties that provide immigration benefits and to fund his border security projects. In light of strong partisanship and opposition to President-elect Trump's proposed immigration policies, it is also very likely that they will face litigation seeking to block their enactment. As with many other areas of the President-elect's agenda, employers and individuals will need to remain alert to see what immigration changes the new administration actually pursues.

TRADITIONAL LABOR ALERTS

Federal Court Strikes Down Lincolnshire's "Right to Work" Ordinance
January 13, 2017

Last week, the U.S. District Court for the Northern District of Illinois held that the Village of Lincolnshire's municipal ordinance regulating union activities was invalid under federal law. The ruling is a defeat for Governor Bruce Rauner in his efforts to work with local governments to pass municipal and county-wide right-to-work ordinances.

Background
Since his election, Governor Rauner has encouraged local governments to create local right-to work areas, or "empowerment zones." In March 2015, in reaction to these efforts, Illinois Attorney General Lisa Madigan issued an opinion that Illinois local governments cannot pass such ordinances because they are preempted by the National Labor Relations Act (NLRA) and can be enacted only on a statewide basis. The Attorney General, relying on state and federal court precedent, reasoned that if political subdivisions of a state were allowed to enact right-to-work ordinances on a local basis, the result would be a "crazy-quilt patchwork of regulations" contrary to the purpose of the NLRA.

Despite this ruling, in December 2015, the Village of Lincolnshire passed an ordinance that created a local right-to-work zone. Section 4 of the ordinance prohibited union security agreements within any collective bargaining agreement between an employer and labor union. Union security agreements, or "union shop" agreements, require employees to make payments to a labor organization as a condition of employment. Section 4(E) of the ordinance prohibited unions from imposing hiring hall provisions, which require all new hires by an employer to be referred through a labor union's hiring hall. Finally, Section 5 of the ordinance required "dues check-off" provisions to be revocable by an employee at any time. Dues check-off provisions permit an employee to authorize his or her employer to automatically deduct union dues from his or her paycheck. The ordinance only applied to private sector companies within the

Village and not to public-sector employees, such as police officers or teachers.

Court Finds Ordinance Preempted by Federal Law

Several labor unions that represent employees who work for private sector companies operating within the Village of Lincolnshire challenged these provisions of the ordinance. The unions argued that the NLRA and the Labor Management Relations Act (LMRA), both federal laws, preempted the Village from regulating the union activity addressed by the ordinance. The Village maintained that Section 14(b) of the NLRA gave the Village and other local governments the authority to regulate this activity.

Congress largely displaced state regulation of private sector labor relations when it passed the NLRA. It is well established that, under the Supremacy Clause of the U.S. Constitution, states may not regulate activity that the NLRA expressly or arguably protects or prohibits – in other words, Congress has "occupied the field" and preempted state regulation in this area. Further, Section 8(a)(3) of the NLRA expressly permits union security agreements within collective bargaining agreements. However, Section 14(b) carves out one exception to Section 8(a)(3)'s exclusive federal regulation of union security agreements by authorizing "any State or Territory" to pass laws prohibiting those agreements. The same section specifically provides that the purpose of the exception is to permit states to prohibit "agreements requiring membership in a labor organization as a condition of employment."

Union Security Agreements

The Court considered whether Section 14(b)'s exception that permits state right-to-work laws also permits local right-to-work ordinances prohibiting union security agreements. Relying on the language of Section 14(b), the Court reasoned that because Congress did not mention local law, and referred only to "State or territorial laws," the exception should be understood as a "narrow authorization that does not extend to local regulation of union security agreements." Similar to the rationale applied by the Attorney General, the Court also found that "it is highly unlikely that Congress intended to subject this national policy [on labor relations] to the patchwork scheme that would result from city-by-city or county-by-county regulation of [union security] agreements." Therefore, the Court held that Section 14(b) does not permit local governments to regulate union security agreements, and struck down Section 2 of the ordinance.

The Village pointed to a recent opinion from the U.S. Sixth Circuit Court of Appeals, which held that Section 14(b) did extend to local law, and that a similar local right-to-work ordinance in Kentucky was not preempted by the NLRA. The Sixth Circuit reasoned that in passing the NLRA and Section 14(b), Congress had not demonstrated a "clear and manifest purpose to preempt state authority to delegate government power to political subdivisions." The Court "respectfully disagreed," and ruled that the operative question is "whether Congress intended to preempt legislation in general in the field of union security agreements." Because it had, the Court found the exception under Section 14(b) must "be read narrowly to extend to the states and no further."

Union Hiring Halls

Relying on the same rationale, the Court found Section 4(E) of the ordinance prohibiting union hiring halls also was preempted by the NLRA. The Court ruled that even if Section 14(b) did permit local regulation of labor relations, union hiring halls are not a form of "compulsory unionism," and are not covered by Section 14(b). Hiring hall provisions require employees to pay referral fees before they are hired, but do not require membership in a union. Therefore, under the narrow exception of Section 14(b), the Court reasoned that not even a state could regulate union hiring hall provisions.

Regulation of Dues Check-Off Provisions

Finally, the Court found Section 5 of the ordinance, which requires any dues check-off to be revocable at any time, also was invalid. Similar to the hiring hall provision, the Court held that this aspect of the ordinance is also preempted by the NLRA and does not fall within Section 14(b)'s narrow exception. Moreover, the Court held that even if Section 14(b) permitted local regulation of labor relations, the LMRA separately preempts local regulation of dues check-off provisions. The LMRA authorizes dues check-off arrangements "which shall not be irrevocable for a period of more than one year." The Court held that because an agreement under the ordinance could satisfy all federal requirements (i.e., be irrevocable for a period of one year and no longer) but not meet the local requirements, the local requirement conflicts with federal law and violates preemption principles.

The Village has not yet indicated whether it will appeal the District Court's ruling. As noted above, the Sixth Circuit has held that local governments may regulate union security agreements under Section 14(b), and the Village could encourage the Seventh Circuit Court of Appeals to agree. We will keep you apprised of further developments in this area.

NLRB Moves Closer to Finding that Scholarship Student-Athletes are Employees

October 13, 2016

On September 22, 2016, the Associate General Counsel ("AGC") for the National Labor Relations Board ("NLRB," or the "Board") issued an *Advice Memorandum* indicating that a number of policies in the Northwestern University Football Handbook were unlawful under the National Labor Relations Act (the "Act"). By subjecting the handbook to the Act, and referencing these scholarship football players as employees, the NLRB seems to be more concretely articulating its position on the status of student-athletes as employees. The Memo is the latest in a seemingly back and forth and abstract saga. If you remember, the Board punted the issue of student-athletes' employment status back in August 2015 when it declined to exercise jurisdiction over the representation petition involving Northwestern University and College Athletes Players Association. The Advice Memorandum, although not a Board decision confirming the status of scholarship student-athletes as employees, provides additional fuel for student-athletes at private institutions to reignite their unionization and pay-for-play efforts.

In reviewing the football handbook, the NLRB found four policies unlawful under the Act. The first was the University's social media policy. The policy prohibited players from posting anything on their personal social media pages that would embarrass the Athletic Department or the University in general. The policy also gave the University unfettered access to the players' social media pages. The AGC found these policies to be unlawfully overbroad and reasonably calculated to dissuade players from exercising their Section 7 rights to discuss the terms and conditions of employment. The AGC noted, however, that the University revised and deleted these provisions in response to the charge in this case.

Next, the handbook prohibited players from discussing "any aspects of the team, the physical condition of any players, planned strategies, etc. with anyone." The AGC also found this policy unlawful because the prohibition against discussions about health and safety issues "would be reasonably construed to prohibit Section 7 activity." The University modified the policy to allow students to discuss general medical and safety issues with third parties without naming specific student names. The AGC noted that this modification "struck the proper balance" between the players right to speak out about these issues, student confidentiality, and protecting football team information.

The handbook also contained a policy that prohibited student-athletes from speaking with the media without prior approval from the athletic communications office. By modifying the policy to include the option of allowing the player to speak to a media representative directly or referring the representative to the athletic communications office, the players' Section 7 rights were no longer impinged upon because they could speak out about their terms and conditions of employment to members of the media.

Finally, the handbook included a dispute resolution policy, which has since been deleted in full. The dispute resolution mechanism required that any complaints or grievances concerning personal rights and/or relationships with the athletic program were to first be taken to the Director of Football Operations. If unresolved, the complaint went to the head coach, Senior Associate Athletic Director for Intercollegiate Services, the Faculty Committee on Athletics and Recreation, and then to the President of the University. Only at the point of taking the grievance to Senior Associate Athletic Director was a player allowed to involve a third party. This grievance procedure interfered with the exercise of Section 7 rights because it prohibited discussion amongst players and third parties "concerning workplace grievances."

The AGC's review of the University's football handbook is in line with the NLRB's General Counsel's Memorandum related to employer handbook policies issued in March 2015. However, it is not simply the AGC's position on the lawfulness or unlawfulness of these policies that makes the Advice Memorandum one of significance. Instead, what is most important is that by finding these policies unlawful under the Act and treating scholarship student-athletes as statutory employees, the AGC has added more fuel to the argument that these student-athletes are employees and should be paid for their services.

It is important to note that the Act only covers private employers. Thus, only student-athletes at private institutions would be affected by any decision to treat student-athletes as employees. However, it is likely that any decision by the NLRB on this matter will influence the treatment of student-athletes in public schools.

NLRB Permits Off-Duty Employees to Picket on Employer Property

October 7, 2016

An employer's ability to prohibit picketing on its property was dealt a serious blow when the National Labor Relations Board (NLRB) recently ruled in *Capital Medical Center* that an acute care hospital violated Section 8(a)(1) of the National Labor Relations Act when it sought to prevent off-duty employees from picketing on hospital property by threatening the picketers with discipline and calling the police on them.

Capital Medical Center (CMC) was in the midst of contract negotiations with UFCW Local 21, the collective bargaining representative of CMC's technical employees, when the Union and some off-duty employees engaged in handbilling and picketing to publicize the lack of progress in negotiations. Initially, the picketing took place on the public sidewalk bordering the hospital and employees distributed handbills on CMC's property outside the main lobby entrance and the entrance to the physicians' pavilion. CMC did not interfere with either of those activities. However, when a few off-duty employees stationed themselves with picket signs on CMC property near the main lobby and physicians' pavilion entrances, CMC intervened. After repeatedly asking the employees to leave, CMC called the police, who declined to remove the picketers because they were not disruptive and did not block entry to or exit from the facility.

The NLRB ruled that CMC violated its employees' right to engage in protected concerted activity when it tried to halt the picketing on CMC property. In reaching its decision, the NLRB applied a balancing test which weighed employees' Section 7 rights of self-organization against an employer's property rights. Here, the NLRB determined that an employer cannot restrict Section 7 activities, such as picketing, unless it shows the restriction is necessary to maintain discipline and production. In an acute care hospital setting specifically, an employer may only prohibit Section 7 activities in non-patient care areas if it demonstrates that the prohibition is necessary to prevent patient disturbance or the disruption of healthcare operations.

The NLRB ruled that CMC failed to establish that the presence of the picketers at the main lobby and physicians' pavilion entrances caused a disturbance to patients or disrupted healthcare operations. The picketers' actions did not meet the threshold necessary to permit CMC to intervene because they did not patrol the doorways, march in formation, chant, or create any real or symbolic barrier to the hospital entryways, and were no more disruptive than the on-property handbilling permitted by CMC.

Member Miscimarra dissented from the majority decision. He faulted the majority for applying the test governing solicitation and distribution of literature on an employer's property to the on-premises picketing that occurred in this case. In his view, the majority should not have treated the two activities the same when balancing the employees' Section 7 rights against CMC's property interests because picketing is more coercive and disruptive than handbilling.

After *CMC*, employers faced with on-premises employee picketing should exercise caution and carefully gather and evaluate all relevant facts before taking action. Whether an employer can prohibit this on-property picketing is a fact-based inquiry that depends on the unique circumstances of each case. Although this case does not create an absolute right for employees to picket on employer property, the NLRB's *CMC* decision tilts the scale in favor of employees.

The NLRB Opens the Door to Union Organizing Among Teaching Assistants and Other Student Assistants at Private Colleges and Universities

August 24, 2016

In what will come as no surprise to even the most casual labor law observer, yesterday the National Labor Relations Board jettisoned established precedent and granted teaching assistants and other student assistants at private higher education institutions the right to organize.

In yesterday's *Columbia University* decision, the NLRB overturned its 2004 Brown University decision and determined that student assistants who "perform work, at the direction of the university, for which they are compensated," even those whose research is funded by external grants, are statutory employees and, as such, have the right to organize. According to the NLRB, "[s]tatutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach." As a result, the NLRB determined that the United Auto Workers were entitled to move forward with an attempt to organize a bargaining unit comprised of all Columbia University graduate and undergraduate teaching assistants and graduate research assistants, a group that includes, among others, "preceptors, course assistants, readers and graders."

After it determined that the student assistants were employees entitled to organize, the NLRB applied its "community of interest" test to constitute an appropriate bargaining unit. The Board made this finding despite the fact that the petitioned-for students were employed in different roles, performed different duties and responsibilities, and were paid differently throughout the university. The Board reiterated its position that in order for a unit to be appropriate, it merely needs to be "*an* appropriate unit" in which the employees share a community of interest. The Board found this to be an appropriate unit because it was a "readily identifiable grouping of employees" in that everyone is a student employee who provides instructional services and includes all research assistants. The Board also pointed out that the members all worked in similar settings (labs and classrooms) and served similar functions for the University with respect to its fulfillment of its teaching and research mission.

As he frequently does these days, Member Miscimarra dissented from the majority decision. He argued that the individuals sought to be organized were not employees as contemplated or defined by the National Labor Relations Act and even if they were, the petitioned-for unit was not an appropriate unit under NLRB precedent. Member Miscimarra chided the majority when he noted "that the Board resembles the 'foolish repairman with one tool – a hammer – to whom every problem looks like a nail; we have one tool – collective bargaining – and thus every petitioning individual looks like someone's 'employee'." *Citing, Boston Medical Center Corp*., 330 NLRB 152, 182 (1999) (Member Brame, dissenting).

Member Miscimarra found that collective bargaining would detract from the students' goals of completing their degrees within the allotted time because, by giving these students the right to organize, it was also giving colleges and universities and the student unions economic weapons to be used against one another. Member Miscimarra noted that the Board's processes and procedures were ill-equipped to deal with representation and unfair labor practice cases involving students and noted that the NLRB and Supreme Court have both previously recognized that "the lecture hall is not the factory floor, and the 'industrial model cannot be imposed blindly on the academic world'." *Citing, Syracuse University,* 204 NLRB 641, 643 (1973).

Adventures in Buttonland: NLRB Rejects Employer Attempts to Ban Buttons at Work

July 22, 2016

Two recent cases, one from the National Labor Relations Board, and one from a federal court of appeals enforcing an NLRB decision, highlight the risk an employer runs when it seeks to prohibit its employees from wearing buttons at work.

In order to foster its image as a "traditional American grill," the Daily Grill, a restaurant in Los Angeles, prohibited its employees from wearing union buttons while interacting with customers.

Although employees had been allowed to wear buttons such as "trainer" and "anniversary" pins, the restaurant threatened to discipline or sent home early several employees who, during a union organizing drive, wore small (one inch in diameter) UNITE HERE union buttons at work.

Under established National Labor Relations Board precedent, employees are allowed to wear union pins or buttons at work absent "special circumstances." In the past, the NLRB has found special circumstances where the display of union buttons may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees.

The Daily Grill argued, and an NLRB administrative law judge (ALJ) found, that the restaurant's ban on union buttons satisfied the special circumstances exception. According to the ALJ, the ban was lawful because it fostered the Daily Grill's public image as a traditional American grill restaurant and that a consistent, customer-driven experience and atmosphere was at the core of the employer's business model, and the uniform and professional appearance of its servers was part of that model.

The National Labor Relations Board disagreed. In *Grill Concepts Services, Inc. d/b/a The Daily Grill and Unite Here, Local 11*, the NLRB explained that when it is faced with an employer's claim that its public image justifies a ban on union buttons, it considers the button's physical appearance and message to determine if it interferes with the employer's desired public image. Contrary to the ALJ, the NLRB found that the employer failed to justify its ban on union buttons because it "presented no evidence on how the Union's small, inconspicuous, and non-inflammatory buttons would unreasonably interfere with a server's ability to provide reliable service or interfere with the [restaurant's] public image."

In *Boch Imports, Inc., d/b/a Boch Honda v. NLRB*, the United States Court of Appeals for the First Circuit agreed with the NLRB that a unionized car dealer's policy that prohibited "message" pins was not justified by special circumstances and violated employee rights under the National Labor Relations Act. In *Boch Honda*, the employer maintained a handbook policy that prohibited customer-facing employees from wearing, among other things "message" pins. Like the *Daily Grill* case, an NLRB ALJ determined that the employer's interests in workplace safety and preventing damage to vehicles met the special circumstances standard and justified the ban. And like the *Daily Grill* case, the NLRB reversed the ALJ and determined that the employer had failed to meet the special circumstances exception because the ban on pins was overbroad. According to the NLRB, the restriction was overly broad because it applied to employees, *e.g.*, administrative and finance employees, who had no contact with vehicles.

On appeal, the court agreed with the NLRB. The court was not persuaded that a "small and unobtrusive" union pin worn by non-uniformed employees would interfere with the general professional image the car dealer was trying to create. The court also agreed with the NLRB that the ban was overbroad. Although acknowledging that a pin could fall into an engine or scratch a vehicle, the court found the ban was not narrowly tailored to prevent those kinds of events from happening.

The First Circuit's decision was not unanimous. Judge Stahl wrote a lengthy dissent challenging the majority's ruling. He stated, "By rubber-stamping the Board's arbitrary infatuation with the uniqueness and uniformity of workplace dress codes, the majority has done little more than grant the Board the authority to play 'fashion police.'"

As Judge Stahl pointed out, the law in this area has drawn employers into a "legal bog." Employer decision-making on matters of buttons and pins in particular and dress codes in general is fraught with peril and requires the drawing of lines more nice than obvious. Employers should review their dress codes in light of cases like *Daily Grill* and *Boch Honda* to evaluate whether they will pass muster if challenged and to make appropriate changes if necessary.

Deflategate for Labor Lawyers Revisited: 2nd Circuit Reinstates Brady Suspension and Reaffirms Judicial Deference to Arbitration

April 26, 2016

The United States Court of Appeals for the Second Circuit has reinstated the four game suspension imposed by the NFL on New England Patriots quarterback Tom Brady for his role in the infamous "Deflategate" scandal. This decision overturned a district court decision which vacated an arbitration award issued by NFL Commissioner Roger Goodell enforcing the suspension.

While this decision will inevitably spark further debate and controversy within the sports world, it should not come as a surprise from a labor law perspective. The district court's original ruling overturning the suspension was quite unusual, given the high degree of deference that courts typically give to labor arbitration awards. The Second Circuit obviously agreed, stressing that a "federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, the most deferential in the law." Under this deferential standard, the Court of Appeals held that Commissioner Goodell properly exercised his broad discretion, and that this case "is not an exceptional one that warrants vacatur."

The lower court originally relied on three rationales for overturning the suspension: 1) Brady had no notice that his actions rose to the level of conduct detrimental to the game, (2) Brady had no notice that he could be suspended for such conduct, and (3) Brady was not afforded adequate due process during the arbitration hearing. The Second Circuit rejected each of these rationales as not being sufficiently deferential to Goodell's authority as an arbitrator.

Over the next few days, this decision is certain to be debated ceaselessly on ESPN and other sports media outlets. The Second Circuit's decision, however, puts the legal debate to rest by reaffirming the finality of labor arbitration awards.

Supreme Court Upholds the Constitutionality of Public Sector Union "Fair Share Fees"

March 30, 2016

In July 2015, the United States Supreme Court decided to hear an appeal of a case from the United States Court of Appeals for the Ninth Circuit regarding the legality of "fair share" fees for public employees. On March 29, 2016, an equally divided Supreme Court issued a one-sentence decision affirming the Ninth Circuit's decision in *Friedrichs v. California Teachers Association*, thereby upholding the constitutionality of state laws that allow unions to charge public employees who choose to opt-out of union membership "fair share" fees.

"Fair share" fees are fees that are proportionate to the union's costs associated with collective bargaining, contract administration and other activities germane to the union's duties as the collective bargaining representative. Public sector unions cannot use "fair share" fees toward their political activities.

California, as well as Illinois and nineteen other states, currently have state laws that allow unions to collect fair share fees from public employees who choose to opt-out of union membership. The Court was poised to hear an appeal by a class of plaintiff teachers in Friedrichs who challenged the constitutionality of the California law allowing for "fair share" fees. Given recent Supreme Court decisions eroding its precedent in this arena, many predicted that the Court's conservative majority would overturn *Abood v. Detroit Board of Education*, its 1977 decision holding that state laws may require public sector employees to pay fees to unions for the union's non-political work.

However, with the unexpected death of Justice Scalia, the Court was left with a 4-4 split and no tie-breaking vote. Thus, with one vacancy on the Court, this highly contentious case was unceremoniously resolved in a single sentence leaving the decision of the Ninth Circuit upholding the California "fair share" fee law to stand.

Where do we go from here? The Court's decision in *Friedrichs* leaves the Ninth Circuit decision in place, but is not itself precedential. *Abood* remains binding authority throughout the country. The plaintiffs have stated that they intend to file for a rehearing before the full Court whenever Justice Scalia's seat is filled. Additionally, there are currently several cases similar to *Friedrichs* that remain pending, including the case of *Bruce Rauner v. American Federation of State, County and Municipal Employees, Council 31*. The *Rauner* case has been stayed until July 7, 2016, presumably pending the Court's decision in *Friedrichs*. We expect the federal district court and subsequently the United States Court of Appeals for the Seventh Circuit to uphold the Illinois "fair share" law based on *Abood's* binding precedent. However, the question that remains is whether the Supreme Court will agree to hear another "fair share" fee case similar to *Friedrichs* in the near future, and that answer likely depends on who is confirmed to fill Justice Scalia's vacancy on the Court. Given the 4-4- split decision, the expectation is that the full Court (whenever it is full) will want to resolve the issue.

At this point, it is difficult to predict when Justice Scalia's seat will be filled. President Obama has nominated Merrick Garland, the Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, to fill Justice Scalia's vacancy. However, Senate Republicans have vowed not to take any action to conduct hearings or confirm the nomination, despite the fact that Judge Garland is universally considered to be a moderate. Therefore, the identity of the Justices voting to grant or deny certiorari on this issue may be very different than those who decided to grant certiorari to *Friedrichs*.

The Eighth Circuit Upholds Specialty Healthcare

March 15, 2016

Last week, the U.S. Court of Appeals for the Eighth Circuit upheld the National Labor Relations Board's *Specialty Healthcare* framework for determining whether a union's petitioned-for bargaining unit is appropriate. Under this two-step analysis, the Board evaluates whether the employees in the proposed unit are "readily identifiable" as a group and "share a community of interest." If the unit is determined to be appropriate, an employer seeking to challenge the proposed unit must show that other workers not identified by the union share an "overwhelming community of interest" with the proposed bargaining unit. Employers face a high hurdle when challenging a union's petitioned-for bargaining unit under *Specialty Healthcare*.

In *FedEx v. NLRB*, the Teamsters filed separate petitions to represent city and road drivers at FedEx terminals in Croydon, PA and Charlotte, NC. City drivers pick up and deliver freight to customers, while road drivers move freight between FedEx facilities. FedEx claimed that the petitioned-for units were not appropriate and should include the dockworkers that load and unload trucks and move freight around the docks at the FedEx terminals. Among FedEx's arguments in favor of a broader unit included that dockworkers may be part of a "dock to drive" program under which workers can obtain commercial driver license and become eligible for city and road driver positions. In addition, FedEx argued that at both locations, some drivers also performed dock work. Two NLRB Regional Directors rejected FedEx's arguments and determined that the bargaining units were appropriate under *Specialty Healthcare*. The NLRB denied FedEx's request for review of the Regional Director decisions, and when drivers in both cities voted to unionize, FedEx refused to bargain, contested the bargaining units determinations, and sought review of the NLRB's decision in the Eighth Circuit where it claimed that *Specialty Healthcare* violated the NLRA, Eighth Circuit precedent, and the Administrative Procedure Act.

The Eighth Circuit upheld the NLRB's *Specialty Healthcare* framework as a "reasonable interpretation" of the NLRA to which the Court "must defer." Importantly, the Court determined that "overwhelming community of interest" standard that is part of the *Specialty Healthcare* analysis is not a material departure from precedent and is consistent with the NLRA. The Court also explained that *Specialty Healthcare* did not create an impossible standard for employers to meet and did not give controlling weight to a union's proposed bargaining unit. The Court referred to the NLRB's decision in *Odwalla, Inc*., 357 NLRB No. 132 (2011), where the employer successfully argued that excluded workers shared an overwhelming community of interest with the proposed bargaining unit, as an example that *Specialty Healthcare* did not unduly bias the framework in favor of the union's proposed bargaining unit.

Having upheld *Specialty Healthcare*, the Eighth Circuit proceeded to dismiss FedEx's challenge to the NLRB's unit determination decisions because FedEx failed to show that dockworkers had an "overwhelming community of interest" with city and road drivers under *Specialty Healthcare*.

The Eighth Circuit joins the Sixth Circuit in affirming the *Specialty Healthcare* unit determination framework. Growing federal court acceptance of *Specialty Healthcare*, along with the NLRB's 2015 expedited election rules, combine to create unique challenges for employers who finds themselves in union organizing campaigns. Thoughtful preparation and planning are necessary for employers to successfully navigate these choppy waters.

NLRB Continues to Tweak its Election Procedures; Announces New "Captive Audience" Rule in Mail Ballot Cases

February 5, 2016

The National Labor Relations Board conducts representation elections by manual voting, where voters cast their ballots in a voting booth, by mail voting, where voters mail their ballots to an NLRB regional office, or a combination of manual and mail voting. In order to protect employee free choice in an election, the NLRB has developed rules governing when an employer may hold mandatory captive audience meetings among its employees before an election. In manual voting situations, the NLRB's long-established rule, known as the *Peerless Plywood* rule, prohibits employers from conducting mandatory captive audience meetings within 24 hours of the start of the election. In mail ballot cases, the NLRB set out its rule in a 1959 case called *Oregon Washington Telephone Co*. There, the NLRB ruled that an employer was prohibited from holding captive audience meetings after an NLRB regional office was scheduled to mail ballots to eligible voters.

In *Guardsmark, LLC*, the NLRB took the opportunity to reevaluate the captive audience rule in mail ballot cases in order to alleviate the apparent confusion caused by the *Oregon Washington Telephone* rule. In *Guardsmark*, the NLRB abandoned the *Oregon Washington Telephone* rule and imposed a new rule for mail ballot cases: "we believe that it is appropriate to provide for a full 24-hour period before the ballot mailing that is free from speeches that tend to interfere with the sober and thoughtful choice which a free election is designed to reflect."

Whether the NLRB needed to jettison the *Oregon Washington Telephone* rule is debatable; dissenting Member Miscimarra certainly didn't think so. He noted that the old rule already incorporated a 24-hour buffer by virtue of the time lag between when ballots were mailed and when they were received by the voters.

In any event, employers now have one less day to hold captive audience meetings in a mail ballot setting. For example, under the *Oregon Washington Telephone* rule, if a regional office was scheduled to mail the ballots at 9:00 a.m. on a Thursday, the employer was prohibited from holding a captive audience meeting after 9:00 a.m. on that Thursday. Now, under the new *Guardsmark* rule, employers may not hold captive audience meetings after 9:00 a.m. on Wednesday. In the new world order resulting from the NLRB's re-write of its election procedures last April, every day counts, but now there is one less day and one less opportunity for employers to engage in captive audience meetings.

A Break from the Trend? NLRB Regional Director Finds Carroll College Exempt from Board Jurisdiction under Pacific Lutheran

January 26, 2016

Union organizing directed at religious college and university faculties has gained momentum since the National Labor Relations Board ("Board") issued its decision in *Pacific Lutheran University ("PLU")* in 2014. In *PLU*, the Board adopted a new, two-part standard for determining whether to assert jurisdiction over faculty at religiously-affiliated colleges and universities. Under the *PLU* standard, the Board will assert jurisdiction unless 1) the college or university holds itself out as providing a religious educational environment; and 2) the college or university holds the petitioned-for faculty out as performing a specific role in creating or maintaining the university's religious educational environment.

The first prong is fairly easy to meet. The college or university merely has to show that it is organized as a nonprofit and that it presents itself as a religious institution. Often, the petitioning union will stipulate to this prong of the test.

The second prong, however, has been the stumbling block for most colleges and universities and has resulted in the Board asserting jurisdiction under the *PLU* test in the vast majority of cases. For the second prong, the college must demonstrate that it holds out the petitioned-for faculty as performing a specific role in creating or maintaining the religious educational environment. The Board considers evidence that includes job descriptions, employment contracts, faculty handbooks, statements to accrediting bodies, and statements to prospective and current faculty and students. While the Board says that it will not look behind these publically available documents to assess the college's actual practice, the Board specifically held in PLU that "generalized statements that faculty members are expected to, for example, support the goals or mission of the university are not alone sufficient." The problem in applying this prong of the test to most religious colleges and universities is that it fails to take into account that one of the core tenets of most of these institutions is to promote diversity and critical thinking to allow students and faculty to come to a greater understanding of the world and its relationship with God. By its very nature, this tenet requires a diverse faculty in order to provide instruction beyond discussions about a specific religion or belief.

In Carroll College the Regional Director for Region 19 (located in Seattle) found that the College met its burden under both prongs of the *PLU* test and declined to assert jurisdiction over the College. In concluding that the College met the second prong of the test, the Regional Director relied on *PLU*'s footnote 19 in which the Board noted that it "will decline jurisdiction so long as the university's public representations make it clear that faculty members are subject to employment-related decisions that are based on religious considerations." Carroll College's faculty handbook enumerated four reasons for which the College could discharge faculty for serious cause, one of which was "continued serious disrespect or disregard for the Catholic character or mission" of the College. There was no credible evidence that the College had relied on this language to take an adverse employment action against a faculty member. The Regional Director, however, found that even though the handbook did not specifically state "that teaching a doctrine at odds with the religious faith of the institution could lead to discharge, the language of the Handbook [was] broad enough to encompass termination for that reason." Thus, the Regional Director declined to assert jurisdiction.

It is instructive that the Regional Director dismissed most of the College's evidence and arguments as insufficient under the second prong of the *PLU* test. For example, the Regional Director was not persuaded to decline jurisdiction by the fact that the College sent prospective faculty members a copy of the its mission statement and required them to reflect and write an essay about it; rather, the Regional Director dismissed that exercise as akin to "generalized statements" that did not have an impact on the faculty's conditions of employment. Nor was the Regional Director swayed by the College President's testimony that faculty advising went beyond academics to include "a strong dedication to the full human and spiritual development of the students;" that was too vague to rise to the level of holding faculty out as religious or spiritual leaders. Finally, the teaching of theology and Catholicism and the inclusion of a minimal number of Catholic related readings was insufficient to show that the College held its faculty out as performing a specific religious function. In the end, the language in the faculty handbook alone was sufficient to carry the day for Carroll and led the Regional Director to dismiss the union's attempt to organize Carroll's faculty.

The Union has a right to request the Board to review the Regional Director's decision, and we expect that they will. For now, however, this decision provides insight into what might persuade a Regional Director to decline jurisdiction over faculty at a religiously-affiliated higher education institutions.

EMPLOYMENT ALERTS

Gifts that Don't Quite Fit in Your Stocking: New Employment Laws Taking Effect in 2017

December 22, 2016

A number of new state or local laws are set to take effect in Illinois in 2017 which will require employers to update their employee handbooks, employment agreements, and other policies and procedures. We address the key changes briefly here, and include links to our previous, more detailed analyses of the various laws within the text.

Prohibition on Non-Compete Agreements for Low-Wage Workers

The Illinois Freedom to Work Act prohibits employers from requiring employees earning $13 per hour or less to sign a covenant not to compete as a condition of employment. The applicable wage threshold will increase in the future if the applicable federal, state, or local minimum wage exceeds $13. The law applies to agreements entered into after January 1, 2017.

Restrictions on Employer Access to Personal Online Accounts

Since 2012 employers have been prohibited from requiring employees to provide their passwords to social networking sites. Effective January 1, 2017, amendments to this law also prohibit an employer from engaging in other activity related to employees' "personal online accounts," which are defined as online accounts that are used primarily for personal purposes. The prohibited activity includes:

- requesting, requiring, or coercing an employee or applicant to authenticate or access a personal online account in the presence of the employer;
- requiring or coercing an employee or applicant to invite the employer to join a group affiliated with the employee's or applicant's personal online account;
- requiring or coercing an employee or applicant to join an online account established by the employer or add the employer or an employment agency to the employee's or applicant's list of contacts that enable the contacts to access the employee or applicant's personal online account;
- discharging, disciplining, or discriminating against an employee for refusing to engage in the above-referenced activity or for filing a complaint concerning an employer's violation of these requirements; and
- failing or refusing to hire an applicant who refuses to provide certain information relating to his or her personal online account.

Notably, the law expressly allows employers to require an employee or applicant to share specific content from a personal online account that has been reported to the employer (without requesting or requiring an employee or applicant to provide a username or password) in certain situations, including investigating an alleged violation of law or work-related employee misconduct. The law also provides a "safe harbor" for situations where an employer's otherwise lawful technology that monitors an employer's network for network security or data confidentiality purposes receives information that allows an employer to access a personal online account.

Domestic Workers' Bill of Rights Act (DWBOR)

Effective January 1, 2017, the DWBOR extends certain legal protections to domestic workers. "Domestic work" includes house cleaning, home management, nanny services, caregiving, cooking, chauffeuring, and other household services performed in a private residence or other location where domestic work is performed. Under DWBOR, domestic workers will now enjoy the anti-discrimination protections of the Illinois Human Rights Act; be entitled to receive compensation of at least the state's minimum wage (currently $8.25 per hour) and overtime pay for working more than 40 hours in a single workweek; and be entitled to at least 24 consecutive hours of rest in every calendar week if they so desire.

Minimum Wage
The minimum wage in Chicago will increase from $10.50 to $11.00 on July 1, 2017, and the minimum wage in the rest of Cook County will increase from $8.25 to $10.00 on the same date. The statewide minimum wage will remain the same ($8.25) in 2017.

Expansion of Employer Coverage under VESSA
Effective January 1, 2017, the Victims' Economic Security and Safety Act (VESSA) has been amended to apply to employers with at least one employee. (Before the amendment, the threshold for employer coverage was 15 employees.) VESSA allows an employee to take unpaid leave for certain purposes if the employee or the employee's family member has been a victim of domestic or sexual violence. The required length of leave is as follows: Up to four workweeks if the employer has between one and 14 employees; up to 8 workweeks if the employer has between 15 and 49 employees; and up to 12 workweeks if the employer has more than 50 employees.

Mandatory Retirement Plans
Under the Illinois Secure Choice Savings Program Act, all Illinois employers (including non-profits) with 25 or more Illinois-based employees who do not sponsor a workplace retirement plan, and who have been in existence for more than two years, will be required to enroll their employees in a state-run Roth-style individual retirement account. Although the law creating the savings program was enacted in 2015, the program is to be implemented on June 1, 2017. Employers who are subject to this law and have not yet taken steps to comply should do so as soon as possible, as they may be subject to penalties for failing to timely enroll eligible employees in the program.

Employee Sick Leave Act
Beginning on January 1, 2017, this state law requires Illinois employers who already provide sick leave for the employee's own medical needs to allow employees to use that leave for the medical needs of their family members. The law defines "personal sick leave benefits" as time accrued and available to an employee to be used as a result of absence from work due to personal illness, injury, or medical appointment.

Paid Sick Leave
Employers in Cook County will be required to provide a minimum of one hour of paid sick leave for every 40 hours worked beginning on July 1, 2017. Twenty hours of unused sick leave must be carried over, and employers covered by the Family and Medical Leave Act (FMLA) must allow employees to carry over 40 hours of accrued sick leave.

Child Bereavement Leave
The law requires employers that are covered by the FMLA to provide up to two weeks (10 working days) of unpaid leave to employees in the event of the death of an employee's child. Although this law became effective on July 29, 2016, we are including it in the event employers missed it earlier this year.

Human Trafficking Poster Notice
Also effective in 2016, the Human Trafficking Resource Center Notice Act requires certain employers to post a notice in a conspicuous place regarding human trafficking. Employers covered under this law include: businesses where the sale of alcohol is the principal business and that hold licenses for on premise consumption retailer licenses under the Liquor Control Act of 1934; adult entertainment facilities; primary airports; intercity passenger rail or light rail stations; bus stations; truck stops; emergency rooms within general acute care hospitals; urgent care centers; farm labor contractors; and private job recruitment centers. The notice must be posted in English and Spanish, as well as in one other language that is the most widely spoken language in the county where the employer is located.

Please contact us for more specific information on these new compliance obligations, including assistance in updating your policies, agreements, and other documents.

Terminated Disney Employees Allege that Outsourcing Work to Indian Workers Discriminated against American Workers

December 20, 2016

Disney continues to face legal repercussions from the company's 2014/15 layoffs of numerous American IT workers, and the outsourcing of their functions to two Indian companies employing H-1B workers. On Monday, Dec. 12th, thirty former Disney workers filed a complaint in the U.S. District Court for the Middle District of Florida seeking compensatory and punitive damages and reinstatement to their old positions under Title VII of the Civil Rights Act of 1964 ("Title VII"), Section 1981 of the Civil Rights Act of 1966 ("Section 1981"), and the Older Worker Benefit Protection Act ("OWBPA"). The lead plaintiff, Leo Perrero, also seeks class certification on behalf of other impacted former Disney workers.

This lawsuit follows charges previously filed by former Disney employees with the EEOC, and a lawsuit against Disney and the consulting firms that employed the H-1B workers (Cognizant Technology Solutions and HCL), that Disney retained to assist in the job outsourcing alleging violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act. The plaintiffs argued in the latter lawsuit that, in light of the termination of Disney's American workers, the H-1B employers' representations in their visa applications violated the requirements of the H-1B program, and Disney was jointly liable under RICO. However, U.S. District Court Judge Gregory Presnell dismissed this lawsuit on October 13, 2016, finding that the claim relied upon a misunderstanding of the H-1B program's obligations.

The new complaint alleges that Disney unlawfully terminated the plaintiffs because of their race, national origin, and age. The complaint also states that Disney failed to meet certain procedural requirements under the Older Workers Benefits Protection Act ("OWBPA").

This type of lawsuit represents a novel application of anti-discrimination law as a means of seeking redress for employees who lose jobs due to foreign outsourcing. In the past, employers have avoided liability in similar situations by showing that the outsourcing was motivated by legitimate business factors (such as cost cutting). It remains to be seen whether the increased scrutiny on immigration and foreign trade characterizing this year's presidential election will impact how the EEOC and/or the courts treat these issues going forward. We will continue to monitor this and similar cases and report on any new developments as they occur.

For now, employers who are considering outsourcing jobs to foreign workers should carefully consider both the political and legal ramifications of any decision that will result in the movement of work outside of the U.S.

Anti-Retaliation Provision of OSHA's Final Rule Is Now In Effect

December 13, 2016

In May, 2016, the Occupational Safety and Health Administration (OSHA) announced a final rule changing the way it collects, and employers report, workplace injury and illness data. Under these new regulations, covered employers will be required to submit injury and illness data to OSHA electronically, and some of this data will be made publicly available on the OSHA website. OSHA has explained that its intention in making this data publicly available is to "nudge" employers to increase their focus on safety.

The new OSHA rule also contains an **anti-retaliation provision**, which prohibits employers from retaliating against employees for reporting work-related injuries or illnesses. This provision requires employers to inform employees of their right to report workplace injuries and illnesses free from retaliation, which can be done by posting the OSHA Job Safety and Health – It's the Law poster from April 2015 or later (**www.osha.gov/Publications/poster.html**). Finally, the rule requires that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and must not discourage employees from reporting.

In a guidance document, OSHA clarifies how the anti-retaliation rule applies to disciplinary, incentive and drug-testing programs. First, OSHA warns employers against disciplining an employee who reports a work-related injury or illness under the pretext that the employee violated a work rule. Specifically, OSHA states the discipline will be pre-textual if an employer disciplines an employee who reports an injury for violating a work rule, but does not discipline an employee who violated the same work rule but did not report an injury.

Second, OSHA warns against safety incentive programs that deter employees from reporting injuries or illnesses. For example, a prize associated with no lost-time injuries will be viewed by OSHA as violating the new rule because it discourages reporting. In contrast, incentive programs that reward positive behavior such as participation in safety training, identification of hazards, or reporting near misses are allowed.

Third, OSHA clarifies that post-incident drug testing pursuant to DOT or other federal or state law requirements is allowed as is post-incident drug-testing if there is a reasonable possibility that drug use contributed to the report or illness. OSHA states that if drug use could not have contributed to the injury, post-incident drug testing would be prohibited retaliation.

These anti-retaliation provisions were originally scheduled to take effect in August 2016. In July 2016, several business groups brought suit in a federal district court in Texas challenging these provisions. They argued that the anti-retaliation provisions unlawfully limited employer safety incentive programs and post-incident drug testing programs, and sought an injunction to prevent these provisions from taking effect. As a result of this lawsuit, OSHA stated that it would delay the enforcement of the anti-retaliation provisions until December 1, 2016.

Late last month, the district court issued an order denying the plaintiffs' request for a preliminary injunction. Notably, the court was careful to emphasize that its decision should not be taken as a comment or indication as to whether a permanent injunction (an order permanently blocking the enforcement of the provisions) would be appropriate and that it would make that determination at a later date. The incoming Trump administration may also roll back OSHA's "clarification." For now, however, employers should know that **as of December 1, 2016, the anti-retaliation provisions of the OSHA final rule are in effect**, and should take immediate steps to ensure they are in compliance.

Specifically, as we previously advised, employers should take care to be sure that the personnel responsible for recording injuries and illnesses are up to speed on the new anti-retaliation requirements of the new OSHA rule, and to train managers and supervisors on these anti-retaliation provisions. In addition, workplace drug testing policies and safety incentive programs must be reviewed for compliance with these new requirements.

Courts are Trending Toward Prohibiting Sexual Orientation Discrimination under Federal Law

December 2, 2016

Two recent court decisions highlight the ongoing struggle by federal courts to determine whether Title VII of the Civil Rights Act prohibits employment discrimination based on sexual orientation.

Hively v. Ivy Tech Community College

Over the summer the Seventh Circuit held in *Hively v. Ivy Tech Community College*, 830 F.3d 698 (7th Cir. 2016), that until a Supreme Court opinion or new legislation broadens the protection of Title VII, it is forced to hold that the statute does not prohibit sexual orientation discrimination. The three-judge panel that issued the decision, however, spent a substantial portion of the opinion questioning whether this holding was still good law or should be reconsidered in light of changing societal views and the Supreme Court's ruling in *Obergefell v. Hodges*, which recognized that a fundamental right for same-sex couples to marry was protected by the Constitution.

The Seventh Circuit then granted *en banc* review to *Hively*, which means the entire court of 11 judges will reconsider the appeal. The oral argument before the full Seventh Circuit was held on November 30. The oral argument reflects the judges wrestling with how to interpret a five-decade-old statute, enacted at a time when Congress almost certainly did not intend the prohibition against sex discrimination to extend to discrimination on the basis of sexual orientation, with the plain language of Title VII barring discrimination the basis of "sex." How, the judges asked the lawyers for both sides, does an adverse employment action against a woman because of her romantic attraction to another woman, as opposed to a man, not constitute discrimination on the basis of sex? As the judges acknowledged, the Supreme Court has never addressed this issue. These and other questions suggest that a majority of the Seventh Circuit may be inclined to reverse its prior precedent and hold that Title VII does prohibit sexual orientation discrimination.

EEOC v. Scott Medical Health Center

A federal district court in Pennsylvania recently held that Title VII does prohibit discrimination on the basis of sexual orientation. In so holding, the district court, which is in the Third Circuit, specifically declined to follow a Third Circuit case from 2001 holding that Title VII did not cover sexual orientation discrimination.

In *EEOC v. Scott Medical Health Center*, No. 16-225 (W.D. Pa. Nov. 4, 2016), the EEOC brought suit on behalf of Dale Baxley, an employee of the Defendant who alleged he was constructively discharged due to the hostile work environment created by the unceasing and pervasive harassment of his supervisor. Mr. Baxley, who is gay and has a male partner, was routinely subjected to "highly offensive statements" and "harassing comments," including slurs and inquiries about his sex life.

The court held that discrimination on the basis of sexual orientation is a subset of sexual stereotyping, which under the Supreme Court's ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989), is discrimination "because of sex" and therefore impermissible under Title VII.

"Forcing an employee to fit into a gendered expectation—whether that expectation involves physical traits, clothing, mannerisms or sexual attraction—constitutes sex stereotyping and, under *Price Waterhouse*, violates Title VII," the court explained.

In arriving at its decision, the court also pointed to the incremental changes that have broadened the scope of Title VII's protection of sex discrimination in the workplace over time, and in particular called out the Supreme Court's recent opinion in *Obergefell* to underscore the "growing recognition of the illegality of discrimination on the basis of sexual orientation." The court specifically declined to follow a Third Circuit appellate decision from 2001, *Bibby v. Philadelphia Coca-Cola Bottling Co.*, which held that Title VII does not prohibit discrimination based on sex, reasoning that the appellate court in that case did not consider the same arguments and analytical framework advanced by the EEOC in the current case.

What's Next?

Lower courts are continuing to struggle with this issue, but a trend may be developing in favor of prohibiting sexual orientation under federal law. The pending Seventh Circuit *en banc* decision in *Hively* may provide some greater clarity, at least for employers in Illinois, Indiana and Wisconsin. Ultimately, however, this is an issue that will need to be resolved by the Supreme Court or through legislative action. The recent election results make it highly unlikely that Congress or President-elect Trump will amend Title VII to expressly include LBGTQ protections. Also, given President-elect Trump's intent to appoint conservative judges, the Supreme Court may become less receptive to the further expansion of federal civil rights protections to LBGTQ individuals. Although it remains unclear to what extent sexual orientation is protected under federal law, currently, 23 states, including Illinois, and many municipalities prohibit discrimination based on sexual orientation.

New Exemption Rules Blocked - Now What?

November 23, 2016

Yesterday, the United States District Court for the Eastern District of Texas dealt employers yet another surprise in this season of upsets with its decision in *State of Nevada v. U.S. Department of Labor*, halting the implementation of the DOL's new FLSA overtime exemption rules, which were set to take effect December 1, 2016. The rules would have increased the minimum salary for exempt executive, administrative and professional employees from $455 per week to $913 per week, or about $47,476 per year. The court issued a nationwide injunction prohibiting the enforcement of the new salary threshold for exempt employees. As a result of the court's ruling, the new rules will not take effect on December 1, the prior rules will remain in effect, and the timing of a change in the rules, if any, is completely up in the air.

While the new rules already faced an uncertain future under the Trump administration and the Republican-controlled congress, most legal observers gave this lawsuit a low probability of success. The complaint, filed on September 19, 2016 by a coalition of 21 states, claims that the DOL exceeded its authority under the FLSA and unlawfully infringed upon states' budgets by enacting the new rules. A coalition of business groups led by the U.S. Chamber of Commerce also filed a parallel lawsuit, which was later consolidated with the states' case. The states asked the court to grant a preliminary injunction blocking the rules from taking effect until a final ruling in the case. For their part the business groups asked the court to skip the preliminaries and expedite its final ruling on the merits.

Although the court declined to issue a final decision for the time being, it granted the states' motion for a temporary nationwide injunction blocking the new rules from taking effect and prohibiting the DOL from expending any resources to enforce them. The court found that Congress intended for the executive, administrative, and professional exemptions to be based on an employee's actual duties and responsibilities, rather than the employee's salary. By issuing a rule that "categorically excluded" employees who performed exempt job duties from exemption based on a "de facto salary-only test," the court determined that the DOL exceeded its authority and violated the unambiguous intent of Congress to exempt employees based upon the type of work they perform. While the Court's ruling seems to suggest that the low $455 per week salary threshold in the existing rules might be permissible because it screens out only "obviously non-exempt employees," the court did not address whether a smaller increase in the current minimum might have been permissible. It also did not rule on whether that lower minimum salary threshold could be subject to automatic increases as the DOL had proposed, finding instead that "because the Final Rule is unlawful, the Court concludes the Department also lacks the authority to implement the automatic updating mechanism."

Importantly, this ruling is not limited to the States that filed the lawsuit. The Court's ruling is nationwide in scope and applies to all employers covered by the FLSA. However, much uncertainty remains. Rulings on preliminary injunctions are subject to immediate appeal. While it is rare for the Fifth Circuit Court of Appeals to overturn a preliminary injunction, this is an unusual and unexpected decision, and the Obama Administration may well try its luck in a bid to preserve the new rules. While its ruling on the preliminary injunction likely forecasts the district court's final ruling on the merits of the case, it is also possible that the court may reach a different result upon final review and lift the injunction.

We also do not know at this time exactly what President-elect Trump will do on this issue when he takes office in January. He may well simply order a halt to further government efforts to defend the Obama administration rules, in which case the current injunction will likely remain in effect and the rules will be dead. But the President-elect is nothing if not unpredictable, and it is at least possible (if unlikely) that his populist side may win out over business interests and lead him to defend the new rules. It is also possible that Congress may step into the fray, either by voting to block the new rules under the Congressional Review Act, or by enacting legislation that either does away with the salary increase or phases it in over several years.

This leaves employers with a difficult question: What now? Unfortunately we are still waiting for a definitive answer.

Employers who are contemplating changes to comply with the new rules but have not yet announced them should consider waiting to see what happens before they act. Employers that have already announced or implemented adjustments will need to decide whether to roll them back, and if so whether to do that now or wait for the dust to clear. Employers who do announce further changes based on this ruling should be clear with employees that further changes might follow depending on the final resolution of the lawsuit and the response of Congress and the new administration. Obviously those communications will need to be handled carefully, particularly if they mean rescinding pay increases or other changes that employees may have seen as favorable.

Finally, as employers plan to respond to these issues, they should watch not only the courthouse in Texas and politicians in Washington D.C., but their state legislatures and city councils. New York already has a higher minimum salary for exempt white collar employees ($675 per week), and has recently proposed increases even greater than those in the now blocked federal rules. If the federal rules are declared dead, other state and local governments may be inspired to take similar action.

DOJ, FTC Announce Plans to Criminally Prosecute Employers That Enter into Wage-Fixing or No-Poaching Agreements

November 15, 2016

In the fiercely competitive market for talent, human resources personnel and recruiters inevitably feel the competing pressures of offering compensation packages that are attractive to potential employees and keeping costs under control. To find the appropriate balance, they may feel tempted to share information with their counterparts at competing organizations and/or reach agreements with them not to recruit one another's employees.

Responding to this issue, last month the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) issued *Antitrust Guidance for Human Resource Professionals (Guidance),* which provides valuable insight into conduct these agencies consider illegal. The guidance describes two types of antitrust violations, which are typically illegal regardless of whether they have an anticompetitive effect:

- *Naked wage-fixing agreements*, in which individuals from different companies make an agreement about employee salaries or other terms of compensation, either at a specific level or within a range; and
- *Naked no-poaching agreements*, in which individuals from different companies agree not to solicit or hire one another's employees.

The most well-known civil enforcement actions brought by the DOJ to date have been against some of the country's largest technology companies (including Google, Apple, and Intel), which entered into "no-poach" agreements to limit their cold calling and hiring of each other's employees.

What is notable about the Guidance is the DOJ's announcement that it will now proceed with criminal investigations and prosecutions of those entering into such agreements. The DOJ regards naked wage-fixing and no-poach agreements as anticompetitive in the same way as agreements to fix prices or allocate customers, which have been criminally investigated and prosecuted as anticompetitive cartel conduct. Both companies and individual employees may be liable for antitrust violations in such situations.

The Guidance also explains that exchanging sensitive information – even absent an explicit agreement – may serve as evidence of an implicit illegal agreement. Although such agreements to share information are not subject to criminal prosecution, they may be subject to civil antitrust liability when they have or are likely to have anticompetitive effects.

Helpfully, the Guidance offers suggestions on how companies may lawfully share information, and provides a list of "red flags" to help HR professionals and other managers avoid engaging in anticompetitive activity.

One type of "no-poaching" agreement that the Guidance does not address are agreements between staffing agencies and their clients. Such agreements often limit the ability of a client to independently hire personnel that are provided by the staffing agency with certain time and geographic limitations. State courts have varied in their treatment of such agreements. For instance, the Wisconsin Supreme Court held in 2002 that a no-hire agreement was unenforceable because the employee was not a party to the contract, and this was a restriction on the employee's individual right and freedom to contract. In contrast, the Illinois Supreme Court held in 2004 that a narrowly drawn restriction that prevented a client from hiring only those employees provided by a staffing agency for a year after the termination of the agreement governing assignment of the employee to the client was a reasonable restriction on trade that was justified by the legitimate business interests of the staffing agency, notwithstanding the fact that the employee was not a party to the agreement. To date, courts do not appear to have analyzed such no-hire agreements under antitrust principles.

Although staffing agency arrangements are not specifically addressed by the Guidance, the Guidance does explain that employers that compete to hire or retain the same employees are "competitors" from an antitrust perspective, regardless of whether the companies make the same products or provide the same services. Since staffing agencies and their clients could be said to "compete" for employees, "no-poaching" agreements with staffing agencies are not necessarily immune from antitrust scrutiny.

While the Trump administration could roll back this stepped-up enforcement agenda, the DOJ's position fits within established antitrust principles and maintaining no poaching agreements or sharing wage information could create exposure through private lawsuits regardless of how aggressively the incoming administration pursues antitrust enforcement. HR professionals are in a position to implement safeguards to ensure that their companies do not run afoul of antitrust laws when recruiting employees, and should seek the advice of counsel before entering into an agreement that could restrict employee recruitment or sharing employee compensation information with other employers.

Suburban Cook County Joins the City of Chicago in Raising the Minimum Wage for Non-Tipped Workers to $13 an Hour

April 30, 2016

The City of Chicago is gradually moving to a minimum wage of $13 an hour by July 2019. On Wednesday, Cook County joined the City of Chicago in gradually increasing the minimum wage by approving a minimum wage increase for non-tipped workers to $13 an hour by July 2020.

The City's gradual minimum wage increases already have begun: the minimum wage for non-tipped workers increased to $10 an hour in July 2015, and then increased to $10.50 an hour in July 2016. The City's minimum wage will continue to increase by $1.00 each July until it reaches $13.00 an hour in July 2019. Beginning in July 2020, the minimum wage will increase with the rate of inflation, but not to exceed 2.5%, provided the City's unemployment rate from the previous year is less than 8.5%.

Like the City, Cook County passed a minimum wage ordinance that raises the minimum wage for non-tipped workers gradually over time until it reaches $13.00 an hour in July 2020. However, the County's minimum wage increases lag more than a year behind the City's: the first increase to $10.00 an hour is effective for Cook County in July 2017, and then increases by $1.00 each July until it reaches $13.00 an hour in July 2020. The County ordinance also provides an increase in the minimum wage for tipped workers earning less than $4.95 an hour beginning in July 2018. These workers will receive an increase equal to the rate of inflation, but not to exceed 2.5%.

The County ordinance will apply to all unincorporated and suburban areas of Cook County, although home rule communities may vote to opt out of the minimum wage increase. Critics maintain that specific city and county ordinances create competitive disadvantages across business communities and that the better solution is a statewide increase, however unlikely that may be, given that similar measures have languished in the General Assembly since 2009.

To Accommodate or not to Accommodate: How to Know if Your Employee Actually Requested a Reasonable Accommodation

October 19, 2016

A divided federal appeals court recently reminded employers that an employee's request for a reasonable accommodation under the Americans with Disabilities Act ("ADA") need not be explicit in order to invoke the interactive accommodation process. In *Kowitz v. Trinity Health*, the Eighth Circuit Court of Appeals found that, based on the circumstances presented in the case, an employee had made an implied request for a reasonable accommodation.

The employee, Roberta Kowitz, worked as a respiratory therapist and suffered from spinal stenosis, a degenerative disease of the spine. Following corrective neck surgery, Ms. Kowitz returned to work after exhausting her medical leave under the Family and Medical Leave Act. At that time, Ms. Kowitz presented her employer with a "return to work" form in which her doctor outlined a number of physical restrictions. The employer provided accommodations with respect to each of these restrictions.

One month later, the employer directed its respiratory therapists, including Ms. Kowitz, to provide updated copies of their basic life support certifications, which consisted of a written examination and a physical demonstration of CPR. While Ms. Kowitz passed the written exam, she submitted a letter informing her employer that she would not be able to complete the physical CPR demonstration until cleared to do so by her doctor. After meeting with her doctor, Ms. Kowitz immediately informed her employer that she would need to complete an additional four months of physical therapy before completing the physical portion of the exam. The employer terminated Ms. Kowitz the following day on the basis that Ms. Kowitz was unable to perform basic life support, which was an essential function of her position.

It is well-established that there are no “magic words” that an employee must use in order to request a reasonable accommodation and begin the interactive process with his or her employer. Instead, an employee is simply required to “mak[e] her employer aware of the need for an accommodation.”

In this case, the majority found that, although Ms. Kowitz did not ask for a reasonable accommodation of her condition, her notification to her employer that she would not be able to obtain the required CPR certification until she had completed physical therapy “implied that an accommodation would be required until then.” The court found that, because the employer was aware of Ms. Kowitz’s specific condition and her work restrictions, and because she referred to her surgery, her prior leave and her ongoing pain in her communications with her employer, there was enough evidence demonstrating that the employer “should have understood—or did understand” that these communications constituted a request for an accommodation. The dissenting judge disagreed, finding that the majority wrongfully conflated “the employer’s knowledge of an employee’s disability with the requirement that an employee must make a clear request for accommodation.”

For now, the majority’s decision serves as a reminder to employers that their employees are not required to make an explicit request for an accommodation in order to begin the interactive process, and that, under certain circumstances, an accommodation request actually may be implied. As a result, if an employer is unclear as to whether an employee has requested a reasonable accommodation, the employer should follow-up with the employee to clarify if the employee is requesting some form of assistance due to his or her disability. If so, the employer must then engage in the interactive process to provide the employee with a reasonable accommodation.

Following Chicago’s Lead, Cook County Requires Employers to Provide Paid Sick Leave to Employees

October 13, 2016

This summer, the City of Chicago passed an ordinance requiring employers located in the City to provide paid sick leave to their employees. Last week, Cook County followed suit, passing a virtually identical version of Chicago’s ordinance that will apply to all employers within the county.

The same start date: July 1, 2017; *the same entitlement*: One hour of paid sick leave for every 40 hours worked; *the same carry over*: 20 hours of unused sick leave can be carried over

Here’s what Cook County employers need to know about this new ordinance:

What employers and employees are covered by this new ordinance?

Covered employers are individuals or businesses – indeed, any “person or group of persons” – that gainfully employ at least one covered employee with its principal place of business within Cook County. However, the new law does not cover federal, state and local government entities.

Covered employees are individuals who: 1) work at least 80 hours for an employer within any 120-day period; and 2) in any two-week period perform at least two hours of work for an employer while physically present within Cook County.

How much sick leave must be provided and when can employees use it?

Employees begin accruing paid sick leave on the first calendar day after the start of their employment or July 1, 2017, whichever date is later. At that point, an employee accrues one hour of sick leave for every 40 hours worked. Sick leave is earned in hourly increments only – there are no fractional accruals. The ordinance assumes exempt employees work 40 hours per week, unless their normal workweek is less than 40 hours, in which case sick leave accrues according to the employee's normal workweek.

Based on the specific language of the ordinance, employees may begin using their accrued sick leave "no later than the 180th calendar day following the commencement of his or her employment." In other words, so long as an employee has been employed for 180 days, they can utilize accrued sick leave. Of course, employers may shorten this 180-day period and allow their employees to use sick leave earlier. Employers also can require that employees use sick leave in four-hour increments.

Are there caps on the amount of sick leave an employee can accrue? And can it be carried over to a following year?
Earned sick leave is capped at 40 hours for each 12-month period, and employees may carry over up to 20 hours of unused sick leave to the next 12-month period. Moreover, employers covered by the Family and Medical Leave Act must allow employees to carry over 40 hours of accrued sick leave.

For what reasons can an employee use sick leave?
Employees may use sick leave in the following circumstances:

- For illness or injury of the employee or the employee's family member, including receiving medical care, treatment, diagnosis, or preventive medical care;
- Where the employee or the employee's family member is a victim of domestic violence or a sex offense; or
- When the employee's place of business is closed due to a public health emergency, or the employee needs to care for a child whose school or place of care is closed due to a public health emergency.

The term "family member" is broadly defined to include a child, legal guardian or ward, spouse under the laws of any state, domestic partner, parent, parent of a spouse or domestic partner, sibling, grandparent, grandchild, step- and foster-relationships, or any other individual related by blood or whose close association with the employee is the equivalent or a family relationship.

Is an employee required to provide notice when using sick leave?
If leave is foreseeable, such as for court dates or medical appointments, employees must provide up to seven days' notice. If the need for leave is unforeseeable, employees must provide as much notice as is practical. Notice can be provided by phone, email, or text message, though employers may adopt call-in policies if they inform employees of these policies in writing and its terms are not unreasonably burdensome. If leave is covered by the FMLA, employees must follow any call-in procedures outlined in the FMLA policy.

Conversely, employers must post notice of employees' rights under this ordinance in a conspicuous location at each facility where any employees work that is located within the geographic boundaries of Cook County. Notice about the ordinance also must be provided to employees at the time of hire.

Can the employer require an employee to provide a doctor's note to support the need for leave?
Employers may require employees using paid sick leave for more than three consecutive workdays to provide certification that the leave was taken for a purpose provided for under the ordinance. Notably, employers cannot insist that the certification specify the nature of the medical issue necessitating the need for leave, except as required by law. Employers also cannot delay sick leave or delay payment of wages because they have not received the required certification.

We already provide paid leave to our employees. Do we even need to follow this ordinance?
If the employer has a policy that grants employees paid time off in an amount and manner that meets the requirements above, the employer is not required to provide additional sick or paid leave. Notably, if the employer's policy awards a full complement of paid time off immediately upon the date of eligibility, rather than through an accrual method, the employer must provide an employee with 40 hours paid time off within one calendar year of eligibility.

For unionized workplaces, an employer and union may agree to waive the requirements of the Ordinance in the collective bargaining agreement so long as it is explicitly stated in the bargaining agreement.

Finally, the ordinance makes clear that employers are strictly prohibited from retaliating against any employee for exercising their rights under the Ordinance. Additionally, an employee's use of paid sick leave under the ordinance cannot be counted for purposes of issuing discipline and terminating employment.

Non-Compete Agreements may be Transferred and Enforced by the Successor Employer Following an Asset Purchase Sale

July 13, 2016

The Eighth Circuit Court of Appeals recently held that non-compete agreements may be transferred to a successor employer through an asset sale and enforced by that successor employer against the employees who previously signed the non-compete agreements. (*Symphony Diagnostic Services No 1 Inc. d/b/a MobilexUSA v. Greenbaum*).

In this case, after their prior employer Ozark Mobile Imaging was sold to Mobilex through an asset purchase sale, two former Ozark employees began working for Mobilex's competitor, BioTech X-ray. The two employees left Mobilex after refusing its job offer for lesser pay and non-guaranteed benefits. Mobilex subsequently sued the two employees to enforce the terms of the non-compete agreement that each had previously signed and entered into with Ozark because they allegedly possessed various trade secrets, including customer lists and methods of operation. The trial court held that Ozark could not assign the employees' non-compete agreements to Mobilex without the employees' contemporaneous consent. On appeal, Mobilex argued that the trial court erroneously considered the non-compete agreements to be "personal service contracts," which require the employees' consent to assign, rather than "stand-alone agreements," which can be transferred as part of an asset purchase sale.

The Eighth Circuit agreed and reversed the trial court's decision. It stated that unlike a personal services contract (*i.e.* an employment contract), which requires an employee to perform an *affirmative* act (*e.g.* to provide professional services), the non-compete agreement that the employees entered into with Ozark required only that they *refrain* from certain actions (*e.g.* working in the mobile diagnostic business), as the non-compete agreements were not part of an employment contract. The court also rejected the employees' argument that the fact that they signed the non-compete agreements in consideration for continued employment transformed the agreements into personal service contracts, reasoning that the agreements imposed no obligation on them to take any affirmative action. The court did note, however, that absent a specific provision permitting assignment, generally a non-compete agreement may not be assigned without the employee's consent when: (1) there would be material change to the employee's job duties and responsibilities with the new employer; or (2) the employee only agreed to the non-compete because of qualities specific to the prior employer. It determined that neither exception applied here because the non-compete agreement only barred the employees from working in their field of medical diagnostics or soliciting business from certain clients within a specific geographical area.

This decision highlights the need for employers to ensure that their employment agreements, particularly those that contain non-compete and/or non-solicitation agreements, contain clauses permitting assignment of those agreements. Indeed, the Eighth Circuit noted the absence of such a clause permitting the assignment of the non-compete agreements above, the inclusion of which would have been dispositive on the issue of assignment. Absent such language, employers run the risk that their contractual protections will be unenforceable in the event of a sale, acquisition, or other change in control.

Chicago Poised to Become Next City to Require Paid Sick Leave for Employees

June 17, 2016

Yesterday Chicago became poised to join a growing group of U.S. cities to mandate paid sick leave for employees when a Chicago City Council committee passed a bill that would provide employees with at least 40 hours per year of paid sick leave. With 38 cosponsors (out of a total of 50 aldermen) and the support of Mayor Rahm Emanuel, the so-called Paid Sick Leave Ordinance (Ordinance), which amends the Chicago Minimum Wage Ordinance, is almost certain to become law.

Under the Ordinance, employers must allow employees to accrue at least one hour of paid sick leave for every 40 hours worked, up to a maximum of 40 hours per year (unless the employer chooses to set a higher limit). The accrual begins from the employee's first day of work or from the Ordinance's effective date of July 1, 2017, whichever is later. The Ordinance applies to all employers that employ at least one part-time or full-time employee within the city limits and that maintain a business within the city limits or are subject to city licensing requirements. Only construction industry employees who are covered by a collective bargaining agreement are exempted from the Ordinance.

Employees must be allowed to use paid sick leave no later than 180 days after starting employment, and may use it in the following circumstances:

- For illness or injury of the employee or the employee’s family member, including receiving medical care, treatment, diagnosis, or preventive medical care;
- Where the employee or the employee’s family member is a victim of domestic violence or a sex offense; or
- When the employee’s place of business is closed due to a public health emergency, or the employee needs to care for a child whose school or place of care is closed due to a public health emergency.

Absences taken pursuant to the Ordinance may not be counted under an employer’s absence control policy as an absence that triggers discipline, discharge, demotion, or any other adverse action against the employee.

Employees must be allowed to carry over half of their accrued, unused paid sick leave to the following accrual year. If the employer is covered by the Family and Medical Leave Act (FMLA), however, employees must be allowed to carry over up to 40 additional hours of accrued paid sick leave to use exclusively for FMLA purposes. (The FMLA generally covers private sector employers who employ 50 or more employees and all public sector agencies and schools regardless of the number of employees.) Therefore, for employers covered by the FMLA, employees will be permitted to carry over as many as 60 hours of paid sick leave per year. Notably, employers are not required to pay out accrued but unused paid sick leave upon an employee’s termination, unless the applicable collective bargaining agreement provides otherwise.

For unionized employers, the Ordinance’s requirements do not take effect until the expiration of the collective bargaining agreement in place at the time the Ordinance goes into effect. After that date, an employer and union may agree to waive the requirements of the Ordinance in the collective bargaining agreement.

The Ordinance requires that employers give employees notice of their right to paid sick leave in two forms: a notice posted in a conspicuous place at each facility located within the city; and a notice to employees with their first paycheck. These notices will be developed by the City’s Department of Business Affairs and Consumer Protection.

Finally, employees may sue for violations of the Ordinance. If a violation is established, employees may be entitled to recover damages equal to three times the full amount of sick leave denied or lost due to the violation, plus interest, as well as attorneys’ fees.

The full City Council is expected to vote on the Ordinance on June 22, after which it will go to Mayor Emanuel for action assuming passage by the City Council. For more details on the Ordinance’s requirements, and to ensure your policies are in compliance with the Ordinance, please contact us.

Attorney General Madigan Sues Jimmy John's over Non-Compete Agreements

June 10, 2016

On Wednesday, Illinois Attorney General Lisa Madigan filed suit against fast-food franchisor Jimmy John's and several Jimmy John's franchisees operating in Illinois claiming that Jimmy John's and its franchises unlawfully require at-will, low-wage employees to sign non-compete agreements. The complaint asserts that at the time of hire, Jimmy John's employees—including delivery drivers and sandwich makers—are required to sign non-compete agreements.

According to the complaint, the non-compete agreements prohibit any Jimmy John's employee from working at any business that earns more than ten percent of its revenue from selling submarine, deli-style, pita or wrapped/rolled sandwiches, if the business is within two miles of a Jimmy John's. This restriction is in place during their employment and for two years after they leave.

Madigan called these non-compete agreements oppressive and unethical in the complaint, adding in a separate statement, "[b]y locking low-wage workers into their jobs and prohibiting them from seeking better paying jobs elsewhere, the companies have no reason to increase their wages or benefits." Madigan also insists that the agreements limit workers' employment options, ability to seek higher wages or advancement, and ability to negotiate wages. Madigan comments that the business practice of using non-compete agreements similar to Jimmy John's has an effect on trade and commerce throughout Illinois and limits the group of available workers to businesses.

In the past, Jimmy John's has been criticized for the use of non-competes with its at-will, lower-paid employees because of the lack of competitive risk a sandwich maker or delivery driver could pose if he or she leaves Jimmy John's to go to work at another restaurant that makes sandwiches.

While non-compete agreements are frequently used with top level management, the suit puts Illinois employers on notice that such agreements, when applied to at-will, low-wage employees, may be problematic. Courts in Illinois and elsewhere will often refuse to enforce non-competes that are overly broad or not reasonably tailored to protect an employer's business interests. Some states, such as California, generally will not enforce non-compete agreements against employees at all. This lawsuit signals that not only are such agreements unenforceable, but, at least in the AG's opinion, they are also illegal and may subject employers who use non-competes for lower level employees to liability for damages and monetary penalties. This lawsuit emphasizes that employers should make sure that non-compete agreements are narrowly tailored and only used when necessary to safeguard an employer's legitimate business interests, such as protecting confidential information, trade secrets or customer relationships.

Seventh Circuit Creates Circuit Split on Arbitration Agreements that Prohibit Class or Collective Wage and Hour Claims

June 2, 2016

Recently, the Seventh Circuit Court of Appeals in Chicago held in *Lewis v. Epic Systems Corporation* that a mandatory agreement between the employer (Epic) and its employees requiring arbitration of wage and hour claims on an individual basis ran afoul of employees' rights "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" under Section 7 of the National Labor Relations Act (NLRA). Other circuit courts, including the Fifth Circuit in *D.R. Horton, Inc. v. NLRB* have come out the other way and upheld mandatory arbitration agreements that require employees to arbitrate wage and hour claims and that waive an employee's ability to bring class or collective claims.

Epic required some of its employees to sign, as a condition of continued employment, an arbitration agreement "mandating that wage and hour claims could be brought only through individual arbitration and that the employees waived 'the right to participate in or receive money or any other relief from any class, collective, or representative proceeding.'" An employee, Lewis, signed the agreement but later sued Epic in federal court on his behalf and on behalf of other employees for alleged wage and hour violations. Epic asked the district court to dismiss the case and asked the court to force

Lewis to arbitrate his dispute on an individual basis. Lewis claimed that the arbitration agreement was unenforceable because it interfered with his and his colleagues' right to engage in protected, concerted activity under NLRA. The district court ruled for Lewis.

On appeal, the Seventh Circuit noted that since as early as 1940, courts have held that contracts "stipulat[ing] . . . the renunciation by employees of rights guaranteed by the [NLRA]" are unenforceable. *See National Licorice Co. v. NLRB*, 309 U.S. 350 (1940). The Court also noted that the National Labor Relations Board has long found unenforceable "employer-imposed, individual agreements that purport to restrict Section 7 rights." Using this as the framework for its decision, the Seventh Circuit found that Epic's arbitration agreement, which mandated that wage and hour claims be brought through individual arbitration and required employees to waive "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding," violated employees' rights under the NLRA to engage in concerted activities.

The Court noted that "[c]ollective or class legal proceedings fit well within the ordinary understanding of 'concerted activities,'" and that these actions "allow employees to band together" and "equalize bargaining power," which is the essence of the NLRA's protections. Because the provisions of Epic's agreement "run[] straight into the teeth of Section 7," the Court determined that the agreement interfered with employees' rights, and therefore violated the NLRA.

Finally, the Court rejected Epic's argument that its arbitration agreement was enforceable under the Federal Arbitration Act (FAA). According to Epic, the FAA, which favors the enforcement of arbitration agreements, overrides the NLRA. The Court saw it differently. Having concluded that Epic's arbitration agreement was unenforceable, the Court explained that the FAA could not be used to "resuscitate" an unenforceable arbitration agreement.

The Seventh Circuit's decision likely will not be the last word on mandatory arbitration agreements, class action waivers, and protected activity under the NLRA. The Court acknowledged that its decision conflicts with the Fifth Circuit's *D.R. Horton* decision and possibly with cases from at least two other circuits. We expect the Supreme Court will be asked to step in and resolve the circuit split. For now, employers within the Seventh Circuit (Illinois, Indiana, and Wisconsin) who have or are considering mandatory arbitration agreements and class action waivers will have to analyze their options in light of *Epic.*

Resignation Date Starts the Statute of Limitations Clock In Constructive Discharge Cases, Supreme Court Holds

May 25, 2016

On Monday, the U.S. Supreme Court ruled that the statute of limitations for purposes of filing a claim alleging constructive discharge begins to run on the date that the employee resigns, as opposed to the last discriminatory act that prompts the resignation, resolving a circuit split.

A "constructive discharge" occurs when an employee establishes that discriminatory conduct makes the employee's working conditions so intolerable that a reasonable person in the employee's position would feel compelled to resign. This is an exception to the general rule that an employee who has resigned cannot claim discriminatory discharge under Title VII of the Civil Rights Act ("Title VII").

In *Green v. Brennan*, an African-American postmaster with the U.S. Postal Service ("USPS") was denied a promotion. Green alleged that the decision was based on his race and filed a formal internal complaint. Thereafter, Green alleged his supervisors retaliated against him and accused him of intentionally delaying mail delivery—a federal crime. Even after the USPS Inspector General reported that no further investigation was necessary, the supervisors continued to threaten Green with criminal charges. The supervisors eventually gave Green an ultimatum: either retire from the Postal Service or accept a transfer to a new office and a much lower salary. Green signed a settlement agreement on December 16, 2009 agreeing to retire, and officially resigned on February 9, 2010.

On March 22, 2010, Green contacted the USPS Equal Employment Opportunity ("EEO") counselor. Green alleged that he was forced into the settlement, and his resignation was a constructive discharge. Under Title VII, a federal government employee must contact an EEO counselor within 45 days of the "matter alleged to be discriminatory." USPS successfully argued before the district court and Tenth Circuit Court of Appeals that the last "matter alleged to be discriminatory" was the entry of the settlement agreement on December 16, 96 days before Green contacted the EEO counselor. Therefore, Green's complaint was untimely. Before the Supreme Court, Green argued that the statute of limitations only began to run on February 9, when he officially resigned his employment.

The Supreme Court agreed with Green. By a 7-1 vote, the Court vacated the Tenth Circuit's ruling that the clock for a claim of constructive discharge starts running at the time of the employer's last alleged act of discrimination. Instead, Justice Sotomayor and the Court agreed with five other Circuit Courts that had previously held that when an employee alleges constructive discharge, the statute of limitations period on the constructive discharge claim starts only when an employee officially resigns and gives "definite notice" of his decision to leave. The Court reasoned that the standard rule for determining the statute of limitations period is that the period starts when the plaintiff has a complete and present cause of action. Because an employee must prove he or she actually resigned in order to establish constructive discharge, the Court reasoned that the limitations period for a constructive discharge claim cannot begin to run before one of the essential elements of that claim has even happened. Notably, the Court's ruling overrules the Seventh Circuit (which has jurisdiction over federal courts in Illinois, Wisconsin, and Indiana), which, like the Tenth Circuit, had previously applied the "last discriminatory act" rule.

While *Green* concerned the application of the 45-day limitations period applicable to federal employees, the Court specifically noted in a footnote that the reasoning of the decision would apply to claims filed against private sector and state and local government employees, which generally have a 180- or 300-day limitations period. *Green* will undoubtedly make it more difficult to effectively defend cases in which an employee alleges constructive discharge because this ruling effectively allows an employee to "resurrect" claims based on alleged discriminatory acts that occurred long before the employee's resignation.

Supreme Court Tells EEOC It May Be on the Hook for Fees if It Does Not Fulfill Its Statutory Pre-Suit Duties

May 25, 2016

Title VII of the Civil Rights Act of 1964 (Title VII) authorizes the award of attorneys' fees to a party who prevails in a discrimination or retaliation claim brought under that statute. Although this fee shifting provision applies to both employee plaintiffs and employer defendants, courts routinely award fees to prevailing plaintiffs but have interpreted this provision to allow prevailing defendants to recover fees only in the rare case where the plaintiff's claim was frivolous or unreasonable. Last week, in a helpful decision for employers, the U.S. Supreme Court clarified that a defendant-employer does not necessarily need to prevail "on the merits" of a discrimination lawsuit to be entitled to fees.

In *CRST Van Expedited, Inc. v. EEOC*, the Court was asked whether a defendant needed to win a favorable ruling on the merits of the claim in order to be considered a prevailing party. In a unanimous opinion, the Court said no, reversing the decision of the Eighth Circuit Court of Appeals.

The Court's decision is the latest skirmish in a long-running battle between the EEOC and CRST, a trucking company. In 2005 a female truck driver for CRST, Monika Starke, filed an EEOC charge alleging sexual harassment. In 2007 the EEOC filed suit on behalf of Starke and other similarly-situated employees.

During discovery the EEOC claimed that over 250 women had been subjected to unlawful harassment. However, the claims of all but 67 of the women were dismissed from the lawsuit during discovery for various reasons. The district court then dismissed the claims of the remaining 67 women and, because the EEOC had failed to investigate their claims before filing suit, found the EEOC's actions had been unreasonable. The district court also awarded CSRT more than $4 million in attorneys' fees, as a prevailing party. The Eighth Circuit affirmed the dismissal of the EEOC's claims on behalf of the 67 women, but reversed the award of attorneys' fees because it reinstated the claims of Starke and one other employee.

After Starke's claim was settled and the claim of the other employee dismissed, the district court again awarded CRST attorneys' fees. On appeal, that Eighth Circuit again reversed, finding that Title VII only allows the recovery of fees if a defendant prevails on the merits of the underlying lawsuit. The Eighth Circuit held that the district court's dismissal based on the EEOC's failure to satisfy its pre-suit requirements was not a victory "on the merits," but rather, was on procedural grounds, and the district court had not definitively ruled that no unlawful discrimination or harassment had occurred.

In reversing the decision of the Eighth Circuit, the Court reasoned that neither the text of Title VII nor Congress' goal in allowing defendants to recover fees in limited circumstances supported the conclusion that a defendant must "win on the merits" to recover fees. The text of the statute allows an award of fees to a "prevailing party," regardless of the reason the party prevailed. Also, Congressional policy, the Court noted, was to deter frivolous Title VII lawsuits which a defendant has won, regardless of the reason for the victory. Imposing an "on the merits" requirement, the Court found, would "undermine that congressional policy by blocking a whole category of defendants for whom Congress wished to make fee awards available," such as those defendants who win on procedural grounds. The Court also noted that it was "common sense" that a defendant could win even if it did not win on the merits, because one way or another, the "plaintiff's challenge is rebuffed."

The Court refused to rule on the ultimate issue of whether CRST was in fact entitled to fees, and the appropriate amount of any fees. Instead, the court remanded the case to the Eighth Circuit to determine whether the EEOC's position was unreasonable. The Court's decision to punt on this ultimate issue appears to be in line with its recent pattern of "minimalist" rulings in light of the vacancy created by Justice Scalia's death. Notably, however, the decision was unanimous in favor of CRST.

This decision is certainly a victory for employers in that the Court has made clear that a defendant may be entitled to recover attorneys' fees even absent a victory on the merits if the EEOC does not adequately investigate or conciliate before filing suit. It was unclear whether the Court's 2015 ruling in *EEOC v. Mach Mining* would provide the needed "stick" for the EEOC to truly change its behavior during the conciliation process and actually provide information that is helpful for employers to assess whether engage in the process or risk expensive, protracted litigation. Although this remains an open question, the *CRST* decision will hopefully give the EEOC greater incentive to make its pre-suit investigation and conciliation efforts thorough and meaningful.

EEOC Issues Final Rules on Wellness Programs Under the ADA and GINA

May 18, 2016

This week the Equal Employment Opportunity Commission (EEOC) issued final rules providing guidance on the application of the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act of 2008 (GINA) to employer-sponsored wellness programs. In 2015 the EEOC issued proposed rules for employer-sponsored wellness programs under the ADA and GINA. The final rules are largely similar to the proposed rules, but do include some important modifications based on public comments the EEOC received. Below are the most significant requirements of the final rules.

Final ADA Rule on Wellness Programs

The final ADA rule on wellness programs applies to any program that asks employees to respond to disability-related inquiries and/or undergo medical examinations. This includes programs that are not offered in connection with a group health plan.

The rule imposes limits on the value of any incentive provided in connection with a wellness program. The limit on the incentive is generally 30% of the total cost of self-only health coverage (including both employer and employee contributions). If an employer offers one group health plan option, but employees who do not participate in the health plan can participate in the wellness program, then the limit is 30% of the total cost of self-only coverage under that plan. If the employer has more than one group health plan option, but employees who do not participate in the health plan can participate in the wellness program, then the limit is 30% of the total cost of the lowest cost self-only coverage available under the employer's plans. If an employer does not offer any group health plan, the limit is 30% of the cost that would be charged to a 40-year-old, non-smoker in the second lowest cost Silver Plan available through the state or federal exchange established under the Affordable Care Act in the location of the employer's principal place of business. In-kind and de minimis incentives must be included when calculating the 30% limit.

Under the final rule, wellness programs must also be "voluntary." A program is voluntary so long as: (i) employees are not required to participate, (ii) coverage under a group health plan or particular benefit packages are not contingent on participation in the wellness program; (iii) non-participating employees are not subjected to adverse employment action, retaliation, coercion, intimidation, or threats, and (iv) notice is provided to employees regarding the program. The notice must (A) be written in a manner reasonably likely to be understood by the employee, (B) describe the type of medical information that will be obtained and the specific purposes for which the information will be used; and (C) describe restrictions on the disclosure of the employee's medical information, who the information will be shared with, and the methods that the employer will use to ensure that the medical information is not improperly disclosed. The EEOC will publish an example of a compliant notice within 30 days of the publication of the final rule.

Reasonable accommodations must be made available to employees with disabilities to earn any incentive offered under a wellness program. Additionally, wellness programs must be reasonably designed to promote health or prevent disease. In particular, a program must not be subterfuge for discrimination and must not be highly suspect in the method chosen to promote health or prevent disease. A program that includes measurements, tests, screenings, or collection of health-related information without providing results, follow-up, or advice designed to improve health is not reasonably designed to promote health or prevent disease. Medical information gathered under a wellness program must generally be disclosed to the employer in aggregate terms that do not identify the employee.

The final rules under ADA are generally effective immediately, but the notice and incentive provisions will only apply as of the first day of the first plan year beginning on or after January 1, 2017.

Final GINA Rule on Wellness Programs

The final GINA rule applies to any employer-sponsored wellness program that requests genetic information. By way of background, GINA generally prohibits employers from using genetic information to make any employment decisions. In the past, the EEOC took the position that providing a financial incentive to an employee in return for medical information about an employee's spouse violates GINA. The EEOC's final rule clarifies that an employer may, subject to certain restrictions, offer incentives for an employee's spouse to provide information about the spouse's medical history as part of a health risk assessment administered under a wellness program. Incentives may not be provided for genetic information about a spouse or information about an employee's children.

The final GINA rule includes a provision almost identical to the ADA rule that requires wellness programs to be reasonably designed to promote health or prevent disease. A program may not impose a penalty or disadvantage an employee because a spouse's disease or disorder prevents or inhibits the spouse from participating or achieving a specific health outcome.

Spouses who participate in a wellness program must provide prior, knowing, voluntary, and written authorization regarding disclosure of their information. The authorization form must describe the confidentiality protections and restrictions on the disclosure of genetic information. The health risk assessment must be provided in connection with the spouse's receipt of health or genetic services offered by the employer, such as services through the wellness program.

Like the ADA rule, the GINA rule imposes a limit on the value of any incentive provided. The limit is 30% of the total cost of self-only coverage under the group health plan in which the employee is enrolled, if enrollment in the health plan is required for participation in the wellness program. If participation in the wellness program does not depend on the employee's or spouse's enrollment in the health plan, the limit is 30% of the total cost of self-only coverage where the employer offers only one group health plan. If the employer offers more than one group health plan but enrollment in a particular plan is not a condition for participation in the wellness program, the limit is 30% of the total cost of the lowest cost self-only coverage under the employer's major medical group health plan. If the employer does not offer any group health plan, the limit is 30% of the cost of self-only coverage available to an individual who is a 40-year-old, non-smoker in the second lowest cost Silver Plan available through an exchange in the location of the employer's principal place of business.

Employers may not deny access to health insurance or any particular plan to an employee, spouse, or covered dependent based on the spouse's refusal to provide information requested as part of a health risk assessment.

The provisions of the GINA rule regarding incentives will apply as of the first day of the first plan year that begins on or after January 1, 2017. Other provisions of the rule are effective immediately.

Coordination with ACA/HIPAA Rules
The rules above apply in addition to prior regulations issued under the ACA and HIPAA. Employers should be aware that compliance with the ACA/HIPAA regulations does not ensure compliance with the ADA and GINA regulations. In particular, the incentive limitations under the ADA and GINA regulations are not identical to the incentive limits under the ACA/HIPAA regulations. Any employer that offers a wellness program with incentives (or penalties) should review their program to ensure compliance with all of the various regulations.

If you have any questions about how the new rules impact your wellness program, please contact us.

What Does The Defend Trade Secrets Act Mean For Employers?

May 16, 2016

On May 11, 2016, President Obama signed the Defend Trade Secrets Act which had been overwhelmingly passed by the U.S. House of Representatives on April 27, 2016, after having previously been passed by the Senate. The Act creates a federal civil cause of action for trade secret theft.

The Defend Trade Secrets Act will allow companies to file civil lawsuits for trade secret theft under the Federal Economic Espionage Act. Previously federal trade secret law provided only for criminal prosecution under federal law, and private litigants had to rely exclusively upon state law for trade secret protection. Although many states have adopted variations of the Uniform Trade Secrets Act, the specifics of state law vary and these differences have led to confusion and uncertainty for companies seeking trade secret protection. The Defend Trade Secrets Act is aimed at eliminating most of this uncertainty and creating a uniform legal standard.

The Defend Trade Secrets Act supplements existing state trade secret law; it does not replace or preempt state law, so it is likely that in many cases a litigant will have remedies available under both state and federal law. We anticipate, however, that the existence of a federal cause of action will mean that federal, rather than state courts, will become the primary forum for trade secret disputes.

In addition to granting federal courts automatic jurisdiction over civil lawsuits involving trade secret claims, the Defend Trade Secrets Act differs from most existing state laws by providing a mechanism for allowing *ex parte* seizures by federal law enforcement. Plaintiffs may ask courts to order that law enforcement personnel seize property "necessary to prevent the propagation or dissemination of the trade secret" without a hearing or an answer from the accused entity. The Act limits these seizures to "extraordinary circumstances" where all the elements that would traditionally entitle a plaintiff to an injunction such as irreparable harm and a strong likelihood of success on the merits are present and the plaintiff also shows that:

- an injunction or other form of equitable relief would be inadequate because the party to which the order would be issued would evade, avoid, or not comply with any such order;
- The entity against whom the seizure is sought has actual possession of the trade secret and any property to be seized;
- The application shows, with particularity what property is to be seized and the location where the property is to be seized from;
- The entity or persons acting in concert with the entity against whom seizure would be ordered, would destroy, move, hide, or otherwise make the matter inaccessible to the court if the applicant were to proceed on notice; and
- The applicant has not publicized the requested seizure.

Companies should proceed with caution when seeking *ex parte* seizures because the Act allows the entity that is subject to the seizure to seek damages if this provision has been abused or they were unfairly targeted. Damages for these improper *ex parte* seizures include those provided under Section 34(d)(11) of the Trademark Act of 1946 and include lost profits, cost of materials, loss of good will, punitive damages (where the seizure is sought in bad faith), and reasonable attorney's fees. Additionally, while state laws differ on whether attorney's fees are available for regular, non-seizure trade secret cases, the Defend Trade Secrets Act explicitly provides for an award of reasonable attorney's fees in three circumstances: (1) where the claim of misappropriation is made in bad faith; (2) a motion to terminate an injunction is made or opposed in bad faith; or (3) the trade secret was willfully and maliciously misappropriated.

This new federal law recognizes that modern trade secret disputes usually lack discrete geographic boundaries. We expect that federal courts will become the primary, if not exclusive forum, for litigating most trade secret disputes. The hope is that this Act and its ensuing cases will provide more certainty for all parties involved in trade secret cases going forward.

EEOC: Denial of Transgender Employees' Access to a Common Restroom Violates Title VII

May 6, 2016

On Monday the Equal Employment Opportunity Commission (EEOC) issued a "Fact Sheet" setting forth its position that denying an employee equal access to a common (i.e., multi-user) restroom corresponding to the employee's gender identity is sex discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

Other key components of the EEOC's position include that:

- An employer may not condition the right to use a common restroom on the employee undergoing or providing proof of surgery or any other medical procedure.
- An employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead. However, the employer can make a single-user restroom available to all employees who might choose to use it without running afoul of Title VII.

The Development of the EEOC's Position

The U.S. Supreme Court held in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989), that discrimination and harassment based on sex stereotyping are prohibited under Title VII. More recently, the EEOC has become increasingly vocal in its view that Title VII's prohibition on sex discrimination includes discrimination based on LGBT status, and in March filed its first lawsuits against employers for discriminating against employees based on sexual orientation. The Fact Sheet explains the EEOC's stance as follows: "Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort."

The Fact Sheet states that contrary state laws are not a defense under Title VII, and its issuance is likely a response to recent, controversial laws in North Carolina and Mississippi that limit transgender people's access to public restrooms. In the latest salvo in this debate, the U.S. Department of Justice yesterday informed the Governor of North Carolina that the state's law violates Title VII because requiring employees to use the bathroom of their biological sex at birth treats transgender employees differently from other employees.

The Fact Sheet also references the recent decision in *G.G. v. Gloucester County School Board*, in which Fourth Circuit Court of Appeals held that a transgender student could challenge a school board policy that limits bathroom and locker room access based on biological sex. Although that case was decided under Title IX of the Education Amendments Act of 1972 – which prohibits discrimination based on sex – the EEOC notes the similarity between the U.S. Department of Education's position and its own.

What the EEOC's Position Means for Employers

While the courts remain divided on the rights of transgender employees and the responsibilities of employers in this regard, the views of the Administration are clear. Employers should review their policies and practices to ensure compliance with applicable federal, state, and local laws. In Illinois, for example, the Illinois Human Rights Act clearly proscribes discrimination based on sexual orientation, which includes gender identity.

In addition, although bathroom and locker room use in schools has garnered the lion's share of media attention to date, the EEOC's Fact Sheet is an important reminder that this is not just an issue for schools. Employers should anticipate that they may encounter resistance within their work force to policies in line with what the EEOC recommends, and need to prepare their managers to handle any resulting conflict consistent with the requirements of applicable law. Thus, employers should remind managers that they set the tone in the workplace and should act accordingly. In addition, managers should be reminded that they are required to report allegations of harassment and may not retaliate against employees who make good-faith complaints of harassment due to, among other things, their sexual orientation or gender identity. Partnering with legal counsel will help employers ensure they are being proactive about implementing best practices and complying with applicable laws.

Definition of "Deliberate and Willful" Misconduct Under the Illinois Unemployment Insurance Act Revised and Expanded

January 26, 2016

Governor Rauner recently signed legislation that revised and expanded the definition of "deliberate and willful" misconduct under the Illinois Unemployment Insurance Act (820 ILCS 405/602). Under the prior definition, the claimant (*i.e.* former employee) would be disqualified from receiving unemployment insurance benefits if the respondent (*i.e.* employer) established that the conduct resulting in termination was "deliberate and willful" (*i.e.* intentional) and amounted to misconduct.

Under the new and expanded definition of misconduct, it no longer is just "intentional" conduct that renders a claimant ineligible for unemployment benefits. Rather, a claimant may now be found ineligible for benefits if he/she engages in certain *non-intentional* conduct as well, which are identified in italics below. The new law also delineates specific acts that constitute misconduct, which the prior definition had not done. The new law provides that "misconduct" now includes:

- Falsification of an employment application, or any other documentation provided to the employer, to obtain employment through subterfuge;
- Failure to maintain licenses, registrations, and certifications reasonably required by the employer, or those that the individual is required to possess by law, to perform his or her regular job duties, unless the failure is not within the control of the individual;
- *Knowing*, repeated violation of the attendance policies of the employer that are in compliance with State and federal law following a written warning for an attendance violation, unless the individual can demonstrate that he or she has made a reasonable effort to remedy the reason or reasons for the violations or that the reason or reasons for the violations were out of the individual's control;

- Damaging the employer's property through conduct that is *grossly negligent*;
- Refusal to obey an employer's reasonable and lawful instruction, unless the refusal is due to the lack of ability, skills, or training for the individual required to obey the instruction or the instruction would result in an unsafe act;
- Consuming alcohol or illegal or non-prescribed prescription drugs, or using an impairing substance in an off-label manner, on the employer's premises during working hours in violation of the employer's policies;
- Reporting to work under the influence of alcohol, illegal or non-prescribed prescription drugs, or an impairing substance used in an off-label manner in violation of the employer's policies; and
- *Grossly negligent* conduct endangering the safety of the individual or co-workers.

It remains to be seen how zealous the Illinois Department of Employment Security will be in enforcing the new definitions of misconduct, particularly those involving non-intentional conduct, as well as how strictly courts will interpret them. In the meantime, employers with questions should contact their Franczek Radelet attorney for guidance.

Illinois Supreme Court Rules Educational Employers Are Not Required to Arbitrate "Do Not Hire" Designation

January 29, 2016

When the Chicago Board of Education refused to arbitrate grievances concerning its "do not hire" policy, it did not violate the Illinois Educational Labor Relations Act according to the Illinois Supreme Court. This case arises out of a June 2010 policy in which the Board designated as ineligible for rehire any probationary appointed teacher (PAT) who was either nonrenewed twice or who had received an unsatisfactory performance rating. The Board implemented this policy by placing a "do not hire" designation in the PATs' personnel files.

The Chicago Teachers Union filed grievances and demanded arbitration on behalf of all PATs as well as individual PATs who received the "do not hire" designation. The Union sought reinstatement and requested that the Board cease placing "do not hire" designations in the personnel files of PATs who were not terminated for cause. The Board refused to arbitrate, arguing that hiring decisions are exclusive management rights. The Union filed an unfair labor practice charge with the IELRB, which found that the Board unlawfully refused to arbitrate the grievances. On appeal, the Illinois Appellate Court reversed the IELRB's decision, and the parties appealed to the Illinois Supreme Court.

In a 6-1 ruling (Justice Kilbride dissenting), the Supreme Court found that the Board did not have a contractual or statutory duty to arbitrate the "do not hire" grievances. Despite a broadly worded definition of the term "grievance" in the parties' collective bargaining agreement, the Court found that the "do not hire" grievances did not relate to employee terms and conditions of employment, but rather to the Board's ability to hire, which is a matter of managerial policy and which was expressly excluded from the bargaining process under the parties' management rights clause.

The Court also concluded that arbitration was statutorily prohibited. First, the Court determined that arbitration would violate the management rights provision set forth in Section 4 of the Illinois Educational Labor Relations Act, which expressly recognizes that educational employers are not required to bargain over matters of inherent managerial policy, including the selection and hiring of new employees. Second, the Court found that arbitration would violate several sections of the School Code, which grant the Board the exclusive power to terminate the employment of probationary teachers through nonrenewal—a discretionary power that the Court emphasized cannot be delegated to an arbitrator or otherwise limited by a collective bargaining agreement. In the Court's view, the "do not hire" grievances impermissibly attempted to force the Board to hire probationary teachers and thus conflicted with the Board's statutory hiring authority. Accordingly, the Court held that the grievances were not arbitrable under either the parties' collective bargaining agreement or Illinois law.

The quick takeaway for educational employers regarding the Court's decision is two-fold: it underscores the need for contract provisions that narrowly define the term "grievance" and broadly and explicitly recognize management rights, and it confirms that hiring decisions and decisions to non-renew probationary employees cannot be delegated to an arbitrator.

IMMIGRATION ALERTS

Emergency Travel Alert for Foreign Nationals

January 27, 2017

On Friday, January 27, President Donald Trump signed an executive order that immediately impacts certain foreign nationals seeking to enter the United States or apply for immigration benefits inside the country. Because of the serious implications of this order on travelers from certain nations, we advise employers and individuals to be aware of the impact of this executive action and delay or otherwise avoid nonessential travel by certain affected persons.

The Order

The order, titled "Protecting the Nation from Foreign Terrorist Entry Into the United States," suspends the non-immigrant entry of nationals (which includes citizens) from certain designated countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) for 90 days from the date of the order. The ban extends to non-immigrant visas and there are some indications that it also extends to other benefits applications filed with U.S. Citizenship and Immigration Services (USCIS) in the United States by nationals of those countries. Green card holders from those countries should generally be permitted to enter the U.S. on a case-by-case basis through the issuance of a waiver by Customs and Border Protection (CBP) so long as they are determined not to pose a threat to the United States. The ban also applies to dual nationals of those countries, although it does not apply to U.S. citizens who are also nationals of those countries. The Department of Homeland Security (DHS) has stated that the order will not restrict the re-entry of people who travel to the designated countries so long as they are not citizens of those countries. This situation remains fluid and evolving.

Additionally, after 90 days, travel will not be automatically reinstated. The ban will remain in place pending the results of DHS reporting on whether those countries provide certain information about their nationals applying for non-immigrant benefits from the United States.

The order also suspends the U.S. Refugee Resettlement program for 120 days, with indefinite suspension for Syrian refugees until the President deems it in the national interest to resume processing such applications. The order contains an exception for refugees that were "in transit" in the days following the order's release, but the exception does not apply to people from the countries designated in the travel ban. The order also includes an exception for religious minorities.

Client Insights

- Non-immigrant visa holders who might be affected by the executive order should delay or otherwise avoid traveling outside of the United States until further notice.
- While DHS has clarified that otherwise admissible permanent resident nationals of these 7 countries should generally be admitted to the United States notwithstanding this travel ban, we nevertheless recommend that such individuals avoid non-essential international travel until we have further information about CBP compliance with the DHS directive. At the very least, individuals from these countries should consult with legal counsel prior to international travel.
- Lawful Permanent Residents are also reminded not to relinquish or abandon their permanent resident status during any detention by CBP Officers. They should insist on speaking with an immigration attorney and appearing before an immigration judge.
- As of this alert's publication, 6 U.S. Federal District Courts have entered injunctive relief countering the implementation of the executive order. These orders vary in scope. While these stays are enforceable against DHS personnel, some reports allege that CBP personnel are not consistently complying with the terms of the stays. It

should also be noted that such injunctive relief does not apply to airports with CBP pre-clearance facilities. These airports include Dublin & Shannon, Ireland; Aruba; Freeport & Nassau, The Bahamas; Bermuda; Abu Dhabi, United Arab Emirates; and Calgary, Toronto, Edmonton, Halifax, Montreal, Ottawa, Vancouver, and Winnipeg, Canada. We recommend that individuals who would otherwise benefit from these injunctions avoid entering the United States from these airports.

- As practices at different airports can vary, we recommend that clients concerned about the impact of this order on their ability to re-enter the United States route their travel through Chicago, IL.
- Please note that further clarification about how the executive order will be implemented by DHS agencies is forthcoming, and litigation in U.S. Federal courts continues. Please stay tuned into our Navigating Change news for updates to this situation as it unfolds.
- Clients are reminded that only nationals or dual nationals of the seven countries on the January 27 executive order are subject to the travel restrictions. At this time, we have no reason to believe that nationals of other countries will be restricted from traveling to the United States. Foreign travelers from other countries should exercise the same diligence and precautions that they would usually exercise when seeking admission to the United States.

What Will Happen in Immigration Enforcement?

January 26, 2017

What We Know

Just a few days after his inauguration, President Trump has taken executive action to advance his top immigration priorities: enforcement and national security.

On Wednesday, President Trump signed two executive orders, titled "Border Security and Immigration Enforcement Improvements" and "Enhancing Public Safety in the Interior of the United States." These orders put into immediate effect, pursuant to President Trump's executive authority, several mandates:

Enforcement and Removal

- Empowerment of newly confirmed Department of Homeland Security Secretary John Kelly to give authority to State and local law enforcement agencies "to perform the functions of immigration officers."
- Defunding of "sanctuary cities," or those with laws, policies, or practices that prevent or hinder immigration enforcement.
- Reinstatement of "Secure Communities" and termination of the Obama administration's recent prioritized enforcement policies.
- Prioritization of removal of immigrants who are inadmissible on criminal, security, or unlawful presence grounds, as well as extensive inclusion of immigrants with criminal charges or convictions, who have made misrepresentations to government officials, fraudulently received public benefits, or who have outstanding orders of removal.
- Collection of all legal fines and penalties against those who aide unlawful immigrants.
- Exclusion of non-U.S. citizens or permanent residents from the Privacy Act regarding personally identifiable information.

Border Security

- Commencement of the planning, design and construction of physical barrier along the southern border, along with assessment and allocation of Federal funds and projection of long-term funding requirements for the purposes of requesting Congressional funding.
- Termination of "catch and release" practices, meaning those detained at the border will stay in detention pending resolution of immigration proceedings.
- Increase of "legally available" resources toward immigration detention efforts on the Southern border, including assignment of asylum officers and immigration judges, building detention facilities, and hiring of 5,000 border patrol agents.

- Assessment of U.S. foreign aid provided to Mexico in the past 5 years.

Trump's Cabinet
On Jan. 21, General John Kelly was confirmed as Secretary of the Department of Homeland Security (DHS). During his confirmation hearing in early January, Kelly's main immigration-related concern was that Customs and Border Protection should be allowed to fully execute its authority. He also advocated that, in response to the Central American migrant crisis at the Southern Border, the United States should actively support Central American governments' efforts to restore public safety and economic opportunity in their borders, while also deporting migrants and targeting American drug use.

What We Believe May Happen in the Short Term
The greatest impact to employers and organizations within the United States from Wednesday's executive order on immigration enforcement will be in the resulting shift toward State and local law enforcement taking action as immigration enforcement. It remains to be seen how this authority will be used, and it is likely that the response from state and local law enforcement will vary by jurisdiction. Regardless, with cooperating state and local law enforcement and increased Federal personnel, immigration enforcement against individuals and employers will rise.

Several additional executive orders are reportedly in the pipeline and could be signed as soon as today. President Trump is expected this week to sign an executive order that will overhaul security measures for all immigrant and nonimmigrant visa programs and mandate the immediate 30-day suspension of issuance of visas and immigration benefits to nationals of countries that are considered to support international terrorism. After that initial period, the order will call for denial of immigration benefits to persons from any country that does not comply with new information sharing requirements instituted as part of the security measures. The order would also overhaul administration of the U.S. refugee resettlement program, temporarily halting acceptance of refugees (including those already approved for entry) and cutting the number of refugees the U.S. will accept in FY2017 to 50,000, from the 85,000 authorized by Congress.

The President is also expected to use his executive authority to repeal President Obama's executive action program known as DACA (Deferred Action for Childhood Arrivals), to place limits and increase enforcement in lawful visa programs, and reduce immigrants' access to public benefits.

Other likely targets for the new administration include efforts to limit legal immigration in the name of preserving American jobs, and to require employers to use the now optional E-Verify employment eligibility verification system.

What We Don't Yet Know
It remains to be seen how DHS will mobilize on the border security and internal enforcement executive orders. In addition, the orders raise many questions about how ramped-up enforcement will be funded. President Trump's orders call for mass hiring of enforcement and administrative personnel, and the border wall has been estimated by some sources to cost $12-15 billion, though the cost is a matter of dispute. (President Trump, for his part, maintains that the cost will eventually be paid by Mexico — possibly through taxation and cessation of aid — although Mexico disputes that it will pay and Mexican President Enrique Peña Nieto said publicly today that he will not attend work meeting with President Trump that was planned for next Tuesday.) Funding for these projects must be approved by Congress.

Although the remaining expected executive orders have been leaked from reliable sources, exact details of President Trump's planned reforms are not certain until they are officially released. The discussion below addresses two prominent concerns for U.S. immigrants and their sponsors:

DACA
In December, then President-elect Trump stated that DACA would be replaced with another solution for DREAMers, a term referring to young immigrants who have been unlawfully living in the United States since a young age and lack criminal histories (often students and young professionals). DACA has provided more than 740,000 DREAMers with work authorization and protection against removal as a "low priority," but no backup solution currently exists for these individuals whose benefits President Trump plans to terminate. A permanent solution will

almost certainly require likely Congressional action. On Monday, White House Press Secretary Sean Spicer confirmed that dissolution of DACA will not happen immediately, and for now, U.S. Citizenship and Immigration Services (USCIS) is continuing to accept and adjudicate DACA applications. That is unlikely to continue if President Trump issues an executive order terminating the program.

For Congress's part, the BRIDGE Act (Bar Removal of Individuals who Dream and Grow our Economy), a bipartisan bill responding to President Trump's promise to end DACA, was introduced to both Houses on January 12 by Reps. Mike Coffman (R-CO) and Luis Gutiérrez (D-IL) and Sens. Lindsey Graham (R-SC) and Dick Durbin (D-IL). The BRIDGE Act would essentially formalize the DACA program through the legislative process, providing "provisional protected presence" and work authorization to grantees. Those who have benefits under DACA would matriculate automatically into the solution created. The BRIDGE Act also provides that the identity information collected in DACA applications would not be utilized for enforcement purposes. This is particularly significant given that the incoming administration has not affirmed that this information would remain protected, as it was during the Obama administration. The likelihood of the bill's success remains to be seen.

H-1Bs and FY2018

With the nearing application date for the Fiscal Year 2018 H-1B lottery, questions abound about the Trump administration's plans for the high-demand professional visa. The administration has engaged in private discussions but has not publicly addressed planned changes to the H-1B program. Because the program is codified in federal legislation, any major changes would require Congressional action. President Trump has previously criticized the H-1B program, which has suffered in reputation in light of two high-profile lawsuits accusing companies of using the program to hire lower-wage foreign workers. However, President Trump has said that he favors bringing skilled talent to the United States. He is reportedly considering ways to alter the program, including increased required wage thresholds and changing the current lottery system of visa selection. There are typically far more H-1B applicants than there are available visas. No clear details have been announced regarding this program, however, and most stakeholders anticipate this year's lottery will take place as usual.

What This Means for Employers

At this time, employers should continue sponsorship of foreign workers normally. Since enforcement is a clear priority of the incoming administration, we strongly advise all employers to conduct internal compliance audits to ensure that required records such as I-9s and LCA public access files (for those sponsoring H-1B visa holders) are properly maintained. Correcting any issues now, before a government compliance audit, can significantly reduce the risk of incurring high fines. Employers should also provide compliance training for staff and ensure that appropriate personnel are familiar with the company's protocols regarding what to do in the event of an audit, site visit, or request for records. If your organization does not have formal protocols in place for responding to immigration enforcement investigations, do not delay in drafting and implementing protocols now.

We will continue to keep you up to date on immigration enforcement and regulatory developments as they occur. In the meantime, please let us know if you have any questions or feedback.

Matter of Dhanasar: A New Standard for National Interest Waivers in the United States

January 10, 2017

On December 27, 2016, the AAO issued a decision that modifies the standards for granting a National Interest Waiver (NIW) in *Matter of Dhanasar*. This decision will impact thousands of applicants seeking U.S. permanent residency based solely upon the importance of their work in the United States or their unique accomplishments/qualifications. The decision fundamentally alters the NIW standard by providing more flexibility to individuals such as entrepreneurs who have traditionally been self-employed, and whose employment was not well-suited for this benefit under the prior NIW test.

Background

Most work-based green card applications require a job offer from a sponsoring employer and an approved "labor certification" from the U.S.

Department of Labor, confirming that the employer has tested the labor market and is unable to find a qualified, willing, and able U.S. worker to fill the position. A recruitment process is conducted to search for U.S. workers who meet the minimal requirements for the position, which must be normal within the occupation and cannot be tailored to the foreign beneficiary's specific background. Since this test focuses on the bare minimum required for a role, the labor certification requirement prevents an employer from taking into consideration special qualifications or accomplishments that make a sponsored worker superior to other applicants and often outstanding in his or her field. The labor certification process is intended to protect the interest of qualified U.S. workers who could suffer loss of opportunity due to the permanent hiring of a foreign worker. However, this requirement makes it more difficult to sponsor for permanent residency someone who is exceptional and can contribute the most to an organization or field of work.

National Interest Waivers

Congress established a special NIW category to permit waiver of the job offer and labor certification requirements when it is the "national interest" to do so. Unfortunately, Congress failed to explain what constitutes national interest, leaving it to the legacy Immigration and Naturalization Service (INS) to interpret Congress's intent. In 1998, the INS issued *Matter of New York State Dep't of Trans*. ("*NYSDOT*"), a decision that established the standards governing NIWs and emphasized the applicant's prior achievements while requiring demonstration that the national interest would be adversely affected if a labor certification were required.

Over the years, this test has received legitimate criticism. Primarily, the emphasis on establishing harm to the national interest by comparison to the interests of a "fictitious" U.S. worker has drawn criticism. In the abstract, entrepreneurs and other professionals have often struggled to convince immigration adjudicators that requiring a labor certification would "adversely" impact the national interest.

Matter of Dhanasar

Addressing this criticism, *Matter of Dhanasar* vacated *NYSDOT* and established a new test for NIWs. Now, applicants must demonstrate the following:

1. The proposed endeavor must have both substantial merit and national importance;
2. The foreign national must be well-positioned to advance the proposed endeavor; and
3. On balance, it would be beneficial to the United States to waive the requirements of a job offer and labor certification.

Significantly, the AAO's decision makes abundantly clear the intent to expand the scope of NIWs to recognize that entrepreneurial ventures are a legitimate basis for such applications. The AAO notes that its prior standard was difficult to apply to entrepreneurs and rectifies this by specifically stating that "prong 1," demonstrating the endeavor's merit, may be achieved by showing how it applies to areas including "business, entrepreneurialism, science, technology, culture, health, or education." The decision also directly addresses the impracticality of requiring an entrepreneur to show why their application shouldn't require a specific job offer from an employer or a labor certification.

Insights

This decision will impact entrepreneurs and traditional NIW applicants. For one, the standard will make it easier for entrepreneurs who will create jobs in a specific area to demonstrate benefits to the national interest in their ability to stay in the U.S. permanently and contribute to the U.S. economy.

Second, the new standard will impact scientists, researchers, and other professionals who have often relied upon the NIW option, and will remain attainable while also avoiding many of the prior test's difficulties. Applicants no longer are required to show that the national interest in avoiding a labor certification outweighs the interests of hypothetical qualified and interested U.S. workers. Educational and research institutions, which traditionally sponsor high-performing individuals for permanent residency in the United States and have a specific interest in NIW petitions, should work with immigration counsel to meet the requirements for the new test.

Much remains to be seen about how the new standard will be applied by U.S. Citizenship and Immigration Services (USCIS). Like any other legal principle, how this standard is put to use will determine whether it makes approval of an NIW application easier for previously marginalized applicants. In the meantime, it creates opportunities for a broader range of applicants and will most certainly prompt new, expanded uses of this category of green card application. This decision also fulfills a promise to improve the National Interest Waiver category made by Department of Homeland Security officials after President Obama announced immigration-related executive actions in November 2014.

Proposed Rule Would Expand the Scope of Discriminatory Employment Practices Under the Immigration and Nationality Act and I-9 Document Abuse Findings

September 9, 2016

A few weeks ago, the Department of Justice (DOJ) published for comment a proposed rule that would amend the regulatory authority provided to the Agency's *Office of Special Counsel for Immigration-Related Unfair Employment Practices* (OSC) to conduct investigations into discriminatory employment practices under the Immigration and Nationality Act ("INA"). The three primary impacts of the proposed rule would be to:

1. Eliminate the intent requirement that has traditionally been required to make a finding that an employer has engaged in discriminatory employment practices under the INA;
2. Penalize "unfair documentary practices" rather than "documentation abuses", marking a similar shift to broader, more encompassing language; AND
3. Rebranding and changing the name of the OSC to the *Immigrant and Employee Rights Section*;

Other amended language in the proposed rule will impact procedural aspects of how charges of discrimination can be filed and will clarify the procedures for processing charges.

Background about the OSC

The OSC has traditionally been responsible for enforcing the INA's prohibition on national origin or citizenship abuse in hiring, recruitment, referral for a fee, or the discharge of an employee, as well as the prohibition on employer retaliation or intimidation of those who file charges or assert rights under the INA. Additionally, the OSC is also responsible for enforcing the prohibition on "document abuse", which refers to situations where the employer, in the I-9 verification process, asks for more or different documents than normally required, or refuses to accept documents which are genuine on their face.

The OSC has been active of late, and has recently announced settlements with several U.S. employers after conducting lengthy investigations into alleged violations of the INA.

Employer Insights

As those familiar with the I-9 process are already aware, employers are already subject to liability upon audit by the Department of Homeland Security ("DHS") for substantive and procedural errors in the I-9 process, and by the OSC for document abuse. Of note, the existing regulations require an "intent to discriminate" concurrently with employer refusal to accept documents that are genuine on their face in the I-9 verification process to constitute document abuse. The proposed regulations would make this intent finding unnecessary for the OSC to conclude an employer has engaged in document abuse during the I-9 process, and would essentially create a broader standard akin to strict liability for a document abuse finding.

The amended regulation would certainly expand what is considered to be unfair documentary practices by implicating practices that have other business or unrelated goals and purposes. Employers will need to evaluate their human resources practices carefully in light of this new rule to minimize liability and look at discriminatory impact instead of the intent behind or purpose of their practices.

The DOJ will accept comments on the proposed rule through September 14, 2016. The rule does not take effect until final publication. We will keep you updated on further developments with regard to this proposed rule.

Proposed Department of Homeland Security Rule Would Provide Selected Foreign Entrepreneurs Temporary Admission to the United States

August 31, 2016

On August 24, 2016, the Department of Homeland Security (DHS) previewed a proposed rule that would provide certain entrepreneurs temporary permission to enter the United States through the DHS's "parole" authority. . Recognizing the importance of start-up businesses to the American economy and the immigration difficulties that many non-U.S. founders have faced, DHS announced the likely publication of such a rule in a series of memoranda published in November 2014, previewing changes to U.S. immigration rules. The proposed rule is not a new visa, as establishing a new visa category would require action by Congress. Instead, it is an extension of the DHS's authority to "parole" selected groups of people into the United States.

The rule will soon be published in the Federal Register, allowing for public comment for 45 days thereafter. The rule will not go into effect until after the comment period and final publication of the rule.

The proposed rule provides guidance for case-by-case adjudication of applications to consider complex, specific details of the start-up business and represents the agency's policy and intention to increase use of its "parole" authority. Entrepreneurs demonstrating that their start-up entity will "provide a significant public benefit" through job creation and "rapid business growth" may be granted an initial stay in the U.S. for a two-year period, which could be extended for an additional 3 years after demonstrating continued public benefit by showing "substantial increases" in investment, revenue or job creation during the initial period.

DHS will consider parole applications for startup entrepreneurs who can demonstrate that:

- The business entity was formed in the United States within the three years prior to the application date
- The applicant has a significant ownership interest (15% interest minimum) in the business entity *and* has an "active and central role in the operations and future growth" of the entity (not a "mere investor")
- Evidence of "significant U.S. capital investment or government funding" is provided, which includes:
  - receipt of at least $345,000 investments of capital from U.S. investors with a history of substantial start-up investments, or
  - receipt of at least $100,000 in Federal, state or local government grants, or
  - partially meeting one of the above criteria plus strong evidence of the entity's "substantial potential for rapid growth and job creation."

The proposed rule, if adopted in this form, is estimated to benefit several thousand foreign entrepreneurs every year. The rule does nevertheless include limitations that could present challenges to entrepreneurs from specific countries. Specifically, because of country quotas and resulting delays in green card issuance, entrepreneurs from oversubscribed countries such as India and China seeking permanent residency based on their role as start-up founders may find that the 5-year parole period is an insufficient time period to await eligibility to apply for adjustment of status (the final green card application).

We look forward to providing addition information on this proposed rule as updates become available. Start-up businesses and higher education institutions with questions about this proposed program are encouraged to speak with an attorney for more information.

Divided Supreme Court Blocks Enactment of Obama Immigration Executive Actions

June 23, 2016

In a non-precedential decision that will leave many legal observers and immigration advocates unsatisfied, the Supreme Court earlier today split 4-4 and issued a *per curiam*, non-precedential order affirming the decision by the U.S. Court of Appeals for the Fifth Circuit in *U.S. v. Texas*. This case involved the legality of the Deferred Action for Parental Accountability (DAPA) and expanded Deferred Action for Childhood Arrivals (DACA) programs that President Obama announced in November 2014. These programs would have provided temporary relief from deportation and work authorization to undocumented immigrants meeting certain guidelines, including those who are parents of U.S. citizens or lawful permanent residents and those who entered the United States as youth. It was estimated that over 4 million individuals in the United States would have met the guidelines of these programs. The Supreme Court's decision does not impact the Deferred Action for Childhood Arrivals (DACA) program that President Obama announced in 2012, which remains in effect. The 2012 program is limited to certain undocumented individuals who entered the United States as children, were under the age of 31 as of June 15, 2012, have continuously resided in the U.S. since June 15, 2007, can demonstrate that they do not have a criminal record, and are in school, have completed high school or a GED certificate, or are honorably discharged veterans of the Coast Guard or Armed Forces.

Background

A group of 26 states, led by Texas as the lead plaintiff, challenged the DAPA and extended DACA programs in the federal district court for the Southern District of Texas before they could be implemented, contending that they exceeded the scope of the President's authority under the U.S. Constitution and violated the Administrative Procedures Act ("APA"). A threshold issue in the case was whether the states had standing to challenge these programs; the states contended that they would suffer an economic injury because of the subsidies that Texas provides to individuals seeking drivers' licenses. In February 2015, an injunction was issued, and the U.S. Court of Appeals for the Fifth Circuit upheld this injunction in November 2015. The Supreme Court agreed to hear this case in January 2016.

Consequences

The Supreme Court issued its decision in a one-page order without an opinion, underscoring the fact that this decision has no precedential value. There remains a possibility of lawsuits in other jurisdictions outside the U.S. Court of Appeals for the Fifth Circuit seeking to compel enactment of the program. Such lawsuits could, foreseeably, result in differing findings about the legality of the program in different Circuit Courts. Additionally, and while far from certain, the lack of precedent could result in the same issue being presented to the Supreme Court again if a future President decides to re-enact the program. As a practical matter, however, this decision will likely prevent the enactment of these programs during the remainder of President Obama's term, and will ensure that the issue of immigration remains squarely in the middle of the current Presidential election campaign.

Ready or not, the new STEM OPT rule is in play!

May 16, 2016

As higher education institutions with international students should already be aware, the Department of Homeland Security ("DHS") recently published a new regulation that provides eligible F-1 graduates from STEM programs in the United States with an additional 24 months of work authorization through the Optional Practical Training (OPT) program. The rule became effective on May 10, 2016, replacing the prior rule providing for only a 17-month OPT extension. Concurrently, DHS has enacted a set of transition procedures for students with:

1) An approved 17-month extension request, who may seek an additional 7 months of work authorization;

2) A pending 17-month extension request as of May 10, 2016;

The benefits offered by these transitional procedures are very time-sensitive, and it is critical that both international student services offices and international students themselves pay close attention to their requirements in order to maintain and extend their status and work authorization through the OPT program. Below is a brief FAQ outlining the most important and time-sensitive aspects of this rule.

1. ***Should a University that does not offer STEM degrees be concerned about the new rule?***

Generally, the answer is no. However, the new rule allows a student with a pre-existing STEM degree from a U.S. institution to request the STEM OPT extension, even if his/her most recent degree is not in a STEM field, under certain circumstances. First, the student must not have previously requested a

STEM OPT extension based on the prior STEM degree. Second, the student's OPT employment must advance the student's training in the prior STEM field.

In this situation, the international student services office at the most recent higher education institution is responsible for verifying compliance with the requirements of the new rule and issuing an I-20 recommending STEM OPT.

2. What happens to a 17-month STEM OPT that a student may have received prior to May 10, 2016?

The rule permits students with 17-month STEM extension to continue using their EADs until expiration, termination, or revocation.

3. ***Can these students apply for an extension and get the full 24-month period?***

Yes. The rule creates a transitional period that began on May 10, 2016, and ends on August 8, 2016, wherein students with the 17-month EADs will be able to apply for an additional 7-month extension, to bring them to the new 24-month maxout. Students must meet several requirements to qualify, including:

- The I-765 request to renew the EAD must be filed at least 150 calendar days before the student's 17-month OPT period ends; AND
- The student must meet all requirements for the 24-month STEM rule.

4. ***What procedures must be followed to apply for the extension?***

The student must apply for the extension during the transition period (before 8/8/16) and must have a recommendation in SEVIS from their most recent alma mater's designated school official (DSO). The student must submit an I-20 from the DSO within 60 days of the date that the DSO enters a recommendation for a 24-month STEM OPT extension into the student's SEVIS record.

5. ***What happens to STEM extension requests that were filed prior to May 10, 2016?***

The 17-month rule remained effective through May 9, 2016. An application filed before May 10, 2016, will be adjudicated under the rules in effect on the date of adjudication. If the application is adjudicated on or after May 10, 2016, it will be adjudicated under the 24-month rule.

USCIS will issue a request for evidence (RFE) to collect evidence to determine whether a STEM extension request filed under the 17-month rule is eligible under the 24-month rule. USCIS will also ask the student to provide a new I-20 endorsed with the 24-month STEM extension recommendation.

6. ***Can students with pending STEM extension requests withdraw earlier-filed STEM requests and file new ones meeting the 24-month guidelines?***

This is strongly discouraged. Students must be in a valid period of post-completion OPT to request the extension. USCIS has warned in a FAQ that it will deny requests from students who withdraw a pending request and then re-file a new request after post-completion OPT period has expired.

Under the OPT rules, students with a pending STEM OPT extension request whose post-completion OPT card expires will receive an auto-extension of this card for 180 days while the card remains pending. This remains true of both the 17- and 24-month extensions.

Will the New Executive Administration Impact the H-1B Lottery?

December 14, 2016

Human Resources professionals with U.S. companies that are reliant upon skilled foreign workers often spend the last few months of the calendar year and the beginning of the new calendar year identifying individuals who will require H-1B sponsorship. As many readers of our alerts may already know, H-1B applications are filed on behalf of individuals offered employment in specialty occupations who have achieved a minimum of Bachelors-level training (through education alone or a combination of education and experience) in a specific field. These applications are subject to an annual cap of 65,000 visas, with an additional 20,000 H-1B visas reserved for holders of a U.S. Masters or other advanced degree. Applications filed by certain employers and for certain positions are exempt from the cap. Those applications subject to the cap are traditionally filed in the first week of April, which is 6 months before the USCIS fiscal year begins and H-1B visas become available. For the last several years, the H-1B quota or cap has been severely oversubscribed. In 2016, a total of 236,000 applications were filed for these visas. In 2015, a total of 233,000 applications were filed for the same quota.

Will the New Administration Impact the Number of H-1B Filings?

Opinions about the impact of the Presidential election on business immigration at this point in time certainly include a certain degree of speculation. Nevertheless, below are a few trends that could impact the number of applications.

The economy is relatively strong right now. Traditionally, over the last 10 years, large numbers of H-1B applications have been filed when the economy has been growing and unemployment has been decreasing. At the same time, the most recent election campaign was not only divisive but also placed an unprecedented degree of emphasis on immigration. While illegal immigration was a significant focus, President-elect Donald Trump also made news stories about the replacement of U.S. workers with foreign labor a focal point of his campaign and was heavy on nationalistic themes. Companies that hire a large number of skilled workers on H-1Bs may be inclined to file a smaller number of visa applications in the upcoming H-1B cap season due to political or perception concerns. Businesses seeking talent may nevertheless find it necessary to hire certain workers requiring H-1B sponsorship, and will have to weigh their business needs against any such general concerns.

Could the New Administration Change H-1B Guidelines?

While the new administration could adopt guidelines impacting the way that the H-1B lottery is conducted this spring, we believe that substantial changes to the program are unlikely.

The President-elect promised in his 100-day plan to thoroughly investigate visa abuse and fraud and indicated on the campaign trail that he would require employers to first attempt to hire U.S. workers before sponsoring workers for visas. However, the H-1B visa program, like many other temporary work visas for skilled workers, does not currently require an employer to attempt to hire a U.S. worker; instead, the employer is simply required to show that the wages and working conditions of the H-1B worker will not adversely impact the wages and working conditions of U.S. workers. While it is certainly possible that the administration could seek to enact such changes to the H-1B visa program eventually, these changes would require Congressional legislation and could not simply be enacted through agency regulation or policy memorandum. Due to the complexity of the issues involved in modifying the H-1B visa program, it is extremely unlikely that any changes will be enacted in time to impact cap-subject H-1B visa petitions for the April 2017 lottery. Furthermore, any changes that are enacted to the H-1B program may not be retroactive; that is, they may impact employer compliance and/or process requirements for new H-1B petitions and future extensions rather than those already in H-1B status.

What Should Employers Sponsoring Workers for Visas Do Right Now?

With certain exceptions, we recommend that employers generally treat the upcoming H-1B season as they normally would in any other year. Employers seeking to sponsor new H-1B workers should be evaluating and determining which employees they wish to sponsor and should work with outside counsel to confirm the timeframes for preparing and filing such applications. As always, employers must recognize that not every application will be selected in the lottery and should also evaluate the availability of alternate options if an H-1B is not selected in the lottery. Recent regulatory changes have also expanded the scope of these options, and individuals who have graduated from Science, Technology, Engineering, and Mathematics ("STEM") fields may be eligible for an additional two years of work authorization even if their initial 12-month post-graduation Optional Practical Training ("OPT") period expires.

Nevertheless, given the President-elect's stated emphasis on investigating compliance with visa requirements, this is an opportune time for employers with existing H-1B workers to take stock of their compliance with H-1B guidelines. Among other steps, we recommend that employers:

(1) Conduct internal audits of their Public Access Files (PAFs);

(2) Verify compliance with recent guidelines requiring amended H-1B petitions when an employee's location of employment changes; and

(3) Ensure that they have a robust system for ensuring that H-1B worker salaries match the higher of the appropriate prevailing or actual wage paid to U.S. workers.

We will soon provide further guidance on potential regulatory changes impacting the H-1B program that the new Trump administration could enact.

EMPLOYEE BENEFITS ALERTS

U.S. Supreme Court to Consider ERISA Church Plan Exemption

January 3, 2017

In a decision that may have profound consequences for the funding and continued operation of defined benefit retirement plans covering employees at religiously affiliated organizations, the U.S. Supreme Court has decided to hear consolidated appeals from the Third, Seventh and Ninth Circuits to determine the scope of the "church plan" exemption under the Employee Retirement Income Security Act (ERISA). The Supreme Court's decision will mainly affect pension plans sponsored by religiously affiliated hospital systems, but other church-associated social service organizations and educational institutions that rely on the church plan exemption may also be impacted.

The church plan exemption allows pension plans sponsored by church affiliated organizations to avoid complying with ERISA's minimum funding, vesting, insurance and other requirements that protect plan participants. The exemption clearly applies to pension plans established and maintained by actual churches, but many religiously affiliated entities also rely on the exemption.

Over the past three years, participants in numerous religiously affiliated hospital systems have challenged their employers' reliance on the church plan exemption on the basis that ERISA's statutory language does not extend to pension plans maintained by entities that are affiliated with a church. In many of these cases, federal courts have given little deference to IRS opinion letters stating that certain of these religiously affiliated institutions qualified for the church plan exemption. In each of the three appeals that were consolidated for the Supreme Court's review, the appellate courts ruled against the hospital systems.

If the Supreme Court's decision extends ERISA coverage to religiously affiliated employer pension plans, participants in these plans will stand to benefit from the many protections that ERISA provides. But depending on the scope of the ruling, the financial pressures of meeting ERISA's minimum funding requirements could force affected employers to freeze or terminate their pension plans. If your organization sponsors a pension plan and relies on the church plan exemption, you should pay careful attention to the Court's decision in these cases.

A Trump Presidency: Potential Impact on Employee Benefits Law and Policy

November 12, 2016

For many months, we have been speculating about how the results of the 2016 presidential election would impact employee benefits policy going forward. Now that Donald Trump has won the election and Republicans have secured a majority in both houses of Congress, we have a better (although still far from clear) idea of the kinds of changes to expect in the employee benefits area over the next few years. Although this is a very preliminary discussion, we expect major changes in employee benefits law and policy during the Trump presidency. Below are several possible benefits-related developments that employers and plan sponsors should be ready for.

Potential Repeal of the Affordable Care Act
Trump has stated repeatedly that he will repeal the Affordable Care Act (the "ACA"). Because a complete repeal may require 60 votes in the Senate (to overcome a filibuster), a wholesale repeal may not be possible. Moreover, some 20 million people may lose their health insurance if the ACA were abruptly repealed. But the Trump administration will almost certainly implement rule-making that will impact key aspects of the law, and the Republican Congress will almost certainly take legislative action to repeal or change key aspects of the law.

The most obvious first task will be to repeal the Cadillac Tax, which is an excise tax on employers and plan sponsors that offer high value health coverage. The tax, currently slated to become effective January 1, 2020, is controversial because it impacts a significant number of employers and union-sponsored plans. Trump's running mate, Mike Pence, has also suggested that the new administration would both repeal the ACA's individual mandate and phase out subsidies for exchange-based coverage, which would encourage many individuals to drop their ACA-based coverage. By extension, we also assume that there will be an effort to repeal the employer mandate and annual ACA information reporting for employers, plan sponsors, and insurers.

Other Health Coverage Initiatives
Trump has stated that he would promote consumer-directed health arrangements by expanding the tax incentives for health savings accounts and thereby promoting high-deductible plans. He has said that he also supports allowing individuals to deduct the cost of individual insurance policies.

Trump also wants to allow insurance companies to sell policies across state lines, which he believes would lead to lower insurance costs. Economists have questioned whether this proposal would have any meaningful impact, because most of the current barriers to interstate sales of insurance are financial rather than regulatory.

Trump has said that he would provide block grants to states to finance their Medicaid programs. States would receive annual lump sums to fund their programs and have more control over those programs, but would also be responsible for any costs that exceed the federal allotment.

Trump has also talked briefly about the price of prescription drugs. He has indicated, for example, that he is in favor of increasing control over drug pricing. Trump's plans with respect to the ACA and health care will become clearer with time. Trump's stated aim, however, is to advance consumer-driven healthcare with the ultimate goal of reducing health insurance costs for both individuals and employers.

Department of Labor Fiduciary Rule
Earlier this year, the U.S. Department of Labor (the "DOL") finalized a rule that expanded the definition of a fiduciary under the Employee Retirement Income Security Act of 1974. The rule primarily impacts the financial industry, which strongly opposed it during the rule-making process. A Trump advisor has stated that the Trump administration would work to have the rule repealed.

The Future of Multiemployer Pension Plans
A significant number of multiemployer (union) pension plans are in a state of crisis. Many of these plans are severely underfunded. For example, the Teamsters' Central States Pension Fund is so underfunded that it is predicted to become insolvent by 2025. In addition, the Pension Benefit Guaranty Corporation's ("PBGC's") multiemployer insurance program, which essentially insures multiemployer pension plans by paying a guaranteed level of benefits to retirees if a plan becomes insolvent, is itself headed towards insolvency. There is an estimated 91% likelihood that the PBGC's multiemployer program will become insolvent by 2032. If the Central States Pension Fund were to become insolvent, that alone would effectively bankrupt the PBGC's program.

In 2014, Congress adopted the Multiemployer Pension Reform Act ("MPRA"). MPRA allows severely underfunded multiemployer plans to apply for Department of Treasury approval to reduce benefits in order to avoid becoming insolvent. MPRA has proven to be wildly unpopular, primarily among retiree groups. Almost immediately after MPRA became law, the Central States Pension Fund applied to reduce benefits, but its application was denied. Other plans' applications to reduce benefits under MPRA have experienced the same fate.

Trump has not, to date, weighed in on how he would solve the multiemployer pension crisis. But it appears that Congress will need to take action in light of the systemic issues that these plans face. Some movement has already occurred—in September, the Senate Finance Committee advanced the Miners Protection Act, which would transfer money from a federal fund meant for reclaiming abandoned mines to the United Mine Workers of America's multiemployer pension plan. But the Miners Protection Act would help just one of many multiemployer plans that need financial support. Further Congressional action could come in the form of providing taxpayer dollars to the PBGC, which has historically been funded solely by insurance premiums paid by plan sponsors and employers, or providing such taxpayer dollars directly to impacted multiemployer funds. In short, this is an area that the Trump administration will eventually have to consider addressing.

Hampering Other DOL Initiatives

In recent years, the DOL's Employee Benefits Security Administration has significantly increased its audit and enforcement activities. This was the result of strong support from the Obama administration, which allowed the DOL to hire a large number of new agents to conduct random and targeted compliance audits of employer-sponsored retirement and group health plans. We expect that the Trump administration will redirect resources such that there will not be the same level of support for these DOL efforts. Nevertheless, because the DOL's expansion under the Obama administration was slow and deliberate, we expect it will take some time for the DOL's activities in the benefits area to slow down.

Potential Reallocation of IRS Retirement Plan Resources

In stark contrast to the DOL's initiatives, over the past several years the IRS has reduced its resources dedicated to qualified retirement plans. First, the IRS recently announced that it was essentially eliminating the determination letter program in all but a few situations. Second, practitioners have anecdotally noticed that fewer IRS agents seem to be available for processing applications under the IRS's Employee Plans Compliance Resolution System, which allows retirement plan sponsors to voluntarily correct certain types of plan administration and tax qualification errors. Third, the IRS had for many years been very active in issuing rules and other guidance in the retirement plan area, but over the past several years there has been a concerted shift of IRS resources away from retirement plan rule-making. This is at least in part due to the IRS's rule-making activity under the ACA. So, if the ACA is repealed or substantially modified, it is possible that additional resources within the IRS will free up and be reallocated towards retirement plans. At the same time, the Trump administration may not provide the same level of overall support to the IRS, which may necessitate further overall cuts to the IRS's retirement plan resources.

Potential Repeal of Dodd-Frank Executive Compensation Rules

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") contains provisions that significantly impact the Securities and Exchange Commission's ("SEC's") regulation of public company executive compensation disclosures. So far, the SEC has issued final rules under Dodd-Frank that require mandatory claw backs of incentive compensation paid to executives under certain circumstances and a new annual disclosure of the ratio between the CEO's pay to the company's median employee pay. Trump has stated that he will repeal Dodd-Frank, including these claw back and disclosure requirements. It is not yet clear whether he would replace Dodd-Frank with new legislation or regulations.

Please let us know if you have any questions about these issues. One way or another, we expect the next four years to be very important ones for the development of long-term employee benefits policy.

Multiple Universities Sued Over 403(b) Retirement Plan Investment Fees

August 22, 2016

In the last several days, a number of large private universities have been sued regarding the investment fees in their 403(b) retirement plans. The lawsuits claim that these universities breached their fiduciary duties under the Employee Retirement Income Security Act ("ERISA") by allowing excessive fees to be charged to plan participants. All but one of these lawsuits has been filed by the same plaintiffs' law firm. These lawsuits are, with some critical differences, similar to the many retirement plan fee lawsuits that were filed against corporate 401(k) plan sponsors over the past 10-15 years, some of which settled for very large amounts.

To date, complaints involving university 403(b) plans have been filed against Yale, NYU, Duke, Vanderbilt, Johns Hopkins, Northwestern, MIT, Columbia, USC, Emory, and Cornell. We expect that more complaints may be filed against other higher education institutions, including mid-sized universities that sponsor plans subject to ERISA, and possibly other non-profit institutions (such as health/hospital systems) that sponsor 403(b) plans.

All of the plans targeted in the litigation are large, with most containing billions of dollars in assets. Importantly, two of the defendant universities that were targeted had recently overhauled their investment structures, with the complaints implying that the changes did not go far enough to remedy allegedly imprudent investment and fee practices.

The complaints allege that the universities (often through their investment committees) acted imprudently by failing to leverage their negotiating power to demand lower priced recordkeeping services and lower-cost investment options. The complaints also include a unique argument that the universities breached their fiduciary duties to participants by using multiple record-keepers and by allowing participants to choose from hundreds of investment options. The litigation underscores the importance of maintaining appropriate investment policies that require plan fiduciaries to monitor and review plan investments, service provider fee terms, and similar fiduciary matters on a regular basis.

Each complaint contains similar allegations that attack what are very common 403(b) plan investment practices and plan design features. Below is a summary of some of the key arguments in the complaints:

Excessive Recordkeeping Fees

Some of the higher education plan sponsors targeted in the complaints paid recordkeeping and other administrative expenses through asset based fees that are part of their plans' underlying investment options. Asset based fees, or revenue sharing payments, are part of the underlying expenses of the plan's investment options. These fees increase in tandem with the amount of assets in the plan, which in turn means that the record-keeper receives higher fees as the plan's assets grow. Sponsors of mid-size and larger retirement plans can avoid asset based fees by negotiating a per-participant fee for recordkeeping. These complaints allege that the plan sponsors acted imprudently by paying some of the plan's recordkeeping expenses through revenue sharing payments. Further, the plaintiffs allege that the plan sponsor failed to take advantage of the plan's significant size to negotiate lower fees for recordkeeping and other plan administrative services.

Employing Multiple Record-keepers

The complaints also generally assert that each institution's investment committees or investment fiduciaries acted imprudently by employing more than one record-keeper for the plan. Due to the historical development of the 403(b) investment provider market, it is a common practice for 403(b) plans to allow multiple record-keepers to service the plan. The complaints allege that this practice undermines the plan's ability to both negotiate favorable fee terms and streamline the plan's administrative services. The plaintiffs allege that plan fiduciaries should have engaged in more regular competitive bidding processes for recordkeeping services and should have employed a single record-keeper. They also generally allege that the plan fiduciaries should have negotiated recordkeeping fees on a per participant basis, as opposed to paying the record-keeper through revenue sharing fees that increase as plan assets increase.

Too Many Investment Options
The plaintiffs also allege that investment fiduciaries acted imprudently by making too many investment options available to plan participants. It is alleged that many of these plans' investment options are duplicative, perform poorly, and feature high fees that are inappropriate for large 403(b) plans. The complaint also alleges that the excessive number of investment products in the plans is harmful to participants who might be confused when choosing how to invest their accounts.

Maintaining "Retail Class" Investment Products on the Plan's Investment Platform
The complaints generally allege that investment fiduciaries acted imprudently by allowing retail class mutual funds (as opposed to lower cost institutional class funds) to be in the plan's investment platform. In many cases, the primary difference between retail class mutual funds and institutional class funds is the total amount of underlying fees charged, with institutional class funds having lower overall expenses. The complaints allege that investment fiduciaries failed to use their bargaining power to ensure that each plan only offered participants institutional class funds or similar low-cost pooled separate accounts. The complaints also allege that investment fiduciaries failed to prudently monitor investment options and remove high-fee and poorly-performing investment products, and failed to consider investments in lower-cost share classes.

Variable Annuity Products
Finally, the complaints challenge the use of variable annuity products as plan investment options. Variable annuity products have historically been a common investment option in 403(b) plans. But variable annuities typically charge significant additional fees far above the fees charged by most standard mutual funds. And variable annuities nearly always have restrictive distribution rules that prevent a participant from withdrawing from the annuity product in a short period of time. In these lawsuits, the plaintiffs allege that it is imprudent for plan fiduciaries to offer variable annuity products due to these high fees and distribution restrictions.

In light of these lawsuits, all private universities, regardless of size, should carefully consider what steps may be appropriate to ensure that they are meeting their fiduciary duty obligations under ERISA. At a minimum, those obligations include adopting and maintaining a process for reviewing the makeup and performance of investment options, administrative fees, and the structure of the plan's recordkeeping relationships.

Although this round of lawsuits is only aimed at private universities that are subject to ERISA, public universities and public school districts that sponsor 403(b) plans should also consider the potential impact that these lawsuits may ultimately have on their plans.

IRS Issues Proposed Regulations on Health Plan Opt-Out Payments

July 7, 2016

The Internal Revenue Service ("IRS") has issued proposed regulations that include additional guidance on the treatment of employer-provided opt-out payments for purposes of affordability under the Affordable Care Act ("ACA"). An "opt-out" payment is a cash payment made to employees who decline to enroll in the employer's group health plan.

Late last year in Notice 2015-87 the IRS confirmed that the value of opt-out payments where the only requirement is for the employee to decline coverage ("unconditional opt-out payments") should be counted as part of an employee's premium payment in determining whether the employer satisfies the affordability provisions of the ACA's employer mandate. However, Notice 2015-87 also stated that the IRS might issue proposed regulations addressing treatment of opt-out payments that are conditioned not just on the employee declining coverage but also on satisfying an additional condition (such as proving that the employee has other coverage) ("conditional opt-out payments").

The new proposed regulations confirm that unconditional opt-out payments will be treated as increasing the employee's required premium payment under the ACA's employer mandate. For employers who offered unconditional opt-out payments prior to December 16, 2015, the value of the payments can be disregarded for ACA affordability purposes until final regulations are issued. There is also temporary relief for employers that are party to a collective bargaining agreement which was in effect prior to December 16, 2015 that requires the employer to offer unconditional opt-out payments. For such employers, the opt-out payment does not have to be treated as part of the employee's cost until the later of (1) the first plan year beginning after the expiration of the collective bargaining agreement (disregarding any extension on or after December 16, 2015) or (2) the effective date of final regulations. The IRS indicates in the proposed regulations that it does not intend to create a permanent exception for opt-out arrangements provided pursuant to collective bargaining agreements.

Conversely, for conditional opt-out payments, the IRS proposed regulations provide that the value of the opt-out payments can be disregarded in determining the employee's cost, if the arrangement is an "eligible opt-out arrangement." An "eligible opt-out arrangement" is one that conditions the opt-out payment on (1) the employee declining employer-sponsored coverage and (2) the employee providing reasonable evidence that the employee and all other individuals for whom the employee expects to claim a personal exemption deduction have minimum essential coverage (other than coverage in the individual market, whether or not obtained through an ACA marketplace exchange). Even where an employer receives reasonable evidence of alternative coverage, if the employer knows or has reason to know that the employee or other members of the employee's family do not (or will not) have coverage, then the employer cannot pay the opt-out payment. Proof of coverage must be provided to the employer at least annually. Based on these requirements, eligible opt-out arrangements will primarily be those that require the employee to provide proof of coverage through a spouse's employer sponsored group health plan.

The proposed regulations are open for comments for 60 days. Please let us know if you have any questions about how this guidance might impact either your current opt-out payment program or your desire to start a new opt-out payment program.

HHS Releases Final Health Equity Rule under Section 1557 of the Affordable Care Act

June 23, 2016

On May 18, 2016, the Department of Health and Human Services ("HHS") issued final regulations interpreting the nondiscrimination provisions of Section 1557 of the Affordable Care Act ("ACA"). The rule mainly impacts insurers and health care providers that receive federal subsidies from HHS. But certain self-insured employer sponsored group health plans are also subject to the rule, and may need to alter their plan designs to comply with the rule.

What the Rule Does

Section 1557 of the ACA generally bars discrimination on the basis of race, color, national origin, sex, age, or disability in any health program or activity that receives federal financial assistance. HHS broadens the definition of sex discrimination to include discrimination on the basis of gender identity, consistent with other recent federal agency guidance in this area. This means that entities covered by the rule may no longer deny or limit gender specific health care because the person seeking that care identifies with or belongs to another gender.

Thus, to the extent that an employer's group health plan is subject to the rule, the plan may no longer include categorical coverage exclusions for services related to gender transitions. Further, a plan may no longer deny claims, limit coverage, or impose additional cost sharing when such denial or limitation is due to the fact that the individual identifies as transgender.

Who is Covered by the Rule?

Only health programs or activities that receive federal financial assistance from HHS are covered by the rule. Federal financial assistance, for purposes of Section 1557, means payments, subsidies or funds provided by or administered through HHS. This includes premium tax credits for the purchase of insurance coverage on an ACA health insurance marketplace, certain Medicare payments, and Medicare Part D subsidies.

A group health plan sponsored by an employer that is not principally engaged in providing or administering health services may nevertheless be subject to the rule where either the employer or the plan receives federal financial assistance (e.g., Medicare Part D subsidies) with respect to the plan. The rule also applies to group health plans sponsored by employers that are principally involved in providing health care (e.g., a hospital system or insurer) that receive federal financial assistance from HHS unrelated to its group health plans.

Additional Requirements

The rule requires covered entities to post a notice of nondiscrimination on its website, and incorporate that notice into hard copies of significant publications issued by the covered entity. The notice should include foreign language taglines addressing the availability of language assistance services in the top 15 languages spoken by individuals with limited English proficiency in the state or states where the covered entity operates. The rule further requires covered entities to offer language assistance services (translation and interpreters) free of charge, to the extent that such services provide meaningful access to the individual. Covered entities with 15 or more employees also need to adopt a grievance procedure and designate an individual responsible for compliance with Section 1557.

What Should Plan Sponsors Do Now?

Most self-insured employer sponsored group health plans are unlikely to be subject to the rule, but it is important that employers determine whether they receive federal financial assistance from HHS with respect to their group health plans, or whether their group health plans receive federal financial assistance. Employers and plan sponsors who are subject to the rule should begin to review their health plan designs and eliminate categorical coverage exclusions for gender transition services. These types of plan design change must be made by the first day of the first plan year starting on or after January 1, 2017. In addition, covered entities need to comply with the notice requirement by October 17, 2016. In addition to beginning to review health plan design features, employers with plans subject to the rule should begin to assess how they will comply with notice and language assistance requirements.

U.S. Department of Labor Issues Final Rule Redefining ERISA's Definition of "Fiduciary" for Certain Types of Investment Advice

April 26, 2016

On April 6th, the U.S. Department of Labor (DOL) released a final rule (the "Fiduciary Rule") that expands the types of retirement investment advice that will be subject to the fiduciary duty rules of the Employee Retirement Income Security Act (ERISA). The Fiduciary Rule primarily affects the investment advice that investment advisers, consultants, broker-dealers, and similar third parties provide to retirement plans, plan sponsors, and individual participants in retirement plans and IRAs. In general, the Fiduciary Rule requires those advisers to provide investment advice that is in the best interest of the recipient of investment advice.

Background on the Rule

With the transition from defined benefit to defined contribution retirement plans and the associated shift of retirement investment responsibilities to individual employees, the DOL sought to expand the fiduciary protections of ERISA to cover additional types of retirement investment advice. Specifically, the new rule confers ERISA fiduciary status to those who provide "recommendations" that constitute "investment advice." Under the new rule, an individual will be an ERISA fiduciary when, for a direct or indirect fee, the individual makes:

- a recommendation that involves the acquiring, holding, or selling of securities or other investment type property in a retirement plan or an IRA; or
- a recommendation regarding the management of securities or other investment property, such as advice regarding investment portfolio composition or a recommendation regarding a rollover from a workplace retirement plan to an IRA.

Whether an individual has made a recommendation depends on the context and presentation of the information. In other words, if the recipient of the information would reasonably view the information as advice to take a particular course of action with respect to retirement investments, it likely constitutes a recommendation. The more specific and tailored the advice, the more likely that it will fall within the scope of the final rule.

In addition to the type of advice, an adviser must also:

- acknowledge that he or she is acting as an ERISA fiduciary; or
- affirm that the advice is made pursuant to a written or verbal agreement that the advice is based on the recipient's particular investment needs; or
- direct the advice to a recipient or group of recipients with respect to the advisability of investing in a particular investment product or offer advice regarding the management of investment property.

The rule also carves out certain activities from the definition of investment advice. Specifically, subject to certain limitations, an adviser's assistance to a participant or plan fiduciary in identifying investment alternatives, or making available a platform of investment alternatives for a defined contribution plan will not be considered a recommendation. General communications and investment education to individuals or plan sponsors also fall outside the scope of the rule, provided that the adviser meets certain criteria laid out in the rule. For now, proposals regarding valuations of ESOPs are also excluded from the rule's coverage.

The BIC Exemption

Along with the Fiduciary Rule, the DOL issued a companion prohibited transaction exemption, called the "best interest contract" exemption, or "BIC" exemption. The exemption responds to the investment advisory industry's concerns about the impact the Fiduciary Rule would have on the industry's current compensation practices. Specifically, the BIC exemption will allow certain categories of financial advisers and the financial institutions that employ them to continue common industry practices, including the recommendation and sale of investment products with 12b-1 fees, revenue sharing payments, and similar forms of variable compensation, provided that those advisers and their financial institutions take certain steps to ensure that the recommendations that they make are in the best interest of their clients.

The BIC exemption is important for small employer-sponsored retirement plans, defined as plans with less than $50 million in assets, because it will require advisers and financial institutions to take additional steps to ensure that the advice that those advisers and institutions provide (such as investment option recommendations in 401(k) plan investment lineups) is in the best interest of the plan. These additional protections require the financial institution to:

- Provide clients with written acknowledgment by the adviser that it is a fiduciary; and
- Issue initial and ongoing disclosures to the client that detail the adviser's standard of care, compensation practices (including compensation that it receives from third parties), as well as provide access to a website with more detailed disclosures.

Financial institutions relying on the BIC exemption must also adopt and adhere to internal policies and procedures designed to limit conflicts of interest in the investment recommendations that its advisers make. Among other things, a financial institution must implement policies that prevent the payment of certain types of compensation (e.g., bonuses) that might have the result of steering the adviser to recommend investments that fall below the "best interest" standard set forth in the rule. It is likely that many advisers to smaller plans will be relying on this exemption, rather than fully complying with the Fiduciary Rule in providing investment advice to plan sponsors.

Effective Date and Future Guidance

The Fiduciary Rule becomes initially effective on April 10, 2017 with respect to certain provisions, and becomes fully effective on January 1, 2018. The rule has proved controversial, as it may have profound implications over how various players in the financial advice industry provide investment recommendations to both ERISA-covered retirement plans and IRAs that receive rollovers from such plans. The DOL is expected to issue further guidance on the scope of the Fiduciary Rule and its various exemptions before it becomes initially effective on April 10, 2017.

Next Steps for Plan Sponsors
Although the full impact of the Fiduciary Rule on plan sponsors will not be known for some time, we believe the final Fiduciary Rule and its companion BIC exemption may ultimately be a positive development for sponsors of small plans in particular, as it will increase the likelihood that these plan sponsors will receive unbiased advice from investment advisers and brokers.

In light of the BIC exemption, sponsors of small retirement plans should expect to receive new paperwork and disclosures from their investment consultants and similar service providers. These materials should outline the service provider's status as a fiduciary as well as details regarding its fee practices. Plan fiduciaries, as part of their ongoing duty to monitor service providers and similar professionals, will need to carefully review these new disclosures to ensure that they understand the adviser's fee practices and determine whether those fee practices are in the best interest of the plan and its participants.

All plan sponsors should undertake a review of their service agreements with any service provider that provides investment advice or education, to determine whether any modifications are needed in light of the final Fiduciary Rule. Many service providers are likely to propose contractual changes to plan sponsors, due to the BIC exemption or the overall heightened compliance burden imposed by the final Fiduciary Rule.

Finally, all plan sponsors should take a close look at the investment education that is provided to employees and plan participants/beneficiaries, to ensure that the investment education qualifies as education (rather than advice) under the Fiduciary Rule.

Important Development in Dave & Buster's Lawsuit Regarding Whether Cutting Employee Work Hours Violates ERISA

February 22, 2016

In a case of first impression that is being closely watched by plaintiffs' attorneys and large employers alike, a federal judge recently ruled against a motion brought by Dave & Buster's, the restaurant chain, to dismiss a proposed class action lawsuit (*Marin v. Dave & Buster's, Inc.*, S.D.N.Y., No. 1:15-cv-03608) alleging that the company impermissibly reduced workers' hours to avoid its obligations under the Affordable Care Act's employer mandate. The ACA's employer mandate generally requires large employers to offer affordable and minimum value health coverage to its full-time employees (defined as employees who regularly work an average of at least 30 hours per week). Employers are generally not required to offer coverage to employees working an average of less than 30 hours per week.

The lawsuit, which was filed in the Southern District of New York by a large proposed class of current and former Dave & Buster's employees, alleges that the company reduced employee work hours to prevent employees from attaining full-time status (and therefore eligibility for health coverage) in violation of Section 510 of ERISA. Section 510 prohibits employers and plan sponsors from interfering with an employee's attainment of benefits. Maria De Lourdes Parra Marin, the named plaintiff, alleged that she regularly worked over 30 hours at Dave & Buster's Times Square location until mid-2013, when her hours (and those of hundreds of other employees) were reduced, allegedly to prevent her from maintaining full-time status, thereby causing her to lose health coverage eligibility under the company's group health plan.

In its ruling against Dave & Buster's motion to dismiss the lawsuit, the court ruled that the plaintiffs had sufficiently pleaded that the company had acted with an "unlawful purpose" in its adverse action against them, as is required to support a claim under ERISA Section 510. The court cited to numerous statements from the company's management regarding the need to reduce full-time staffing to limit financial exposure under the ACA. In support of its motion to dismiss, Dave & Buster's argued that an employee has no entitlement to "benefits not yet accrued," and must show more than a "lost opportunity to accrue additional benefits" to sustain a claim under ERISA Section 510; it was not possible to violate Section 510, the company argued, by preventing employees from becoming eligible for future benefits. The court rejected this argument, ruling that the company's actions had affected the plaintiffs' current benefits, as well as their attainment of future benefits.

Since the ACA employer mandate went into effect in 2014, it has been a common practice for large employers to structure employee work hours and staffing so as to manage their financial exposure under the mandate. If the plaintiffs in *Marin* ultimately prevail, this may significantly impact employers' ability to implement such strategies in the future. Employers should therefore continue to monitor this case closely.

U.S. Supreme Court Clarifies the Scope of ERISA Fiduciary Obligations in Recent Stock Drop Decision

February 2, 2016

In recent years, plaintiffs' lawyers have brought numerous ERISA breach of fiduciary duty lawsuits against employers that offer employer stock funds in their 401(k) plans. These lawsuits are typically brought on behalf of plan participants who have lost money because the value of the company's stock has dropped. For many years, plaintiffs faced uphill battles in these so-called "stock drop" suits as most federal appellate courts adopted a "presumption of prudence" that favored plan fiduciaries' decisions with respect to the continued inclusion of company stock in 401(k) plans. In 2014, in *Fifth Third Bancorp v. Dudenhoeffer*, the U.S. Supreme Court weighed in on this issue and eliminated this presumption of prudence.

With *Dudenhoeffer*, the Supreme Court seemingly tilted the law in favor of plaintiffs in these stock drop suits. In *Dudenhoeffer*, the Supreme Court held that fiduciaries responsible for administering employer stock funds are generally subject to the same fiduciary standards as all other ERISA fiduciaries. However, a decision on a recent appeal to the Supreme Court clarified that *Dudenhoeffer* still imposes a high bar on plaintiffs in these suits.

In *Harris v. Amgen*, the Supreme Court held that the Ninth Circuit failed to properly apply the new *Dudenhoeffer* standard when it failed to evaluate whether the plaintiff's complaint plausibly alleged that a fiduciary in the defendant's position could not have concluded that removing the Amgen stock fund from the list of investment options would not cause more harm than good to the stock fund. For employer stock fund fiduciaries defending stock drop claims, this decision suggests that plaintiffs may continue to struggle to allege a plausible alternative action that plan fiduciaries should have taken, when, as the Supreme Court explained, a company's decision to halt trading in the stock fund could compound participant losses by sending a signal to the markets that the company itself views its own stock as a bad investment.

IRS Issues New Guidance on ACA and Other Health Plan-Related Legal Requirements

January 13, 2016

In Notice 2015-87 the Internal Revenue Service (IRS) issued guidance on various health plan-related topics, including: (1) treatment of employer-provided opt-out payments for purposes of affordability under the Affordable Care Act (ACA); (2) the application of the ACA market reforms to health reimbursement arrangements (HRAs); (3) ACA issues relating to the McNamara-O'Hara Service Contract Act (SCA) and Davis-Bacon and Related Acts (DBRA); (4) the extension of special ACA rules for educational institutions; and (5) issues arising out of the interaction of COBRA with health flexible spending account plans (FSAs) that offer carryover options.

Health Coverage Opt-Out Payments

Many employers offer an "opt-out" payment to employees who decline to enroll in the employer's group health plan. The IRS has now confirmed that the value of these types of opt-out payments should be counted as part of an employee's premium payment in determining whether the employer is satisfying the affordability provisions of the ACA. In the guidance, the IRS states that because employees who elect to enroll in coverage are effectively giving up the right to receive additional compensation where an opt-out payment is available, the IRS views this as the economic equivalent of charging a higher premium to employees.

The IRS further indicates that it will be proposing regulations to reflect this rule and that the rule will only apply for periods after final regulations are issued. However, according to the IRS, the rule will apply immediately for any opt-out arrangement that is adopted after December 16, 2015. In addition, the notice states that the proposed regulations may address the treatment of opt-out payments that are conditioned not just on the employee declining coverage but also on satisfying an additional condition (such as proving that the employee has other coverage).

Employers who implement a new opt-out provision after December 16, 2015 should confirm that they still meet the affordability requirements of the ACA. Employers who previously adopted opt-out provisions should be aware that they may have to make changes once final regulations are issued.

Health Reimbursement Arrangements
The IRS reconfirms several technical questions about using HRAs to reimburse premiums paid for individual market coverage, as follows:

- An HRA that covers less than two participants who are current employees is not subject to the market reforms. This reconfirms that retiree-only HRAs can reimburse individual market insurance premiums.
- An HRA that does not meet the retiree-only exception may not be used to reimburse individual market insurance premiums for former employees.
- Unused amounts credited to an HRA before January 1, 2014 under terms that were in effect prior to January 1, 2013 may be used to reimburse medical expenses in accordance with the pre-2013 terms of the HRA without causing the HRA to be out of compliance with the annual dollar limit prohibition and preventive services requirements of ACA.
- An HRA reimbursing medical expenses for an employee and the employee's spouse and/or dependents may not be integrated with self-only group coverage under the employer's group health plan. This prohibition will not be enforced until 2017.
- An HRA that reimburses premiums for individual market coverage will not fail to comply with the market reforms if the coverage only includes excepted benefits (such as dental or vision).
- In order to comply with the ACA, an HRA that is part of a cafeteria plan must be integrated with a group health plan, regardless of whether it is funded solely with employee salary deferrals or employer flex credits.

McNamara-O'Hara Service Contract Act and Davis-Bacon and Related Acts
The IRS notes that the SCA and DBRA, which require federal contractors to pay prevailing wages and fringe benefits or pay cash in lieu of fringe benefits for workers, create complex issues under the ACA, especially for purposes of reporting the cost of coverage. The IRS intends to continue reviewing how these laws will coordinate with the ACA. In the meantime, until additional guidance is issued (and in any event for plan years beginning before January 1, 2017), for purposes of calculating ACA affordability, employer fringe benefit payments that are made available to employees to pay for employer-sponsored coverage will be treated as reducing the employee's required contribution for participation, but only to the extent the payment is necessary to satisfy the requirements to provide fringe benefits under the SCA or DBRA. In other words, these cash payments will be treated as making the coverage more affordable for employees for the time being.

Educational Institution Break in Service Rules
There are special rules that apply to educational institutions under the ACA for purposes of determining whether an employee has had a break in service. Most employers may treat an employee who has a break in service of at least 13 weeks as having terminated from employment and been rehired. For educational institutions, a 26 week break in service rule instead applies. The IRS has been informed that educational institutions are attempting to avoid the application of this special rule by using staffing agencies. The IRS intends to amend its regulations on this issue to provide that the special rules apply to any employee providing service primarily to one or more educational organizations, even if the employee is hired through a staffing agency.

COBRA Continuation Rules and Health FSA Carryovers
Health FSA plans can provide for an optional carryover of up to $500 of unused amounts remaining at the end of a plan year. A health FSA is not obligated to make COBRA continuation

coverage available unless, as of the date of the COBRA qualifying event, the amount the qualified beneficiary may become entitled to receive is higher than the amount the FSA may require to be paid for COBRA coverage for the remainder of the plan year. The IRS has now clarified that any amount carried over from a prior plan year is included in determining the amount of the benefit that the qualified beneficiary may become entitled to receive.

Additionally, a self-insured group health plan can typically charge up to 102 percent of the premium cost for COBRA coverage based on a reasonable estimate of the cost of providing coverage to non-COBRA beneficiaries. For health FSAs, an employer may base its reasonable estimate on the maximum amount available under the health FSA for the coverage period. However, the IRS has clarified that the maximum amount does not include unused amounts carried over from prior years. The applicable COBRA premium must be based solely on the sum of the employee's salary reduction election for the year and any non-elective employer contribution.

Comments on Notice 2015-87 may be submitted until February 18, 2016.